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FCPA & Anti-Bribery Alert

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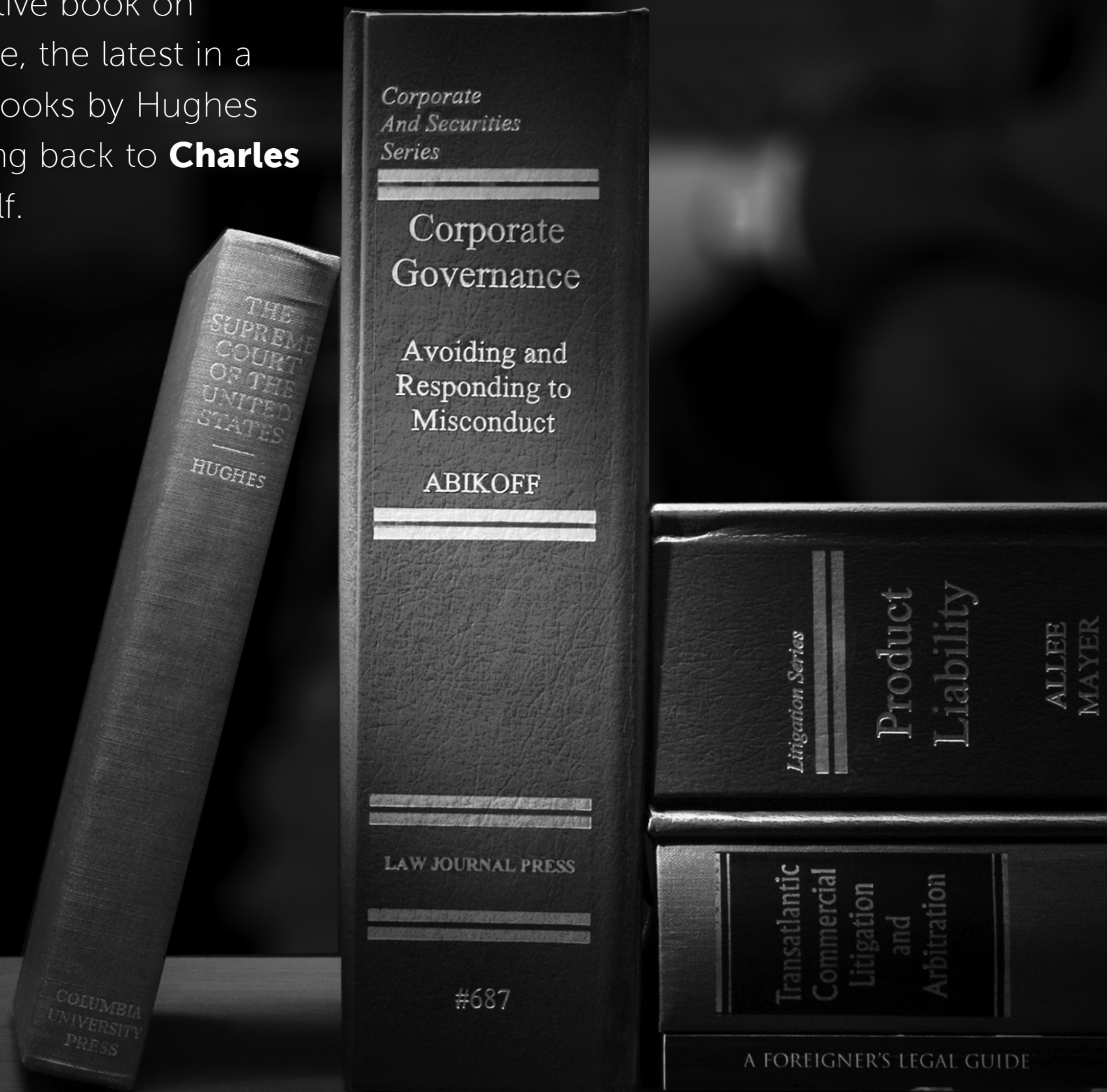

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INTRODUCTION

I am pleased to share with you the latest edition of our FCPA & Anti-Bribery Alert.

This Alert begins with a short overview of Trends & Lessons (Chapter 1), and then discusses select international Focus Issues (Chapter 2). For example, the Focus on U.S. Enforcement Guidance discusses the Yates Memorandum and the new FCPA Pilot Program, while the Focus on Brazil surveys the status of Operation Car Wash and other Brazilian anti-corruption investigations, which have already resulted in over 1,000 separate legal proceedings against both individuals and companies, and which continues to unfold. The Focus on China describes Chinese efforts to inspect SOEs and encourage whistleblowers, provides an update on Operation Fox Hunt and Operation Sky Net, and explores legislative and regulatory developments. The Focus on Norway explores Norwegian anti-corruption enforcement developments, including ØKOKRIM enforcement actions.

Chapter 3 continues our tradition of providing narrative summaries of each FCPA enforcement action or criminal matter organized alphabetically by year. Our Alert sets out the published facts that have led to settlements and criminal matters to help readers understand the circumstances and apparent compliance program failures that lead to enforcement actions. Chapter 4 discusses developments related to the U.K. Bribery Act, including U.K. enforcement actions of note. In Chapter 5, we explore the role of multilateral development banks in the international anti-corruption enforcement environment.

These are just some of the highlights contained in this Alert. As always, the full, 500-page version is freely available for download from our website (www.hugheshubbard.com), and contains (i) descriptions of all FCPA settlements and criminal matters from 2005 through 2016 (including recent updates), (ii) a discussion of other FCPA and related developments, and (iii) a summary of each DOJ Review and Opinion Procedure Release issued from 1980-present. For more information about the matters discussed in this Alert or our Anti-Corruption and Internal Investigations practice generally, please contact me or any member of our Practice Group.

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TABLE OF CONTENTS

CHAPTER 1: TRENDS & LESSONS 1
- I. Enforcement Trends 1
- II. Lessons from Enforcement Activity 6

CHAPTER 2: FOCUS ISSUES 11
- I. Focus on New U.S. Enforcement Guidance 11
  - A. Yates Memorandum 11
  - B. Pilot Program for Voluntary Disclosure of FCPA Violations 13
- II. Focus on Brazil 17
  - A. Anti-Corruption Enforcement 17
    - 1. Operation Car Wash 17
    - 2. Operation Zelotes 20
    - 3. Operation Black Blood 21
  - B. Anti-Corruption Laws 22
    - 1. New Regulations (2015) 22
    - 2. Court Interpretation and Enforcement Policy 24
- III. Focus on China 24
  - A. CCDI Initiatives to Detect Public Corruption 25
    - 1. Inspections of State-Owned and Affiliated Entities 25
    - 2. Encouraging Whistleblowers Through Creative Reporting Channels 25
  - B. Increased International Cooperation Through Operations Fox Hunt and Sky Net 26
  - C. Legislative and Regulatory Development 27
    - 1. Criminal Law Amendment and Judicial Interpretation 27
    - 2. Draft Amendment to the Anti-Unfair Competition Law 30
    - 3. Regulatory Changes in the Public Procurement and Healthcare Sectors 30
  - D. GlaxoSmithKline, Mark Reilly, and ChinaWhys Owners Peter Humphrey & Yu Yingzeng 31
- IV. Focus on Norway 32
  - A. Enforcement Action: Former Yara Executives Kendrick Taylor Wallace, Daniel Clauw, Thorleif Enger, and Tor Holba 32
  - B. Investigations of Note 34
    - 1. Kongsberg Gruppen ASA 34
    - 2. Sevan Drilling ASA 35
    - 3. Telenor ASA and VimpelCom 36
    - 4. Parliamentary Inquiries into Telenor and Statoil ASA 36
  - C. Stakeholder Enforcement: Council on Ethics for the Government Pension Fund Global 37
    - 1. The Fund and the Ethical Guidelines 37
    - 2. Investigations by the Council of Ethics 38
    - 3. Formal Observation 40
    - 4. Considerations for Exclusion 40
    - 5. Specific Cases 41
  - D. Proposed Anti-Corruption Law Reforms 43
    - 1. Corporate Criminal Liability for the Acts of "Associated Persons" 44
    - 2. Absolute Defense for Companies Having Adopted "Reasonable Measures" to Prevent Corruption 44
- V. Focus on E.U. Data Protection 45
  - A. The E.U. General Data Protection Regulation 45
  - B. E.U.-U.S. Data Transfers: Safe Harbor to Privacy Shield 48
- VI. Focus on the Panama Papers 51

A. Public Reaction and Political Fallout ... 52
B. Subsequent Reforms ... 53

CHAPTER 3: FCPA ... 54
I. FCPA Elements and Penalties ... 54
A. Anti-Bribery Provisions ... 54
B. The Exception and Defenses to Alleged Anti-Bribery Violations ... 55
C. Accounting Provisions ... 56
D. Penalties ... 56
II. FCPA Settlements and Enforcement Actions ... 57
A. 2016 ... 57
1. Akamai Technologies ... 57
2. Analogic, BK Medical ApS, and Lars Frost ... 59
3. Biomet ... 62
4. Johnson Controls ... 65
5. Key Energy ... 68
6. LATAM Airlines, LAN Airlines, and Ignacio Cueto Plaza ... 70
7. Las Vegas Sands ... 72
8. Nordion and Mikhail Gourevitch ... 76
9. Nortek ... 77
10. Novartis ... 79
11. Olympus ... 81
12. PTC ... 84
13. PTC and Yu Kai Yuan ... 86
14. Qualcomm ... 87
15. SciClone Pharmaceuticals ... 89
16. VimpelCom ... 91
B. 2015 ... 95
1. BHP Billiton ... 95
2. BNY Mellon ... 97
3. Bristol-Myers Squibb ... 99
4. Chestnut Group and Dmitrij Harder ... 101
5. FLIR Systems ... 103
6. Goodyear ... 105
7. Hitachi ... 107
8. Hyperdynamics Corporation ... 109
9. IAP Worldwide Services and James Rama ... 110
10. ICBC Standard Bank ... 113
11. Louis Berger International, Richard Hirsch, and James McClung ... 115
12. Mead Johnson ... 117
13. PBSJ and Walid Hatoum ... 119
14. Petrotiger Former Executives Joseph Sigelman, Gregory Weisman, and Knut Hammarskjold ... 121
15. PDVSA Procurement Prosecutions: Rincon, Shiera, & Millan, and Ramos, Gravina, & Maldonado ... 124
16. SAP SE and Garcia ... 127
17. Tenam/Tenex/Rosatom Executive Vadim Mikerin, and Boris Rubizhevsky (NexGen Security), and Daren Condrey (Transport Logistics International) ... 129
C. 2014 ... 130
1. Alcoa / Alcoa World Alumina ... 130
2. Alstom S.A. ... 132
3. Asem M. Elgawhary ... 135
4. Avon Products. ... 136
5. Bio-Rad Laboratories. ... 139
6. Bruker ... 142

7. Dallas Airmotive 144
8. Dmitry Firtash et al. 145
9. Hewlett-Packard Co. 146
10. Layne Christensen Co. 149
11. Marubeni 151
12. Smith & Wesson 151
13. Stephen Timms and Yasser Ramahi (FLIR Systems) 153
14. Gregory Weisman, Knut Hammarskjold, and Joseph Sigelman 154

D. 2013 155
1. Archer Daniel Midlands Company 155
2. Bilfinger SE 157
3. Frederic Cilins 158
4. Diebold 160
5. Keyuan Petrochemicals 163
6. Koninklijke Philips Electronics 164
7. Subramanian Krishnan 165
8. Direct Access Partners Executives Ernesto Lujan, Tomas Clarke, Jose Hurtado, Benito Chinea, and Joseph DeMeneses, and former BANDES Vice President Maria Gonzalez 166
9. Parker Drilling Company 169
10. Ralph Lauren 170
11. Stryker 172
12. Total S.A. 173
13. Weatherford International Limited 174

E. 2012 177
1. Allianz SE 177
2. Biomet 179
3. BizJet 181
4. Data Systems & Solutions 183
5. Eli Lilly and Company 184
6. Marubeni 186
7. Nordam Group 186
8. Oracle 187
9. Orthofix International 188
10. Garth Peterson 190
11. Pfizer 193
12. Smith & Nephew plc 195
13. Tyco International 196

F. 2011 201
1. Aon 201
2. Armor Holdings & Richard Bistrong 203
3. Ball 205
4. Bridgestone 206
5. Comverse 207
6. Diageo 209
7. IBM 211
8. JGC 212
9. Johnson & Johnson 213
10. Magyar Telekom and Deutsche Telekom 216
11. Maxwell Technologies 218
12. Rockwell Automation 220
13. Tenaris S.A. 221
14. Tyson Foods 222
15. Watts Water 224

G. 2010 225
1. ABB Ltd., Fernando Basurto & John O'Shea 225

2. Alcatel-Lucent 229
3. BAE Systems 239
4. Daimler 243
5. Dimon and Universal 248
6. General Electric 251
7. James H. Giffen and Mercator 252
8. Innospec 255
9. Charles Paul Edward Jumet & John W. Warwick 255
10. Lindsey Manufacturing, Enrique & Angela Aguilar 257
11. Military and Law Enforcement Products Sting 259
12. NATCO Group 261
13. Panalpina-Related Oil Services Industry Sweep 262
14. RAE Systems 274
15. Technip and Snamprogetti 275
16. Terra Telecommunications (Haiti Teleco) 276
17. Veraz Networks 281

H. 2009 281
1. AGCO 281
2. Avery Dennison 283
3. Control Components 284
4. Helmerich & Payne 289
5. ITT 290
6. William J. Jefferson 291
7. KBR/Halliburton Company 292
8. Latin Node and eLandia International Inc. 293
9. Nature's Sunshine Products, Douglas Faggioli, and Craig D. Huff 295
10. Novo Nordisk 296
11. Jeffrey Tesler & Wojciech Chodan 297
12. United Industrial & Thomas Wurzel 298
13. UTStarcom 301

I. 2008 303
1. AB Volvo 303
2. AGA Medical 304
3. Aibel Group Ltd. 305
4. Ramendra Basu 306
5. Con-Way 306
6. Faro Technologies 307
7. Fiat 308
8. Flowserve 309
9. Gerald and Patricia Green 310
10. Misao Hioki 312
11. Nexus Technologies 313
12. Shu Quan-Sheng 314
13. Siemens 315
14. Leo Winston Smith & Martin Self (Pacific Consolidated Industries LP) 326
15. Jack Stanley 326
16. Westinghouse 327
17. Willbros Group 328

J. 2007 332
1. Akzo Nobel 332
2. Baker Hughes 333
3. Bristow Group 334
4. Chevron 335
5. Chiquita Prosecution 336
6. Delta & Pine Land Company 337

7. Dow Chemical Company 337
8. El Paso 338
9. Immucor 339
10. Ingersoll-Rand 340
11. Lucent Technologies 341
12. Paradigm 342
13. Chandramowli Srinivasan 344
14. Syncor International& Monty Fu 345
15. Textron 346
16. Vetco International Ltd. 348
17. York International 349
K. 2006 351
1. ITXC 351
2. Faheem Mousa Abdel Salam 352
3. Richard John Novak 353
4. Oil States International 354
5. David M. Pillor & InVision 355
6. John Samson, John Munro, Ian Campbell and John Whelan 357
7. Schnitzer Steel Industries 358
8. Statoil 359
9. Tyco International 360
L. 2005 362
1. DPC (Tianjin) Co. Ltd 362
2. David Kay and Douglas Murphy 363
3. Victor Kozeny, Frederic Bourke, Jr. and David Pinkerton 364
4. Micrus 367
5. Monsanto 367
6. Robert E. Thomson & James C. Reilly 369
7. Titan 369
III. Other FCPA Developments 371
A. United States Developments and Regulatory Guidance 371
1. The Meaning of "Instrumentality": Esquenazi and Duperval 371
2. The Resource Guide to the U.S. Foreign Corrupt Practices Act 375
3. Rulings on the Statute of Limitations in Civil Penalty Actions 382
4. Resource Extraction Disclosure Rules 385
5. SEC Whistleblower Rules 388
6. Kleptocracy Asset Recovery Initiative 391
B. U.S. Investigations, Disclosures, and Prosecutions of Note 394
1. JPMorgan Chase 394
2. Halliburton 395
3. Wal-Mart 396
C. FCPA-Related Civil Litigation 398
1. Derivative Actions 398
2. Class Action Securities Suits 403
3. Civil Actions Brought by Partners or Competitors 406
4. Lawsuits by Foreign Governments and State-Owned Entities 407
5. Whistleblower Complaints 412
6. Suits Against Former Employees 413
IV. DOJ Advisory Opinions 415
1. DOJ Review Procedure Release 80-01 415
2. DOJ Review Procedure Release 80-02 416
3. DOJ Review Procedure Release 80-03 416
4. DOJ Review Procedure Release 80-04 417
5. DOJ Review Procedure Release 81-01 417
6. DOJ Review Procedure Release 81-02 419
7. DOJ Review Procedure Release 82-01 419

8. DOJ Review Procedure Release 82-02 420
9. DOJ Review Procedure Release 82-03 420
10. DOJ Review Procedure Release 82-04 421
11. DOJ Review Procedure Release 83-01 421
12. DOJ Review Procedure Release 83-02 421
13. DOJ Review Procedure Release 83-03 422
14. DOJ Review Procedure Release 84-01 423
15. DOJ Review Procedure Release 84-02 423
16. DOJ Review Procedure Release 85-01 424
17. DOJ Review Procedure Release 85-02 424
18. DOJ Review Procedure Release 85-03 425
19. DOJ Review Procedure Release 86-01 425
20. DOJ Review Procedure Release 87-01 426
21. DOJ Review Procedure Release 88-01 426
22. DOJ Review Procedure Release 92-01 427
23. DOJ Opinion Procedure Release 93-01 427
24. DOJ Opinion Procedure Release 93-02 428
25. DOJ Opinion Procedure Release 94-01 428
26. DOJ Opinion Procedure Release 95-01 430
27. DOJ Opinion Procedure Release 95-02 430
28. DOJ Opinion Procedure Release 95-03 432
29. DOJ Opinion Procedure Release 96-01 433
30. DOJ Opinion Procedure Release 96-02 434
31. DOJ Opinion Procedure Release 97-01 434
32. DOJ Opinion Procedure Release 97-02 435
33. DOJ Opinion Procedure Release 98-01 436
34. DOJ Opinion Procedure Release 98-02 436
35. DOJ Opinion Procedure Release 00-01 437
36. DOJ Opinion Procedure Release 01-01 438
37. DOJ Opinion Procedure Release 01-02 439
38. DOJ Opinion Procedure Release 01-03 440
39. DOJ Opinion Procedure Release 03-01 440
40. DOJ Opinion Procedure Release 04-01 441
41. DOJ Opinion Procedure Release 04-02 442
42. DOJ Opinion Procedure Release 04-03 443
43. DOJ Opinion Procedure Release 04-04 444
44. DOJ Opinion Procedure Release 06-01 444
45. DOJ Opinion Procedure Release 06-02 446
46. DOJ Opinion Procedure Release 07-01 447
47. DOJ Opinion Procedure Release 07-02 448
48. DOJ Opinion Procedure Release 07-03 448
49. DOJ Opinion Procedure Release 08-01 449
50. DOJ Opinion Procedure Release 08-02 452
51. DOJ Opinion Procedure Release 08-03 454
52. DOJ Opinion Procedure Release 09-01 455
53. DOJ Opinion Procedure Release 10-01 456
54. DOJ Opinion Procedure Release 10-02 457
55. DOJ Opinion Procedure Release 10-03 459
56. DOJ Opinion Procedure Release 11-01 461
57. DOJ Opinion Procedure Release 12-01 462
58. DOJ Opinion Procedure Release 12-02 464
59. DOJ Opinion Procedure Release 13-01 464
60. DOJ Opinion Procedure Release 14-01 465
61. DOJ Opinion Procedure Release 14-02 467

CHAPTER 4: U.K. ANTI-BRIBERY DEVELOPMENTS 468
I. The MOJ Guidance 469
II. Other Developments 474
A. The Crime and Courts Act 2013 474
B. Deferred Prosecution Agreements Code of Practice 476
C. Sentencing Council Guideline 477
III. U.K. Enforcement Actions of Note 479
1. F.H. Bertling Ltd 479
2. DPA with Undisclosed U.K. Company 479
3. Peter Michael Chapman (Securency PTY Ltd.) 480
4. Alstom 481
5. Sweett Group 482
6. Standard Bank 482
7. Smith & Ouzman Ltd 483
8. Former Sustainable AgroEnergy PLC Executives 484
9. JLT Specialty Limited 484
10. News Corporation 485
11. Sandals Resorts International 488
12. Mawia Mushtaq and Yang Li 490
13. Munir Patel 491
14. Julian Messent 492
15. Victor Dahdaleh and Bruce Allan Hall 494
16. Mabey & Johnson 495

CHAPTER 5: MULTILATERAL DEVELOPMENT BANKS (MDBS) 498
I. Context 498
II. Why the MDB Sanction Process Matters From a Business Perspective 499
III. Overview of MDB Sanctions Regimes 499
A. World Bank Sanctions Regime 499
B. African Development Bank Sanctions Regime 502
C. Other MDB Sanctions Regimes: Highlights of Recent Changes 503
IV. Mitigation of Potential Sanctions: Useful Lessons from the World Bank Sanctions Board's Decisions 504
A. Cooperation with INT 505
B. Internal Investigations 505
C. Disciplining Responsible Employees 506
D. Compliance Programs 506
V. A Growing Trend of International Cooperation and Referrals 507
A. Referrals from National Authorities to MDBs 508
B. Referrals from MDBs to National Authorities: SNC-Lavalin 508
C. Coordinated Relief 510

CHAPTER 6: ENFORCEMENT UPDATES IN SELECT COUNTRIES 511
I. Enforcement Actions In Canada 511
A. Former Cryptometrics Executives Robert Barra, Dario Bernini, and Nazir Karigar and Former E.M.G Employee Shailesh Govindia 511
B. Griffiths Energy and Chadian Diplomats Mahamoud Bechir and Youssouf Takane and their Wives 512
II. Enforcement Actions in France 514
A. Safran Group 514
III. Enforcement Actions in Italy 515
A. Eni & Royal Dutch Shell 515
B. Giuseppe Orsi and Bruno Spagnolini (Finmeccanica SpA) 517
IV. Enforcement Actions in Sweden and Switzerland: TeliaSonera AB 519
A. Initial Allegations Regarding TeliaSonera 519
B. Swedish & Swiss Authorities Target TeliaSonera 519

C. Internal Review and Change of Management at TeliaSonera 520
D. Dutch and U.S. Authorities Target TeliaSonera and VimpelCom 520
V. Enforcement Actions in The Netherlands & Brazil: SBM Offshore 521
A. February 2014 Wikipedia Modification 521
B. Equatorial Guinea and Angola 522
C. Brazil 522
D. Settlement: The Dutch Perspective 522
E. The Brazil Settlements 523
F. Involvement of Other Authorities 525

CHAPTER 7: OTHER INTERNATIONAL DEVELOPMENTS 526
I. International Organizations 526
A. OECD Reports 526
B. OECD, World Bank, and UNDOC Anti-Corruption Handbook 534
C. OECD Good Practice Guidance 534
D. International Chamber of Commerce Guidelines 537
E. Global Witness Report - British Banks and Nigerian Corruption 539
II. Relevant Developments in European Law 544
A. The European Court of Justice & In-House Counsel Legal Privilege 544

CHAPTER 1: TRENDS & LESSONS

The combination of resolved actions, ongoing criminal and regulatory investigations, guidance issued by regulatory authorities, and other developments discussed below underscore a number of important 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. These themes take the form of both enforcement trends and practice lessons.

I. Enforcement Trends

- *Large Corporate Penalties Remain in Play:* Despite the stated focus on individual liability, more than a decade into the modern era of anti-corruption enforcement, it remains clear that enforcement agencies continue to seek and will not hesitate to impose substantial corporate penalties that can pose enterprise risk for certain organizations. This is evidenced by several nine-figure settlements (excluding costs associated with investigations and post-resolution requirements, such as monitorships), such as the January 2016 settlement between U.S. and Dutch authorities and VimpelCom, for a combined $795 million (*see* p.91).

- *Renewed Focus on Holding Individuals Accountable:* Even as corporate penalties remain a significant factor, the United States has made it an explicit priority to target and prosecute individuals for FCPA and related violations. Between January 2015 and August 2016, approximately 25 individuals were prosecuted by U.S. authorities in connection with FCPA settlements and FCPA violations, sometimes on related charges such as money laundering. The September 2015 Yates Memorandum (*see* p.11) announced that the DOJ would emphasize the importance of prosecuting individuals for corporate wrongdoing.

  Additionally, under the DOJ's new FCPA Pilot Program (*see* p.13) and in recent settlements, the DOJ has demonstrated that it will assess remedial actions that companies have taken against individuals when determining whether a company is eligible to receive remediation credit. For example, in explaining why LATAM (*see* p.70) paid a criminal penalty within the U.S. Sentencing Guidelines' recommended penalty range (rather than receiving credit for a penalty below the guidelines), the DOJ noted that LATAM failed to discipline the employees involved.

  Other countries also appear focused on prosecuting individuals for corruption related violations. For instance, in July 2016, the Serious Fraud Office charged seven former and current employees of F.H. Bertling Ltd. (*see* p.479) on charges that the individuals bribed foreign government officials in Angola. And as discussed further in our Focus Issues below, Brazil and China have both continued to aggressively pursue individuals. In Brazil, enforcement efforts associated with Operation Car Wash have resulted in over 226 official proceedings against individuals (*see* p.17). In China, Operation Fox Hunt—a campaign to capture the high-level "tigers" and low-level "flies" who have accepted bribes—and Operation Sky Net have produced dramatic results: between 2014 and January 2016, over 300,000 Party members – including several senior members – were disciplined for corruption related offenses (*see* p.26).

- *Increasing Enforcement Agency Resources and Cooperation:* The dynamics and pace of international corruption enforcement is changing. American enforcement agencies now have greater resources than ever before, and these increased resources are also being leveraged more than ever by the increasing levels of cooperation with (and among) other national enforcement agencies as well as with multilateral development banks.

  - *U.S. Adding Resources to Investigate Corruption:* Both the DOJ and FBI have announced increases in manpower to their FCPA enforcement groups, highlighting the attention to and prioritization of FCPA enforcement by these agencies. In early 2016, the DOJ announced that it was adding 10 prosecutors to the FCPA unit of the Fraud Section, a more than 50% increase in the staffing for the unit. According to the DOJ, "[t]he Department's demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light."

    Additionally, in March 2015, the FBI created three new squads of special agents committed to investigating and prosecuting conduct related to international bribery. These squads are based in New York City, Los Angeles, and Washington, D.C., and consist of agents, analysts, and other professional staff who have significant experience with white collar crimes, particularly foreign bribery cases. They will focus both on investigating the "supply side" of international corruption—the companies which offer and pay bribes—and the "demand side"—the foreign officials soliciting bribes and sometimes using the U.S. banking system to launder or hide the bribes they receive. The squads coordinate with the DOJ and SEC, as well as with international law enforcement agencies.

  - *International Coordination:* As much as ever, international regulators are cooperating in their anti-corruption enforcement efforts. The DOJ and SEC continue to rely upon and provide assistance to a growing number of non-U.S. enforcement agencies in complex bribery investigations. In November 2015, the SEC and U.K. Serious Fraud Office each announced settlements with ICBC Standard Bank (*see* p.113). Just a couple of months later, the DOJ, SEC, and the Public Prosecution Service of the Netherlands reached a global settlement with VimpelCom. Such cooperative efforts have been extending beyond the traditional U.S.-U.K. channel. In its September 2015 press release announcing the enforcement action against Hitachi (*see* p.107), for example, the SEC stated that it had received support not only from the DOJ and FBI, but also the South African Financial Services Board and, for the first time ever, the African Development Bank's Integrity and Anti-Corruption Department. In connection with Operation Car Wash in Brazil, reports are that Brazilian authorities are cooperating not only with U.S. and U.K. authorities, but also those in Switzerland, Monaco, Portugal, and elsewhere.

  - *Further Validation for MDBs:* It is no secret that the World Bank and other multilateral development banks have taken an aggressive approach toward investigating and sanctioning companies for fraud, corruption, and collusion on bank-financed projects (*see* p.498). However, recent actions by U.S. regulators have validated the role these banks

play in global anti-corruption enforcement. In particular, as mentioned, the African Development Bank ("AfDB") is now actively coordinating with the SEC and DOJ where appropriate, an effort that led to an action against Hitachi by the SEC in addition to the settlement agreed between Hitachi and the AfDB. Similarly, the DOJ declined to impose a monitor for Alstom so long as Alstom's compliance efforts were accepted by the World Bank, which had imposed its own compliance monitor as part of an earlier, separate settlement.

- *Emphasis on Self-Reporting:* For several years, the DOJ and SEC have sought to encourage companies to self-report violations, and both agencies have taken concrete actions to incentivize such reporting. In November 2015, the SEC announced a policy change, requiring companies to self-report violations in order for the Enforcement Division to recommend resolution through an NPA or DPA. In April 2016, the DOJ announced its FCPA Pilot Program, in which the DOJ will consider a declination for FCPA violations if a company voluntarily self reports the violation and meets certain other conditions (namely, remediation of the misconduct, cooperation with the DOJ's investigation, and disgorgement of profits earned as a result of the misconduct).

  The DOJ and SEC have begun acting in accordance with these guidance changes. Since April 2016, the DOJ has issued declination letters to three companies through the Pilot Program, two of which (Akamai (p.57) and Nortek (p.77)) also reached Non-Prosecution Agreements with the SEC.

- *Emphasis on Cooperation:* The DOJ and SEC have long signaled that extensive cooperation with their investigations may yield less severe penalties. Since 2015, the DOJ and SEC have been attempting to better define what cooperation is expected and what credit will be afforded. In September 2015, in connection with the Yates Memorandum, the DOJ made clear that to receive cooperation credit, a company must disclose all relevant facts about individual misconduct.

  The DOJ provided more detail regarding cooperation and credit in the FCPA Pilot Program. The DOJ stated that to receive full cooperation credit, a company must disclose all facts relevant to the investigation, including the involvement of the company's officers, employees, or agents. In addition, a company must preserve and collect relevant documents and information and provide timely updates on its internal investigation. The DOJ also set guidelines for the credit that a company can earn for cooperation: for companies who cooperate but do not voluntarily disclose the violation, credit will be capped at a 25% reduction off the bottom of the U.S. Sentencing Guidelines penalty range.

  The importance of full cooperation is illustrated by the June 2016 action against Analogic Corporation and its subsidiary, BK Medical (*see* p.59). Although BK Medical voluntarily disclosed the violation and took extensive remediation measures, it did not receive full credit for cooperation because it failed to disclose all relevant facts about its internal investigation, particularly the number and identities of end-users who received bribes. As a result, although otherwise eligible for a 50% reduction or declination under the DOJ Pilot Program, BK Medical only received a 30% reduction off the bottom of the Sentencing Guidelines fine range for its self-disclosure, remediation, and cooperation.

- *Credit for Management Changes:* Regulators may use enforcement actions as carrots or sticks, either to force changes in management where the regulators believe management is insufficiently attuned to corruption concerns, or to reward companies that change management in response to findings of misconduct. The Resource Guide notes that "[n]o executive should be above compliance . . . and no person within an organization deemed too valuable to be disciplined, if warranted." Furthermore, the DOJ has stated that "for a company to receive full cooperation credit following a self-report, it must root out the misconduct and identify the individuals responsible, even if they are senior executives."

  This view has been borne out in settlement language. For example, in the 2016 settlement and declination with Nortek, authorities noted that Nortek had terminated five involved persons, including the offending subsidiary's managing director and CFO. In the 2016 settlement and declination with Johnson Controls, the DOJ noted that Johnson Controls had terminated 16 employees and closed the offending subsidiary (*see* p.65).

- *Role of Media Leaks and Data Hacks in Initiation of Investigations:* Cyber-security is an ever-increasing focus of corporations, as domestic and foreign hackers are developing more sophisticated means of stealing company data. In addition, in the digital age, more information is available to employees at the touch of a button than ever before, increasing the risk of leaks and hacks. Leaks and hacks can significantly impact or prompt potential government investigations. In early 2016, a leak of emails from oil services company Unaoil resulted in a series of stories in Australian and American news outlets, prompting intense media scrutiny and an SFO investigation into Unaoil's business practices. Subsequently, Unaoil clients such as KBR and Core Laboratories disclosed that they had received questions from the DOJ related to its investigation into whether certain services provided by Unaoil may have violated the FCPA, and that they were cooperating with the DOJ. Petrofac, a U.K. oil services company that engaged Unaoil primarily in Kazakhstan from 2002-2009, hired external audit and law firms to conduct an independent investigation and announced that it "did not find evidence confirming the payment of bribes."

  Similarly, a cyber-security breach at the law firm of Mossack Fonseca made public millions of documents (the so-called "Panama Papers" discussed at p.51) regarding offshore accounts and beneficial ownership of the firm's clients, information that law enforcement agencies around the world are drawing on to investigate possible corruption, tax, and money laundering offenses. In the era of Wikileaks and expert hackers, not to mention significant incentives for would-be whistleblowers, it is becoming increasingly difficult for companies to maintain secrecy over their sensitive data.

- *Trends in the Interpretation and Application of the FCPA:*

  - *Expansive Assertion of Anti-Corruption Jurisdiction:* For years, U.S. regulators have taken, and continue to take, an expansive jurisdictional view as to the applicability of the FCPA. For example, in the 2016 VimpleCom settlement, the DOJ cited the use of U.S.-based email accounts and the use of U.S.-based correspondent bank accounts as jurisdictional bases for VimpleCom and its subsidiary, Unitel. When combined with increased enforcement activities by other countries and international bodies (such as the World Bank Group and the African Development Bank Group), companies face a

multitude of possible enforcement bodies devoting more attention to investigating and sanctioning corruption, and the number of places in the world where companies can operate without fear of prosecution is shrinking.

- *Use of Constructive Knowledge Standard:* The DOJ and SEC have shown a clear willingness to rely on the constructive knowledge element of the FCPA, invoking "high probability" language and relying on circumstantial factors, in instances where a company's conduct may fall short of actual knowledge. In the SEC's August 2016 Key Energy settlement (*see* p.68), the SEC stated that the parent company ignored red flags when it failed to ask why its Mexican subsidiary wanted to donate 26 times more gifts to the Pemex Christmas party raffle than the year before, and when the local country manager explained that the increase was due to an increase in business that year.

- *Direct Parent Company Involvement Not Required:* The DOJ and SEC continue to hold parent companies liable for books and records or internal controls violations committed without their knowledge by their non-U.S. subsidiaries when the subsidiaries' misrepresented financials are consolidated into the parent corporations' books and records. In connection with the 2016 settlement between the SEC and Johnson Controls, for example, the SEC alleged that Johnson Controls was liable for the actions of its Chinese subsidiary even though Johnson Controls was not accused of having any prior knowledge of the illicit behavior. The U.K. SFO has taken a similar position in moving against Mabey Engineering under the Proceeds of Crime Act for actions of its subsidiary Mabey & Johnson (*see* p.495). As a result, companies must ensure that their anti-corruption compliance policies and procedures are implemented throughout the corporate structure and extended to subsidiaries, including those gained through acquisition.

- *Use of Money Laundering, Wire Fraud, and Related Financial Crime Statutes:* Prosecutors remain committed to enforcing laws prohibiting other financial crimes, such as money laundering and wire fraud, that often intersect with FCPA enforcement actions. Unlike the FCPA, these statutes can apply to foreign officials or private parties for soliciting or accepting corrupt payments, as demonstrated by the prosecutions of Vadim Mikerin (the former President of a U.S.-based subsidiary of Russia's State Atomic Energy Corporation) and three former PDVSA officials (Ramos, Gravina, & Maldonado), all of whom pleaded guilty to money laundering-related charges (*see* p.124).

- *Broad Reading of "Anything of Value":* The FCPA prohibits far more than mere cash payments and can be violated by the provision of such diverse benefits as entertainment, scholarships, vehicles, shoes, or stock and profits sharing. Travel expenditures, even when there is some link to legitimate business and promotional activities, remain a frequent source of charged impropriety when excessive or not mostly related to the business purpose.

    - Scrutiny of Jobs & Internships: Benefits to relatives of the foreign official may also run afoul of the law, as demonstrated by the DOJ and SEC's settlements with BNY Mellon and Qualcomm regarding in part, the hiring of relatives of Chinese government officials.

    - Spotlight on Gifts & Hospitality: Regulators' increasing focus on gifts & hospitality is illustrated by the fact that so many U.S. enforcement actions since the beginning of 2015 have included the improper provision of gifts, hospitality, and/or travel, including Akamai, BHP Billiton, Bristol-Myers Squibb, FLIR, Key Energy, LATAM & Plaza, Nortek, Olympus, the PDVSA individual prosecutions (Rincon & Shiera et al.), PTC & Yu Kai Yuan, Qualcomm, SciClone, and Las Vegas Sands.

- *Compliance Monitors and Consultants:* The imposition of compliance monitors or consultants as part of settlements continues to be a key element of negotiations. In general, the DOJ considers several factors when deciding whether to impose a monitorship, including (i) whether the company has an effective internal compliance program and sufficient internal controls, (ii) the seriousness, duration, and pervasiveness of the misconduct, and (iii) the nature and size of the company. In April 2016, with the announcement of the FCPA Pilot Program, the DOJ publicly expressed its willingness to forego a compliance monitor under appropriate circumstances. In particular, the FCPA Pilot Program memorandum indicates that if a company has established a risk-based compliance program with an independent and appropriately staffed compliance team, the DOJ will consider foregoing the imposition of a monitor, assuming other criteria of the Pilot Program are also met (including cooperation). (For more on the Pilot Program, *see* p.13)

- *Focus on Conduct in China:* Enforcement actions involving conduct in China are as prevalent in U.S. enforcement activity in 2015 and 2016 as ever before. Nine of the 23 settlements (40%) announced from January 2015 through publication in August 2016 involved improper conduct in China: Akamai, Bristol-Myers Squibb, Johnson Controls, Las Vegas Sands, Mead Johnson, Nortek, Qualcomm, SciClone Pharmaceuticals, and Yu Kai Yuan (PTC).

- *Focus on the Financial Services Industry*: While the energy, pharmaceutical, and defence industries have long been targets of increased attention with respect to FCPA enforcement, activities within the financial services industry appear to be under additional scrutiny. This appears consistent with general enhanced regulatory focus on the industry since the 2008 financial crisis. In 2011, the SEC notified a number of banks and private equity funds that it was investigating whether they may have violated the FCPA in relation to their dealing with sovereign wealth funds. Then, in 2013, the Sons and Daughters hiring-related investigations brought new FCPA scrutiny to banks, leading to the 2015 BNY Mellon settlement (*see* p.97). Also in 2015, five former Direct Access Partners executives were sentenced to prison terms of 1-4 years for their roles in paying bribes to secure bond trading business (*see* p.166), and in 2016, ICBC Standard Bank settled with the SFO and SEC in relation to bribes paid in connection with a $600 million sovereign debt security private placement. As of August 2016, JP Morgan Chase was reportedly close to resolving its own "Sons and Daughters" investigation, and, hedge fund Och-Ziff Capital Management Group LLP announced an FCPA settlement reserve of $414 million, with press reports that the DOJ may seek a guilty plea in relation to conduct in Libya.

II. Lessons from Enforcement Activity

- *Compliance Programs Must be Effective at Preventing Misconduct:* Recent enforcement actions make clear that maintaining a compliance program is not enough, compliance

programs must be adequate and effective at preventing and detecting misconduct. Since January 2015 alone, U.S. enforcement authorities have criticized Bristol-Myers Squibb, FLIR, ICBC Standard Bank, PBSJ, SAP & Vincente Garcia, and Nortek stressing that the companies' managers regularly failed to notice or investigate so-called compliance "red flags." In addition, recent enforcement actions have reflected a willingness of the SEC and DOJ to prosecute companies even when the companies had established compliance programs at the time of the misconduct and the employees involved intentionally evaded the controls in place. In 2016, the SEC charged both SAP and Johnson Controls for failing to maintain adequate internal controls despite the fact that employees engaged in conduct specifically to evade controls. Johnson Controls, for example, maintained a system requiring any payments to vendors or third parties in China over a reasonable amount to be approved by the branch in Denmark. Employees intentionally evaded these controls in making payments to suspicious vendors by structuring the transactions in amounts just under this threshold. Similarly, an SAP employee's initial scheme to make payments through a new agent was thwarted when the agent was flagged during due diligence, prompting the employee to resort to a different, more complicated scheme, to avoid these controls (*see* p.127).

These actions underscore the importance for companies of continuously testing and reviewing their compliance program to ensure that it is adequately designed to prevent misconduct.

- *Paper Procedures Are Not Enough*: Company procedures that require due diligence, anti-corruption covenants, other contractual provisions and certifications, or appropriate accounting practices provide no protection (and may prove harmful) when the procedures are not followed or are followed only to the extent to "paper the file."

- *Structure and Staff Compliance Functions Appropriately*: Government regulators have emphasized the need for companies to take measures to ensure that their compliance obligations are taken seriously at the highest level of management and that the compliance function is appropriately structured, staffed, and funded. When discussing Qualcomm's failure to devise and maintain adequate internal controls, the SEC in particular pointed to the fact that Qualcomm did not employ a chief compliance officer for its global operations, nor specifically for its Chinese operations, which generated almost half of the Company's revenues at the time in question (*see* p.87). The authorities also criticized VimpelCom's lack of adequate compliance structures and personnel. At the time of its purchase of the two subsidiaries through which payments were made, VimpelCom had no Chief Compliance Officer, and the individual later hired for this role was considered underqualified and given substantially inadequate resources.

- *Apply Close Scrutiny to High Risk Subsidiaries or Units:* The 2016 SEC enforcement action against Johnson Controls was based on the actions of Johnson Controls' Chinese subsidiary. Despite the fact that the subsidiary's employees actively circumvented Johnson Controls' risk-based compliance program and actively concealed improper activity from Johnson Controls, the SEC found that Johnson Controls failed to exercise sufficient oversight despite multiple trainings and audits, that Johnson Controls gave too

much autonomy to the local Chinese Managing Director (who organized and actively concealed the improper conduct from the parent company), and that Johnson Controls' audit procedures failed to test payments under the thresholds that were set to trigger compliance scrutiny—a weakness that was exploited by the subsidiary's employees to funnel improper payments primarily through payments too small to trigger scrutiny. The Chinese affiliate had previously been owned by York International Corp., and the Chinese affiliate had been one subject of York's 2007 FCPA settlement. Nonetheless, the Johnson Controls settlement indicates that authorities are willing to pursue enforcement actions against parent companies even when employees actively circumvent compliance policies and conceal improper activity from the parent company.

- *Adequately and Appropriately Investigate and Respond to Allegations*: Enforcement agencies expect companies to adequately and appropriately investigate allegations or evidence of misconduct. Once, for example, payments to an agent or others are determined to be inconsistent with the FCPA, anti-corruption standards, or company policies, termination of the payments is expected, and further action, such as revising codes of ethics and compliance training, will be viewed as necessary (and favorable) by regulators. Breakdowns in internal controls should be fully remedied, and companies that encounter anti-corruption issues in one circumstance should be careful not to repeat the mistakes that led to such issues.

  Identification of red flags or suspicious conduct by internal or external auditors has also been used by enforcement agencies as evidence of companies' knowledge of and failure to stop improper practices. In its 2016 settlement with Las Vegas Sands (*see* p.72), for example, the SEC noted that Las Vegas Sands' internal audit department had highlighted that the majority of entertainment expenses were related to entertainment of government officials, but that the auditors failed to elevate the issues sufficiently within the company.

- *Need for Appropriate Due Diligence and Monitoring of Business Partners:* The vital importance of risk-based due diligence of third parties is perhaps the single most important lesson to guide the development and implementation of an effective corporate compliance program. Over two-thirds of the settlements and prosecutions in 2015 and 2016 involved third party agents or intermediaries. In almost every one of those cases, the DOJ or SEC criticized the companies for failing to conduct appropriate due diligence on their proposed third-party agents or intermediaries, or for ignoring red flags that suggested that there was a high probability that the payments to such entities would be passed on to government officials. For example, Nordion (*see* p.76) failed to conduct any due diligence on its agent in Russia, and its failure to do so put it in a position where it could not rationally form a basis to conclude that no illegal payment was made, making it liable for violating the recordkeeping and internal control requirements. This focus on the central importance of effective risk-based due diligence has also been embraced by the international community, with the OECD releasing guidance on internal controls, ethics, and compliance programs that counsel towards the adoption of a risk-based approach to due diligence.

  - *Determine Identities of Beneficial Owners:* Entities such as shell companies can easily conceal the identities and locations of their beneficial owners, and thus the true source or

destination of funds. Any due diligence procedure must seek to learn the identities of all beneficial owners and actual control persons of various shell companies, holding companies, and trusts that maintain an ownership interest of an agent or third party.

- *Examine Carefully the Qualifications of Agents, Distributors, and other Third Parties:* Companies must understand the background and competence of agents and intermediaries, and enforcement agencies will criticize and penalize companies for failing to do so. The DOJ and SEC criticized Nordion, for example, for engaging an agent that did not have any experience in the relevant industry. Third parties that are insufficiently qualified or with little or no assets (i.e., a "brass plate" or "mailbox" companies) should be avoided. Although distributors have traditionally been viewed as presenting less corruption risk than business development agents, the 2016 enforcement actions against Analogic, Mead Johnson, SAP, and Olympus demonstrate that the qualifications, activities and payments associated with distributors should be evaluated as well, particularly in certain contexts or jurisdictions in which such relationships are heavily relied upon.

- *Examine Carefully Tasks to be Performed by Third Parties:* Companies must examine an agent's competence to provide the relevant services and the value of those services relative to the agent's compensation. Companies should validate the tasks allegedly being provided by the agent to ensure they are undertaken. In 2015 and 2016, enforcement actions against VimpleCom, Louis Berger, and PDVSA suppliers Rincon & Shiera all involved third parties paid through agreements for non-existent services.

- *Recognize the Risks in Handling Confidential Information:* Companies must be cautious with respect to non-public or confidential information that third parties may seek to provide regarding clients, competitors, or bid processes. Aside from potential anti-competition violations, regulators may view the mere possession of such materials as evidence that they were obtained through improper means. This flows from the belief that individuals who have access to such materials would not provide them to others absent the return of some improper benefit. (*See*, e.g., the 2014 enforcement action against Asem Elgawhary, the former Bechtel employee who solicited kickbacks from international companies to provide confidential information during bid processes). The 2015-16 settlements involving PBSJ, IAP & James Rama, Key Energy, as well as six PDVSA procurement-related individual prosecutions (Rincon & Shiera et al.) all involved the handling of confidential information.

- *Recognize the Importance of Foreign Investigations:* In the past, the DOJ has favorably cited advice given by outside counsel that foreign investigations provided the DOJ and SEC "ample" basis for launching an investigation, and that those agencies would expect a company, at a minimum, to conduct an adequate investigation of the allegations and the larger implications of any improper conduct that was discovered. Consistent with this view, the SEC criticized Diebold in its complaint against that company for failing to adequately investigate and address red flags that arose from a government agency investigation in China. In today's environment of increased cross-border enforcement activity and investigative cooperation, companies would be wise to assume that an investigation

conducted in one jurisdiction may have implications in other jurisdictions in which the company does business.

- *Conduct Appropriate Employee Training:* Employees overseeing high-risk transactions or operational areas (such as customs clearance and logistics) should receive frequent training. In numerous settlements, enforcement agencies have stressed that training should be conducted in languages that employees understand. In 2012, the SEC criticized Orthofix for giving anti-corruption training in English to employees who "spoke minimal English," while in 2014, the SEC criticized Bruker failing to translate compliance materials and trainings into local languages for Chinese subsidiaries. Similarly, in the 2016 Nortek and Akamai settlements, the SEC highlighted that pre-settlement corrective steps included providing training in appropriate languages.

- *No De Minimis Exception:* The FCPA contains no *de minimis* exception. Authorities have brought enforcement actions based on small-value bribes, particularly where they were numerous and frequent. Nortek's 2016 settlement involved $290,000 in improper payments spread across five years and 400 transactions with an average value of less than $750 each. Past settlements with Dow, Paradigm, and Avery Dennison involved frequent payments each of $100 or less.

- *Experienced Anti-Bribery Counsel Required:* While the mere use of outside counsel will not completely insulate a company from FCPA liability, the selection of experienced anti-corruption counsel gives the greatest chance of compliance with the expectations and requirements of enforcement agencies. The DOJ has previously rejected three potential independent monitors recommended by BAE as insufficiently qualified for the position. The World Bank Sanctions Board, in its first published decisions, also emphasized that only internal investigations conducted by experienced, independent counsel will enable a respondent company to mitigate the penalty to be imposed on it for improper conduct.

CHAPTER 2: FOCUS ISSUES

From "Operation Car Wash" in Brazil to "Operation Fox Hunt" in China, countries around the world are pursuing anti-corruption enforcement actions against both individuals and corporations with more resources and vigor than ever before. The growing international consensus that forceful measures are necessary to combat the plight of corruption continues to bear fruit as well in the form of stronger anti-corruption legislation around the world. This year we focus on several of the most important enforcement efforts that occurredboth inside and outside of the United States.

I. Focus on New U.S. Enforcement Guidance

A. Yates Memorandum

On September 9, 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a policy memorandum titled Individual Accountability for Corporate Wrongdoing (the "Yates Memorandum"), which articulates six new steps that the DOJ will take in furtherance of its policy to investigate and hold accountable individuals responsible for corporate misconduct. While the DOJ has had a longstanding policy of holding individuals responsible for corporate misconduct—as articulated in similar DOJ policy memoranda dating back to the 1999 memorandum issued by then-Deputy Attorney General Eric Holder—the six steps articulated in the Yates Memorandum indicate a heightened focus on individuals, and most likely top-level management. The policies articulated in the Yates Memorandum have the potential to impose additional burdens on companies, particularly for the receipt of cooperation credit.

(1) ***To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct***. The Yates Memorandum confirms that this requirement equally applies to corporations seeking to cooperate in criminal and civil cases. In a speech at NYU the day after the release of the Yates Memorandum, Deputy Attorney General Yates elaborated on this policy under which the identification of culpable individuals is a threshold matter for companies seeking cooperation credit. Yates explained that "[t]he rules have just changed." She emphasized that if a company wants to receive any credit for its cooperation, "it must give up the individuals, no matter where they sit within the company." Yates further explained that companies would not simply be able to plead ignorance. If a company does not know who was responsible, the company must conduct an investigation and find out. Moreover, Yates made clear that cooperation from a company must continue beyond the actual settlement and that corporate plea agreements and settlement agreements will include provisions requiring such ongoing cooperation.

(2) ***Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation***. In her speech at NYU, Yates indicated that DOJ attorneys had already been instructed to focus on individuals from the start of an investigation, regardless of whether the investigation begins as criminal or civil. The Yates Memorandum expressly states that focusing on individual wrongdoers early in the investigation will increase the chances that such individuals will cooperate with the investigation and provide information about higher level executives.

(3) ***DOJ Criminal and civil attorneys handling corporate investigations should be in routine communication with one another***. The Yates Memorandum makes clear that DOJ criminal and civil attorneys should communicate and alert each other to investigations so as to be able to identify circumstances where concurrent criminal and civil investigations should be pursued.

(4) ***Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals***. The Yates Memorandum clarifies that, when the DOJ resolves a matter with a company before reaching resolution with responsible individuals, DOJ attorneys should take care to preserve the ability to pursue charges against the individuals. More directly, the Yates Memorandum makes clear that, except for extraordinary circumstances, the DOJ will not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individuals involved.

(5) ***Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized***. In her NYU speech, Yates indicated that, as with the DOJ's agreement now required to dismiss charges against, or provide immunity for, individuals as part of a corporate resolution, a decision to not take any enforcement action against a related individual must be approved in writing by the relevant United States Attorney or Assistant Attorney General. While this is purely an internal procedural change, it is designed to ensure that prosecutors justify their decisions not to prosecute individuals. It is often easier for a prosecutor to cut a deal with a company than to resolve individual criminal charges, as the latter involve potential prison time or other significant consequences to individuals. But the approval requirement in the Yates Memorandum may force prosecutors to more carefully consider criminal charges before resolving corporate criminal investigations. Accordingly, it could contribute to an increased volume of prosecutions against individual corporate executives.

(6) ***Civil enforcement attorneys should also consistently focus on individuals and evaluate whether to bring suit against an individual based on considerations beyond the individual's ability to pay***. In her NYU speech, Yates made clear that this step was a signal that the DOJ would pursue civil actions against individuals responsible for wrongdoing even if those individuals do not have the financial resources to pay the civil penalty.

As a result of the Yates Memorandum and the policy changes articulated therein, relevant portions of the U.S. Attorneys' Manual (Title 9, Chapter 28 "Principles of Federal Prosecution of Business Organizations," Title 4, Chapter 3 "Compromising and Closing," and Title 1, Chapter 12 "Coordination of Parallel Criminal, Civil, Regulatory and Administrative Proceedings") were updated and revised in November 2015.

In a November 16, 2015 speech at the American Banking Association and American Bar Association Money Laundering Enforcement Conference in Washington, D.C., Yates addressed two concerns a company might have regarding the policies articulated in the Yates Memorandum, namely

that it will force companies to engage in broad, costly and time-consuming internal investigations in order to gather facts regarding responsible individuals and that it will force companies to disclose attorney-client privileged information discovered through such internal investigations. With respect to the first concern, Yates explained that the DOJ expects companies to undertake an internal investigation that is appropriately tailored to the alleged misconduct and, when in doubt, discuss the scope with the DOJ. As to waiver, Yates confirmed that the policy requires companies to provide only non-privileged information, but that non-privileged information includes facts learned during outside counsel's interviews of corporate employees.

A significant theme throughout the Yates Memorandum is an emphasis on the application of its principles to both criminal and civil matters. Ultimately, however, the Yates Memorandum may impact civil enforcement more than criminal. Indeed, the DOJ has long ago voiced its belief the "prospect of prison time" for an individual employee is the strongest deterrent against corporate crime. In her NYU speech, Yates recognized that "it can be extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary to establish proof beyond a reasonable doubt." Nothing in the Yates Memorandum suggests that the shift in policy will make it any less difficult to meet such a burden.

The impact on civil enforcement, however, largely stems from what the DOJ itself is willing to accept when pursing a civil violation. The sixth step of the Yates Memorandum evidences a consciousness within the DOJ of its perceived complacency when it comes to civil prosecution of individual executives. In civil matters, judgments against individuals inevitably result in less monetary recovery compared to the corporation itself. Thus prosecutors have in the past factored the discrepancy between individual and corporate resources when deciding how to resolve cases. The Yates Memorandum, however, insists that the sufficiency of an individual's resources to satisfy a judgment will not control the decision to prosecute. Individual resources are naturally smaller tokens to capture but the belief is that any losses in monetary returns will be outweighed by long term deterrence. The Yates Memorandum also strongly suggests that the non-monetary value associated with punishments levied on individuals is just as important, if not more important, then the dollar sum recovered. As Yates said, the public expects and demands the DOJ will implement these changes aimed at correcting the perception that misconduct will go unpunished, even if that perception is incorrect. The DOJ thus seems eager to pursue cases that make an impact on the public perception of investigations, and that means more than just the largest dollar sum recovered.

B. Pilot Program for Voluntary Disclosure of FCPA Violations

On April 5, 2016, in a memorandum entitled *Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* ("Guidance"), Andrew Weissman, Chief of the DOJ's Fraud Section, unveiled an initiative to encourage voluntary self-reporting in FCPA cases through an FCPA enforcement pilot program ("Pilot Program"). Under the one-year Pilot Program, companies will be eligible to receive significant mitigation credit related to FCPA violations if they: (1) voluntarily self-disclose FCPA violations, (2) fully cooperate with the DOJ's ensuing investigation or follow-up questions, (3) agree to disgorge all profit earned from the illicit acts, and (4) take sufficient remedial measures, including adoption of a robust compliance program. As detailed in the Guidance, companies that take such measures will be eligible for certain mitigating credit, including a reduction of up to 50% off of the otherwise-applicable U.S.

Sentencing Guidelines penalty range (or a formal declination of prosecution if appropriate) and avoidance of a compliance monitor.

1. Voluntary Self-Disclosure in FCPA Matters

The cornerstone of the Pilot Program is the requirement that a company voluntarily disclose the FCPA violation. In order for a disclosure to be considered voluntary, it must occur prior to an "imminent threat" of disclosure by an employee or third party or the initiation of a government investigation, be made within a reasonable time of the company becoming aware of the violation, and include all relevant facts (including information regarding the individuals involved). Moreover, a disclosure will not be considered voluntary if the company is required to make it by law, agreement or contract.

The Guidance is clear that even with full cooperation and appropriate remediation, absent voluntary disclosure, the Fraud Section's FCPA Unit will grant a maximum reduction of only 25% off the bottom of the U.S. Sentencing Guidelines penalty range. If nothing else, this change alone is significant, as companies have in the past received greater reductions, even absent voluntary disclosure. For example, in 2014, Alcoa World Alumina LLC ("Alcoa") reached a plea agreement with the DOJ in which it agreed to pay $209 million to resolve FCPA violations, a greater than 50% reduction off of the bottom of the Federal Sentencing Guidelines fine range. Similarly, VimpelCom's $460 million fine to the DOJ was a 45% reduction off of the bottom of the applicable Sentencing Guideline fine range, despite having not voluntarily disclosed the misconduct prior to the DOJ's investigation. It is also unclear how this policy would affect the willingness or ability of the Fraud Unit to offer a fine reduction for reasons other than cooperation, such as a company's ability to pay or the amount paid in fines by the company to other regulators for the same conduct.

2. Full Cooperation in FCPA Matters

In order to be eligible for the Pilot Program, a company must also provide full cooperation to the FCPA Unit. According to the Guidance, a company must be prepared to disclose all facts relevant to the investigation, including details regarding the involvement of the company's officers, employees, or agents. Indeed, in many ways, this requirement doubles-down on the 2015 Yates Memorandum, which is specifically referenced in the Guidance. In order to qualify for the Pilot Program and receive the potential mitigation offered, a company must be willing to name names.

In addition, the Guidance details other steps that will be required in order to receive credit for full cooperation:

- Preservation, collection and disclosure of relevant documents and information;
- Updates on the status and findings of the company's internal investigation;
- Making available for DOJ interviews any company officers or employees who possess information relevant to the investigation;
- Disclosure of all relevant facts gathered during any independent investigation, including specifically an attribution of the sources of those facts rather than just a narrative;

- Disclosure of overseas documents (unless the company can establish that disclosure is legally prohibited); and

- Where requested, translation of relevant documents in foreign languages.

The Guidance is clear that the level of cooperation expected will be assessed based on the circumstances. A small company will not be required to conduct the same type of investigation (and in the same time-frame) as a Fortune 100 company. Moreover, the Guidance specifically states that full cooperation credit is not based on the willingness of the company to waive attorney-client privilege or work-product protection. Finally, cooperation will not be assessed on an all-or-nothing basis. Companies that meet some of the cooperation elements will be eligible for some cooperation credit under the pilot program, but such credit will be "markedly less" than full cooperation credit.

3. Timely and Appropriate Remediation in FCPA Matters

A company must take appropriate and timely steps to remediate the misconduct, including implementing an effective ethics and compliance program, appropriate discipline of employees, and any other steps to reduce the risk of misconduct recurring. The Guidance is clear that before even considering remediation, the Fraud Section will evaluate whether the company is eligible for cooperation credit. A company that does not cooperate will not be eligible for credit for remedial actions.

With respect to expectations regarding compliance programs, the Guidance acknowledges that the implementation of an effective ethics and compliance program may vary depending on the size and resources of a company. However, the Guidance provides several elements that the DOJ considers particularly important regardless of the size of the company:

- Whether the company has an overall culture of compliance, raising awareness among employees that any criminal conduct (including the one underlying the investigation) will not be tolerated;

- Whether the compliance function is independent and is granted sufficient resources;

- Whether the compliance function is staffed with quality and experienced compliance personnel, who are able understand and identify the transactions posing a potential risk;

- Whether the company has performed an effective risk assessment and tailored the compliance program to the risks identified in that assessment;

- How a company's compliance personnel are compensated and promoted compared to other employees;

- Whether the compliance program is monitored and audited to assure its ongoing effectiveness; and

- Whether the company has set up the reporting structure of compliance personnel in a manner that allows for independence and avoids potential conflicts of interest.

4. Disgorgement of Profit

Finally, although not classified as a formal requirement of the Pilot Program, the Guidance is clear that in order to qualify for any mitigating credit under the Pilot Program, a company will be required to disgorge all profits deriving from the FCPA misconduct.

5. Potential Credit

A company that meets the requirements of the Pilot Program qualifies for the full range of potential mitigation credit. In particular, companies that meet all of the requirements will be eligible for up to a 50% reduction off the bottom of the U.S. Sentencing Guidelines penalty range. In addition, for companies that meet each of the requirements, the DOJ will consider a declination of prosecution if appropriate. In making that determination, prosecutors will take into account various factors including the seriousness of the offence, a significant profit to the company from the misconduct, or a prior resolution with the DOJ within the past five years.

Finally, the Guidance indicates that companies that qualify for mitigation credit under the Pilot Program generally will not be subject to review by an independent compliance monitor, so long as the company has implemented an effective compliance program at the time of the resolution (as evaluated while considering remediation credit).

6. Impact of the Pilot Program

Initial commentary from the legal community on the announcement of the Pilot Program reflected skepticism regarding its impact and a belief that the Pilot Program left too much discretion to the DOJ to determine how credit should be given to participating companies. In particular, offering "up to" a 50% reduction from the bottom of the U.S. Sentencing Guidelines' recommended penalty range provides little guarantee for companies considering self-disclosure. Shortly after the Pilot Program was announced, news leaked that the FCPA Unit had initially proposed a program that would have offered full declinations for companies that met the requirements. However, senior Justice Department leadership apparently balked at the idea of foregoing all prosecutorial discretion, and a compromise was reached.

Despite skepticism, early returns show that the DOJ may indeed be willing to decline to prosecute companies that fully meet the requirements under the Pilot Program, at least for conduct that is neither egregious nor widespread. Since the Pilot Program was announced, three companies (*see Nortek, Akamai, and Johnson Controls*) have received declination letters from the DOJ, each referencing the Pilot Program. Each case involved relatively small value bribes paid to government officials in China and each company also reached some sort of settlement with the SEC related to the underlying misconduct.

It is clear, however, that a company must be willing to meet the DOJ's expectations for cooperation if it hopes to receive full mitigating credit under the Pilot Program. In June 2016, while Nortek and Akamai were receiving declination letters for conduct that each voluntarily disclosed, BK Medical ApS ("BK Medical") was agreeing to an NPA with the DOJ in which it was required to pay a criminal fine of $3.4 million (*see Analogic Corporation, BK Medical ApS, and Lars Frost* for full details). Although BK Medical's parent company, Analogic Corporation ("Analogic"), conducted an internal investigation, voluntarily disclosed the improper conduct of BK Medical, cooperated with the investigation by the DOJ and SEC, terminated or disciplined all employees involved, and enhanced its compliance program, BK

Medical received “only” a 30% reduction off of the bottom of the Sentencing Guideline fine range. According to the DOJ, BK Medical was not afforded full mitigating credit because it did not disclose all relevant facts, particularly “the identities of a number of the state-owned entity end-users of the Company's products, and about certain statements given by employees in the course of the internal investigation.” Despite the fact that BK Medical did not receive full mitigating credit, it was not required to appoint a compliance monitor and instead received a three-year period of self-reporting regarding its compliance program.

The Pilot Program is initially intended as a one-year program, running until April 2017. The success of the Pilot Program at encouraging self-reporting remains to be seen. While the potential mitigating credit offered under the Pilot Program is significant—particularly the prospect of the declination and the ability to avoid a costly and burdensome compliance monitor—it is still unclear how the DOJ will use its discretion in determining the amount of credit for each eligible company. This uncertainty may keep many would-be participants away until the DOJ demonstrates a willingness to provide full mitigation credit on a regular basis, including for conduct that is more egregious or involves larger sums than the cases that so far have been resolved through the Pilot Program.

II. Focus on Brazil

A. Anti-Corruption Enforcement

1. Operation Car Wash

Since 2014, the world has watched the unraveling of Brazil's Operation Car Wash (known locally as *Operation Lava Jato*), the largest anti-corruption and anti-money laundering investigation in the nation's history. Perceived as a major turning point for the country's institutions, this operation has impacted every aspect of life in Brazil, with serious and long lasting effects on the country’s economy, political system, and social stability. On a global scale, through Brazil's active cooperation with foreign authorities, the same facts have also resulted (and will likely continue to result) in enforcement actions in multiple other jurisdictions.

a. Case History and Current Status

In March 2014, Brazilian authorities began an operation focused on dismantling a massive money laundering scheme carried out by a network of criminal gangs. Through coordinated “dawn raids,” the Federal Police seized approximately $2.1 million in cash and three hotels, as well as numerous luxury vehicles and works of art. They also arrested a number of suspects, including black market moneychanger Alberto Youssef and his partner Carlos Chater, owner of a gas station in Brasilia that was used to launder an initially estimated $4 billion. This humble business was the starting point and inspiration for what became known as “Operation Car Wash.”

After this first police operation, the probe quickly expanded beyond its initial scope. Based on evidence collected, and with the cooperation of certain defendants, authorities discovered that the money laundering scheme was part of a much more complex and intricate corruption scheme involving state-controlled oil giant Petrobras.

Allegedly, over the past ten years, several of the largest contracting groups in Brazil colluded to rig Petrobras bids and fix prices, paying kickbacks to public officials who not only failed to halt the cartel activity, but also actively favored certain of its members. The anticompetitive practices are alleged to have included rotating contract awards, excluding other qualified bidders, leaking confidential information, sole-sourcing without a legitimate justification, agreeing to undue and inflated contract amendments, and expediting contracting proceedings. According to authorities, these companies funneled portions of the improper gains (at percentages ranging between 1% and 5% of the price of each contract) to high level Petrobras executives, as well as to Brazil's major political parties and politicians, who in turn appointed such executives. In some cases, payments were executed through brokers or commercial agents (such as Youssef), who received the amounts under fabricated agreements and subsequently transferred them to public officials through offshore accounts or in the form of tangible goods (*e.g.*, artwork, real property, furniture, payment of expenses). In other cases, payments were made directly to political parties (particularly the then-ruling party, *Partido dos Trabalhadores*, "PT") as official donations or off-book campaign contributions.

Openly inspired by Italy's Operation Clean Hands (which employed similar tactics to investigate and prosecute politicians and mafia members in the 1990s), the Car Wash task force relies heavily on the use of pre-trial arrests and on the cooperation of defendants through plea agreements. Just as importantly, the operation also relies upon the support of a civil society that is frustrated by decades of corruption and impunity. Over the course of the past two years, authorities have conducted more than thirty sub-operations, consisting of overt, widely publicized enforcement acts (including raids and high-profile arrests), frequently followed by interviews and press conferences. In effect, the progress of the investigations has become somewhat of a media spectacle in Brazil, which has helped to ensure continuous public interest and scrutiny over the case.

As of June 2016, these enforcement efforts included: (i) over 1,000 anti-corruption proceedings (including investigations and enforcement actions against companies and individuals) related to allegations of bribery, money laundering, and conspiracy, among others; (ii) over 150 arrests; (iii) over 50 settlements (including leniency agreements with companies and plea bargains with individuals); and (iv) over 100 international cooperation proceedings (including requests from Brazil to 30 different countries, and requests received by Brazil from over a dozen other countries). The authorities are now reportedly seeking to recover a total of approximately BRL 37.6 billion ($ 11 billion), which they estimate has been misappropriated from Petrobras through procurement fraud, inflated prices, and unjustified contract amendments. To date, approximately BRL 3 billion ($880 million) has already been collected, of which BRL 660 million ($196 million) was repatriated from offshore bank accounts.

As noted above, investigated (and arrested) individuals include not only high-level company executives and commercial agents, but also a number of Petrobras officials and politicians, such as federal congressmen, senators, and state ministers. Notably, former president Luis Inacio "Lula" da Silva and his family are under investigation for corruption, influence peddling, and money laundering. In March 2016, Brazilian authorities conducted raids at Lula's properties and subpoenaed him to testify. Amidst rumors of his imminent arrest, then-president Dilma Rousseff attempted to appoint him as a state minister, which would have resulted in his prosecution being transferred to the Brazilian Supreme Court. Multiple lawsuits across the country were initiated to block Lula's appointment, based on claims that it served no purpose other than to frustrate the investigations. Before a final decision was reached,

however, Congress began processing and voting on Rousseff's impeachment, suspending her from office in May 2016. As a result, Rousseff's ministers, including Lula, were discharged.

Subsequently, the Prosecutor-General sought authorization from the Supreme Court to investigate Rousseff for obstruction of justice. Aside from the appointment of Lula, she is also accused of having appointed a justice to the highest Court of Appeals with a specific mandate to release certain individuals who had been arrested in connection with Operation Car Wash. In parallel, Rousseff faces allegations that her presidential campaigns of 2010 and 2014 were partially financed with bribery money derived from the Petrobras scheme.

b. Outlook: Focus on International Companies

At the time of publication, it was unclear how the administration of interim president (and Rousseff's former vice president) Michel Temer might affect the progress of Operation Car Wash. Temer has publicly declared his support for the investigations, and has dismissed certain of his new ministers who have become implicated in the investigation. At the same time, some of the most prominent figures in his party (center-leftist *Partido do Movimento Democratico Brasileiro* “PMDB”) are under investigation, including Senate speaker Renan Calheiros and former House speaker Eduardo Cunha. The latter, who supported Rousseff's impeachment, was subsequently suspended by the Supreme Court for allegedly using his office to interfere with the investigations. In an attempt to avoid having his mandate revoked, Mr. Cunha ultimately resigned from his position as House speaker.

As of mid-2016, Car Wash enforcement efforts have shown no signs of slowing. In fact, the operation has expanded beyond the scope of Petrobras contracts, into activities involving the national development bank (*Banco Nacional de Desenlvolvimento Econômico e Social*, "BNDES") and the state-controlled power company, Eletrobras. To date, the proceedings have centered largely on domestic (*i.e.*, Brazilian) companies and individuals. However, at the end of 2015, Car Wash prosecutors publicly indicated that enforcement will begin to focus on foreign (*i.e.*, non-Brazilian) entities as well, and specifically advised potential defendants to self-report and cooperate. Non-Brazilian companies and corporate groups are expressly covered by the Clean Companies Act ("CCA") (which also applies to foreign-based parent entities and joint venture partners), making it logical that Brazilian authorities assess potential avenues of enforcement against such entities. As of November 2015, over 30 international companies were reportedly under investigation, out of almost 300 currently doing business with Petrobras.

c. Developments Outside of Brazil

The scope of the criminal activities being investigated in connection with Operation Car Wash reaches well beyond Brazilian borders. The scheme has allegedly included, for example: (i) the use of bank accounts in countries including Andorra, Antigua and Barbuda, Austria, Bahamas, Belize, Canada, Cayman Islands, Hong Kong, Liechtenstein, Luxembourg, Monaco, Switzerland, the U.S., and Uruguay; (ii) the use of offshore companies in countries including China, Virgin Islands, Panama, the U.S., and Uruguay; and (iii) overt acts (such as meetings) in Bolivia, the Netherlands, Peru, Portugal, the U.K., and the U.S. Accordingly, as noted above, Brazilian authorities have been closely working with their foreign counterparts, not only to request information and assistance (for instance, to lift bank secrecy on certain investigated individuals, or to repatriate money), but also to share findings and evidence for use in related proceedings abroad.

Most notably, U.S. authorities have initiated anti-corruption proceedings against over a dozen companies, Brazilian and others, in connection with the Car Wash allegations. In particular, the DOJ and SEC are investigating Petrobras and Eletrobras, as well as a number of Petrobras contractors, including contracting groups and other companies operating in the oil and gas industry. Certain of these companies are likely subject to U.S. jurisdiction for having securities that trade in the U.S., while others may be subject to jurisdiction for having undertaken acts in the U.S. in furtherance of improper activities. Such activities could include, for example, having money pass through U.S. bank accounts, using U.S. affiliates in connection with improper acts, or planning portions of a corruption scheme in U.S. territory.

In the scope of these inquiries, U.S. regulators have been cooperating not only with Brazilian authorities, but also with key defendants in the Brazilian proceedings. As of June 2016, the DOJ had reportedly signed plea bargains with at least three individuals (including two Brazilian executives and a former Petrobras official), who agreed to collaborate with the investigations to avoid further prosecution and penalties in the U.S.

In parallel, Petrobras is facing litigation proceedings in New York (including a securities fraud class action lawsuit and multiple independent investor complaints), in which its shareholders are claiming damages in connection with the alleged bribery scheme.

Outside of the U.S., countries including the Netherlands and Switzerland have launched their own enforcement proceedings against individuals and companies implicated in Operation Car Wash.

2. Operation Zelotes

In March 2015, public reports indicated that Brazilian Federal Police have been conducting a criminal investigation into suspected corruption at the federal tax appeals division (*Conselho Administrativo de Recursos Fiscais,* "CARF"). A division within the Ministry of Finance, CARF acts as a second line of review for taxpayer challenges to fines imposed by the Federal Revenue Service. It has over 200 members and is composed of tax authority officials and taxpayer representatives, with cases typically being reviewed by mixed teams of six "councilors."

The probe began in 2013, after authorities received an anonymous letter reporting that, since 2005, CARF had been providing favorable rulings in return for a percentage of the reduced tax penalties, at rates amounting to up to 10% in some cases. Reportedly, the investigation was dubbed "Operation Zelotes" as a historical reference to the Zealots, a group of rebels that, in the first century, sought to fight Roman occupation in Judea and was aggressively opposed to taxation.

According to press reports, prosecutors believe that a number of companies used third party intermediaries, such as law firms and consulting agents, to funnel improper payments to CARF officers in exchange for favorable rulings. It appears that at least 70 companies (including banks, steel producers, communications companies, and car manufacturers) are under investigation, and the authorities estimate that the scheme has cost Brazil over BRL 19 billion ($5.6 billion) over the years.

As the operation progressed, investigators apparently found evidence that some of the third parties implicated in the CARF corruption scheme had also made improper payments to ensure the enactment of presidential regulations between 2009 and 2013, which created tax exemptions in favor of car manufacturers. Two senators, the former head of the Federal Court of Accounts, and Dilma

Rousseff's former Minister of Finance are reportedly under investigation in connection with these allegations. In addition, a son of former president Lula is accused of having received improper payments in excess of BRL 2.4 million ($700,000) to facilitate this scheme.

As of June 2016, a dozen individuals had been convicted of crimes including corruption, influence peddling, and money laundering in connection with Operation Zelotes, while over 20 others had been charged with similar conduct.

3. Operation Black Blood

Since 2014, Brazilian authorities have been investigating certain contracts between Petrobras and SBM Offshore that allegedly resulted in illegally diverted funds. Conducted in parallel to "Operation Car Wash," this probe specifically targeted the alleged involvement of certain SBM executives in the transfer of $46 million in improper payments to Swiss bank accounts between 1998 and 2012 for contracts for oil production and offloading ships. In December 2015, the authorities conducted coordinated raids and charged 13 individuals in connection with such allegations (including SBM Offshore's CEO, Bruno Chabas, and board member Sietze Hepkema), in an operation known as "Operation Black Blood." In January 2016, Messrs. Chabas and Hepkema entered into separate agreements with Brazilian prosecutors, under which each executive agreed to pay R$250,000 ($60,000) to settle claims related to their possible involvement with the Petrobras scandal. Reportedly, SBM Offshore was set to pay the fine on behalf of both individuals.

The company was also facing potential liability in connection with these claims. According to media reports, it had been negotiating a settlement with the authorities since 2014, but the discussions stalled for several months. Nevertheless, in July 2016, SBM was able to reach a leniency agreement with the Ministry of Transparency, Oversight, and Controls, the Office of the Federal Prosecutor, the Federal Attorney-General, and Petrobras to settle the corruption claims. Under the settlement, SBM agreed to pay damages amounting to USD 341.8 million (of which USD 328.2 million will be paid to Petrobras and USD 13.6 million will be paid to the federal government); USD 179 million of this amount will come from forfeited bonus payments under two ongoing contracts with Petrobras. In addition, SBM has also agreed to: (i) cooperate with any official investigations that may be conducted with respect to third parties in connection with this case; (ii) enhance its Compliance Program as applied to its Brazil operations; and (iii) periodically report to the Ministry of Transparency, Oversight, and Controls, for a three-year period, on matters covered by the leniency agreement. In return, SBM was ensured the right to participate in ongoing public tenders and secure future opportunities with public institutions.

The SBM leniency agreement must still be reviewed and approved by Brazil's Federal Court of Accounts (*Tribunal de Contas da Uniao*, "TCU"). Nevertheless, it signals an important shift in the enforcement context in Brazil, as the Ministry of Transparency, Oversight, and Controls is reportedly in negotiations with other companies in connection with Operation Car Wash, which could signal additional settlements to follow.

B. Anti-Corruption Laws

1. New Regulations (2015)

Brazil began a complete overhaul of its anti-corruption framework in August 2013, with the enactment of the Clean Companies Act ("CCA") (Law No. 12846/13). Under this new law, companies are subject to a strict liability standard for bribery and fraud against domestic and foreign public institutions, risking harsh punishment regardless of corrupt intent. Notably, potential sanctions may include monetary fines, debarment from public procurement, and even compulsory dissolution of the business. Since the enactment of the CCA, other regulations have been enacted with an aim to clarify and facilitate the implementation of its requirements.

a. Decree No. 8420/2015

Although the CCA became effective in January 2014, in practice, enforcement was not enabled until over a year later, when then-incumbent president Dilma Rousseff issued a decree regulating key aspects of the law (Decree No. 8420 from March 2015). Among other things, the decree provided sentencing guidelines with a clear focus on prevention, specifically rewarding companies with a strong compliance program in place. To be considered effective and warrant a lesser fine, such a program must include the following elements: (i) an adequate tone at the top; (ii) written integrity policies (*e.g.*, standards of conduct, code of ethics, anti-corruption procedures); (iii) periodic compliance training; (iv) periodic risk assessments, with an aim to enhance and update the compliance program; (v) thorough and truthful bookkeeping; (vi) internal controls ensuring the accuracy of financial reports; (vii) specific procedures to prevent fraud and other misconduct in connection with public tenders, government contracts, and any interactions with public officials (*e.g.* paying taxes, handling inspections, or applying for licenses), including through third parties; (viii) a compliance function with adequate structure, independence, and powers to implement the integrity program; (ix) adequately publicized reporting mechanisms, which must be accessible to employees and third parties, as well as whistleblower protection measures; (x) disciplinary measures for misconduct; (xi) mechanisms ensuring detection, prompt discontinuation, and timely remediation of misconduct; (xii) due diligence for third parties (including suppliers, contractors, agents, and business partners); (xiii) background checks and exposure assessments prior to any corporate reorganization (including mergers and acquisitions); (xiv) continuous monitoring of the compliance program, with an aim to improve internal controls; (xv) transparency in political activities (*e.g.*, donations to candidates and political parties). In addition to an effective compliance program, other mitigating factors include cooperating with the authorities, self-reporting misconduct, and remediating damages. On the other hand, larger fines are due where management has knowledge of the wrongdoing and fails to prevent it, or where there is a pattern of continuous or recurrent offenses.

Furthermore, the decree also clarified the role of different agencies with overlapping powers to enforce the CCA. Civil sanctions must be pursued in court, through legal action initiated, as a rule, by the Office of the Prosecutor. As for administrative penalties, generally, the government institution directly affected by an alleged offense has primary jurisdiction to conduct and judge the corresponding sanctions proceeding. However, where the primary entity is unwilling or unable to do so, or where multiple federal entities are affected, the Ministry of Transparency, Oversight, and Controls (previously named Federal Comptroller-General) has subsidiary jurisdiction over the matter.

b. Regulations by the Ministry of Transparency, Oversight, and Controls

In light of its new responsibilities, in April 2015, the Ministry of Transparency, Oversight, and Controls issued additional regulations to structure and govern its sanctions proceedings. Most notably, Regulation No. 909 established a three-prong test for companies to earn a fine reduction based on the implementation of an effective compliance program. Namely, investigated companies must: (i) demonstrate which of the controls described above (as listed in the March 2015 decree) are included in the compliance program, and prove that they are adequate to the company's size, operations, and relevance in the market; (ii) demonstrate that the program has been consistently and effectively implemented over time, including through written records, statistics, and sample case files; and (iii) demonstrate that the program had been created prior to the alleged misconduct, and prove that the controls were used to prevent, detect, and remediate the specific acts under review. To satisfy such prongs, companies may submit evidence including official documents, emails, memoranda, minutes of meeting, reports, internal policies, and payment or accounting data.

c. Presidential Regulation No. 703/2015

Among other innovations, the CCA gave the Ministry of Transparency, Oversight, and Controls the powers to settle claims of violations of the CCA and the Federal Law on Public Procurement (Law No. 8666), through leniency agreements to be negotiated and signed with implicated companies.

The CCA provisions on such leniency agreements were harshly criticized for numerous gaps that arguably hamper enforcement, including the fact that: (i) they do not require the approval of public prosecutors who may be pursuing the criminal liability of individuals; (ii) they require a guilty plea by any company applying for leniency, without exception; (iii) they do not cover alleged violations of the Federal Improbity Law (Law No. 8429/1992), a statute often used by the authorities to impose heavy fines on companies who engage in misconduct in the frame of government contracts; (iv) they only extend the leniency benefits to "the first company to cooperate;" and (v) they do not allow for a complete exemption of penalties, only allowing for fine reductions by no more than 2/3.

In response to these perceived flaws, then-incumbent President Rousseff enacted a presidential regulation in December 2015 (Provisional Measure No. 703) to amend the CCA provisions on leniency agreements. In particular, the new regulation: (i) excluded the mandatory guilty plea; (ii) eliminated the provision that only "the first company to cooperate" may have the right to leniency; (iii) included alleged violations of the Federal Improbity Law in the scope of the leniency agreements; and (iv) expanded potential benefits to include a complete exemption of fines. This regulation was not well received by the Brazilian public, however, not only because its provisions were perceived as intending to favor specific companies implicated in Operation Car Wash, but also because the matter arguably should have been addressed through a legislative amendment and did not justify the use of a presidential regulation (an act normally reserved for emergencies). As a result, and the regulation was not ratified by Congress, and its effectiveness lapsed after 6 months.

Due to the uncertainty created by Provisional Measure No. 703, no leniency agreements were signed while the regulation was in force. Nevertheless, after it lapsed, the first settlement under the CCA (with SBM, as described above) was finally reached.

2. Court Interpretation and Enforcement Policy

Consistent with the policies behind these new rules, Brazilian courts and enforcement authorities are also emphasizing the importance of deterrence, which has resulted in an anti-corruption environment where companies are strongly encouraged to invest in internal controls and prevention. In effect, based on the evolution of recent cases (after years of inquiries, court decisions, and public statements by investigators and regulators), companies operating in Brazil now have a more clear picture of the enforcement policies to which they are subject, and specific guidance on where to focus their resources.

For example, in a high-profile decision from June 2015, the judge leading Operation Car Wash expressed concern that certain companies accused of corruption had not adopted any remedial measures (such as conducting an internal investigation into the allegations or punishing any offenders), despite widely publicized reports of their potential involvement in the Petrobras scheme and despite the launch of formal criminal proceedings against some of their directors. In an order to hold multiple top executives in pretrial detention, the judge stated that a lack of reaction from the board suggests that the alleged acts were not a mere deviation by one or more specific employees, but rather the reflection of an established company policy. For these reasons, he urged all companies to take the Car Wash investigation as a wake-up call to reassess their practices, understand and disclose the entirety of relevant facts, acknowledge improper acts, and compensate all damages.

III. <u>Focus on China</u>

The anti-corruption crackdown in China, which was launched in late 2012, following the 18th National Congress of the Communist Party of China ("CPC" or the "Party") continued in 2015. Throughout the year, President Xi has repeatedly emphasized that the fight against corruption never ends and that the Party's zero-tolerance policy towards corruption is here to stay. According to a report released on January 24, 2016 by the Central Commission for Discipline Inspection ("CCDI"), the CPC's highest anti-corruption organ, approximately 300,000 Party members have been disciplined for corruption since 2014. The political will to fight corruption is not only illustrated by the sheer number of public officials investigated, Party-disciplined and/or convicted, but also by the high-ranking profile of these officials. President Xi famously referred to these high-ranking corrupt officials as the "tigers" of corruption. Zhou Yongkang, China's former Security Chief, is the most prominent "tiger" convicted in 2015. Zhou had been investigated since 2012 for various corruption-related and abuse of power charges. He was expelled from the Party in 2014 and, one year later, received a non-public trial before the First Intermediate People's Court in Tianjin. On June 11, 2015, the Court sentenced Zhou to life imprisonment for "accepting bribes, abusing his power, and deliberately disclosing state secrets." Zhou, who is the highest level official sentenced in China since 1978, pleaded guilty and waived the right to appeal. Other high ranking officials investigated in 2015 (some of whom were closely linked to Zhou, allegedly precipitating their fall) include the former Head of the CPC in the Heibei Province, the former commander of the People's Liberation Army, the former judge of China's Supreme People's Court and the former vice mayor of Shanghai.

President Xi, during a speech held at the Politburo's collective study session on June 26, 2015, pointed out that "most Chinese government officials are [now] afraid of engaging in corruption." According to Xi, the corruption campaign is now entering its second phase, focused on making public officials "unable to engage in corruption." In line with this goal, and as described below, many of China's anti-corruption initiatives in 2015 (from building effective bribery detection mechanisms, reinforcing

international cooperation to prevent the flight of economic crime perpetrators, to enhancing the domestic anti-corruption legislative and regulatory framework) are thus "prevention-focused."

A. CCDI Initiatives to Detect Public Corruption

1. Inspections of State-Owned and Affiliated Entities

In 2015, the CPC organized three rounds of inspections, covering over 80 state-owned and affiliated entities and institutions in a wide array of industries ranging from oil and energy, electricity, telecommunications, minerals, transportation, aviation, to banking and insurance. The main purpose of these inspections, which have been organized since the start of President Xi's anti-corruption campaign, is to test the reviewed entities' compliance with the Party's integrity and anti-corruption principles. They are conducted by so-called Central Inspection Teams, whose members are selected from various governmental departments and agencies, including the CCDI, the Organization Department of the CPC Central Committee, and the National Audit Office. The inspections, which can take several months to complete, generally comprise the review and analysis of documents (including whistleblower communications) and interviews with relevant staff of the reviewed entities. The findings are subsequently published in summary reports on the CCDI's website. The inspections' success is illustrated by the fact that more than half of all the CCDI's investigations initiated since the 18th central committee of CPC in late 2012 have been triggered by information gathered by Central Inspection Teams.

During the course of the 2015 inspections, the Compliance Inspection Teams uncovered various compliance failures, including passive corruption, misuse of state-owned assets for personal benefits, misuse of public funds for travel and entertainment/gifts, and inadequate compliance systems to prevent conflicts of interests and corruption risks. As a result, six high-ranking executives of the targeted entities were placed under investigation, including, in the oil and gas sector, the former Vice Chairman of PetroChina; the former Deputy General Manager of China National Offshore Oil Corp (CNOOC); the former President of Sinopec; and in the telecommunications sector, China Telecom's former Vice President and current Chairman.

2. Encouraging Whistleblowers Through Creative Reporting Channels

Far from only relying on the work of the Central Inspection Teams mentioned above, the CCDI has made it a priority to encourage Chinese citizens to actively participate in the fight against corruption by public officials. For that purpose, the CCDI has built a whistleblower platform that allows the anonymous reporting of public corruption through three, creative and user-friendly channels: (i) an online message box; (ii) a mobile app for smartphones; and (iii) a designated "WeChat" account. Upon submission, each case will be assigned a tracking number, allowing the whistleblower to follow the progress of the investigation. Misconduct to be reported includes the giving or accepting of gifts and money; the giving and accepting of hospitality over a certain acceptable threshold; and the use of public funds for personal travel or banquets.

So far, the whistleblower platform has proven to be very well received by the Chinese public. Indeed, the online message box and mobile app became available in June 2015, and by the end of 2015, 120,800 cases had been reported, representing a 13% increase over the year 2014. The account WeChat was launched on January 1, 2016, and nearly 16,000 cases have been reported in one month.

B. Increased International Cooperation Through Operations Fox Hunt and Sky Net

In July 2014, China launched "Operation Fox Hunt," a campaign aimed at repatriating economic crimes fugitives and recovering stolen assets. Between July 2014 and January 2015, Operation Fox Hunt led to the recovery of approximately RMB 3 billion (approximately USD 460 million) and the repatriation of 680 fugitives, of which 332 returned after Chinese authorities announced, in October 2014, that lighter punishments would be given to individuals who voluntarily turned themselves in.

In March 2015, building on the success of Operation Fox Hunt, Chinese authorities announced the launch of a broader anti-corruption campaign code-named "Operation Sky Net." Operation Sky Net not only focuses its efforts on the repatriation of economic crimes fugitives and the recovery of stolen assets, it also aims to prevent corrupt officials and assets from leaving the country in the first place, by, among other things, cracking down on illegal personal IDs and passports, as well as investigating underground banks and offshore companies used for transferring illicit assets. Many key government agencies and departments are involved in Operation Sky Net, the most important of which include the People's Bank of China, the Party's Organizational Department, the Supreme People's Procuratorate, and the Ministry of Public Security. Each of them leads an operation with a particular focus. For example, the People's Bank of China is responsible for collaborating with various commercial banks to monitor and prevent money laundering and the transfer of illicit assets.

Shortly after the launch of Operation Sky Net, the CCDI, in cooperation with the Chinese Central Bureau of the International Criminal Police Organization ("Interpol") released a "100 most wanted" list of Chinese fugitives. The list includes the suspects' photos, identification and visa numbers, crimes reportedly committed, and possible countries of hiding. Among the 100 fugitives, 40 were believed to have fled to the U.S. By November 2015, a total of 863 fugitives had been captured from 68 countries and regions, including 196 Party members and officials. Nineteen of the repatriated fugitives who returned to China appeared on the most wanted list, and 48 fugitives were repatriated from the U.S.

Aside from cooperating with Interpol, China also reinforced its ties with law enforcement agencies of individual countries, where some of the fugitives were hiding. For example, in April 2015, the Chinese State Councilor and Public Security Minister Guo Shengkun reached an agreement with the U.S. Secretary of Homeland Security Jeh Johnson on streamlining the repatriation process of Chinese fugitive officials who have received final deportation orders. Moreover, in December 2015, China's Anti-Money Laundering Monitoring and Analysis Center and its U.S. counterpart, the U.S. Treasury Department's Financial Crimes Enforcement Network signed a memorandum of understanding for an expanded U.S.-China joint effort to tackle money laundering and terrorism financing.

China conducted similar efforts with its European partners. For example, in July 2015, the Sino-French extradition treaty, which aims to expedite and streamline arrests of fugitives suspected of corruption, became effective. The treaty had initially been signed in 2007, and was ratified by China the following year. France's legislature, however, showed resistance in ratifying the treaty over concerns of the death penalty being imposed on individuals extradited to China. These concerns were addressed as the treaty (at Article 3) now specifically includes the power of a party to refuse extradition in cases where the fugitives would face death penalties in their home country. This development also helped advance the negotiation of extradition treaties between China and other European countries, who had had similar concerns. Indeed, five months after the ratification of the China-France treaty, in December 2015, the

extradition treaty between China and Italy was ratified and became effective. The year 2015 also saw China's first extraditions from Greece, Bulgaria, Spain, and Hungry.

The effort to track down fugitives and recover misappropriated assets has continued in 2016. In March 2016, a high-level official from the CCDI promised a Sky Net Operation 2016 even more comprehensive than its 2015 predecessor (including, for instance, an expanded list of wanted fugitives). China also emphasized its continued commitment on the war against corruption in its role as the 2016 host of the G20 summit. In a speech on the upcoming summit (which will be held in the city of Hangzhou on September 4-5), President Xi called for increased international collaboration in the hunt for financial crime fugitives and the recovery of illicit assets.

C. Legislative and Regulatory Development

In 2015 and early 2016, China enacted and proposed several new laws and regulations that brought substantive changes to the Chinese anti-corruption environment. These laws and regulations broaden the scope of corruption-related offenses and place an increased responsibility on market players to prevent instances of corruption.

1. Criminal Law Amendment and Judicial Interpretation

On November 1, 2015, the Ninth Amendment to China's Criminal Law ("Ninth Amendment") came into effect. More recently, on April 18, 2016, China's Supreme People's Court and Supreme People's Procuratorate jointly released a judicial interpretation, which provides guidance on the graft and bribery provisions in the Criminal Law. ("Judicial Interpretation"). The Ninth Amendment and the Judicial Interpretation have made significant changes to pre-existing Criminal Law with regards to anti-corruption. Select revisions focusing on anti-corruption are outlined below.

Criminalizing the offering of bribes to close relatives of, or any person close to, current and former public officials/state workers. The Criminal Law used to penalize people receiving bribes who were close to current/former government officials, but not the bribe-givers. However, under the revised Criminal Law, the offering of bribes to close relatives or persons close to public officials (or former public officials) has now become a crime, punishable by fines and/or imprisonment.

Clarified definition of the crime of accepting bribes. As defined in the Criminal Law, if a state functionary, by taking advantage of his power, accepts money or property and acts to seek benefits for another, he can be prosecuted for the crime of accepting bribes. Two common scenarios falling under the definition have, in practice, been found to be ambiguous and given rise to diverging interpretations.

- The first problematic scenario relates to the connection between, on the one hand, the money or property accepted and, on the other hand, the action of seeking benefits for another. Typically, such a scenario would involve a company, which has continuously for the past five years given cash-filled "red envelopes" to a state functionary on Chinese New Year's. These envelopes are given for the general purpose of maintaining a good relationship with the state functionary; in other words, the company never makes any request for a specific benefit or favor. During the sixth year, without consulting or receiving instructions from the company, the state functionary selects the company as the winner of a government procurement contract, even though the company's offer was not the best.

- While scholars and courts previously disagreed whether, in such a scenario, the state functionary could be accused of the offense of taking bribes, the Judicial Interpretation has now clarified that if a state functionary “clearly knows” that the other person has a favor to ask at the time he accepts money or property, the connection between “to seek benefits for another” and “money or property” is established. Therefore, the state functionary can be prosecuted for accepting bribes regardless of the remote connection between the bribes and the action of seeking benefits.

- The second ambiguous scenario assumes that the action “to seek benefits for another” was taken first, under no influence from another, but the state functionary accepted money or property intended to thank him, afterwards.

  - Here, the Judicial Interpretation clarified that it does not matter whether the money or property is accepted before or after the action of seeking benefits for another is taken. Therefore, even a retired state functionary can be guilty of bribery if he accepts money or property for a benefit he improperly sought for another person several years previously, while still active.

Imposing monetary fines on all individuals. In the past, monetary fines were mostly imposed on entities only (with one exception – individual bribe-givers could be fined when the bribe was particularly large and was offered to an employee of a company or a foreign official performing official duties). The Ninth Amendment extends monetary fines to all individuals who commit corruption offenses. Moreover, the Judicial Interpretation provides further details on the amount of fines imposed. For example, with respect to the crime of bribe-taking, the amounts of monetary fines as determined by the sentence terms are illustrated in the chart below.

Sentence Term	Fines (RMB)
Imprisonment ≤ 3 years	100,000 ≤ fines ≤ 500,000
3 years ≤ imprisonment ≤ 10 years	200,000 ≤ fines ≤ twice the amount of illegal benefits obtained; or confiscation of property
Imprisonment ≥ 10 years; or life-imprisonment	500,000 ≤ fines ≤ twice the amount of illegal benefits obtained; or confiscation of property

More stringent requirements for penalty mitigation and exemption. Before the Ninth Amendment, a bribe-giver could be eligible for penalty mitigation or complete exemption by making a voluntary confession regarding the illicit conduct before the start of a prosecution. More stringent requirements now apply to mitigate the penalty of a self-disclosing bribe-giver. Indeed, in order to be considered for penalty exemption, the bribe-giver must not only have voluntarily confessed to the crime before the commencement of the prosecution, but he/she also has to meet at least one of the following three criteria: (1) the crime committed has to be relatively minor; (2) the bribe-giver must have provided information that leads to the successful investigation of a major case; or (3) the bribe-giver has assisted the authorities in some other major way. Moreover, the Judicial Interpretation has provided illustrative details on each of these requirements, describing what would constitute a “relatively minor” crime, when

information provided would be considered as having led to a "successful investigation", and what is considered any other form of "major" contribution. (Note that upon the release of the Ninth Amendment, many understood that condition (1) (i.e. the crime must be relatively minor) was a mandatory condition for penalty exemption and that, in addition, either one of conditions (2) or (3) had to apply, as well. While this aspect was not addressed in the Judicial Interpretation, the Supreme Court recently commented through a large state-owned news agency that conditions (1), (2) and (3) can be applied alternatively for the purposes of qualifying for exemption.)

Adjusted thresholds for Bribery Prosecution and Sentencing. Prior to the Ninth Amendment, the prosecution and sentencing standards were based solely on monetary thresholds; circumstances were considered only once the category was decided. The Ninth Amendment adopted more comprehensive standards that combine both the scale of illegal payments ("relatively large," "large," and "extremely large" amounts) with the special circumstances of the case, ("relatively serious," "serious," and "extremely serious" circumstances.)

Moreover, the Judicial Interpretation clarified the threshold for prosecuting bribery offenses (RMB30,000, unless exceptions apply) and provided further guidance to make the sentencing standards easier to follow in practice.

As an example, the table below illustrates how the offense of accepting bribes has been changed through the Ninth Amendment and the Judicial Interpretation.

Before the Ninth Amendment	If an individual accepts bribes ***of no less than RMB50,000 but less than RMB100,000***, he shall be sentenced to a fixed-term imprisonment of not less than five years, which may be combined with confiscation of property. In addition, if the circumstances are especially serious, he shall be sentenced to life imprisonment and confiscation of property.
After the Ninth Amendment	If an individual ***accepted a relatively large amount*** or ***where there are relatively serious circumstances***, he shall be sentenced to a fixed-term imprisonment of no more than three years, or criminal detention with a fine.
After the Judicial Interpretation	"***Relatively large***" means the amount is between RMB 30,000 and RMB 200,000. If the amount taken is between RMB10,000 and RMB 30,000 (not included), and the case includes one of the following factors, it shall be found "***relatively serious***", and shall fall within the same sentencing category: [the list is not exhaustive] (1) the person has previously received Party discipline or administrative sanctions for corruption, accepting bribes or misappropriating public funds; (2) the person has previously been criminally prosecuted for an intentional crime; (3) the person has solicited bribes multiple times.

Further clarification on the definition of "money and property." The Criminal Law refers to bribes as "money and property." The Judicial Interpretation clarifies that "money and property" should include intangible benefits, which, for instance, cover house renovation, debt exemption and tours. Note

that in 2008, China's Supreme People's Court and Supreme People's Procuratorate had previously issued a joint opinion which interpreted the word "property" broadly to include benefits such as membership cards and travel benefits. However, the scope of this opinion was limited to commercial bribery, while the Judicial Interpretation applies to all bribery contexts.

2. Draft Amendment to the Anti-Unfair Competition Law

On February 29, 2016, the Legislative Affairs Office of the State Council in China submitted the revision draft to the Anti-Unfair Competition Law for public comments ("Draft Amendment"). Some key features proposed thus far are outlined below.

Broadened definition of commercial bribery. Under the current Anti-Unfair Competition Law, to constitute a commercial bribery, the bribe-taker needs to be an entity or individual with whom the bribe-giver is doing business. The Draft Amendment expanded the scope of bribe-takers, such that, in addition to an opposing party in a transaction, a bribe-taker can also be a third party who might influence the transaction.

Clarification on application of vicarious liability. While the current Anti-Unfair Competition Law does not shed light on how to differentiate an employee's personal liability from employer's liability, the Draft Amendment proposes that by default, bribes offered by an employee with the aim to obtain a business opportunity or gain an advantage for the employer are treated as conduct of the employer; to the contrary, if there is evidence to support that bribes taken by an employee are against the interests of the company, the conduct is not considered a company action.

Stricter books and records requirements. The current Anti-Unfair Competition Law includes a requirement that commissions and discounts received and given should be accurately reflected in books and records. The proposed Draft Amendment proposes a much broader provision, which requires that business operators truthfully record any "economic benefits" bestowed on one another, not only in accounting books but also in contracts. Failure to do so would, under the text proposed in the Draft Amendment, constitute an "act of commercial bribery."

3. Regulatory Changes in the Public Procurement and Healthcare Sectors

In addition to the changes and proposed changes in its anti-corruption legislation, China has undertaken changes to public procurement and healthcare regulations, which are aimed at increasing transparency in these two historically corruption-ridden sectors.

On March 1, 2015, the Implementation of the Government Procurement Law of the People's Republic of China ("Implementation") came into effect. While the previous law contained a general publication of information requirement, the Implementation now specifies which type of information must be publicized with every public tender, such as the bidding results and the underlying procurement contract with the winning bidder. Importantly, the Implementation now requires the publication of the Finance Department's responses to complaints regarding public procurement processes. The Implementation now also gives clear guidance on types of improper behaviors for purchasers and evaluation experts, stating, for example, that purchasers are prohibited from soliciting or accepting gifts, kickbacks, and other goods or services irrelevant to the procurement. Similarly, evaluation experts who

accept bribes or fail to exercise the evaluation with the required degree of independence and/or disclose a conflict of interest face many possible consequences (depending on the gravity of the circumstances, ranging from the invalidation of the expert opinion, debarment, and civil fines to criminal sanctions.)

Important changes with respect to anti-corruption compliance have also taken place in China's Public Healthcare sector: on October 20, 2015, the National Health and Family Planning Commission announced the implementation of the Administrative Measures on Accepting Donations for Public Welfare by Healthcare Entities ("Administrative Measures"), which replaced the previously applicable interim measures released in 2007. Among other things, the Administrative Measures – which apply to both domestic and foreign donations – bar healthcare entities from accepting donations in certain situations, including where such donations involve for-profit activities or are possibly associated with commercial bribery or unfair competition. The Administrative Measures now also require that anti-corruption due diligence be performed on donations in so-called "pre-evaluation sessions" at the time of the donation application. Finally, the Administrative Measures increase the transparency of the donation process by requiring healthcare entities to publish details regarding the donation on their websites or local major news media.

D. GlaxoSmithKline, Mark Reilly, and ChinaWhys Owners Peter Humphrey & Yu Yingzeng

On September 19, 2014, British pharmaceutical company GlaxoSmithKline PLC ("GSK") was found guilty of bribing non-government personnel in China using a scheme that relied on hundreds of travel agencies to funnel illicit payments to Chinese doctors and health officials to boost GSK drug sales. Indeed, the Changsha Municipality Intermediate People's Court in Hunan province fined GSK 3 billion yuan (approximately $484 million USD), the largest ever imposed by a Chinese court, bringing what BBC China termed a "humiliating" conclusion to a sordid tale of sex tapes and slush funds, bribes and kickbacks, and a televised, groveling corporate apology to the Chinese state and people. The court also found Mark Reilly, a U.K. citizen and the former head of GSK China, guilty of orchestrating the byzantine bribery scheme.

GSK's troubles in China began in January 2013 when an anonymous whistleblower began sending emails to GSK's board, top executives, and compliance officers alleging that GSK China sales personnel had provided Chinese doctors with cash payments, lavish dinners, and all expenses-paid trips to Europe in exchange for prescribing the company's drugs. Around the same time, Chinese police and the Chinese Ministry of Public Security began investigating suspicious activity at a Shanghai travel agency and traced a money laundering conspiracy involving tens of millions of dollars and spanning several years back to GSK China executives.

In March 2013, the whistleblower sent a sex video of Mark Reilly, recorded without his knowledge or consent from inside his Shanghai apartment bedroom, to GSK executives. GSK hired a due diligence firm, ChinaWhys, owned by Peter Humphrey (a U.K. citizen) and his wife Yu Yingzeng (a Chinese-born American citizen), to investigate the source of the sex tape. Humphrey and Yu's investigation (which also touched upon the whistleblower emails denouncing the corruption scheme) came to an abrupt halt when the couple was arrested in July 2013 for violating Chinese privacy laws. A year later, in August 2014, during a one-day trial, the couple was found guilty of illegally obtaining 256 items of information on Chinese citizens, such as IDs and travel records. The arrest and subsequent conviction of Humphrey

and his wife sent chills through the compliance community, which often relies on third-party investigative firms, such as ChinaWhys, for business partner intelligence.

In June 2015, Peter Humphrey and Yu Yingzeng were granted early release, mainly for health reasons. As for GSK, the company tried to actively improve its image in China following the scandal. Importantly, in 2015, GSK China fired 40 percent of its sales representatives who allegedly violated GSK's ethics and employee code of conduct in connection with the bribery scandal, including some experienced employees who were above the level of regional manager.

IV. Focus on Norway

Norway has seen a continued high level of anti-corruption investigation and enforcement activity between 2014 and early 2016. In addition to the sustained enforcement and investigative activity of the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime ("ØKOKRIM"), including the landmark convictions of several Yara International ASA senior executives for bribery of foreign public officials in Libya and India, the Norwegian Parliament's Standing Committee on Scrutiny and Constitutional Affairs has increasingly scrutinized publicly owned companies, including Telenor and Statoil, in connection with allegations of corrupt activity overseas.

The recent investigations by the country's Council on Ethics for the Government Pension Fund Global and its recommendations to exclude from the Fund's portfolio or to place under observation companies that may be involved in gross corruption, constitute a new form of stakeholder enforcement. Such stakeholder enforcement is contributing to shaping (and elevating) Norway's position in the international anti-corruption landscape, and may serve as inspiration for other sovereign wealth funds and other investment institutions at home and overseas.

Norway is currently also considering further strengthening its anti-corruption laws. A March 2016 Private Members' Bill is currently under consideration by the Parliament's Standing Committee on Justice and will, if adopted, introduce a broader corporate criminal liability for corruption and an absolute defense for companies having implemented "reasonable preventive measures", largely modelled upon the U.K. Bribery Act.

A. Enforcement Action: Former Yara Executives Kendrick Taylor Wallace, Daniel Clauw, Thorleif Enger, and Tor Holba

On July 7, 2015, Oslo District Court rendered a unanimous verdict convicting four former senior executives of Yara International ASA ("Yara"); former CEO Thorleif Enger, former Head of Upstream, Tor Holba, former Head of Operations, Daniel Clauw, and former Chief Legal Counsel, Kendrick Wallace, for paying, aiding, and abetting payments of over $8 million in bribes to family members of public officials in Libya and India in connection with the establishment of two joint ventures. The Court found that the payments constituted an improper advantage provided to senior government officials in connection with a position, office or assignment within the meaning of §§ 276(a) and (b) of the former Norwegian Criminal Code (§§ 387 and 388 of the new Norwegian Criminal Code, which entered into force on October 1, 2015), and found all defendants guilty of gross corruption. All of the defendants have appealed their convictions; the appellate hearing opened on August 23, 2016 and is slated to last for three and a half months. All four defendants pleaded not guilty. It is expected that the appellate hearing will include the testimony of new witnesses, including the alleged recipient of the bribes in Libya, Muhammed Ghanem.

In January 2014, Yara had already accepted to pay NOK 295 million (approximately $48.5 million at the time)—the largest corporate penalty ever imposed on a corporation in Norway—in connection with the same facts relating to Libya and India in addition to the payment of bribes in Russia. Yara is partially owned by the Norwegian government, which holds around 36% of its shares.

1. Conduct in Libya

From 2004 to 2009, Yara was negotiating with the Libyan National Oil Corporation ("NOC") regarding a joint venture for the production of fertilizers in Libya. The Court found that in 2007, Wallace orally agreed to pay $4.5 million in bribes to Mohamed Ghanem (the son of former Libyan Oil Minister) and Dr. Shukri Ghanem (then-Chairman of Libya's National Oil Corporation and *de facto* Oil Minister) in connection with negotiations of the joint venture between Yara and NOC. At least $1.5 million was paid to a Swiss account held by Mohamed Ghanem. Yara asked the Swiss company Nitrochem Distribution AG ("Nitrochem") to advance the payment for Yara. Yara refunded Nitrochem through its partially owned Swiss entity, Balderton Fertilizer SA ("Balderton"). The refund was concealed through inflated invoices for several ammonium deliveries from Nitrochem to Balderton between October 2007 and May 2008. The ammonium deliveries were then sold from Balderton to Yara Switzerland SA for a price which also included the inflated price Balderton had paid for the raw materials. The payment was made at the same time as Yara and NOC were concluding their negotiations of a Heads of Agreement, which was signed in April 2007. Wallace was found guilty of having entered into the oral agreement with Dr. Shukri Ghanem and that this agreement and the payment were Yara's negotiations with NOC and Dr. Ghanem's role. The Court further found that Wallace aided in making and concealing the payment. Enger, Yara's CEO at the time, was found to have approved the deal.

2. Conduct in India

In April 2007, Wallace and Clauw offered on behalf of Yara to pay an initial bribe of $250,000—which later increased to $3 million—to Gupreetesh Singh Maini son of Dr. Jivtesh Singh Maini, who at the time served as the Additional Secretary and Financial Adviser in the Ministry of Chemicals and Fertilizers and member of the Board of Kribhco, in connection with the negotiations of a joint venture between Yara and Kribhco. In October 2007, Yara paid $1 million on the basis of an invoice sent from the son of the public official from the Lebanese company CYC SARL. The amount was later paid from Yara to an account in Hong Kong belonging to Krystal Holdings & Investments Limited, a BVI company owned by the wife of the public official and the wife of his son. Again, Enger was found to have approved the deal.

In both cases, the Court noted that the consultancy agreements entered with the sons of the public officials were fictitious, as these individuals did not have the skills, experience, or independence required to assist Yara, and that in reality the role of these individuals was to obtain information and exercise influence on behalf of Yara in the ongoing JV negotiations.

3. Convictions, Sentencing, and Aggravating Factors

Thorleif Enger was convicted and sentenced to a jail term of three years, half of the six years requested by ØKOKRIM, but still relatively strict by Norwegian standards; Kendrick Wallace was convicted to a jail term of two and a half years, while former executive vice presidents Daniel Clauw and Tor Holba were sentenced to two years each.

The judgment represents a landmark case in Norway. To establish the guilt of senior executives who have not been personally or directly involved in the payment of bribes, Norwegian law generally requires that prosecutors demonstrate that the executives had obtained sufficient knowledge of the misconduct and made no attempt to stop it. Here, by contrast, the Court strongly criticized senior management, and in particular Thorleif Enger's management style, and noted that while he was not personally involved in the payment of the bribes, he failed to undertake steps to ensure that they were not paid and also asked not to be informed of the details, which was perceived as tantamount to offering his consent to the bribery scheme.

The Court noted that the four individuals' membership on the company's executive management team was an aggravating factor for sentencing purposes. While the Court acknowledged that the company had undertaken significant steps to limit corruption risks, it observed that these individuals held such influence within the organization that they could ignore the company's internal controls and processes and together had assisted in "significantly deteriorating the value of the company's anti-corruption compliance efforts." It further stated that there would be little value in implementing an anti-corruption compliance program if the executive management did not itself respect its own policies and procedures. It added that the individuals were also convicted for failing to prevent corruption when they had the ability to do so.

The Court directed particularly sharp criticism against Enger, noting that, in his capacity as CEO, his breach of trust was considered the most serious. The Court noted that while Enger had knowledge of the corrupt activity, he remained passive. He had indicated that he did not want to know about the corruption and he did not intervene to prevent the corruption. The Court noted that Enger "had the possibility of ending the corruption both in India and Libya," and he "was the one in charge of ensuring that the company's ethical rules and guidelines were followed." Instead, he approved of the corrupt activity of individuals within his executive management team and thereby demonstrated that corruption was accepted in Yara. As part of his defense, Enger had argued that he trusted his colleagues and had a delegating management style. The Court rejected this argument saying that "a top manager cannot delegate [away] his responsibility. He was responsible for ensuring that executive management demonstrated to the other employees of the company that the ethical guidelines were respected. His approval of the corrupt activity he was aware of was a necessary prerequisite for the criminal activity. At the end of the day, the responsibility to prevent corruption remained with Enger."

ØKOKRIM has expressed satisfaction that the Court sent an important signal that senior executives must be held criminally responsible for bribery. According to the agency, the Yara case constitutes one of the most complex foreign bribery investigations conducted by the agency to date, and involved significant cross-border cooperation and coordination with enforcement agencies in 12 jurisdictions and the testimony of 85 individuals. French police helped arrest two of the individuals who were living in France at the time.

B. Investigations of Note

1. Kongsberg Gruppen ASA

In February 2014, ØKOKRIM charged Norwegian company Kongsberg Gruppen ASA ("Kongsberg") and its subsidiary Kongsberg Defence & Aerospace AS ("Kongsberg Defence"), and an unnamed Kongsberg Defence employee with gross corruption and bribery related to deliveries of

communication equipment to Romania between 1999 and 2008. On August 16, 2016, ØKOKRIM announced that it had charged Dag Tore Sekkelsten, the former Head of Sales for Eastern Europe of Kongsberg Defence Communications, with serious breach of trust, money laundering and gross tax evasion in connection with payments of approximately NOK 180 million (approximately USD 21 million) to a General in the Romanian Intelligence Services, a former Deputy Director for Telecommunications of the Romanian Ministry of Interior and to himself. According to ØKOKRIM, the illegal transfers were made between 2000 and 2006 through a sophisticated network of companies, including companies registered in the Isle of Man, Switzerland and Saint Vincent & the Grenadines. ØKOKRIM said that Mr. Sekkelsten was the only Kongsberg employee involved and that he conspired with individuals overseas, but that there was not sufficient evidence of corruption. ØKOKRIM also indicated that it had dropped the charges against Kongsberg and Kongsberg Defence due to lack of evidence that the company had been involved in these activities; separately, two external audit firms hired by Kongsberg each concluded that Kongsberg and Kongsberg Defence had maintained robust compliance programs and had not been involved in Mr. Sekkelsten's misconduct. Finally, ØKOKRIM indicated that as part of the investigation it has cooperated extensively with authorities in Romania, Switzerland and the Isle of Man.

2. Sevan Drilling ASA

In October 2015, Sevan Drilling ASA ("Sevan Drilling"), an international drilling contractor specializing in ultra-deepwater operations, listed on the Oslo Stock Exchange and controlled by Seadrill, was charged with gross corruption in connection to alleged payments of bribes to Petrobras officials in connection with the award of Petrobras drilling contracts to Sevan Marine ASA ("Sevan Marine") between 2005 and 2008.

At the time of the conduct in question, Sevan Drilling was 100% owned by Sevan Marine. However, in 2011, Sevan Marine underwent restructuring as the company was on the verge of bankruptcy due to intensive investment in rigs and drill ships. As part of the restructuring process, Sevan Drilling was spun-out and listed separately on the Oslo Stock Exchange. Following the restructuring, Sevan Drilling gained control of two rigs that had long-term contracts with Petrobras.

On June 29, 2015, following allegations in the Brazilian press that Sevan Marine had made improper payments through its former Brazil Managing Director Raul Schmidt Felippe, Jr. to obtain the Petrobras contracts, Sevan Marine and Sevan Drilling issued separate Oslo Stock Exchange Notices indicating that Sevan Drilling had hired the Norwegian law firm Selmer DA to conduct an investigation of the allegations. On October 16, 2015, Sevan Marine disclosed that its Board of Directors had received the investigation report relating to the facts and circumstances surrounding the awards of contracts by Petrobras, and that the report concluded that "illegal conduct occurred in the form of improper payments to obtain business when Petrobras awarded contracts to Sevan Piranema, Sevan Driller and Sevan Brazil during the relevant period," and that there were "indications of suspicious acts and transactions, constituting both a neglect of Sevan's affair and/or a conflict with Sevan's interests and such acts may potentially represent economic crime." Sevan Marine indicated that the report had been transmitted to ØKOKRIM and that the Board of Directors had also initiated early contact with the relevant prosecutor's offices in the other concerned jurisdictions (U.S., U.K. and Brazil).

Days after the notice, ØKOKRIM confirmed that its investigators had raided the offices of Sevan Drilling at several locations in Norway seizing important volumes of documents and data relating to the circumstances surrounding use of agents and contracts in Brazil. The Company has confirmed that

Norwegian prosecutors have charged the company with breaches of §§ 276(a) and (b) of the Norwegian Criminal Code (now §§ 387 and 388 of the new Norwegian Criminal Code).

While the charges are not public, according to Brazilian and Norwegian news reports Sevan is suspected of having paid at least USD 20 million in bribes between 2012 and 2015 through Raul Schmidt Felippe, Jr. The payments were allegedly made through the Swiss bank Julius Baer to accounts controlled by Mr. Jorge Luiz Zelada, former Head of Petrobras' International Division. Mr. Schmidt Felippe, Jr. led Sevan's activities in the country until 2007, after which he established his own consultancy company and acted as a consultant in connection with the three contracts Sevan Marine concluded with Petrobras. ØKOKRIM has indicated that this case is one of the most serious corruption cases in Norwegian history.

3. Telenor ASA and VimpelCom

The U.S. and Dutch bribery investigations of VimpelCom (discussed more fully at p.91), of which the Norwegian majority state-owned telecommunications company Telenor ASA ("Telenor") owns 33%, has also had ramifications in Norway. ØKOKRIM is currently investigating the matter. ØKOKRIM has suggested that it provided assistance to the U.S. and Dutch authorities in connection with this case, and it has confirmed that it has also conducted preliminary interviews of its own of a number of witnesses. For example, in November 2015, it arrested former VimpelCom Chief Executive and former Telenor executive Jo Lunder for questioning at Oslo airport. Oslo District Court later ordered his release from police custody. An external audit report strongly criticized Telenor's management for the manner in which it had handled the allegations of corruption in VimpelCom. While the report found that no Telenor employee had been involved in corruption, members of Telenor's management were criticized for failing to address and report the allegations to senior management and the Board in an appropriate and timely manner. During the external review, two of Telenor's executives—the Chief Financial Officer and its General Counsel—were suspended from their positions pending the outcome of the investigation. Following the publication of the report, Telenor agreed with both individuals that they would leave the company.

4. Parliamentary Inquiries into Telenor and Statoil ASA

The Norwegian Parliament's Standing Committee on Scrutiny and Constitutional Affairs serves as the Parliament's auditory and control body, which includes responsibility for monitoring the administration of the government's interests in companies and banks, and may open inquiries into the management of wholly or partly state-owned companies. Such inquiries are initiated by a written request to the responsible Minister, who will provide a written answer. If the Committee is not satisfied with the answer, the Committee may ask additional questions or formally open an inquiry, which means that the Committee formally examines the case and provides a recommendation to the Parliament. Normally a hearing will be held. In the past year, the Committee has scrutinized several state-owned companies in connection with allegations of corruption.

In particular, the Committee re-opened an inquiry of Telenor, and specifically the manner in which it had handled the VimpelCom case. An initial public hearing was held on January 14, 2015, and criticism of Telenor's handling of the matter by the Committee led the Company, among other things, to sever a consultancy agreement with its former Chief Executive Officer, Jon Fredrik Baksaas, who had stepped down in August 2015. In October 2015, after receiving a letter from the Minister of Trade and Industry in which she explained that she had received new information from Telenor regarding the matter, the

Committee decided to re-open an inquiry and the company's former Chairman of the Board Sven Aaser was forced to resign because the Minister of Trade and Industry, Monica Mæland, said she no longer had confidence in the Chairman due to the way the Board had handled the VimpelCom matter. At the request of the Norwegian Attorney General, the public hearing was postponed six months to prevent any risk of destruction of evidence that might affect ongoing U.S. and Dutch investigations. On May 27, 2016, following the publication of the external report by a law firm, the Committee held a public hearing relating to Telenor's handling of allegations of corruption in VimpelCom and found that Telenor had not provided the Minister of Trade and Industry with complete information. The Committee highlighted areas of remediation for Telenor.

The Committee has also opened preliminary inquiries relating to Statoil ASA's ("Statoil") payments of more than $85 million to Sonangol that was earmarked to fund various social projects in Angola, including the financing of the construction of a Research and Technology Centre. However, no one knows where the funds have gone, and no research Centre has ever been constructed. Statoil is 67% owned by the Norwegian State. In its correspondence with the Committee, Statoil and Norwegian Oil & Energy Minister Tord Lien have been asked to provide detailed information relating to the contracts in question, and cited the opinions of their external counsels who have found that the payments have been made consistent with Norwegian and other relevant anti-corruption laws. In March 2016, the Committee also opened preliminary inquiries into Norsk Hydro's dealings with Talco Management Ltd, a British Virgin Island company, in connection with an aluminum plant operated by Norsk Hydro in Tajikistan. The Norwegian State holds a 34.26% interest in Norsk Hydro.

C. Stakeholder Enforcement: Council on Ethics for the Government Pension Fund Global

An increasingly important actor in the Norwegian anti-corruption landscape is the Council on Ethics ("Council") for the Government Pension Fund Global ("GPFG" or the "Fund"), which recommends whether the Fund exclude or put companies on observation if there is an unacceptable future risk that the company may contribute to gross corruption. Since 2013, the Council has stated that investigations relating to allegations of gross corruption has become one of its priorities, and the recent uptick in the number of such corruption may have also been driven by the transfer of final decision-making power from the Ministry of Finance to the Norwegian Central Bank's investment branch, Norges Bank Investment Management ("NBIM or the "Bank").

1. The Fund and the Ethical Guidelines

a. The Government Pension Fund Global

The Norwegian Government Pension Fund Global ("GPFG" or "Fund") was created in 1990 as a long-term tool for investing current petroleum revenue in order to meet the combined challenge posed by the expected drop of future revenues together with the expected increase in public pension expenditures. The Ministry of Finance owns the Fund on behalf of the Norwegian people. The Ministry of Finance has the overall responsibility for the management of the Fund and has issued guidelines for its management. The Fund is managed by the Norwegian Central Bank ("Norges Bank" or "Bank"), whose Executive Board has delegated the operational management to Norges Bank Investment Management ("NBIM").

At year-end 2015, the GPFG was one of the largest sovereign wealth funds in the world. The Fund is currently managing assets of more than USD 850 billion, with investments in more than 9,000 companies in 78 countries. It owns approximately 1.3% of the equity of listed companies on a worldwide basis, and 2.4% of the equity of listed European companies.

The Fund invests in equities, bonds and real estate globally, and consists of 60% equities, 35-40% fixed-income securities and up to 5% real estate. All companies in the Fund are listed on overseas stock exchanges. The formal framework for the Fund was established by the Norwegian Parliament ("Storting") in the Government Pension Fund Act. The composition of the portfolio is kept secret, but holdings of the Fund, as of December 31, are published in the Annual Report in March of the following year.

b. The Guidelines for Observation and Exclusion from the Government Pension Fund Global

The framework for the management of the GPFG include the Guidelines for observation and exclusion of companies from the GPFG's portfolio ("Ethical Guidelines"), which are designed to "remove ethical risk from the [F]und," based on (i) whether the companies (or companies they control) produce or sell certain specified products ("product-based exclusion") or (ii) whether there is an unacceptable risk that the companies contribute to or are responsible for a negative conduct that meets certain criteria ("conduct-based exclusion") for responsible investment.

With respect to product-based criteria, the Ethical Guidelines provide that the Fund shall not invest in companies who directly or indirectly: (i) produce weapons that violate fundamental humanitarian principles through their normal use; (ii) produce tobacco; (iii) sell weapons or military material to states that are affected by investment restrictions on government bonds; or (iv) mining or power-producing companies that directly or indirectly (through companies that they control) mine or produce power and—through themselves or entities they control—derive 30% or more of their income from thermal coal or base 30% or more of their operations on thermal coal.

Under the conduct-based criteria, companies may be put under observation or be excluded if there is an unacceptable risk that it contributes to, or is responsible for: (i) serious or systematic human rights violations such as murder, torture, deprivation of liberty, forced labor and the worst forms of child labor; (ii) serious violations of the rights of individuals in situations of war or conflict; (iii) severe environmental damage; (iv) acts or omissions that on an aggregate company level lead to unacceptable greenhouse gas emissions; (v) gross corruption; or (vi) other particularly serious violations of fundamental ethical norms. To enforce these criteria, the Ethical Guidelines provide that the Bank may, at the recommendation of the Council of Ethics, exclude companies from the Fund or place them on observation.

To enforce these criteria, the Ethical Guidelines provide that the Bank may, at the recommendation of the Council of Ethics, exclude companies from the Fund or place them in observation.

2. Investigations by the Council of Ethics

The Council, which investigates potential violations and provides recommendations to Norges Bank regarding exclusion and observation, is an independent advisory council that was established by

Royal Decree in 2004. It is composed of five members, including a Chair and Vice Chair, appointed by the Ministry of Finance upon recommendation by the Bank for a period of four years. Five new Council members were appointed in December 2014 for a term of four years, and the council is now led by Johan H. Andresen, a Norwegian industrialist and philanthropist. The Council's new members notably include the current Secretary General of Transparency International Norway. The Council is assisted by a secretariat, which administratively is located within the Ministry of Finance.

The Council is vested with responsibility to continuously monitor the Fund's portfolio to identify companies that contribute to or are responsible for conduct which may justify observation or exclusion. The Council encourages individuals and organizations to provide information about cases that may be of relevance for its work, but as an advisory body, it is not bound to investigate these. The Council either investigates matters on its own initiative or at the request of the Bank. To date, the identification of companies to investigate has been through systematic reviews of problem areas and sector studies, reports received from special interest groups, news monitoring, and employing an external firm of consultants that carries out daily online searches in several languages to find news items about companies in the portfolio. The Council also uses external consultants to monitor companies whose activities may contravene the weapons and tobacco criteria. In an effort to establish a more transparent and coherent process for initiating investigations, the revised Ethical Guidelines require that the Council develop and publish principles for the selection of companies subject to "closer investigation," and that the Bank may adopt "more detailed expectations relating to these principles."

After identifying a company for investigation, the Council obtains information from research institutions as well as national, regional, and international organizations, and then assesses the specific allegations in light of the requirements of the Ethical Guidelines. The Council typically engages in a dialogue with companies under investigation and grants them an opportunity to present information and viewpoints to the Council at an early stage of the process. Where the Council decides to recommend an observation or exclusion, the company will be permitted to provide their views on draft recommendations prior to submission to the Bank.

The Council has adopted a regional and sectorial hybrid approach to investigating corruption cases, focusing on companies that work in sectors that are particularly corruption-prone, such as the construction, oil & gas, and defense industries within countries perceived to have high corruption risks. The Council prepares a publicly available annual work plan defining priorities for its work, and an annual report on its activities, both of which must be submitted to the Ministry of Finance.

Importantly, the Ethical Guidelines, as revised in 2014, provide for enhanced coordination and exchange of information between the Bank and the Council. The changes appear designed to address previous criticisms of inefficiency and delays in the Council's investigative process, and to prevent the Bank and Council from adopting what has in the past been perceived as inconsistent and conflicting approaches to the implementation of the Fund's responsible management policy. In addition to conducting regular meetings to coordinate their work and exchange information, the Bank and the Council are now required to coordinate their communications with companies to ensure that these are perceived as consistent. To this end, the Bank may access the Council's communications and meetings with companies, and may integrate such communications into its general follow-up of the companies in its portfolio. Again, the new Guidelines require that the Bank and the Council formalize the process through

the adoption of detailed procedures for the exchange information and coordination to clarify their respective roles and responsibilities.

3. Formal Observation

The Council has the authority to put companies under formal observation if, for instance, there are doubts as to whether the conditions for exclusion (discussed below) have been fulfilled or any other uncertainty about the situation. The observation mechanism allows for a more dynamic approach, in which the Council may positively influence a Company's conduct. During an observation period in connection with allegations of gross corruption, the Ethics Council would monitor (i) the development of the company's compliance programs, (ii) its implementation of remedial measures to address past misconduct, and (iii) any new allegations of corruption.

To date, three companies have been placed under observation. In 2009, Siemens AG was placed under a four-year observation term, which has since been lifted. In 2011, Alstom SA was placed under observation, and the observation was lifted in 2015. In 2016, Petrobras was also put under observation.

4. Considerations for Exclusion

The Ethical Guidelines provides a list of general factors the Bank must assess in determining whether to exclude a company. These include: [i] "the probability of future norm violations; [ii] the severity and extent of the violations; [iii] the connection between the norm violation and the company in which the Fund is invested; [iv] the breadth of the company's operations and governance, including whether the company is doing what can reasonably be expected to reduce the risk of future norm violations within a reasonable time frame; [v] the company's guidelines for, and work on, safeguarding good corporate governance, the environment and social conditions; and [vi] whether the company is making a positive contribution to those affected, currently or in the past, by the company's conduct." Before making a decision on observation and exclusion, the Bank must also evaluate "whether other measures, including the exercise of ownership rights, may be more suited to reduce the risk of continued norm violations, or whether such alternative measures may be more appropriate for other reasons."

With respect to gross corruption, the Council also considers whether (i) the amount, the frequency, and systematic nature of the allegations constitute gross corruption, and (ii) there is an unacceptable risk that gross corruption will continue in the future. The Council will recommend exclusion when both of these criteria are met.

Key to the second part of the test for exclusion as a result of gross corruption is whether the company has implemented an effective anti-corruption compliance program, and, on this point, the Council bases its assessment on established international norms and best practices. The Council considers these to include existing FCPA and U.K. Bribery Act guidance and practice, the UN's anti-corruption portal TRACK, the UN Global Compact and the OECD's good practice guidance on internal controls, ethics and compliance and Transparency International's Business Principles for Countering Bribery. The Council places particular importance on how anti-corruption compliance policies and procedures are managed internally and communicated externally, and the degree to which they are effectively implemented and the ways in which the company has organized its anti-corruption work. In practice, companies involved in corrupt activities must demonstrate that they have developed an effective

compliance program and devoted appropriate resources to this work such that the Council is satisfied that the risk of future corruption has been sufficiently reduced so that the company need not be excluded from the Fund.

An innovation of the revised Ethical Guidelines is that it requires the Bank to consider whether other measures, including the active exercise of ownership rights, may be better suited to reduce the risk of future violations prior to making a determination on whether to observe or exclude a company. The Bank shall consider all alternative measures at its disposal and shall apply these in a coherent manner. This requirement is reflective of the Council's practice to date, pursuant to which the Council has viewed exclusion and observation as last resort, preferring instead to mitigate risks when possible by encouraging companies to implement sufficient remedial measures. At the same time, the Council has viewed the criteria for exclusion as a significantly "high threshold" that would only apply to a few companies. As noted by the Chairman of the Council in the introduction to the 2015 Annual Report, the role of the Council is to "help remove ethical risk from the Fund," and that this "does not mean recommending as many exclusions of companies as possible, but rather to make recommendations relating to the most serious or systematic violation." Indeed, the Council does not seek to become a new enforcement agency, but seeks a softer and result-oriented approach based on cooperation and dialogue to encourage companies to refrain from corrupt activity. On this point, the Chairman noted that the Council will be "just as happy when companies that are in a dialogue with the Council or Norges Bank alter their conduct and thus themselves reduce the risk of a future violation of the criteria."

In an effort to promote transparency and responsible investment, the Bank publishes all decisions under the Ethical Guidelines with corresponding Council recommendations. The Bank is also required to maintain a public list of companies excluded from the Fund or placed under observation.

5. Specific Cases

In 2013, the Council on Ethics commenced a systematic review of countries and sectors in order to identify companies involved in corrupt activity. To date, the Council has focused on industries traditionally perceived to be relatively prone to corruption risk, including the building and construction industry, oil and gas sector, and defense industry, and has just started a telecommunications industry study.

Out of a total of 60 companies under review, 11 companies were investigated under the corruption criterion. As described below, two companies were excluded (China Railway & ZTE), one was placed under observation (Petrobras), and one company removed from observation (Alstom)

- *Exclusion of China Railway Group (2014)*: The Council recommended the exclusion of China Railway Group Ltd. ("CRG") from the Fund due to the high degree of probability that CRG had paid bribes to government officials for contracts regarding construction of railways and housing projects. Although the Council acknowledged that the recent anti-corruption campaign in China might generally have a positive effect, the Council found that CRG had not responded to the corruption allegations presented in its draft recommendation and that it did not appear to have implemented adequate measures internally to prevent future violations.

- *Exclusion of ZTE Corporation (January 7, 2016*): Upon recommendation of the Council, and for the first time, the Bank excluded the Chinese state-owned enterprise ZTE from the fund on the basis that there was a clear risk of the company being engaged in corrupt activity. ZTE is one of the world's largest producers of telecommunications equipment and network solutions. The Council noted that ZTE and its representatives have been linked to corruption allegations in 18 countries, including Zambia, the Philippines, Papua New Guinea, Liberia, Myanmar, and Nigeria, and that formal investigations had been launched in 10 of these. While only one investigation led to a conviction *in absentia,* the Council also took into account that as soon as the investigation started, the company's employees had left the country. In addition, the Council found that ZTE's anti-corruption program did not contain the elements that can reasonably be expected from an effective program and that in its communications with the Council, the company failed to prove satisfactory answers on the measures it has undertaken to prevent corruption. In its exclusion recommendation, the Council discussed at length the missing or unclear elements it considers to be key to an effective compliance program, including that it was unclear: (i) what risk identification and assessment ZTE conducted when establishing its anti-corruption compliance program; (ii) what risk assessments ZTE performed on third parties including partners and sales consultants; (iii) what consequences ZTE employees face if they breach laws and internal guidelines; (iv) how ZTE ensures the independence of its compliance staff; and (v) how ZTE monitors and controls its anti-corruption procedures. Regarding the first point, the Council noted that risk identification and assessment is an essential prerequisite for robust, targeted measures, and "lays the foundation for and facilitates continual adjustment and improvement of the entire company's anti-corruption systems."

- *Observation of Petrobras (January 28, 2016*): Upon recommendation from the Council, the Bank placed Petrobras under observation in connection with the Operation Car Wash investigation (discussed more fully at p.17). In the view of the Council, the significant scope of the ongoing investigations in Brazil, which have led to numerous charges and several convictions for bribery of former senior executives of the company, appears to confirm that Petrobras is responsible for gross corruption. It is the first case in which the Council has undertaken action against a company on the basis of passive corruption. The Council noted that until 2013, Petrobras had not adopted proper anti-corruption policies and procedures, and even if they did exist at the time, it is clear the company had not effectively identified and prevented corruption. The Council noted that a new anti-corruption compliance program was adopted in 2013, and that several important parts of the program were first introduced in 2014. While the Council did not find that Petrobras had established that its anti-corruption procedures are organized and implemented in a sufficiently effective fashion, the Council gave weight to the company's argument that the company was the victim of acts of its senior employees. It also noted that companies that had recently implemented an anti-corruption program should be granted some time to implement the program, and that the ongoing international and national enforcement actions against the company would likely force the company to take further steps in the right direction. The Council therefore recommended placing the company under observation instead of exclusion from the fund and indicated that the case will be re-assessed in 2016.

- *Removal of Alstom S.A. from the Observation List (December 22, 2015*): In October 2015, the Council recommended that Alstom be removed from the observation list on the basis that the risk of future corruption had been significantly reduced since 2010. In particular, the Council noted that the company had implemented significant changes to its internal anti-corruption compliance program, and that the senior management of the company now has sent a much clearer message that corruption is not accepted within Alstom and that any improper activity will be investigated and sanctioned. The Council also noted that the company will, for a period of three years, be subject to self-reporting to the DOJ, and that there are reasons to believe that any weaknesses in the company's internal controls will be identified and addressed through this process. Finally, the Council noted that two-thirds of the company would be acquired by GE by end 2015.

The Council on Ethics has indicated that anti-corruption compliance will become an area of increased focus in the years to come. For example, of the three companies excluded in 2014, only one involved gross corruption; while in its 2015 Annual Report, the Council reported that most of its meetings in 2015 related to corruption issues. While the Council's previous approach to investigations may have been driven to some degree by political considerations imposed by the Ministry of Finance, the transfer of final decision-making power from the Ministry to the Bank alleviates these concerns, and may lead to an uptick in the number of corruption investigations in the future. In its 2015 Annual Report, the Council stated that it has come quite far in its process of gathering information on several corruption cases and plans to hold several meetings with companies in 2016.

D. Proposed Anti-Corruption Law Reforms

On March 17, 2016, six MPs from Norway's Conservative Party introduced a Private Members' Bill (67L 2015-2016) largely inspired by Section 7 of the U.K. Bribery Act, seeking (i) to broaden companies' criminal liability for acts of corruption to include acts committed by "Associated Persons," and (ii) introducing an absolute affirmative defense for companies having adopted "reasonable measures" to prevent corruption.

Norway's new Criminal Code became effective in October 2015, and the pre-existing anti-corruption provisions (contained in §§ 276(a) and (b), adopted in 2003 following Norway's implementation of the OECD Convention) have been reproduced in §§ 387-389 without any material changes. The provisions criminalize domestic and foreign corruption, gross corruption and trading in influence, however critics have suggested that Norway's anti-corruption law is not sufficiently clear with respect to criminal liability for associated persons, and does not reward companies that develop effective anti-corruption compliance programs.

The draft bill seeks to address this criticism and proposes to add the following to § 27 of the Criminal Code: "For violations of Sections 387-389 of the Criminal Code, the company may also be punished when the act has been performed by someone who through its services or assignments for the company must be associated with the company. However, this shall not apply to the extent that the company can demonstrate that prior to the conduct it had undertaken all reasonable measures to avoid it."

1. Corporate Criminal Liability for the Acts of “Associated Persons”

Corporate criminal liability is regulated in § 27 of the new Criminal Code, which provides that companies can be held criminally liable when a criminal offense has been *committed by someone who acted on behalf of a company*. Under Norwegian law, this criterion is relatively narrowly construed, and has close parallels to the application of theories of vicarious liability of employers for the acts of their employees, in practice requiring that the person acting on behalf of the company must have a relatively close connection to the company for the company to be held criminally liable.

Largely modeled upon Section 7 of the U.K. Bribery Act, the Draft Bill proposes that companies' liability for acts of corruption should extend to acts committed by persons “associated with the company.” An “Associated Person” may include both physical persons and legal entities, including agents and other third parties who perform services for or on behalf of the company. Pursuant to the proposal, a broader scope of companies' criminal liability will force companies to take responsibility not only for their own acts abut also for acts performed by others with a varying degree of association with the company. Companies that remain passive in the face of red flags will therefore be punished in the same way as persons who are actively involved in corrupt activity—provided that the offender has sufficient connection to the company.

2. Absolute Defense for Companies Having Adopted “Reasonable Measures” to Prevent Corruption

Under the current law, the determination of whether a company should be subject to corporate liability depends on an overall assessment of a number of factors defined in Section 28 (a)-(h) of the Norwegian Criminal Code, including (a) deterrent effect of the punishment; (b) gravity of the offense; (c) whether the company could have prevented the offence through guidelines, instruction, training, control or other measures; (d) whether the offence was committed in order to promote the interests of the company; (e) whether the company has had or could have obtained any advantage by the offense; (f) the company's financial capacity; and (g) whether other sanctions have as a consequence of the offence been imposed on the company or on any person who has acted on its behalf, including whether a penalty has been imposed on any individual person.

While some weight is given to the implementation of preventive measures under (c) above, critics have argued that unlike under the FCPA or the UKBA, Norwegian companies only receive credit for such activity to reduce a fine, and that there are therefore only limited incentives to develop effective compliance programs. The drafters of the Bill argue that in return for broad corporate criminal liability, companies should only be punished where they have failed to implement and maintain an effective compliance program.

Unlike the U.K. Bribery Act, which refers to “adequate procedures” as an absolute defense to failure to prevent corruption by associated persons, the Draft Bill refers to “reasonable measures to prevent corruption.” This language appears to mirror the formulation used by §1-6 of the Norwegian Liability Act, which provides that a person who has suffered damage as a result of corrupt activity may obtain damages from the responsible person's employer unless the employer can demonstrate it had “undertaken all reasonable measures to prevent corruption, and responsibility will not be reasonable after an assessment of the totality of the circumstances.” While “all reasonable measures” appear to be less stringent than “adequate procedures,” the drafters argue that this defense would preclude criminal

responsibility where a company had adopted "proportional, meaningful and adequate preventive measures adapted to the risk profile of the company." It has been argued that the new legislation will reward companies who invest in training of their employees and implementing appropriate policies and procedures to prevent corruption, while companies that "still do not take corruption seriously through failing to prevent its own employees and associated persons from corrupt activities will be subject to broader criminal liability."

The draft bill has been referred to the Standing Committee on Justice for a first examination, which will draft a recommendation and submit it to the Parliament for debate.

V. Focus on E.U. Data Protection

Data protection has grown in importance in the past decade, and is a subject of great importance to Europeans in particular. This section discusses two separate currents of legal developments related to data privacy. First, Section A discusses the new E.U. General Data Protection Regulation ("GDPR"), enacted in April 2016, which strengthens the protections of personal data within the E.U. Then, Section B discusses issues that have arisen with the need to transfer personal data between the E.U., where data protections are generally stronger, and the United States, which led initially to the creation of the Safe Harbor regime. After the Safe Harbor regime was invalidated by the European Court of Justice, it was replaced in 2016 by a new Privacy Shield regime, although it remains an open question whether the Privacy Shield (as enacted) will survive legal scrutiny in the E.U.

A. The E.U. General Data Protection Regulation

In April 2016, after four years of preparation to overhaul the European Union's data protection rules, the members of the E.U. Parliament gave final approval to the E.U. General Data Protection Regulation ("GDPR"). The GDPR's stated aims are to return control of personal data to citizens and to simplify regulations. This new set of rules is a modernization of the data protection regime established by Directive 95/46/EC, which dates to 1995. The GDPR came into force in May 2016, and member states have two years to comply. To better understand the 2016 modernization, we will briefly explore the contours of the 1995 Directive it superseded.

1. Data Protection Under the 1995 E.U. Directive

Directive 95/46/EC, adopted by the European Commission on October 24, 1995 ("the 1995 Directive"), sought to protect E.U. citizens' rights with respect to their private data both when the data is used within the E.U. and when it is transferred out of the E.U. It restricts the "processing" and "transfer" of "personal data," which covers "any information relating to an identified or identifiable natural person, including workplace information pertaining to employees." The responsibility for compliance rests on the shoulders of the "controller," meaning the natural or artificial, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

Under the 1995 Directive, the "processing" of personal data encompasses essentially every action taken in connection with U.S. discovery, including "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."

Personal data should not be processed at all, except when three conditions are met: (i) transparency, (ii) legitimate purpose, and (iii) proportionality. Accordingly, (i) the data subject has the right to be informed when his or her personal data is being processed; (ii) personal data can only be processed for specific explicit and legitimate purposes; and (iii) personal data may be processed only insofar as it is adequate, relevant, and not excessive in relation to the purposes for which it is collected and/or further processed.

Under the 1995 Directive, the transfer of personal data is strictly prohibited when the data is intended to be transferred to non-E.U. countries, except if the recipient country provides an adequate level of protection according to the European Commission. Because only approximately a dozen non-E.U. countries are recognized as providing "adequate" protections, companies must usually rely on other grounds to transfer data outside the European Economic Area ("EEA"). Other grounds that justify such transmission of data outside the EEA include consent, necessity for the performance of an agreement, or other adequate safeguards which include standard contractual clauses issued by the E.U. Commission and intra-group Binding Corporate Rules ("BCRs").

The 1995 Directive requires each EEA country to enact data protection laws that are at least as protective as the Directive itself, which led some countries to enact data protection laws more protective than the minimum required by the 1995 Directive. As a result, the degree of protection, the definition of personal data, the enforcement of sanctions, the notification requirements to Data Protection Authorities, among other things, vary from country to country within the EEA, resulting in a complex web of data privacy laws within the E.U.

To simply this tangled web of regulation, and to strengthen online privacy rights in the modern digital landscape, the European Commission proposed in January 2012 to draft a comprehensive reform of E.U. data protection rules. This effort resulted in the 2016 E.U. General Data Protection Regulation, or GDPR.

2. The 2016 E.U. General Data Protection Regulation

The GDPR reform consists of two instruments, a Regulation and a Directive. On the one hand, the General Data Protection Regulation is directly applicable within the Member States and is intended to enable people to better control their personal data. On the other hand, the Data Protection Directive will require the E.U. members to implement laws covering the police and criminal justice sector and ensuring that the data of victims, witnesses, and suspects of crimes are duly protected in the context of a criminal investigation or a law enforcement action.

Both the Regulation and the Directive were adopted by the European Council on April 8, 2016 and the European Parliament on April 14, 2016. The official texts of the Regulation and the Directive have been published in the E.U. Official Journal on May 4, 2016.

The Regulation entered into force on 24 May 2016, and it shall apply from 25 May 2018. The Directive entered into force on 5 May 2016 and E.U. Member States have to transpose it into their national law by 6 May 2018.

The 2016 GDPR makes numerous key changes to the 1995 Directive's regime. For example, the GDPR:

(1) **Creates a single set of harmonized rules on data protection, directly applicable in all E.U. Member States**, to replace the complex web of existing laws;

(2) **Introduces higher sanctions** (up to the greater of 4% of the annual worldwide turnover of an offending organization or E.U.R 20 million) and **empowers each Data Protection Authority** to impose sanctions;

(3) **Creates a new, independent super-regulator** – **European Data Protection Board** ("EDPB") – that will include the head of each national Data Protection Authority and the European Data Protection Supervisor ("EDPS") or their representatives, and will replace the Article 29 Working Party (discussed below);

(4) **Broadens the territorial scope of data protection laws to companies outside the E.U. targeting E.U. consumers** (by offering goods or services to E.U. citizens or by monitoring their behavior) no matter whether the processing tool is used inside or outside the E.U. (standing in sharp contrast to the 1995 Directive, under which the processing tool had to be located inside the E.U. to be governed by the Directive);

(5) **Broadens the scope of liable persons to include data processors** in addition to data controllers; for the first time, data processors must (i) maintain a record of processing activities for each controller, (ii) designate a Data Protection Officer where required, (iii) appoint a representative (when the company in not established in the E.U.) in certain circumstances, (iv) notify the controller of data breaches without undue delay; Data controllers now must notify the Data Protection Authority of most data breaches without undue delay, and where feasible within 72 hours of awareness.

(6) **Increases the responsibility of organizations** regarding how they control and process personal data, including requirements to: (i) keep extensive internal records of data protection activities; (ii) conduct data protection impact assessments for high risk projects; (iii) hire, in some large organizations, a Data Protection Officer; and (iv) notify the relevant Data Protection Authority of data breaches;

(7) **Simplifies companies' interactions with Data Protection Authorities** by introducing the "one-stop-shop" model, under which an organization with a trans-European footprint may designate the national Data Protection Authority of one country as its lead regulator, which will coordinate with any other Concerned Authorities. It remains to be seen exactly how the One-Stop-Shop model will work and whether forum-shopping will emerge as a problem;

(8) **Clarifies the consent required** from data subjects. Such consent could previously be assumed in certain circumstances, but now consent must be given explicitly and must be as easy to withdraw as to give, and data controllers must be able to demonstrate that consent was given;

(9) **Increases transparency obligations** within privacy notices, such that existing forms of fair processing notice will have to be re-examined;

(10) **Increases Data Subjects' rights** to restrict certain processing and to object to the personal data being processed for direct marketing purposes;

(11) **Introduces a new right to data portability** enabling data subjects to easily transfer their data from one service provider to another, and allowing individuals to receive back their personal data in a structured and commonly used format to be easily transferred to another data controller;

(12) **Introduces a new right to be forgotten (or right of erasure)** allowing data subjects to directly require a controller to erase personal data without undue delay in certain situations, such as when consent is withdrawn and no other legal ground for processing applies.

B. E.U.-U.S. Data Transfers: Safe Harbor to Privacy Shield

Many companies need to transfer personal data from the E.U., where data privacy protections are generally more robust, to the United States. Since 2000, a mechanism had been in place whereby U.S. companies could transfer E.U. personal data to the U.S. if they participated in a self-certification system known as the Safe Harbor. Then, in 2015, the European Court of Justice invalidated the Safe Harbor regime and ushered in a period of uncertainty with respect to transatlantic data transfer. In February 2016, after two years of cross-Atlantic negotiations, the European Commission issued the framework that would become the new E.U.-U.S. Privacy Shield to replace the invalidated Safe Harbor. Although the E.U. Commission endorsed the Privacy Shield in July 2016, questions remain whether the Privacy Shield will fall to legal challenge like its predecessor.

1. The E.U.-U.S. Safe-Harbor

The E.U.-U.S. Safe Harbor mechanism framed the transfers of private data since its adequacy was recognized by the Commission in its Decision 2000/520/EC of July 20, 2000 pursuant to Article 26 of the Directive 95/46/EC (hereafter: "the Safe Harbor Decision"). In this decision, the Commission recognized that the Safe Harbor Privacy Principles issued by the U.S. Department of Commerce provided adequate protection of personal data transferred from the E.U., and as a result, personal data could be freely transferred from E.U. Member States to companies in the U.S. that signed up to the Principles, despite the absence of a general data protection law in the U.S. Although the Safe Harbor relied on commitments and self-certification of adhering companies, its rules were binding under U.S. law (and enforceable by the U.S. Federal Trade Commission ("FTC")) for entities that signed up to them.

2. The 2015 Schrems Case: Invalidating the Safe Harbor

The first steps towards the unraveling of the Safe Harbor Decision were taken by Edward Snowden, a former U.S. government analyst who sensationally leaked a large volume of U.S. National Security Agency files to international journalists in 2013. Among other fallout from the Snowden revelations, a European law student named Max Schrems filed suit against Facebook when he learned that, according to documents leaked by Snowden, certain American companies including Facebook were forced to share personal data—including personal data of European citizens—to U.S. intelligence agencies.

The ultimate result of the suit was the Schrems v Data Protection Commissioner case in which, on October 6, 2015, the ECJ invalidated the Commission's July 2000 Safe Harbor Decision. The ECJ ruled that the Safe Harbor Decision did not contain sufficient findings on the limitations of U.S. public authorities' access to data as well as on the existence of effective legal protection against such interference. Furthermore, the Court confirmed that even where there is an adequacy decision from the Commission under the 1995 Directive, the Member States' Data Protection Authorities are required to independently examine whether data transfers to a third country comply with 1995 Directive's requirements.

3. Transitional Arrangements: Standard Contractual Clauses and Binding Corporate Rules

The invalidation of the Safe Harbor created great uncertainty in the international business community. While the Commission and the U.S. authorities had started talks on a new transatlantic data exchange agreement as early as January 2014 in the wake of the Snowden revelations, no agreement had yet been finalized at the time of Schrems. Thus, the question at that time was how to transfer data from the E.U. to the U.S. without the Safe Harbor. This led the Article 29 Working Party ("Article 29 WP")—the independent advisory body gathering representatives of all Member State Data Protection Authorities, the EDPS, and the European Commission—to issue a statement providing, among other things, that:

- Data transfers can no longer be based on the Commission's invalidated Safe Harbor Decision;
- Standard Contractual Clauses [ ] and Binding Corporate Rules [ ] can in the meantime be used as a basis for data transfers….

4. The 2016 Privacy Shield: A Safer Safe Harbor?

In a July 12, 2016 decision, the European Commission essentially approved the new Privacy Shield by recognizing that the U.S. ensures "an adequate level of protection for personal data transferred under the E.U.-U.S. Privacy Shield ["Privacy Shield"] from the [European] Union to self-certified organizations in the United States." This decision rendered the Privacy Shield Framework Principles (the "Principles") immediately applicable.

Like the now-invalid Safe Harbor, the Privacy Shield rests on a system of self-certification by which U.S. organizations commit to the Principles. The Principles include several new requirements, including requirements to (i) inform individuals of data processing, (ii) maintain data integrity and purpose limitations, (iii) ensure accountability for data transferred to third parties, (iv) cooperate with the Department of Commerce, (v) ensure commitments survive as long as data is held, and (vi) ensure transparency related to enforcement actions. The Privacy Shield buttresses the role of the Department of Commerce, including giving the Department the responsibility to maintain and publicize lists of organizations participating in the Privacy Shield and monitoring and verifying that these organizations are complying with the Privacy Shield's Principles.

The Principles require U.S. companies to reply to complaints from individuals within 45 days. The Data Protection Authority will also work with the Department of Commerce and Federal Trade

Commission to ensure that unresolved complaints by E.U. citizens are investigated and resolved. As last resort, an arbitration mechanism will ensure an enforceable decision.

As evidence that the Snowden revelations still reverberate in Europe, the negotiation of the Privacy Shield resulted in the U.S. government providing strong written assurances (including representations from the U.S. Office of the Director of National Intelligence, the U.S. Secretary of State, and the U.S. DOJ, all published in the U.S. Federal Register) that any access by U.S. public authorities to personal data will be subject to clear limitations, safeguards, and oversights mechanisms. In addition, a Privacy Shield Ombudsperson, an undersecretary of the U.S. government but independent from the intelligence community, will be available to receive complaints from individuals.

Notwithstanding European concerns with respect to the alleged intrusiveness of U.S. intelligence collection activities, the final Privacy Shield includes a potentially significant caveat: "adherence to the Principles is limited to the extent necessary to meet national security, public interest, or law enforcement requirements."

5. July 2016 Working Party Statement on Privacy Shield

On July 26, 2016, the Article 29 Working Party issued a statement that commended the work done to achieve the Privacy Shield including through considering various concerns raised by the Working Party in the past, but fell short of a full-throated endorsement of the Privacy Shield, stating that "a number of [Working Party] concerns remain."

The Working party stated that it "would have expected stricter guarantees concerning the independence and the powers of the Ombudsperson mechanism. Regarding bulk collection of personal data, the WP29 notes the commitment of the ODNI not to conduct mass and indiscriminate collection of personal data. Nevertheless, it regrets the lack of concrete assurances that such practice does not take place."

Rather than fully endorse (or reject) the Privacy Shield, the Working Party stated that it would withhold further judgment until the first joint annual review to "assess if the remaining issues have been solved [and] if the safeguards provided under the E.U.-U.S. Privacy Shield are workable and effective."

6. Privacy Shield Analysis & Critique

Critics have charged that although the Privacy Shield is presented as being based on "notice and choice," it does not in reality give users substantial choice. While it gives companies general approval to use the personal data of any person, these persons can object only two ways. First, if an individual knows which U.S. company is using their data, then they can contact the company to actively "opt out." (Critics have also noted that the choice of an opt-out default system gives U.S. companies a significant competitive advantage over European firms that operate under the opposite presumption, with an "opt-in" system under which they must ask customers for affirmative consent.) A second method of objecting to the use of one's private data involves seeking formal legal remedy, but the rules for legal redress are not simple: a European individual who believes his or her rights have been violated would first need to contact private U.S. arbitration bodies and their European national authority, who in turn would contact the U.S. authorities, in order to ultimately address any concerns with a "privacy shield board."

Critics have also noted that the Privacy Shield does not appear to have remedied the attributes of the old Safe Harbor regime that led to its invalidation by the ECJ in the wake of the Snowden revelations. In its 2015 Schrems ruling invalidating the Safe Harbor, the European Court of Justice strongly criticized mass-surveillance laws in the U.S.; not only have these mass surveillance laws not substantially changed in the meantime, but also the Privacy Shield uses the exact same wording as the Safe Harbor regarding these laws. Therefore, the new Privacy Shield may be vulnerable to the same legal arguments about permanent mass surveillance in the U.S. used to invalidate the Safe Harbor. In addition, critics fear that the new U.S. Ombudsman will lack the true independence and authority to serve as a check and balance against overbroad collection of E.U. personal data by the U.S. intelligence community. Max Schrems, the eponymous Schrems plaintiff who continues to be active as a privacy advocate, has argued that "the Privacy Shield must comply with the criteria defined by the E.U. and its courts of justice, which clearly indicated that the mass collection of personal information is not compatible with the fundamental personal data protection rights." Time will tell whether Schrems, which invalidated the Safe Harbor, will be followed by a Schrems II challenging the Privacy Shield.

VI. Focus on the Panama Papers

In early 2015, an anonymous whistleblower provided German news agency Süddeutsche Zeitung ("SZ") with approximately 11.5 million files leaked from the Panama-based law firm Mossack Fonseca & Co. One of the largest data leaks in history, the leaked documents included email communications, corporate registration documents, and bank account information related to approximately 214,000 offshore entities established by Mossack Fonseca over the last four decades. Given the considerable volume of information, SZ turned to the International Consortium of Investigative Journalists ("ICIJ"), a Washington, D.C.-based network of investigative journalists from over 65 countries, for help reviewing the documents. The leaked documents, along with associated reports released by the ICIJ, are now commonly referred to as the "Panama Papers."

To analyze the millions of documents, the ICIJ enlisted the help of 107 media organizations from 76 countries. As a testament to the magnitude of the undertaking, the ICIJ (and its 107 partner organizations) devoted a year to the process of analysis and only first publicized the existence of the Panama Papers—alongside a broad summary of information contained therein—on April 3, 2016.

The ICIJ uncovered offshore companies with connections to 12 current and former world leaders and more than 100 other politicians and officials. The ICIJ has launched a searchable online database which allows users to easily find information regarding shareholders, proxies, and intermediaries of the offshore companies detailed in the Panama Papers. Those reportedly connected to the offshore entities include the King of Saudi Arabia, the President of Ukraine, the President of Argentina, the President of the United Arab Emirates ("UAE"), and the Prime Minister of Iceland, as well as close relatives and associates of Chinese President Xi Jinping, Russian President Vladimir Putin, former Argentinian Presidents Néstor Kirchner and Cristina Kirchner, and former U.K. Prime Minister David Cameron. The leak also revealed offshore entities reportedly connected to well-known figures in the entertainment and sports industries, including soccer star Lionel Messi, golfer Tiger Woods, movie stars Emma Watson and Jackie Chan, former Miss World Aishwarya Rai, and the estate of late American filmmaker Stanley Kubrik.

As the ICIJ itself indicates in a disclaimer prominently featured on the Panama Papers' database, offshore companies are not *per se* illegal, and may be useful for a number of legitimate purposes such as

asset management or estate planning. Offshore companies may also be legitimately used to provide a safe haven for individuals from unstable jurisdictions, or to legally increase the tax efficiency of complex corporate transactions. Nonetheless, banking and tax havens often feature relatively lenient disclosure requirements, often allowing ultimate beneficial shareholders to remain undisclosed behind a veil of nominee shareholders who appear as corporate administrators and/or shareholders on paper. The resulting opacity—which makes it difficult to trace or monitor financial transactions—is what often attracts improper activities such as tax evasion, money laundering, and corruption.

The concern that such offshore entities may be used for improper purposes prompted a number of jurisdictions to launch criminal enquires in the wake of the publication of the Panama Papers. On April 19, 2016, the U.S. DOJ began a criminal investigation focused on tax avoidance schemes exposed in the Panama Papers. By that time, criminal inquiries had also been launched in a number of countries, including the U.K., Switzerland, the Netherlands, Austria, Australia, and New Zealand. On April 22, 2016, Panama, which had come under intense international criticism, launched a raid on Mossack Fonseca's headquarters.

A. Public Reaction and Political Fallout

When the Panama Papers story broke in April 2016, the exposé made headlines around the world and sparked political demonstrations in several countries, including most notably in Iceland. Below, we briefly explore the effects of the Panama Papers revelations on senior political figures in Iceland, Spain, and the United Kingdom.

1. Iceland

Sigmundur Davíð Gunnlaugsson, the Prime Minister of Iceland, was the first world leader to be significantly affected by the Panama Papers. The ICIJ's reports publicized Prime Minister Gunnlaugsson's link to a BVI-registered company called Wintris, Inc., registered in 2007 with the help of Mossack Fonseca. According to the reports, Mr. Gunnlaugsson co-owned Wintris with his wife prior to his entering Iceland's Parliament in April 2009, and then reportedly transferred his interest in Wintris to his wife for one dollar on December 31, 2009, shortly before a new Icelandic law would have required him to disclose his stake in the offshore company. The ICIJ's reports further indicated that Wintris owned millions of dollars in bonds from the three main Icelandic Banks, all of which collapsed within days of each other during the 2008 financial crash. Because Gunnlaugsson had rapidly risen from journalist to member of parliament to prime minister—the country's youngest, at 38 years of age—primarily on a wave of post-crash, anti-bank, populist anger and a political platform of non-payment of Iceland's debt to foreign creditors, the existence of an opaque offshore company through which he (or his wife) owned Icelandic Bank bonds ($8 million pre-crash) was particularly damaging. Reports noted that it was unclear whether Prime Minister Gunnlaugsson's political actions benefited or hurt the value of his Wintris investments. Regardless, popular sentiment quickly turned against Gunnlaugsson, who stepped down on April 5, 2016, one day after a large public demonstration outside of Parliament demanded his resignation and two days after the ICIJ publicized the Panama Papers.

2. Spain

Ten days later, on April 15, 2016, the Spanish Minister of Industry, Energy and Tourism, José Manuel Soria, resigned amid reports connecting him to two offshore investments. Panama Papers

revelations first linked Mr. Soria to a Bahamas-based company called U.K. Lines, and other media reports subsequently linked him to another company based on the English Channel island of Jersey. Despite first denying ties to any offshore companies, Mr. Soria stepped down as Minister after the publication of a leaked 2002 document bearing his signature. Mr. Soria has not been charged with any wrongdoing.

3. United Kingdom

In the U.K., then-Prime Minister David Cameron faced criticism over reported links to a Panama-based offshore company set up by his late father which was revealed in the Panama Papers. On April 7, 2016, Mr. Cameron admitted to having held shares in the Panama-based Blairmore Holdings which he sold just prior to becoming Prime Minister in 2010. Mr. Cameron disclosed that he and his wife had purchased the shares in 1997 for £12,497 and had sold them for £31,500 before he became prime minister. Mr. Cameron reported that he had paid all applicable taxes, including income tax on dividends received. On April 10, 2016, Mr. Cameron released information from his previous six years of tax returns in an effort to address questions regarding his finances. Several leading British politicians followed suit with personal disclosures, including opposition party leader Jeremy Corbyn, then-Mayor of London Boris Johnson, and first minister of Scotland Nicola Sturgeon.

B. Subsequent Reforms

In the wake of the Panama Papers revelations, several countries also launched reform plans to confront the challenges associated with tax havens and international tax evasion. In the U.K., for example, Mr. Cameron announced new transparency measures to increase corporate transparency in U.K.'s dependencies and to fight against corporate tax evasion. In the U.S., the Obama Administration publicized reform plans to "strengthen financial transparency, and combat money laundering, corruption and tax evasion." Among other things, the U.S. plan includes a new Financial Crimes Enforcement Network (FinCen) "Customer Due Diligence" rule requiring financial institutions to better know and verify the ultimate beneficial owners of companies, and to facilitate the sharing of such information between financial institutions and relevant law enforcement authorities. The U.S. Treasury Department and the Internal Revenue Service are also planning to issue new regulations to close a loophole that has allowed non-U.S. citizens to potentially hide their assets using a narrow category of U.S.-incorporated companies (Single Member Limited Liability Companies) when those companies, under certain circumstances, are classified as "disregarded entities" by the IRS.

CHAPTER 3: FCPA

I. FCPA Elements and Penalties

The FCPA has two fundamental components: (1) the Anti-Bribery Provisions in Section 30A of the Securities Exchange Act of 1934 ("Exchange Act")1 and in Title 15, United States Code,2 and (2) the Books and Records and Internal Accounting Control Provisions in Sections 13(b)(2)(A)3 and 13(b)(2)(B)4 of the Exchange Act, respectively (collectively, the "Accounting Provisions"). The DOJ has exclusive jurisdiction to prosecute criminal violations of the FCPA, while the DOJ and the SEC share jurisdiction over civil enforcement actions.

A. Anti-Bribery Provisions

The FCPA's Anti-Bribery Provisions prohibit: (i) an act in furtherance of (ii) a payment, offer or promise of, (iii) anything of value, (iv) to a foreign official,[5] 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 either (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.[6]

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.[7] The term foreign official has been construed by federal prosecutors to include employees, even relatively low-level employees, of state-owned institutions.

Under the FCPA, "a person's state of mind is 'knowing' with respect to conduct, a circumstance, or result" if he or she has actual knowledge of the conduct, circumstance or result or "a firm belief that such circumstance exists or that such result is substantially certain to occur."[8] In addition, knowledge of a circumstance can be found when there is a "high probability" of the existence of such circumstance.[9] 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 prohibitions by their unwarranted

1 Codified at 15 U.S.C. §§ 78dd-1(a).
2 15 U.S.C. §§ 78dd-2(a), 78dd-3(a).
3 Codified at 15 U.S.C. § 78m(b)(2)(A).
4 Codified at 15 U.S.C. § 78m(b)(2)(B).
5 The FCPA further prohibits payments to foreign political parties and officials thereof.
6 *See* 15 U.S.C. §§ 78dd-1(a).
7 15 U.S.C. §§ 78dd-1(f)(1).
8 *Id.*
9 *See* 15 U.S.C. § 78dd-1(f)(2)(B).

> obliviousness to any action (or inaction), language or other "signaling [*sic*] device" that should reasonably alert them of the "high probability" of an FCPA violation.[10]

Since the 1977 enactment of the FCPA, the Anti-Bribery Provisions have applied to U.S. and foreign issuers of securities that registered their securities with or reported to the SEC and to domestic concerns such as U.S. citizens and companies organized under U.S. law or with a principal place of business in the United States, if the U.S. mails or a means or instrumentalities of U.S. interstate commerce (such as an interstate wire transfer) were used in furtherance of the anti-bribery violation.[11] In 1998, amendments to the Anti-Bribery Provisions generally extended U.S. jurisdiction to cover acts outside of U.S. territory in furtherance of an anti-bribery violation by U.S. issuers and domestic concerns and acts inside U.S. territory in furtherance of an anti-bribery violation by other persons, such as foreign non-issuers and foreign nationals, who were not previously subject to the FCPA.[12] Such extended jurisdiction is not dependent upon the use of U.S. mails or means or instrumentalities of U.S. interstate commerce.[13]

The FCPA also applies to officers, directors, employees, or agents of any organization subject to the FCPA and to stockholders acting on behalf of any such organization.[14]

B. The Exception and Defenses to Alleged Anti-Bribery Violations

Under the FCPA, facilitating payments "to expedite or to secure the performance of a routine governmental action" are excepted from the Anti-Bribery Provisions.[15] This is a narrow exception, only applying to non-discretionary acts such as obtaining official documents or securing utility service and not applying to any decision to award or continue business with a particular party.[16] Also, its practical effect is limited because many other jurisdictions and international conventions do not permit facilitation payments.

There are two affirmative defenses to the FCPA. Under the "written law" defense, it is an affirmative defense to an FCPA prosecution if the payment, gift, offer, or promise of anything of value that is at issue was lawful under the written laws and regulations of the recipient's country.[17] It is also an affirmative defense if the payment, gift, offer, or promise of anything of value was a reasonable, *bona fide* expenditure directly related either to the promotion, demonstration, or explanation of products or services, or to the execution or performance of a contract with a foreign government or agency.[18] Both defenses, however, are narrow in practice and, because they are affirmative defenses, it would be the defendant's burden to prove their applicability in the face of an FCPA prosecution.

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[10] H.R. Rep. No. 100-576, at 920 (1987) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953.
[11] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
[12] 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3(a).
[13] *Id.*
[14] 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).
[15] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
[16] 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).
[17] 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).
[18] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

C. Accounting Provisions

The FCPA's Accounting Provisions apply to issuers who have securities registered with the SEC or who file reports with the SEC.[19] The Books and Records Provisions compel such issuers to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.[20] The Internal Accounting Controls Provisions require such issuers to devise and maintain a system of internal accounting controls regarding accounting for assets, enabling the preparation of financial statements, and providing reasonable assurances that management authorizes transactions and controls access to assets.[21] As used in the Accounting Provisions, "reasonable detail" and "reasonable assurances" mean a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[22]

D. Penalties

The FCPA imposes both criminal and civil penalties. Willful violations of the Anti-Bribery Provisions carry maximum criminal fines of $2 million for organizations and $250,000 for individuals, per violation.[23] Under U.S. criminal law, alternative fines of up to twice the pecuniary gain from the offense apply instead, if the alternative fine exceeds the maximum fine under the FCPA.[24] Individuals also face up to five years' imprisonment for willful violations of the Anti-Bribery violations.[25] Anti-bribery violations also carry civil penalties of up to $16,000 for organizations or individuals, per violation.[26] These fines may not be paid by a person's employer or principal.[27]

Willful violations of the Accounting Provisions carry maximum criminal fines of $25 million for organizations and $5 million for individuals, or, if greater, the alternative fine of twice the pecuniary gain.[28] Individuals face up to 20 years' imprisonment for willful violations of the Accounting Provisions.[29] Civil penalties for violations of the Accounting Provisions include disgorgement of any ill-gotten gains and

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[19] 15 U.S.C. § 78m(b)(2). The Accounting Provisions were passed as part of the original 1977 FCPA legislation out of concern over companies improperly recording payments on their books and records and failing to fully account for illicit "slush" funds, from which improper payments could be made. These provisions, however, have broader application than simply within the context of the FCPA. For purposes of this Alert, when violations of these provisions are alleged in the context of improper payments to foreign officials or similar conduct, they are referred to as violations of the FCPA's Accounting Provisions. When violations occur in situations not involving improper payments (*see, e.g.*, the Willbros Group settlement discussed *infra*), they are described as the Exchange Act's books and records and/or internal controls provisions.

[20] 15 U.S.C. § 78m(b)(2)(A).

[21] 15 U.S.C. § 78m(b)(2)(B).

[22] 15 U.S.C. § 78m(b)(7).

[23] 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

[24] 18 U.S.C. § 3571(d), (e) (fine provision that supersedes FCPA-specific fine provisions).

[25] 15 U.S.C. §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

[26] 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e); *see* DOJ & SEC, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT (2012) (indicating that the maximum civil penalty for an anti-bribery provision violation is $16,000, but citing the SEC's announcement of the adjustment for issuers subject to SEC enforcement without citing to a parallel DOJ announcement for domestic concerns and other persons).

[27] 15 U.S.C. §§ 78ff(c)(3), 78dd-2(g)(3), 78dd-3(e)(3).

[28] 15 U.S.C. § 78ff(a); 18 U.S.C. § 3571(d), (e).

[29] 15 U.S.C. § 78ff(a).

penalties up to $775,000 for organizations and $160,000 for individuals, per violation, in actions brought by the SEC.[30]

II. FCPA Settlements and Enforcement Actions[31]

A. 2016[32]

1. Akamai Technologies

On June 6, 2016, the DOJ issued a declination letter regarding its investigation of Akamai Technologies, Inc. ("Akamai"), a NASDAQ-listed, Massachusetts-based technology provider of cloud computing services. The following day, the SEC announced that it entered into a Non-Prosecution Agreement ("NPA") with Akamai with respect to related allegations that the company's wholly-owned subsidiary, Akamai (Beijing) Technologies, Co. Ltd ("Akamai-China"), had paid bribes to government officials in China between 2013 and 2015. These payments were masked as legitimate transactions, causing Akamai's consolidated accounts to be inaccurate. In addition to its obligation to cooperate with the SEC, Akamai agreed to pay $671,885, including $652,452 in disgorgement and $19,433 in prejudgment interest.

a. Non-Prosecution Agreement with the SEC

According to the SEC, Akamai failed to maintain accurate books and records and to devise and maintain a system of internal controls that would have reasonably prevented and detected improper payments made by Akamai-China to Chinese government officials. According to the NPA, the following findings would have been proven as facts if the case had been taken to trial, and Akamai agreed in the NPA not to dispute, contest, or contradict these findings in the event that it violates the NPA and is later prosecuted on the basis of these findings.

The SEC described two types of bribe payments: improper gifts and entertainment that Akamai-China gave directly to end users (some of whom were Chinese public officials), and money and things of value given by a Regional Sales Manager working together with a local Chinese intermediary to end users (some of whom were Chinese public officials). Akamai-China used these bribes to induce end users to purchase 100 times more network capacity than they needed.

From at least 2013 to at least 2015, Akamai-China's Regional Sales Manager collected kickbacks from a local intermediary and used part of the money to bribe three end users of Akamai-China services, two of whom were state-owned entities. According to the SEC, Akamai-China was required by Chinese regulation to distribute its cloud computing services in China through intermediaries called Channel Partners, and one of these Channel Partners entered into the scheme to pay kickbacks to Akamai-China's Regional Sales Manager. According to the SEC, the Channel Partner paid money into the

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30 15 U.S.C. § 78u(d)(3), (5); *see* 17 C.F.R. § 201.1005, Table V (2013) (adjusting the amounts for inflation).

31 Hughes Hubbard represents or has represented multiple companies who have been the subject of the enforcement actions or other activities summarized in this Alert. All details and information provided in this Alert in connection with such enforcement actions, however, are based solely on on the government's charging documents or other publicly available documents. Additionally, all descriptions of allegations underlying the settlements (or other matters such as ongoing criminal cases) discussed in this Alert are not intended to endorse or confirm those allegations, particularly to the extent that they relate to other, non-settling entities or individuals.

32 Cases and settlements have been organized alphabetically within each year.

Regional Sales Manager's bank account, or the accounts of his nominees, and the Regional Sales Manager "then paid a portion of these funds, and also provided expensive gifts, to employees of the three end customers." These payments or gifts were worth approximately $155,500, of which approximately $38,500 was paid in cash to government officials. Akamai-China was also cited as having directly given approximately $32,000 worth of gifts and entertainment to end user employees during the same period.

i. Lack of Internal Accounting Controls and Inaccurate Books & Records

The SEC found that Akamai's control failures at Akamai-China enabled the bribery to go undetected. Among others, Akamai failed to devise and maintain (i) a system of internal controls that would have reasonably assured that transactions were executed in accordance with the company's polices and were accounted for, (ii) a formal due diligence process for its Chinese partners, (iii) procedures for effectively reviewing and approving gifts and entertainment, and (iv) a process for monitoring or reviewing customer usage in high risk regions. Akamai also failed to exercise its audit rights to ensure compliance with anti-bribery policies, to provide adequate employee training on anti-bribery policies, and to translate compliance policies into Mandarin.

ii. Self-Reporting, Cooperation, and Remedial Measures

Akamai promptly self-reported to the SEC and DOJ and conducted a thorough investigation upon receipt of a December 2014 whistleblower complaint from an Akamai-China sales representative that the Regional Sales Manager had received improper payments from Channel Partners and had made improper payments to end users to obtain business. We note that the time period between whistleblower complaint and the SEC NPA (and DOJ Declination) was approximately 18 months.

The SEC acknowledged Akamai's cooperation and remedial steps. In addition to its self-reporting, Akamai provided detailed findings of its internal investigations, including results of audits of its Chinese partners, summaries of witness interviews, and factual chronologies with supporting documentation. Akamai also identified and presented relevant documents to the SEC, along with timely updates of information and progress on remedial measures, provided translated documents, and made witnesses available for interviews and testimony.

The SEC identified several concrete remedial steps taken by the company. The Regional Sales Manager was placed on administrative leave, and subsequently resigned in April 2015. Akamai also terminated the relationship with the culpable local partner. Further, the company conducted a comprehensive global review of its compliance program, and initiated steps to ensure its employees were receiving adequate training. Among other actions, Akamai (i) implemented a comprehensive due diligence process for its partners, and engaged an external consultant to conduct risk assessments, (ii) strengthened its anti-corruption policies, (iii) enhanced its monitoring functions, including naming a Chief Compliance Officer and a global team of compliance professionals, (iv) provided extensive mandatory trainings on the FCPA and anti-corruption policies in appropriate languages, and (v) enhanced its travel and expense control requirements in China.

b. DOJ Declination

The DOJ declination letter, publicly released by Akamai, cited the FCPA Pilot Program as basis for according Akamai credit for its voluntary disclosure of misconduct by an Akamai-China employee and

a local Chinese service distribution partner. As factors contributing to the declination decision, the DOJ noted Akamai's full disgorgement of ill-gotten gains to the SEC, its full cooperation with the DOJ (which included identification of relevant individuals and agreement to continue cooperating with any individual prosecutions), and the steps taken to enhance its compliance program and internal accounting controls. The DOJ cited remedial measures including the prompt suspension of an employee involved in the misconduct (and that individual's subsequent resignation), the disciplining of five other involved employees, and the termination of the Chinese service distribution partner.

2. Analogic, BK Medical ApS, and Lars Frost

On June 21, 2016, NASDAQ-listed Analogic Corporation ("Analogic") and its wholly-owned Danish subsidiary, BK Medical ApS ("BK Medical") agreed to pay nearly $15 million in criminal penalties and disgorgement to settle DOJ and SEC charges of violating the FCPA's books and records and internal controls provisions. Specifically, subsidiary BK Medical entered into a Non-Prosecution Agreement with the DOJ which included a $3.402 million penalty, three years of reporting to the DOJ, and a commitment to cooperate with any related U.S. or foreign authorities' investigations or prosecutions, including of related individuals. The SEC settlement involved only Analogic and the former CFO of its subsidiary, BK Medical. The SEC did not require Analogic to pay a civil penalty, but did require Analogic to pay $7.673 million in disgorgement plus $3.81 million in pre-judgment interest. The SEC required BK Medical's former CFO, Danish-resident Lars Frost, to pay $20,000 to resolve charges, which he neither admitted nor denied, that he violated the books and records and internal controls provisions of the FCPA.

a. Distributors Directed BK Medical to Make Bribe Payments

Massachusetts-based Analogic manufactures and sells health care technology, and its subsidiary BK Medical focuses on ultrasound equipment. During the relevant time, BK Medical sold its equipment either directly or through distributors in various countries, including Russia, where BK Medical sold equipment exclusively through unnamed "Distributor 1" to hospitals or medical facilities that were either owned or controlled by Russia and that "performed functions that the Russian government treated as its own, and thus were instrumentalities of the Russian government" for the purposes of the FCPA.

At the heart of the settlement are charges that BK Medical engaged in over two hundred sham transactions involving distributors between 2001 and 2011, funneling approximately $20 million to third parties. The DOJ stated that BK Medical paid approximately 80% of these bribes, or approximately $16 million, on the instructions of Distributor 1 in Russia. Although the majority of details in the settlement were provided with respect to Distributor 1 in Russia, the SEC noted that some of BK Medical's hundreds of suspicious payments were also made through distributors working in Ghana, Israel, Kazakhstan, Ukraine, and Vietnam.

In its relationship with Distributor 1 in Russia, BK Medical kept two sets of invoices for each sale: the correct invoice, and the inflated "special" invoice. According to the DOJ, after BK Medical sent Distributor 1 the correct invoice for each sale, Distributor 1 would request that BK Medical provide a second, inflated fictitious invoice outside of the normal invoicing and accounting system. According to the SEC, BK Medical personnel created the second, fictitious invoice by cutting and pasting the BK Medical logo and other elements onto the template sent by Distributor 1 in order to create this document outside of the normal invoicing system. In 2004, a BK Medical Senior Vice President of Sales for distributors

provided Distributor 1 with the following draft text to include in the second, fictitious invoice that would be sent back to BK Medical as a way to explain the overpayment:

> Please note that this is simply a part of the Russian market conditions and it is a result of our process going from the former Soviet planning economy . . . the level of official salaries in many sectors are extremely low which makes it impossible to maintain a reasonable standard of living. The money we request you to transfer are not in any way money for [Distributor 1], you already know about this, but is is [sic] for various obligations that is [sic] not in our control. We know that sometimes that money goes back into the regions for education and training, which under normal conditions would not be possible, but also for general improvement of the living standard among a lot of different persons, not only persons on high levels . . . If you cannot continue to help us with the money transfers, we will risk up to 90% of our B-K business . . . Please understand that your Western word 'bribe' is not used in our Russian market. . . .

Distributor 1 would pay BK Medical the inflated price shown on the fictitious invoice, but BK Medical would only record the real price as revenue while crediting the excess amount to its accounts receivable account for the Russian distributor—essentially creating a slush fund—until BK Medical received further instructions from Distributor 1.

At some point after the overpayment, Distributor 1 would instruct BK Medical to pay the excess funds to unknown third parties, both individuals and entities including shell companies. None of the recipients of these payments had any business relationship with BK Medical, and BK Medical did not conduct due diligence on any of the recipients, but instead "merely sent them money" at the direction of Distributor 1. According to the SEC, the recipients "ranged from apparent shell corporations located in places such as Belize, the British Virgin Islands, Cyprus, and Seychelles, to specific individuals in Russia." According to the DOJ, "there is evidence that at least some of these payments to third parties were ultimately [made] to doctors employed by Russian state-owned entities." The SEC stated that approximately half of the payments related to Distributor 1 were made to banks in Latvia, on Russia's border.

On certain occasions, Distributor 1 provided false invoices from certain unknown recipients that indicated that the recipients had provided "marketing" or "logistic services" or services for which a "commission" was owed, but BK Medical employees confirmed that none of the recipients provided any services to BK Medical. Finally, because the payments were made from the excess funds in the accounts receivable system, they circumvented the normal vendor approval process for payments made from the accounts payable system.

The SEC also noted that, while the above methodology was followed for the majority of the suspicious payments, on at least two occasions BK Medical made direct payments to unknown recipients in advance of the sale through, and payment from, Distributor 1. According to the SEC, BK Medical paid "approximately $95,000 in total payments to unknown third parties, for unknown reasons, before receiving the [corresponding] funds from the Russian distributor."

b. A Missed Opportunity in 2008

In 2008, an Analogic Senior Vice President identified the risk of bribery in BK Medical's business, and recommended that BK Medical implement an FCPA training program and an "official process for validating that their distribution partners do not, or are not likely to engage in prohibited behavior." While Analogic did provide FCPA training to BK Medical sales and finance staff, "no official process was implemented, and no steps were taken to validate whether [Distributor 1 in Russia] or any other distributor was engaged in prohibited behavior."

c. DOJ Pilot Program: Incomplete Cooperation & Partial Credit

When Analogic discovered the payment arrangements at BK Medical in 2011, Analogic (1) halted the transactions; (2) conducted an internal investigation; (3) self-reported its findings including a full accounting of all suspicious payments to third parties by distributor and recipient; (4) cooperated with the SEC's investigation and cooperated partially with the DOJ's investigation; (5) terminated eight BK Medical distributors; (6) improved BK Medical's distributor due diligence; (7) terminated BK Medical employees including former CFO Lars Frost and the Senior Vice President of Sales for distributors; (8) disciplined other BK Medical employees related to the suspicious transactions; (9) enhanced Analogic's oversight of BK Medical including BK Medical's hiring of a compliance officer; (10) improved BK Medical's internal accounting controls; and (11) required additional and ongoing compliance training for relevant employees. We note that Analogic discovered and stopped the payments in 2011, meaning that the delay between discovery and final settlement with the SEC and DOJ in June 2016 was approximately five years.

BK Medical's NPA is the DOJ's first corporate enforcement action under the DOJ pilot program announced early April 2016, which promotes voluntary self-disclosures, cooperation, and remediation. The DOJ noted that although BK Medical had self-disclosed and engaged in extensive remediation, BK Medical did not receive full credit for its cooperation because its "cooperation subsequent to its self-disclosure did not include disclosure of all relevant facts that it learned during the course of its internal investigation; specifically, the Company did not disclose information that was known to the Company and Analogic about the identities of a number of the state-owned entity end-users of the Company's products, and about certain statements given by employees in the course of the internal investigation."

Under the parameters of the DOJ's pilot program, the DOJ can offer a company up to 50% reduction below the U.S. Sentencing Guidelines fine range (up to 25% for full cooperation without self-disclosure, and up to 50% for self-disclosure followed by full cooperation). The DOJ stated that BK Medical received full credit for self-disclosure available under the DOJ Pilot Program, but did not specify the breakdown of credit given for disclosure and remediation. In total, BK Medical received a 30% discount off the bottom of the U.S. Sentencing Guidelines fine range.

d. SEC Settlement with Former BK Medical CFO Lars Frost

Lars Frost, who worked in BK Medical's finance department beginning in 1999 and served as its CFO from 2008 until his termination in September 201l, agreed to pay a civil penalty of $20,000 to settle SEC allegations that he knowingly circumvented BK Medical's internal controls and falsified its books and records.

The SEC found that Mr. Frost personally authorized around 150 improper payments to unknown third parties, ten of which were authorized during his tenure as CFO, knowing that such payments violated and circumvented the internal accounting controls of the company. According to the SEC, both before and after he became CFO, Mr. Frost submitted false quarterly sub-certifications to Analogic certifying the company's compliance with internal accounting controls. The SEC further alleged that Mr. Frost was also aware of the fake contracts requested by Distributor 1 and failed to disclose them despite his responsibility of completing quarterly checklists designed to identify unusual transactions for Analogic's controller. Because the false elements were incorporated into Analogic's books and records, the SEC found that "Frost was a cause of Analogic's [FCPA] violations."

3. Biomet

On March 26, 2012, Biomet Inc., a medical product maker based in Indiana, settled FCPA charges with the DOJ and SEC for conduct occurring between 2000 and 2008. For most of the period of the misconduct, Biomet was listed on NASDAQ and was required to file periodic reports with the SEC, making it an "issuer" under the FCPA with respect to that time period. Biomet was targeted as part of the government's widespread investigation into medical-device manufacturers for bribes paid to health care providers and administrators employed by state-owned or -controlled institutions. In total, Biomet agreed to pay more than $22.85 million to settle charges brought by the DOJ and SEC, including a $17.28 million criminal penalty, $4.43 million in disgorgement of profits, and $1.14 million in prejudgment interest.

The DOJ charged Biomet with one count of violating the anti-bribery and books and records provisions of the FCPA, as well as three counts of violating the FCPA's anti-bribery provisions, and one count of violating the internal controls and books and records provisions. The DOJ alleged that Biomet made over $1.5 million in improper payments to doctors and officials at publically owned hospitals in Argentina, Brazil, and China, which were falsely recorded as "'commissions,' 'royalties,' 'consulting fees' and 'scientific incentives' to conceal the true nature of the payments." Biomet entered into a DPA with the DOJ, in which it admitted responsibility for actions taken by its employees, officers, agents, and subsidiaries, and admitted to the facts alleged by the DOJ.

The SEC also charged Biomet with violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Biomet consented to the entry of a court order enjoining the company from further FCPA violations and agreed not to deny any of the allegations in the SEC's Complaint—which closely tracked the DOJ's allegations.

a. DOJ and SEC Allegations

According to DOJ and SEC, between 2000 and 2008 Biomet and four subsidiaries located in Argentina, China, Sweden, and Delaware paid more than $1.5 million in bribes to health care providers in China, Argentina, and Brazil in order to secure business with hospitals. These payments were recorded in the company's books and records as "commissions," "royalties," "consulting fees," and "scientific incentives." According to the government, bribes involved employees and managers at Biomet, its subsidiaries, and its distributors. The payments were not stopped by Biomet's compliance and internal audit functions even after they became known.

i. Conduct in China

In China, Biomet sold medical device products through two subsidiaries, Biomet China (a Chinese company and wholly owned subsidiary of Biomet) and Scandimed (a wholly owned Swedish subsidiary that sells in China and elsewhere). The DOJ and SEC alleged that Biomet China and Scandimed funneled bribes through a distributor who offered money and travel to publicly employed doctors in exchange for Biomet purchases. One e-mail from the Chinese distributor, sent on May 21, 2001, indicated that:

> [Doctor] is the department head of [public hospital]. . . . Many key surgeons in Shanghai are buddies of his. A kind word on Biomet from him goes a long way for us. Dinner has been set aside for the evening of the 24th. It will be nice. But dinner aside, I've got to send him to Switzerland to visit his daughter.

A separate April 21, 2002 e-mail from the Chinese distributor stated:

> When we say "Surgeon Rebate included," it means the invoice price includes a predetermined percentage for the surgeon. For example, a vendor invoices the hospital for a set of plate & screws at RMB 3,000.00. The vendor will have to deliver RMB 750.00 (25% in this case) in cash to the surgeon upon completion of surgery.

Biomet's President of International Operations in Indiana and employees in the United Kingdom were also allegedly made aware of the bribes in 2001. For example, one e-mail sent from the Chinese distributor copying the Associate Regional Manager stated "[Doctor] will become the most loyal customer of Biomet if we send him to Switzerland." And, in 2005, the Director of Internal Audit instructed an auditor to code as "entertainment" payments being made to doctors in connection with clinical trials.

In 2006, Biomet ended its relationship with the Chinese distributor and hired staff to sell devices directly, but the misconduct continued. In October 2007, Biomet China sponsored 20 surgeons to travel to Barcelona and Valencia ostensibly for training; however, the trips included substantial sightseeing and entertainment at Biomet's expense. Additionally, in October 2007, Biomet China's product manager sent an e-mail to the Associate Regional Manager in which he discussed ways to bypass anti-corruption efforts by the Chinese government.

ii. Conduct in Brazil

In Brazil, Biomet's U.S. subsidiary, working through a distributor, allegedly paid an estimated $1.1 million in the form of 10% to 20% "commissions" to doctors at publicly owned and operated hospitals in order to sell Biomet products. The government alleged that Biomet employees were aware of these payments as early as 2001. Payments were openly discussed in documents between Biomet's executives and internal auditors in the United States, Biomet International, and its distributor. For example, in August 2001 the Brazilian distributor sent an e-mail to Biomet's Senior Vice President in Indiana, copying the Director of Internal Audit, stating it was paying commissions to doctors. The SEC alleged that no efforts were made to stop the bribery after its disclosure. In April 2008, following its acquisition by private equity groups, Biomet decided to purchase the Brazilian distributor and sent

accountants and counsel to conduct due diligence. Accountants identified certain payments to doctors, raising red flags of bribery. In May 2008, Biomet terminated its relationship with its distributor and withdrew from the Brazilian market.

iii. Conduct in Argentina

The DOJ and SEC alleged that, with respect to Argentina, employees of Biomet paid doctors at publicly owned and operated hospitals directly, with kickbacks as high as 15% to 20% of sales. In total, Biomet allegedly paid approximately $436,000 to doctors in Argentina. In order to conceal the payments, employees of Biomet Argentina (a wholly owned Biomet subsidiary incorporated in Argentina) created false invoices from doctors stating that the payments were for professional services or consulting. Prior to 2000, the payments were falsely recorded as "consulting fees" or "commissions." In 2000, the Argentine tax authorities forbade tax-free payments to surgeons, and Biomet Argentina employees began recording the payments as "royalties" or "other sales and marketing."

Auditors and executives at Biomet's headquarters in Indiana were aware of these payments as early as 2000. For example, in 2003, during the company's audit of Biomet Argentina, the audit report stated that "[R]oyalties are paid to surgeons if requested. These are disclosed in the accounting records as commissions." The internal audit did not make any effort to determine why royalties were being paid to doctors, amounting to some 15% to 20% of sales. Later in 2008, Biomet distributed new compliance guidelines related to the FCPA, and the Managing Director of Biomet Argentina informed Biomet's attorneys of the company's payments to doctors. Biomet reacted by suspending the payments and sending outside counsel to investigate.

b. Settlement Terms

In March 2012, Biomet entered into a three-year DPA with the DOJ, as well as a settlement with the SEC, which required that Biomet implement a rigorous system of internal controls and retain a compliance monitor for 18 months. Biomet also agreed to pay a criminal fine of $17.28 million to the DOJ and $5.5 million in disgorgement of profits and prejudgment interest to the SEC. The DPA recognized Biomet's cooperation during the DOJ's investigation, as well as the company's self-investigation and remedial efforts. Biomet also received a penalty reduction in exchange for its cooperation with ongoing investigations in the industry.

c. Post-Settlement Disclosures

In April 2014, Biomet and Zimmer Holdings, Inc. ("Zimmer"), another Indiana-based designer, manufacturer, and marketer of medical products, announced their intent to merge. In addition to antitrust inquiries from the U.S.Federal Trade Commission and the European Commission, Biomet's DPA presented potential difficulty to the proposed merger because the DPA required that all of its obligations be transferred to Biomet's successor in interest, should be company sell, merge, or transfer substantially all of its business operations.

In July 2014, following its receipt of an SEC subpoena, Biomet announced that in October 2013 it had discovered possible violations of the terms of the DPA in its Brazilian and Mexican operations. Biomet also announced that it had disclosed this information to the DOJ, SEC, and its independent compliance monitor in April 2014. In an SEC filing, Biomet stated that it had fired or disciplined

employees involved in the conduct, but that the DOJ had "full discretion" to decide whether the company had breached its DPA.

d. DPA Extensions

In March 2015, just a week before the terms of Biomet's DPA, as well as the appointment of its independent compliance monitor, were set to expire, the DOJ informed the company that it was extending the term of the DPA and monitorship for an additional year, while it continued an investigation into Biomet's Brazilian and Mexican activities. Biomet disclosed this through an 8-K filing on March 17, 2015.

At this time, Biomet and Zimmer had entered into a Merger Agreement which had not been concluded. Also on March 17, 2015, Zimmer issued its own 8-K filing, which quoted extensively from Biomet's disclosure, and noted the companies' pending merger.

The merger between Zimmer and Biomet closed successfully in June 2015, in a cash and equity transaction of over $13.3 billion. In connection with the transaction, Zimmer changed its corporate name to Zimmer Biomet Holdings Inc. ("Zimmer Biomet"), while Biomet was formally maintained as an indirectly owned subsidiary. Since this time, Zimmer Biomet has continued to disclose information regarding the status of Biomet's DPA in its quarterly and annual SEC statements.

In March 2016, Biomet, now Zimmer Biomet Holdings, Inc. ("Zimmer Biomet"), announced that its DPA had been extended again because the DOJ and SEC were still investigating alleged misconduct in Brazil and Mexico. The agreement was not extended for a specific amount of time; rather, Zimmer Biomet stated that "[t]he DOJ, the SEC and Biomet have agreed to continue to evaluate and discuss these matters during the second quarter of 2016," and as a result the DPA would not be resolved by March 26, 2016.

Most recently, in a June 2016 court filing, the DOJ stated that Zimmer Biomet had breached its DPA based on the company's conduct in Brazil and Mexico, and due to its failure to implement and maintain an effective compliance program. While this finding could lead to criminal charges, the DOJ also stated that Zimmer Biomet had agreed to continue to cooperate with the investigation, and that it was involved in ongoing discussions to resolve the matter without a trial. In August 2016, Zimmer Biomet announced in an SEC filing that it was "probable" that the company would face additional FCPA-related liabilities.

While it remains to be seen how this saga will ultimately end for Biomet, this case is an important and stark illustration that a company's FCPA issues do not end once a DPA is negotiated and signed. Post-resolution, there remain significant risks for companies subject to ongoing obligations to U.S. authorities, and significant consequences for failing to satisfy U.S. authorities that these obligations are being met.

4. Johnson Controls

On July 11, 2016, the SEC announced a settlement with Johnson Controls, Inc. ("JCI"), a NYSE-listed multinational with headquarters in Wisconsin. The SEC Cease-and-Desist Order alleged that JCI's Chinese subsidiary, China Marine, made payments to sham vendors between 2007 and 2013 in violation of the FCPA's books and records and internal controls provisions. JCI neither admitted nor denied the

SEC's findings. JCI agreed to pay to the SEC, $14,362,561, consisting of $11.8 million in disgorgement, a $1.18 million in civil penalty, and $1,382,561 in prejudgment interest. JCI also agreed to self-report to the SEC on the status of its FCPA and anti-corruption compliance measures for one year. On the same day, the DOJ issued a Declination Letter to JCI in connection with the same misconduct.

JCI, a multinational conglomerate, operates in 150 countries where it provides automatic temperature control systems for buildings, industrial facilities, and ships. China Marine is part of JCI's global marine's "Building Efficiency" business, and designs, sells and services marine refrigeration and HVAC systems in China through two legal entities, York Refrigeration Marine (China) Ltd ("YRMC"), and JCI Marine (Shanghai) Trading Company Ltd., both of which are described as wholly-owned indirect JCI subsidiaries.

a. Previous Misconduct by YRMC

JCI acquired YRMC as part of its 2005 acquisition of York International Corporation ("York"). In 2007, York, a Pennsylvania-based global provider of HVAC products and services, agreed to pay over $12 million for FCPA violations, including misconduct arising out of the Iraqi Oil-for-Food scandal. The settlement with York also involved illicit payments by YRMC to agents and Chinese government officials between 2004 and 2006. As part of that settlement, York retained an independent compliance monitor that reviewed the effectiveness of controls within its operations and until 2010, reported its findings to JCI. Although JCI made enhancements to its compliance program, these were ultimately ineffective as they failed to detect and deter subsequent violations by certain subsidiaries, as is described below.

b. SEC Settlement

According to the SEC Order against JCI, from 2007 to 2013, China Marine's Managing Director and approximately 18 employees in three offices orchestrated an embezzlement and bribery scheme involving $4.9 million in improper payments made to or through approximately 11 vendors to employees of state-owned shipyards, ship owners and others. The SEC determined that these payments resulted in $11.8 million in benefits to JCI.

The scheme purportedly involved participation by, or knowledge of, a majority of China Marine managerial and other personnel. First, the Managing Director approved requests for adding vendors with undisclosed affiliations with China Marine sales managers. Upon approval, sales managers generated purchase orders for bogus costs for parts and services from these vendors and submitted the purchase orders to the Procurement Manager for approval. The fake purchase orders were then transferred to the Finance Manager, who authorized the payments, often without required supporting documentation. The proceeds from the transactions with these vendors was returned to employees' personal bank accounts, where it was used to make payments to employees of Chinese state-owned customers and for personal enrichment.

Through the above arrangement, China Marine employees effectively circumvented JCI's risk-based compliance procedures. The employees intentionally utilized a scheme involving vendors considered to be "low risk" due to the value of the transactions and lack of obvious contact with government officials. For instance, the average value of the transactions was $3,400, an amount that avoided scrutiny and additional oversight from the JCI entity in Denmark responsible for overseeing China Marine's operations.

The SEC determined that throughout this six-year period, China Marine operated with limited oversight. Although JCI's Denmark office was responsible for supervising China Marine, the China Marine Managing Director largely had unfettered autonomy and JCI relied on his ability to supervise the operations. However, the Managing Director not only organized the illicit schemes but instructed employees to refrain from disclosing the payments to JCI lawyers, accountants, and auditors, and to avoid or delete related documentation.

The SEC concluded that JCI failed make and keep books, records, and accounts that fairly and accurately reflected its transactions. The agency also stressed JCI's failure to devise and maintain an internal accounting controls system that would have reasonably prevented and detected FCPA violations by China Marine, a high-risk subsidiary whose violations were considered to have been reasonably foreseeable based on historical failures. The SEC found that JCI's oversight was insufficient despite multiple compliance trainings provided to China Marine employees and periodic audits conducted on the company.

In particular, the SEC pointed to JCI's ineffective adoption of the independent monitor's recommendations to more closely integrate its marine business within the group's compliance culture, as well as JCI's decision to transfer oversight of China Marine to a newly hired, largely autonomous Managing Director. While China Marine was required to report to JCI's Denmark office, only a few transactions reached the reporting thresholds, and the SEC questioned whether managers in Denmark were sufficiently familiar with China Marine's operations to identify improprieties. The SEC Order also found that JCI failed to ensure that its audit and testing procedures would adequately review payments that were routinely below the testing thresholds. The lack of controls resulted in JCI's failure to detect misconduct until the first of two anonymous whistleblower reports made in December 2012, after the Managing Director's resignation.

Nonetheless, JCI self-reported the potential violations to the SEC and the DOJ in June 2013, shortly after it retained outside counsel to conduct internal investigations, and approximately one month after it received a second anonymous whistleblower compliant. The SEC commended JCI's thorough, complete, and timely cooperation in reporting and subsequent investigations. JCI provided to the agency, factual chronologies, "hot" document binders, interview summaries, and translations of numerous emails and documents. In addition to making local and foreign employees available for interviews, JCI provided "real time" reports of employee interviews, and took steps to secure and preserve evidence when it caught a Chinese employee shredding documents.

The SEC further acknowledged JCI's remedial efforts including the termination of 16 employees implicated in the illegal schemes. JCI also placed all suspect vendors on "do-not-use/do-not-pay" lists, closed down China Marine's offices, and transferred all remaining employees (which did not include sales or procurement personnel) to other subsidiaries. JCI additionally enhanced its integrity testing and internal audits to include enhanced scrutiny of vendor on-boarding, and now implements random site audits to assure delivery of goods on purchase orders.

c. DOJ Declination

The DOJ's Declination Letter cited the FCPA Pilot Program as the basis for its no-action relief against JCI. According the DOJ, the case against JCI was closed for the company's voluntary disclosure of misconduct, the thoroughness of its internal investigations, and full cooperation as reflected in its

provision of all known relevant facts to the DOJ, along with its agreement to continue to cooperate with any ongoing investigations of individuals. The DOJ also highlighted JCI's disgorgement and civil penalty to the SEC, its enhanced compliance program and internal accounting controls, and full remediation, including termination of employees and high-level executives involved in the misconduct.

5. Key Energy

On August 11, 2016, Key Energy Services, Inc. ("Key Energy"), a Houston-based provider of onshore energy production services that is listed on the New York Stock Exchange, agreed to pay $5 million in disgorgement to resolve internal controls and books and records violations in connection with the conduct of its Mexican subsidiary, Key Mexico. Key Mexico had made approximately $561,000 in illegal payments via a consulting firm to an employee of Petróleos Mexicanos ("Pemex"), a Mexican state-owned company, between August 2010 and May 2014. The SEC Cease-and-Desist Order ("Order") noted that it did not impose a penalty in addition to the imposed disgorgement in part because of Key Energy's vulnerable financial condition, and the Order included a provision governing payment of disgorgement in the event the company goes into bankruptcy. In April 2016, Key Energy disclosed that the DOJ had declined to prosecute related misconduct.

Key Energy provides rig-based services to major oil and gas companies across the United States, Mexico, Colombia, Russia, and the Middle East. In September 2015, the company announced its failure to meet the NYSE continued listing standard of $1 minimum trading price. The company's shares continued to trade below this threshold, and on July 27, 2016, Key Energy announced that it would not contest the NYSE determination to commence de-listing of its stock. Moody's also downgraded the company's bonds to highly speculative, and Key Energy now trades on the over-the-counter markets.

The following summary is based on the facts alleged by the SEC in its administrative order; Key Energy was not required to admit or deny the SEC's factual allegations.

a. Payments to Pemex Employee Through Sham Consultancy Company

Key Mexico hired the consulting firm in approximately August 2010. The SEC found no evidence that the consulting firm ever provided genuine services; instead, it appears to have been a vehicle for conveying payments to an official who worked in the Pemex department that negotiated and approved certain contracts. Of the $561,000 paid to the Pemex employee through the consulting company, at least $229,000 in payments were improperly described in Key Mexico's accounting system as "expert advice on contracts with the new regulations of Pemex/Preparation of technical and economic proposals/contract execution." In exchange for the payments, the Pemex employee assisted Key Mexico with bidding for contracts, lobbying for lucrative amendments to existing contracts, and by providing non-public information about tenders. The Pemex employee's connection to the consultancy company was known to Key Mexico's Country Manager, who also paid approximately $6,400 from his personal account to the Pemex employee's personal account.

We note that Key Energy is not the first company to come under scrutiny for alleged bribes paid to Pemex officials. The FCPA settlements involving Hewlett-Packard (2014), Bridgestone (2011), and Paradigm (2007) each involved underlying conduct including bribery of Pemex officials.

In 2011, Key Energy became aware of the relationship between its Mexican subsidiary and the consulting firm, although Key Energy did not learn of the connection to the Pemex employee. Nonetheless, Key Energy allowed the relationship to continue despite several violations of its own internal compliance program, including (i) the relationship had not been pre-approved by the parent company; (ii) there was no written contract between the subsidiary and the consultant; and (iii) no due diligence had been performed on the consultant. Key Mexico also allowed payments to be made to the consultant despite not having adequate proof of services documentation. Key Mexico finally regularized its relationship with the consultant through a written contract two years later, in 2013. Key Energy and Key Mexico never conducted due diligence, and therefore Key Energy did not discover the relationship between the Pemex official and the consultancy company until 2014, when the SEC notified Key Energy of its concerns and Key Energy launched its own internal investigation.

b. Christmas Raffle Gifts to Pemex Officials

The SEC also highlighted Key Energy's failure to examine $118,000 in gifts provided by Key Mexico to Pemex officials, and approved by Key Energy on the understanding that the gifts were for a Pemex company Christmas party raffle. First, Key Mexico hid from its parent company the fact that $55,000 of the gifts were not actually earmarked for the raffle, but were instead given to "approximately 130 specific Pemex officials working in the regions in which Key Mexico operated." Second, the SEC noted that Key Energy failed to consider that the $118,000 donation was 26 times larger than the raffle donation Key Mexico made the prior year. The Order stated that Key Energy "failed to respond effectively to signs indicating that the gifts provided . . . were being given as rewards for providing Key Mexico with increased business that year" in part because Key Energy "failed to consider the implications of the explanation by Key Mexico's country manager that the higher gift amount in 2012 was correlated to Key Mexico having done more business with Pemex that year." The SEC noted that, if the parent company had asked for more information, it would have learned that its subsidiary was giving Christmas gifts to Pemex officials at the same time that the subsidiary was "engaged in ongoing negotiations with Pemex, including negotiations to obtain additional funding for work required under its contracts with Pemex."

c. Cooperation and Remedial Measures

In January 2014, the SEC informed Key Energy that it was investigating potential FCPA violations. Key Energy commenced a broad internal investigation in response. The Mexico Country Manager resigned in February 2014. In April 2014, Key Energy reported its initial findings to the SEC, including information that the departed Country Manager had promised bribes to Pemex employees.

Crediting the company's cooperation and "significant remedial measures" in the settlement, the SEC highlighted: (i) the appointment of a new Chief Compliance Officer who supervised the overhaul of Key Energy's compliance program, and who visited each international location to conduct training for all international employees; (ii) the development of compliance policies and adoption of enhanced due diligence procedures for vendors; (iii) the suspension of payments to vendors and third parties in Mexico; (iv) the manual review of over 600 vendors, including targeted reviews of vendors in Russia and Colombia; (v) enhanced financial controls in Mexico, Colombia, and Russia; (vi) an enhanced corruption risk assessment process; (vii) the hiring of new controllers in Colombia and Mexico, and enforcing reporting to the U.S. Controller and the CFO; and (viii) the coordinated exit of all markets outside North America, including Mexico.

d. Lessons from Key Energy

This settlement serves as a reminder that compliance programs must be effectively implemented. The SEC Order noted that Key Energy already had a set of compliance policies including a Code of Conduct, FCPA Policy and Procedure, and other documents. However, the Commission found that Key Energy failed to implement its compliance program or to implement sufficient accounting controls that would have prevented improper payments or provided reasonable assurances that its subsidiaries' transactions were executed in accordance with its internal policies. In addition, the Key Energy settlement is another reminder that companies must adequately respond to red flags: Key Energy became aware of Key Mexico's relationship with the consultant two years after the relationship had been entered into—already a significant failure and a red flag from a compliance standpoint—and yet waited another two years before insisting on following the company's own requirements that third parties be engaged through written contracts, and never conducted due diligence on the consultant. These failures are related to the over-arching problem of Key Energy's under-empowered compliance program: the SEC Order noted that Key Energy had "no independent compliance staff or internal audit function that had authority to intervene into management decisions and, if appropriate, take remedial actions."

6. LATAM Airlines, LAN Airlines, and Ignacio Cueto Plaza

On July 25, 2016, LATAM Airlines Group S.A. ("LATAM"), as successor-in-interest to LAN Airlines S.A. ("LAN"), agreed to pay $22 million to the DOJ and SEC to resolve criminal and civil FCPA books and records and internal controls violations for misconduct in Argentina. LATAM admitted that executives of LAN and of its subsidiaries paid bribes to Argentine labor union officials through a fictitious $1.15 million contract with a third party consultant. In return, the unions agreed to refrain from enforcing certain contractual terms and labor rules, which resulted in an estimated benefit of $ 6,743,932 in decreased labor expenses to LAN's Argentine subsidiary. In February 2016, the SEC settled related books and records and internal controls charges with LAN CEO, Ignacio Cueto Plaza, who paid a $75,000 civil penalty and committed to a number of compliance obligations.

LATAM is a NYSE-listed airline holding company based in Chile, with operations across the Americas, Australia, and Europe. LATAM was formed as a result of a 2012 merger between Chilean airline LAN, and TAM Airlines S.A., a Brazilian company. Prior to the merger, LAN shares traded as ADRs on the NYSE, and the shares of LATAM continued to be traded as ADRs following the merger. All LAN subsidiaries, including Miami-based LAN Cargo and Atlantic Aviation Investments LLC ("AAI"), incorporated in Delaware, were subsequently merged into LATAM.

a. Union Negotiations, the One Function Rule, and a Consultant

In April 2005, LAN purchased 49% of AERO 2000, a non-operating airline in Argentina. The agreement required that LAN employ personnel of two other defunct airlines under pre-existing collective bargaining agreements ('CBAs"). Upon commencing operations, AERO 2000, renamed LAN Argentina S.A. ("LAN Argentina"), began experiencing increased demands from five labor unions that represented the workers it had acquired under the April 2005 arrangement. The unions threatened to enforce the "one function rule," provided in the CBAs, that restricted workers to a narrowly defined single role, and would have required LAN Argentina to double its workforce. Though rarely enforced in practice, the rule provided the unions with leverage, which was used during a contentious campaign for wage increases, that also included strikes and work stoppages.

During the course of the campaign for wage increases, LAN Cargo's Vice President of Business Development was contacted by an Argentine lawyer (the "consultant") who, during the relevant period, served as a Cabinet Advisor to the Secretary of Argentina's Ministry of Transportation. The consultant offered to negotiate with the labor unions on LAN's behalf in return for a $1.15 million payment that would be shared with parties who had influence over the unions. With approval of Mr. Cueto Plaza, the LAN Cargo VP agreed to engage the government official as a consultant.

The consultant successfully negotiated with the labor unions on LAN's behalf, resulting in an agreement to refrain from enforcing the one function rule against LAN Argentina for a four-year period and to a lower wage increase than initially sought, resulting in an overall benefit of approximately $6.744 million to LAN. In October 2006, to support the $1.15 million payment, LAN officials agreed to enter into a contract with the consultant for a fictitious study of Argentine and regional air routes and a legal analysis on Argentine law. Although neither the draft agreement nor the services were ultimately executed, the consultant's company submitted invoices to LAN, which made the payments to personal accounts owned or controlled by the consultant and his family members. The LAN Cargo VP directed the consultant to address three of four invoices to AAI, another LAN subsidiary, and the payments were recorded in AAI's books as made to "other debtors," and approved by LAN executives, including Cueto Plaza. Payments in excess of $1 million were made to the consultant's brokerage account in Virginia, USA, while other payments were made to an account in Spain.

b. Terms of the LATAM DPA and SEC Order

The three-year DPA includes an independent compliance monitor for a period of not less than 27 months and a criminal penalty of $12.75 million, a sum computed under the U.S. Sentencing Guidelines with a base fine of $8.5 million and a 1.5 multiplier. The DOJ described several reasons why LATAM paid a criminal penalty within the U.S. Sentencing Guidelines range, rather than one discounted from the bottom of the sentencing range. For example, although LATAM ultimately fully cooperated, the DOJ described it as having failed to voluntarily disclose the misconduct in a timely manner, given that disclosure occurred only after press reports of investigations by Argentine and Chilean law enforcement, causing a four-year delay and the loss and destruction of potentially relevant evidence including through routine data retention policies. Further, while the company agreed to future cooperation with the DOJ, the DPA noted that LATAM failed to adequately remediate the misconduct and failed to discipline any of the responsible employees (including a high-level executive), which it described as undermining the effectiveness of its compliance program. The DOJ also identified the company's prior enforcement history, including LAN Cargo's 2009 guilty plea for criminal conspiracy to fix prices in the airline cargo industry between 2003 and 2006.

In addition to improving its compliance policies and procedures, LATAM agreed to provide full disclosure and cooperation with any FCPA investigations of the company, its officers, directors, employees, agents, partners and consultants, and with regulatory and other enforcement agencies when requested by the DOJ. In connection with the DPA, the DOJ also agreed to conditionally release LATAM from civil and criminal liability for certain conduct concerning gifts, entertainment, and travel expenses to government officials in Argentina between 2005 and 2011, that had been disclosed to the DOJ prior to DPA.

In its settlement with the SEC, LATAM agreed to cooperate with other judicial or administrative proceedings, to appoint an independent compliance monitor, and to pay $9,437,788, consisting of

disgorgement and prejudgment interest. The SEC Order considered remedial steps taken by LAN and its successor entity, emphasizing the evolution of the company's compliance program from the initiation of a basic compliance program in 2008 and the engagement of a new General Counsel and Vice President of compliance to the 2013 adoption of a new Code of Conduct and other internal polices including on anti-corruption, gifts, travel, hospitality and entertainment, procurement and payments. The SEC noted that LATAM hired several compliance personnel, including a Compliance Manager who oversees a team of twenty.

c. LAN CEO Ignacio Cueto Plaza's $75,000 Penalty and Remedial Actions

On February 4, 2016, the SEC announced that it had issued a Cease-and-Desist Order against Ignacio Cueto Plaza, the sitting CEO of LAN, in connection with his role in the conduct described above. Cueto was charged with causing LAN to violate the books and records and internal control provisions of the FCPA as a result of his role as President and Chief Operating Officer of LAN from 2005 until the airline merged with TAM in 2012, at which time he became the CEO of LATAM.

In settling the administrative proceeding, Cueto agreed, without admitting or denying the SEC's findings, to undertake a series of remedial actions and to pay a civil money penalty of $75,000. The remedial actions included agreeing to complete any required anti-corruption and related ethics training required by LAN, which the SEC noted at a minimum would include annual live and online anti-corruption training, and cooperating with the SEC in connection with any related judicial or administrative proceeding or investigation. The SEC also noted that Cueto is now subject to LATAM's enhanced compliance structure and internal accounting controls and is required to certify compliance with LATAM's new Code of Conduct (adopted in 2013), as well as other internal corporate policies, including an Anti-Corruption Guide and a Gifts, Travel, Hospitality and Entertainment Policy. Cueto was credited with having attended Corporate Governance Training and provided a certification confirming acknowledgement of the Code of Conduct, and relevant applicable regulations and Company policies. Cueto also executed an amendment to his employment agreement under which he acknowledged being informed about LATAM's Manual for the Prevention of Corruption and that he is responsible for performing his duties in compliance with the highest ethical standards and all Company policies and procedures.

7. Las Vegas Sands

On April 7, 2016, the SEC imposed a settled cease-and-desist order against Las Vegas Sands Corp. ("Vegas Sands") to resolve allegations that the Company had violated the books and records and internal controls provisions of the FCPA in connection with its operations in China and Macau. Under the settlement, Vegas Sands agreed to pay a $9 million civil penalty to the SEC and retain an independent compliance monitor for a period of two years.

Vegas Sands is a Nevada-based casino and resort operator that was founded by billionaire Sheldon Adelson. The Company owns and operates resorts and casinos in the U.S. and Asia through a network of subsidiaries and is traded on the NYSE.

According to Company filings, the SEC first subpoenaed Vegas Sands in February 2011, and requested that the Company produce documents relating to its FCPA compliance. At the same time, the Company also learned that the DOJ was conducting a similar investigation. Vegas Sands believed that the SEC subpoena was triggered by a 2010 lawsuit filed by Steven Jacobs, the former CEO of Sands

China Ltd. ("Sands China"), a Vegas Sands subsidiary that is traded on the Hong Kong Stock Exchange. Jacobs' lawsuit alleged breach of contract against Vegas Sands and Sands China, and breach of the implied covenant of good faith and fair dealing and tortious discharge in violation of public policy against Vegas Sands. His case devolved into a nearly six-year long discovery dispute before being resolved on May 31, 2016 through a confidential settlement.

The SEC alleged that between 2006 and 2011, Vegas Sands failed to devise and maintain a reasonable system of internal accounting controls over its operations in China and Macau and failed to accurately record various transactions in its books and records. The SEC made numerous allegations in the cease-and-desist order, most of which center around Vegas Sands' relationship with a consultant in China who, according to the SEC, received over $62 million during this time period.

The SEC indicated that in 2006, the then-Vice President of Vegas Sands Asian Development identified a former Chinese government official to serve as a consultant and assist the Company with its activities in China. According to the SEC, Vegas Sands used the consultant's services on a number of projects that involved significant internal controls failures, the most notable of these being Vegas Sands involvement with a Chinese basketball team, the purchase of an office building in Beijing, and Vegas Sands' retention of a ferry management company.

a. The Basketball Team

The SEC alleged that, in early 2007, Vegas Sands' President sought to purchase a professional basketball team in China in order to promote the Company and bring customers to the Vegas Sands-owned Venetian Macau, which has its own sports arena. Because a gaming company is not permitted to own a basketball team under the Chinese Basketball Association's rules, Vegas Sands allegedly used the consultant as a front to buy the team. The consultant established a subsidiary to purchase the team, and according to the SEC, one of Vegas Sands' Chinese subsidiaries transferred over $6 million to the subsidiary.

In September 2007, a Vegas Sands finance director apparently raised concerns regarding the basketball transaction to the CFO of Vegas Sands. According to the SEC, the finance director was particularly concerned with the repeated transfer of funds to the consultant without any supporting documentation regarding the basketball team's need for the funds or the manner in which they were used. The CFO instructed the director to conduct a review of the team's books; however, the audit was apparently obstructed by the consultant. The SEC alleged that the President of Vegas Sands subsequently arranged to have the finance director placed on administrative leave and eventually terminated.

In October 2007, the CFO of Vegas Sands allegedly expressed a number of concerns internally regarding the basketball team, including the manner in which Vegas Sands had provided the $6 million to the consultant for the team, the inability of Vegas Sands to track funds that it had transferred to the consultant, and a lack of recourse if the consultant failed to purchase the team. In late 2007, Vegas Sands apparently retained an international accounting firm to review the transaction. When the firm was instructed to cease its investigation in February 2008, it apparently had already identified over $700,000 in unaccounted funds that had been transferred to the consultant. The SEC alleged that despite these findings, more than $5 million in additional payments were subsequently made to the consultant in connection with the team.

According to the SEC, in total between March 2007 and January 2009, Vegas Sands paid approximately $14.8 million to the consultant in connection with the basketball team pursuant to a series of sponsorship and advertising contracts. Approximately $6.9 million of this amount was allegedly transferred without the appropriate authorizations or necessary supporting documentation.

b. Development of a Resort on Hengqin Island and the Beijing Business Center

According to the SEC, beginning in 2006 Vegas Sands' President sought to develop a resort on the Hengqin Island, a new resort district in China. The Vegas Sands President allegedly understood that any such development would need the approval of various governmental entities and sought to partner with a Chinese company that could improve Vegas Sands' ability to obtain the needed approvals. Vegas Sands' consultant allegedly introduced the Company to the chairman of a state-owned entity ("SOE") who was thought to have particular influence in connection with Hengqin Island.

According to the SEC, Vegas Sands initially attempted to form a joint venture with this state-owned entity. Under the proposed joint venture arrangement, Vegas Sands would make a real-estate investment by purchasing a building in Beijing from the entity and the entity would help Vegas Sands develop Hengqin. The SEC alleged that the chairman of the SOE and Vegas Sands' consultant indicated, however, that it would be necessary to have a third company involved in the relationship to act as a "beard" because the SOE's board would not approve a direct relationship with a casino operator.

Accordingly, instead of the joint venture, Vegas Sands' President approved using the consultant to purchase the Beijing building from the SOE. Vegas Sands apparently planned to turn the building into a business center to assist U.S. companies seeking to do business in China. The building was to be named the "Adelson Center" and was scheduled to open in August 2008.

The SEC alleged that no research or analysis was done to determine whether the need existed for the business center or whether it was likely to generate a profit of loss. Numerous employees were apparently also concerned that the purchase was solely for political purposes. Nevertheless, between July 2007 and February 2008, approximately $43 million was transferred to one of the consultant's entities to purchase the real estate. According to the SEC, there were also a number of other payments made related to the building that were not properly approved or that had questionable justifications. For example, the SEC noted that the title to the basement of the building was not transferred in the initial sale and that Vegas Sands subsequently transferred $3.6 million to the consultant as prepayment for a five year lease of the basement even though it was unclear how the consultant had obtained title to the basement. The SEC also noted that between November 2008 and July 2009, approximately $900,000 in purported property management fees were paid to an entity controlled by the consultant, even though the building was managed by a property manager affiliated with the SOE during all relevant times.

In total, Vegas Sands transferred approximately $61 million to the consultant in connection with the real estate deal. After the project was cancelled in late 2008, Vegas Sands received only $44 million of that sum back from the consultant.

c. Macau Ferry Operation

According to the SEC, in 2007 Vegas Sands set up a high-speed ferry business to transport customers from China and Hong Kong to Macau. Vegas Sands sought to contract with a ferry services provider to operate the ferries. Apparently under pressure from Vegas Sands president, Vegas Sands employees selected two entities: (1) a recently formed ferry company that was partially owned by a Chinese state-owned ferry company, and (2) a shipping company owned indirectly by Vegas Sands' consultant and the SOE Chairman. The SEC noted that Vegas Sands' President stated in an email that the selection of the newly formed ferry company would be politically advantageous. The SEC also indicated that the ferry company had an annual budget that included business entertainment. Even though Sands China's internal audit department found that the company was spending the majority of its entertainment expense on government officials, and had indicated that this spend was necessary to secure routes for ferries, the auditors failed to elevate this issue within the Company.

d. Additional Conduct

The SEC also alleged that Vegas Sands' internal accounting controls were deficient in a number of other areas. The Agency noted that even though Vegas Sands had a policy requiring backup documentation for reimbursement of payments to outside counsel in excess of $100, this policy was not uniformly enforced and in 2009, an attorney was reimbursed for "expenses in Beijing" in the amount of $25,000 without providing documentation to support the charges. According to the SEC, the attorney later stated that he actually requested the funds on behalf of a friend who was an unpaid consultant to Vegas Sands. This payment was also allegedly recorded in the Company's books and records as a reimbursement of legal expenses, despite the lack of documentation.

The SEC also noted that Vegas Sands provided complimentary items and services such as restaurant meals and hotel stays to actual and potential gaming customers and business contacts in Macau. According to the SEC, however, casino employees often failed to record the recipients of these complimentary items, resulting in an inability to track or audit this practice or identify whether complimentary items were provided to government officials or politically exposed persons.

e. Cooperation and Remedial Efforts

In determining an appropriate resolution for this matter, the SEC indicated that it took into consideration Vegas Sands' cooperation with Commission staff and prompt remedial actions. Vegas Sands' Audit Committee retained outside counsel to conduct an internal investigation and shared the findings of the investigation with the SEC, providing information that otherwise may not have been available to SEC staff. Vegas Sands facilitated interviews with key foreign witnesses and voluntarily produced translations of key documents including large volumes of business, financial, and accounting records. The company also hired a new general counsel and new heads of internal audit and compliance, and established a new Board of Directors Compliance Committee. In addition, Vegas Sands increased the compliance and accounting budgets, updated certain key documents including its Anti-Corruption Policy, and developed and implemented enhanced anti-corruption training and an electronic procurement and contract management system.

8. Nordion and Mikhail Gourevitch

On March 3, 2016, Nordion (Canada) Inc. ("Nordion Canada"), a privately held Canadian company that is a successor in interest to global health science company, Nordion, Inc. ("Nordion"), agreed to pay a civil penalty of $375,000 to the SEC to settle allegations that Nordion violated the books-and-records and internal accounting controls provisions of the FCPA with respect to its application for governmental approval to distribute its liver cancer treatment, TheraSphere, in Russia. Prior to becoming a privately held company (and during the period relevant to the conduct described below), Nordion had its common stock registered with the SEC pursuant to Section 12(b) and was traded on the NYSE.

Separately, Mikhail Gourevitch, an engineer formerly employed by Nordion, agreed to pay $178,950 to the SEC to settle allegations that he violated the anti-bribery, books-and-records, and internal controls provisions of the FCPA in connection with his role in the scheme. The SEC's settlement with Mr. Gourevitch, a dual Israeli and Canadian citizen, included disgorgement of $100,000, prejudgment interest of $12,950, and a civil penalty of $66,000.

The settlements focus on Nordion's use of an agent between 2004 and 2011 to attempt to obtain approval to distribute TheraSphere in Russia. According to the SEC, during this period Nordion (i) failed to conduct virtually any due diligence on the agent; (ii) failed to provide adequate anti-corruption training to its employees; (iii) paid invoices even though they lacked detail and directed Nordion to make payments to offshore bank accounts for entities that were unknown to Nordion; and (iv) did not have adequate policies and procedures in place to detect corruption risks.

Although Nordion had reported the fact and results of its internal investigation to both U.S. and Canadian authorities, it was reported in March 2016 (following the SEC settlement) that the Royal Canadian Mounted Police closed their own investigation into this matter without taking further action against Nordion or Nordion Canada.

a. Use of Third-Party Agent in Russia

According to the SEC, during the summer of 2000, Mr. Gourevitch informed Nordion that his childhood friend in Russia could help the company purchase a medical isotope known as cobalt-60 from the Russian Government. Nordion had previously purchased cobalt-60 from the Canadian government and then resold the product to health care institutions. Soon thereafter, the company informally authorized the agent to meet with Russian officials on Nordion's behalf. Nordion subsequently signed a written consulting agreement with the agent in approximately March 2002, despite having performed little or no due diligence. The SEC noted that despite having no experience in the nuclear power industry, with nuclear medicine or with medical isotopes, the agent was successful in helping Nordion obtain the cobalt-60 supply contracts.

Following this success, Nordion enlisted the agent in 2004 to assist the company in obtaining approval from the Russian Government to distribute its liver cancer treatment, TheraSphere. Nordion entered into a contract with the agent to register, license and distribute TheraSphere and ultimately paid the agent a total of $235,043 for this purpose between 2005 and 2011. Ultimately, however, the project was unsuccessful and Nordion was never able to distribute TheraSphere in Russia.

According to the SEC, Mr. Gourevitch, who remained Nordion's primary contact with the agent, knew that the agent intended to use a portion of its compensation from Nordion to bribe Russian officials in an attempt to obtain approval for the drug. The agent also allegedly returned at least $100,000 of its fee directly to Mr. Gourevitch to compensate him for his role in the scheme.

The SEC alleged that Mr. Gourevitch and the agent explicitly discussed the scheme in email exchanges, which were conducted in Russian, apparently to avoid disclosure of the scheme. In one exchange cited by the SEC, Mr. Gourevitch is alleged to have altered cost estimates provided by the agent, which had included bribes to Russian officials as "unofficial costs" to "ensure the favorable acceptance of TheraSphere." Mr. Gourevitch is then alleged to have informed the agent (in Russian) that "Nordion does not want to see the bribes in your cost estimate and justification."

b. Disclosure and Cooperation

In August 2012, Nordion disclosed to the SEC and DOJ, as well as to Canadian authorities, that it had discovered evidence that improper payments may have been made to a Russian government official, and was conducting an internal investigation related to such payments. The SEC noted that it was refraining from imposing a greater penalty on the company in light of its cooperation with the investigation and remedial efforts, which included the fact that Nordion cooperated with investigations in both countries (including by making individuals available for interview) and hired outside counsel to revise its anti-corruption policies and procedures. The company's remedial measures included additional compliance staffing (led by a new Director for Corporate Compliance), as well as the incorporation of a compliance component as part of its annual employee performance reviews. Nordion also conducted additional anti-corruption, internal accounting controls and finance trainings to board members, management and employees, and enacted an enhanced protocol for the use of third party agents, which requires all agents to enter into contracts that include FCPA warranties and representations and to adopt Nordion's anti-corruption policies.

9. Nortek

On June 3, 2016, the DOJ issued a declination letter to Nortek, Inc. ("Nortek"), a Rhode Island-based company listed on the NASDAQ Global Select Market. On June 7, Nortek also entered into a Non-Prosecution Agreement ("NPA") with the SEC, agreeing to pay $322,058 ($291,403 in disgorgement and $30,655 in prejudgment interest) to resolve allegations that Nortek, through the actions of a Chinese subsidiary, violated the FCPA's internal controls and books and records provisions. In addition to the disgorgement and interest, Nortek reported that it spent over $3.1 million in connection with its investigation by the end of fiscal year 2015.

Nortek manufactures and sells a range of construction, remodeling, computer, heating, and security products, and indirectly owns Linear Electronics (Shenzhen) Co. Ltd. ("Linear China"), a Chinese subsidiary at the center of the alleged misconduct. According to the NPA's Statement of Facts—which, in the event that Nortek breaches the NPA, Nortek agreed not to "dispute, contest, or contradict"—between 2009 and 2014, Linear China employees, including its managing director, accounting manager, and customs liaison officer made or approved improper payments including transfers of cash, gift cards, meals, travel, entertainment and accommodation to local Chinese officials "to procure preferential treatment, relaxed regulatory oversight, and/or reduced customs duties, taxes, and fees."

These improper payments were made at least monthly, over the five-year period, during which Linear China made over 400 transactions totaling approximately $290,000 to officials in China's customs, environmental protection, health inspection, labor, police, telecommunications, and tax agencies. Based on the total amount and number of reported transactions to numerous recipients (approximately $290,000 paid in over 400 transactions), the average size of each improper payment was under $750.

The SEC found that Nortek's failure to devise and maintain a system of internal controls enabled the scheme to go undetected during the period, and that Nortek failed to notice obvious red flags in Linear China's financial records, including the size of meals and entertainment expenses. Nortek also failed to review or test Linear China's accounts, or to establish procedures to the train the subsidiary's employees in anti-corruption compliance. In addition, Linear China's accounting department actively participated in the misconduct when it "in some instances…entered the illicit payments as entries in various accounts and supported the expenditures with false or misleading information and supporting documentation."

a. Self-Reporting, Cooperation, and Remedial Measures

In 2014, an internal audit identified questionable payments in Linear China's books and records, prompting Nortek to conduct an internal investigation of Linear China's misconduct, including through forensic analysis of Linear China's financial records. The investigation confirmed that improper payments had been made to Chinese officials in Shenzhen. Before completing its full investigation, Nortek self-reported its preliminary findings to the SEC and DOJ.

Nortek provided the SEC with comprehensive disclosure of the findings of its investigations, including identifying all improper payments and potentially improper payments made to foreign officials. The SEC stressed that Nortek assisted the SEC by "effectively segregating, organizing, and presenting the most salient documents to the staff" to make the SEC's review easier. The SEC noted that Nortek also assisted by making witnesses available—particularly including witnesses located in China—and by providing summaries of witness interviews, voluntarily translated documents, and timely updates of newly discovered information in the course of the internal investigation. Nortek also evaluated its other Chinese businesses to determine whether improper conduct had occurred there as well.

Nortek took immediate actions to end the improper payments and conducted significant remedial measures including the termination of employment of the Linear China managing director and CFO and an extensive review of its compliance program. The SEC highlighted specific corrective steps including: (i) provision of mandatory FCPA and anti-corruption training to its employees across the globe, and in appropriate languages, (ii) strengthening of anti-corruption policies, (iii) development of a compliance committee with representatives from management and subsidiaries to supervise compliance implementation, and (iv) modification of its internal audit schedule to prioritize high-risk geographic locations.

b. DOJ Declination: Factors Cited in Decision Not to Prosecute

The DOJ's one-page declination letter cited the FCPA Pilot Program and stated that, "despite the bribery by employees of the Company's subsidiary in China," the DOJ declined to prosecute Nortek because of a number of factors, including but not limited to:

- The fact that Nortek's internal audit function identified the misconduct;

- Nortek's prompt voluntary self-disclosure;
- Nortek's thorough investigation;
- Nortek's fulsome cooperation including identifying all involved or responsible individuals and providing all facts relating to that misconduct to the DOJ;
- Nortek's agreement to continue to cooperate in any ongoing investigations of individuals;
- Nortek's newly enhanced compliance program and internal accounting controls;
- Nortek's full remediation, including terminating all five individuals involved in the China misconduct, two of whom were high-level executives of the China subsidiary; and
- Nortek's disgorgement to the SEC.

10. Novartis

On March 23, 2016, Swiss-based pharmaceutical company Novartis AG ("Novartis") agreed to pay approximately $25 million to settle SEC allegations that it violated the books and records and internal accounting controls provisions of the FCPA through the conduct of two of its subsidiaries in China. The SEC Cease and Desist Order (the "Order") states that Novartis offered, and the SEC had accepted, the settlement in which the company (without admitting or denying any of the findings in the Order) agreed to disgorge $21,579,217, pay prejudgment interest of $1,470,887, and pay a civil penalty of $2,000,000. Though based in Basel, Switzerland, Novartis is traded on the New York Stock Exchange and employs 120,000 people in 180 countries.

As described in greater detail below, the SEC found that between 2009 and 2013, employees and agents of two Novartis subsidiaries in China used various methods—including false receipts and fake medical studies—to provide money and things of value to Chinese health care providers ("HCPs") to influence them to favor Novartis products. They would then improperly record these costs as legitimate expenses for conferences, lecture fees, marketing events, educational seminars, and medical studies. The false receipts were used to obtain reimbursement money, which was used to provide improper travel and entertainment to Chinese HCPs as rewards and inducements for prescribing Novartis products.

The settlement appears to have arisen from the results of an internal investigation prompted by whistleblower allegations. In August 2013, one month after the arrest of four GlaxoSmithKline ("GSK") sales employees in China as part of an investigation into alleged bribery of doctors and healthcare officials, a Chinese newspaper published allegations that Novartis and French drug maker Sanofi S.A. had also engaged in allegedly corrupt activity which bore similarities to the allegations made against GSK.

According to the paper, an unnamed former Novartis employee who supervised drug sales to large Beijing hospitals alleged that she was instructed to pay RMB50,000 in bribes to doctors in order to obtain Rmb640,000 worth of cancer drug sales during June and July of 2013. At the time, Novartis responded by stating that it had launched an internal investigation into the claims, and added that the whistleblower had threatened Novartis with unspecified actions if the company did not pay her

RMB5,000,000 in compensation. The Chinese government also announced that it would intensify efforts to investigate corruption in the pharmaceutical sector. This prompted speculation among some journalists that Chinese corruption probes were politically motivated—aimed at extracting lower prices from foreign drug makers and/or bolstering China's domestic pharmaceutical industry.

The SEC Order stated that Novartis conducted an "expansive review" into its relationships with third party travel and event planning vendors. This review, the results of which were shared with the SEC, revealed that that a significant percentage of events did not comply with existing Novartis policies and procedures, including "events for which no record existed to verify it had occurred, events for which inconsistent records existed, and events that could not be verified from available information."

Employees at one subsidiary, Shanghai Novartis Trading Ltd ("Sandoz China"), provided cash, gifts, entertainment, and favors to HCPs and their family members, with the knowledge of Sandoz China management. Sandoz China employees submitted fake or falsified receipts for reimbursement, and then used the cash to fund gifts and entertainment provided to the HCPs. Certain Sandoz China employees maintained spreadsheets that directly linked certain cash values (referred to as "investments") paid to HCPs in exchange for a number of monthly Novartis product prescriptions. HCPs were categorized into tiers, including one described by Sandoz China employees as "money worshippers." The annual "investment" kickbacks ranged from several hundred to several thousand dollars per year per HCP. Sandoz China employees also organized phony medical studies, that were not approved by the Novartis Global Internal Quality Assurance group as are legitimate medical studies, and paid HCPs to collect and analyze data regarding patient reactions to Novartis drugs. Although no genuine data was collected, payments made under these purported studies totaled approximately $522,000 between 2009 and 2010.

Besides gifts and cash, Sandoz China employees regularly retained complicit local Chinese travel and event planning companies to pay the travel expenses for HCPs in connection with educational conferences and business events. However, the travel often "did not include an educational purpose or the scientific/educational components were minimal in comparison to the sightseeing or recreational activities, and were instead a method of influencing the HCPs. The related expenses were approved and paid with little or no supporting documentation." In one case highlighted by the SEC Order, Novartis paid a Chinese travel company $25,000 for a medical lecture by certain HCPs to educate other HCPs, "despite the lack of any confirmation: (1) that the lecture was organized by Sandoz China and held in the venue for which an invoice was submitted; and (2) that the lecture was attended by HCPs."

Like Sandoz China, the other Novartis subsidiary named in the Order—Beijing Novartis Pharma Co., Ltd. ("Novartis China")—organized "thousands" of marketing events through numerous (unnamed) third party travel and event planning vendors that arranged venues, flights, hotels, transit, food and entertainment. Without describing specific examples of conduct, the Order stated that Novartis "did not have sufficient internal accounting controls or anti-corruption compliance measures" in place, failed to conduct adequate due diligence on the third parties, failed to require sufficient proof of services documentation for the expenses submitted by the third parties, and failed to provide adequate anti-corruption training to its personnel with respect to the third party relationships. The Order noted, however, that Novartis had taken prompt remedial measures to improve such control shortcomings, including "overhauling its anti-corruption policies and procedures, terminating and/or imposing other disciplinary sanctions against culpable employees, suspending vendor relationships and payments, doubling its training initiatives, re-organiz[ing] its compliance function to include enhanced oversight by

regional and headquarter compliance personnel, and eliminat[ing] the use of vendors to support external meetings."

The SEC Order contains continuing obligations for Novartis. Although it did not impose an external monitor or compliance consultant, it requires Novartis to provide regular reports to the SEC over the next two years on the progress of its remediation efforts. Specifically, the Order requires Novartis to (1) conduct an initial review and submit an initial report within 180 days of the Order, and (2) conduct and prepare two follow-up reviews and reports within 270 days, and 450 days respectively, of completion of the initial report. The Order also requires Novartis to certify its compliance with the SEC undertakings, providing sufficient support to evidence such compliance.

At press time, media reports indicated that over 25 individuals are also facing legal repercussions in South Korea for conduct similar to that which is described above in China. Korean authorities raided Novartis Korea's offices in Seoul in February 2016, and the subsidiary's first Korean CEO, Moon Hak-sun, was suspended from all duties in April 2016. Then, on August 8, 2016, South Korean prosecutors indicted six current and former Novartis Korea executives, including Moon, principally on charges that they paid more than $2.3 million in bribes to doctors through a program of academic events sponsored by trade journals in exchange for prescriptions of Novartis products. Reportedly, the Seoul Western District Prosecutor's Office also indicted six medical journal publishers and fifteen doctors on related charges. According to a spokesman for Novartis, South Korean prosecutors have asked the government to suspend Novartis' operations in the country. In a statement reported by the press, Novartis admitted some improper conduct, acknowledging that "certain associates in Korea conducted small medical meetings . . . through trade journals, in violation of our policies . . . [and] some associates supported travel to overseas congresses for some healthcare practitioners in a way that did not fully comply" with standards of self-regulation established by the Korean Research-based Pharma Industry Association.

In the United States, Novartis is also facing charges in the Southern District of New York that it provided U.S. HCPs with kickbacks worth more than $65 million in cash and entertainment. In *United States v. Novartis Pharmaceuticals Corp.*, the Department of Justice is alleging that Novartis violated the Anti-Kickback Statute by paying HCPs honoraria that, in some cases, amounted to tens of thousands of dollars per doctor, to speak at more than 38,000 Novartis-funded speaking events. The Department of Justice alleges that these speaking events, held at high end restaurants, sports bars, Hooters restaurants, and fishing lodges, were excuses to bribe HCPs with cash and lavish dinners. Novartis employees, according to the Department of Justice allegations, also recorded numerous sham speaking events and paid honoraria for the HCPs even though those events did not occur and no HCPs attended.

11. Olympus

a. Overview

On February 29, 2016, as part of a coordinated enforcement action, the medical imaging and surgical equipment company Olympus entered into several settlements and agreements to resolve criminal charges and civil claims relating to violations (and/or conspiracies to violate) the FCPA, the Anti-Kickback Statute ("AKS") as well as the federal False Claims Act ("FCA") and state FCA statutes. In total, Olympus agreed to pay $646 million and entered into two separate DPAs with the DOJ, a civil settlement, as well as a "Corporate Integrity Agreement" with the Office of Inspector General of the U.S. Department of Health and Human Services ("HSS Department").

Olympus Corporation ("Olympus") is a Japanese-incorporated company with operations across the globe. The settlements of the above-mentioned coordinated enforcement action were entered into not with Olympus, but with two U.S.-based subsidiaries of Olympus: (i) Olympus Corporations of the Americas ("OCA"), a New York corporation headquartered in Pennsylvania, which oversees operations in all of the Americas and (ii) Olympus Latin America Inc. ("OLA"), a Delaware-incorporated subsidiary headquartered in Miami, in charge of overseeing operations in the Caribbean and Central and South America. OLA is a subsidiary of OCA.

OLA entered into a three-year DPA with the DOJ and paid $22.8 million in penalties to resolve charges of violating and conspiring to violate the FCPA's anti-bribery provision ("OLA DPA"). OLA admitted and accepted as true the facts set out in the OLA DPA, highlights of which are described below. OCA, in its role as OLA's parent company, agreed to certain terms of the OLA DPA. Importantly, OCA agreed, via the OLA DPA, to enhance its corporate anti-corruption compliance program through various measures, including by conducting periodic risk-based reviews and establishing an effective internal reporting system.

OCA also entered into its own three-year DPA with the DOJ and agreed to pay $312.4 million in penalties (*i.e.* $306 million plus accrued interest) to resolve criminal charges that it conspired to violate the AKS, which prohibits exchanging or offering to exchange anything of value to induce (or subsequently reward) the referral of federal health care program business ("OCA DPA"). Again, OCA admitted and accepted as true the facts described in the OCA DPA, summarized below.

Both the OCA and OLA DPAs impose a three-year monitorship by an independent monitor, whose obligations are the same in both monitorships.

In parallel to the resolution of the criminal charges via the DPAs, OCA also settled civil charges under the federal FCA and various state FCA statutes ("Civil Settlement"), pursuant to which OCA agreed to pay an additional $310.8 million ($306 million plus interest). The FCA *qui tam* complaint which led to the litigation resolved by the Civil Settlement had been filed by OCA's former compliance officer, John Slowik. Slowik received approximately $50 million as part of the Civil Settlement. The Civil Settlement specifies that except for the facts admitted as part of the OCA DPA, the Civil Settlement should not be viewed as an admission of liability by OCA.

OCA entered into the Civil Settlement with, amongst others, the Office of Inspector General of the HSS Department, with whom OCA also entered into a separate, five-year Corporate Integrity Agreement. The Corporate Integrity Agreement, which was executed as a condition of release from other administrative sanctions, imposes a wide range of enhancement measures to OCA's compliance program as relating to federal health care program requirements.

b. Foreign Bribery: FCPA Violations described in OLA PDA

According to OLA DPA, employees of OLA made "hundreds of unlawful payments" and provided "personal benefits, including cash, money transfers, personal or non-Olympus medical education travel, free or heavily discounted equipment, and other things of value" to healthcare professionals employed at various publicly owned health care facilities in Brazil, Bolivia, Colombia, Argentina, Mexico, and Costa Rica. These direct and indirect payments were made so that the health care professionals would "authorize or influence [the health care] facilities' decisions to purchase Olympus equipment and to

prevent public institutions from purchasing or converting to the technology of competitors." In total, the unlawful payments made by OLA amounted to approximately $3 million and generated around $7.5 million in profits between 2006 and 2011.

The bribery scheme employed by OLA had been devised by OLA's senior management. OLA identified health care professionals who sat on public tender boards and/or who otherwise had a strong influence over the health care institutions' purchasing decisions and labeled them as "Key Opinion Leaders" (or "KOLs"). Most of the improper benefits to the KOLs were channeled through specifically established training centers. Although the training centers were apparently also used for legitimate training purposes, their main purpose was to provide pecuniary benefits to the KOLs who managed them. Specifically, in exchange for managing the training centers, KOLs would receive an "annual salary of $65,000 …, a 50% discount on Olympus equipment, and a $130,000 budget for what was termed 'VIP Management.'"

Moreover, OLA created a so-called "Miles Program" which provided free travel to KOLs and their family members for non-training center related reasons. Under the program, one "mile" was equivalent to one U.S. dollar that could be used for personal travel expenses. In certain cases, KOLs received as much as 5,000 and 30,000 miles (*i.e.*, $5,000 and $30,000).

OLA also maintained a spreadsheet to calculate the "return on investment" and track the sales that could be attributed to KOLs, connecting the value of benefits provided to them.

Numerous emails by OLA employees unequivocally established the expected quid-pro-quo nature of the arrangements. In exchange for the benefits received, KOLs were expected to steer tenders in OLA's favor. In one particularly candid email, an OLA employee emailed a colleague about a corrupt payment to a health care professional, stating: "[I]t is important for [the health care professional] to understand that what we are doing is not because we are nuns from Mother Teresa's order in Calcutta. Rather, we expect reciprocity on his part …."

OLA tried to cover up the bribery scheme by, *inter alia*, purposefully omitting references to the underlying economic arrangements from relevant contracts. For example, in relation to a donation made to influence a KOL based in Honduras, an OLA employee emailed the following instructions to a local distributor (as translated): "The document should make no allusion (mention, comment, etc.) to the fact that the donation to be made, will favor or promote new business with Olympus or with [the distributor]. The donation should not be interpreted as an action which conditions business later. . . . This is extremely important. I'll explain in detail later."

The OLA DPA calculated the base penalty for the above-described conduct at USD 28.5 million, but OLA received a 20% credit for its cooperation with the DOJ, including for having conducted an extensive internal investigation, translating numerous documents, and organizing voluminous evidence. OLA had also taken remedial actions by "terminating its involvement with numerous responsible parties, including employees and third-party distributor relationships in Latin America, and enhancing its due diligence for third-party agents and consultants."

c. Domestic Bribery: AKS Violations described in OCA DPA

While the OLA-DPA focused on the foreign bribery violations, the OCA DPA settled violations of the AKS. According to the Statement of Facts of the OCA DPA, OCA "sought to, and did, induce doctors, hospitals, and other health care providers to buy OLYMPUS products by giving them various types of remuneration, including grants, payments for travel and recreational activities, consulting payments, and gifts or no-charge loans of OLYMPUS equipment, some of which sold for $20,000 or more." Through this conduct, OCA facilitated "more than $600 million in sales of OLYMPUS medical and surgical equipment" making "more than $230 million in gross profits."

12. PTC

On February 16, 2016, the SEC issued an administrative cease-and-desist order against Massachusetts-based technology company PTC Inc. ("PTC") in connection with allegations that PTC's wholly-owned Chinese subsidiaries—Parametric Technology (Shanghai) Software Company Ltd. and Parametric Technology (Hong Kong) Ltd. (collectively, "PTC China"), which operated as a single company during the relevant period—violated the anti-bribery, books and records and internal controls provisions of the FCPA. On the same day, PTC China entered into a non-prosecution agreement ("NPA") with the DOJ to resolve allegations related to this same conduct. As part of its settlement with the SEC, PTC agreed to disgorge profits of $11,858,000 and pay $1,764,000 in prejudgment interest; under its NPA with the DOJ, PTC China agreed to pay a penalty of $14,540,000. The DOJ noted that PTC received partial cooperation credit but did not receive credit for voluntary disclosure because, although PTC had made a disclosure in 2011 in connection with an internal review, it apparently "did not voluntarily disclose relevant facts known to PTC Inc. at the time of the initial disclosure…."

Also in connection with this conduct, the SEC in late 2015 entered into its first-ever deferred prosecution agreement ("DPA") with an individual (discussed separately below). The three-year DPA was agreed with Yu Kai Yuan, a former employee of PTC China, in exchange for his "significant cooperation" and certain conditions which are described in more detail below.

The SEC and DOJ alleged that between 2006 and 2011, PTC China provided travel, gifts and entertainment to employees of Chinese state-owned entities in order to win and retain contracts. During this time period, PTC China provided personal travel to these government officials that was valued at nearly $1.2 million and gifts and entertainment that was valued at more than $250,000, generating approximately $11.85 million in profits for the company.

PTC is a technology company that sells computer-aided drafting and project management software to customers in North America, Europe, and China. In China, U.S. authorities described a business model that included the engagement of a number of third parties—described as "business partners"—to provide lobbying or "influence services" and, in some instances, to also assist with information technology support services. These third parties often had long-standing relationships with government officials who worked for PTC China's customers, and in some cases the government officials chose the specific business partners with whom they wished to collaborate. PTC China sales staff had wide discretion in setting the success fee arrangements with business partners, which ranged from between 15% and 30% of the contract price, and negotiated these fees on a deal-by-deal basis.

During contract negotiations with Chinese state-owned entities, government officials, sometimes in coordination with PTC China's business partners, would request that PTC China provide them with overseas travel that was ostensibly for training, but which in fact primarily involved tourist activities. According to PTC's policy, it was not supposed to pay for customers to travel to the United States for training. Nonetheless, PTC China, the officials, and PTC China's business partners would agree upon a travel budget for the contract and the Chinese government officials would then "gross up" the contract price to cover the travel costs. PTC China sales staff would itemize the travel costs in the contract documents for approval by senior PTC China personnel, but once the costs were approved, PTC China employees would remove the line items for travel before the contract documents were signed by PTC and the state-owned entities.

The travel arrangements typically included a one-day visit to PTC's facility, where PTC would demonstrate the company's products and services, followed by additional days of sightseeing that lacked any business purpose. Typical travel destinations in the United States included New York, Las Vegas, San Diego, Los Angeles, and Honolulu, and included guided tours, golf, and other leisure activities. The SEC noted that the officials who went on the trips were often the signatories of purchase agreements with PTC.

On one trip in September 2010, for example, a PTC China employee accompanied nine officials from three state-owned entities on a one-day trip to PTC's facility in Massachusetts, followed by sightseeing visits to New York, Los Angeles, Las Vegas, and Honolulu. An email discussing the visit noted that one of the attendees was not interested in overseas training, but instead wanted solely to engage in sightseeing activities. The DOJ noted that the Chinese customers whose employees went on the trip ultimately signed over $3.5 million worth of agreements with PTC.

Expenses relating to travel for these officials were disguised and recorded as commissions and subcontracting expenses paid to the business partners, so that the costs of overseas travel did not raise suspicion with PTC's headquarters. The DOJ noted that when PTC discovered that a particular expense line item was being improperly used, PTC China began including the travel costs as part of its business partners' commissions in order to avoid detection by PTC. The SEC also noted that PTC China's sales staff tracked the travel payments made to the business partners on spreadsheets that were kept separate from PTC China's regularly maintained books and records in order to monitor the arrangements with the business partners and government officials.

Between 2009 and 2011, PTC China sales staff also provided at least $250,000 in gifts and entertainment directly to Chinese government officials. The SEC alleged that the value of the gifts and entertainment ranged from between $50 and $600 and often included small electronics such as cell phones, iPods and GPS systems, as well as items such as gifts cards, wine and clothing. According to the SEC, PTC China provided these gifts in violation of PTC's policies which placed a limit of $50 on gifts and entertainment provided to government officials, required PTC China sales staff to obtain pre-approval for expenses over $500, and required PTC China sales staff to document the date, place, attendees and purpose of all business entertainment.

a. SEC Cease-and-Desist Order

The SEC alleged that PTC violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. In addition to the conduct discussed above, the SEC noted numerous

breakdowns of PTC's compliance program, including that compliance investigations of PTC China in 2006, 2008, and 2010, did not uncover or halt the improper payments to Chinese government officials. The SEC alleged that PTC also neglected to periodically assess the risks associated with PTC China, or to tailor its accounting controls to the risks presented by PTC China's particular circumstances. PTC China's Code of Ethics and Anti-Bribery policies were also vague and not based on the risks associated with Chinese operations, and PTC did not have independent compliance staff or an internal audit function that had authority to review and test internal accounting controls or intervene into management decisions.

In resolving these allegations through a settled cease and desist order, the SEC noted that PTC discovered the improper payments in 2011 and engaged independent counsel and an independent forensic consulting firm to undertake an investigation that was overseen by the Audit Committee of the Board of Directors. PTC then voluntarily self-reported the results of its internal investigation to the SEC and responded to information requests. The SEC noted, however, that PTC did not "uncover or disclose the full scope and extent of PTC China's FCPA issues until 2014." The SEC also acknowledged that PTC undertook significant remedial measures including terminating senior staff implicated in the violations, revising its pre-existing compliance program, updating and enhancing its financial accounting controls and compliance protocols and implementing additional specific enhancements in China.

b. DOJ Non-Prosecution Agreement

The DOJ agreed to refrain from pressing criminal charges against PTC China if the company complies with the terms of an NPA for a term of three years. The DOJ indicated that it agreed to resolve these allegations through an NPA given that, amongst other things, PTC China cooperated, at least partially, with the DOJ's investigation and PTC China undertook extensive remedial measures. Under the terms of the NPA, PTC China is required to self-report to the DOJ on the status of its compliance program remediation efforts. Within one year of signing the NPA, PTC China is required to submit a report detailing all remediation efforts, proposed improvements to the compliance program, and the scope of later reviews. PTC China must then conduct two annual follow-up reviews, tailored to any comments provided by the DOJ in response to the first report, and report on the results of these reviews to the Department.

13. PTC and Yu Kai Yuan

On February 16, 2016, the SEC announced that, for the first time, it had entered into a DPA with an individual to resolve FCPA allegations. The agency entered into a three-year DPA with Yu Kai Yuan, a former sales executive at PTC China to resolve allegations that Yuan caused PTC China to violate the books and records and internal accounting controls provisions of the FCPA. Yuan neither admitted nor denied the SEC's allegations, but agreed not to contest or contradict the factual statements contained in the Agreement in any future SEC enforcement action.

As discussed in more detail in our summary of the SEC and DOJ settlements involving PTC Inc. ("PTC") and PTC China, from 2006 until 2011, PTC China allegedly routinely provided gifts, entertainment, and personal travel for employees of Chinese state-owned entities in a corrupt effort to obtain and retain business. PTC China provided the Chinese government officials with leisure travel throughout the United States that was valued at nearly $1.2 million and often involved trips to locations such as New York, Hawaii, Las Vegas, and Washington, D.C. The true cost and nature of these trips was concealed by funding the travel through third party business partners who used their commissions and

subcontracting fees to pay for the improper travel. In addition, the SEC claimed that PTC China provided the officials with more than $250,000 in gifts and entertainment, often involving items such as iPods, GPS systems, gifts cards, wine and clothing. These gifts and entertainment were provided in many instances in violation of PTC's policies, which placed a limit of $50 on gifts and entertainment that could be provided to government officials.

Although the DPA with Yuan recites many of the same allegations that were included in the SEC's cease-and-desist order with PTC, the agency does not make clear what role Yuan played in this misconduct. The agency merely notes that Yuan is a Chinese citizen who resides in Shanghai and that from 1996 until 2011 he was employed as a sales executive at PTC China.

This is the first time that the SEC has resolved FCPA allegations involving an individual through the use of a DPA. The SEC reiterated that "DPAs facilitate and reward cooperation in SEC investigations by foregoing an enforcement action against an individual who agrees to cooperate fully and truthfully throughout the period of deferred prosecution." The agency noted that it decided to resolve the allegations against Yuan through a DPA given Yuan's "significant cooperation" with the SEC's investigation.

The agency first used a DPA to resolve FCPA allegations against a company in May 2011 when it entered into a DPA with global steel manufacturer Tenaris SA, who had been accused of bribing government officials in Uzbekistan (and which is discussed below). The SEC's use of DPA to resolve these allegations was part of a larger effort, known as the Cooperation Initiative, which the SEC unveiled in early 2010 and ushered in a series of changes to SEC enforcement policy designed to encourage and reward cooperation. As part of the Cooperation Initiative, the SEC also introduced its first formal framework for evaluating cooperation by individuals. This framework is outlined in section 6.1.1 of the updated SEC enforcement manual and provides four factors that the SEC will consider in determining "whether, how much, and in what manner to credit cooperation by individuals." These factors are: 1) an assessment of the assistance provided by the cooperating individual in the investigation or related enforcement action, including whether the cooperation substantially aided the investigation, the timeliness of the cooperation, and the quality of the assistance, amongst other things; 2) the importance of the underlying matter, 3) the societal interests in ensuring that the cooperating individual is held accountable for his or her misconduct; and 4) the appropriateness of cooperation credit based upon the profile of the individual.

14. Qualcomm

On March 1, 2016, the SEC entered a cease-and-desist order in an internal administrative proceeding against Qualcomm Incorporated ("Qualcomm"), the world's largest mobile chipmaker, in a settlement for alleged violations of the FPCA's anti-bribery, books and records, and internal controls provisions with respect to the Company's operations in China from 2002 through 2012. Without admitting or denying the SEC's findings, Qualcomm agreed to pay a civil monetary penalty of $7,500,000. The company also agreed to self-report to the SEC for two years on the status of its remediation and implementation of compliance measures. During this two-year period, Qualcomm will conduct at least two reviews and submit at least two reports detailing its anti-corruption remediation efforts and compliance program proposals.

Michele Wein Layne, Director of the SEC's Los Angeles Regional Office, commented that, for over a decade, "Qualcomm went to extraordinary lengths to gain a business advantage with foreign officials deciding between Qualcomm's technology and its competitors."

Indeed, according to the SEC order, Qualcomm employed several means to influence the decisions of the relevant Chinese officials. First, Qualcomm allegedly provided frequent meals, gifts and entertainment to Chinese officials who were considering whether to adopt or retain Qualcomm-developed technology. According to the SEC order Qualcomm paid for gifts and hospitalities such as "airplane tickets for children of government officials, event tickets for spouses of foreign officials and luxury goods" as well as "golf outings" and "sightseeing [tours] for spouses and children of foreign officials", many of which had "no valid business purpose." Qualcomm apparently also offered luxurious hospitality packages for the 2008 Beijing Olympics worth almost $100,000 (per couple) to at least fifteen foreign officials.

Second, and perhaps more importantly, this settlement is yet another illustration of alleged illicit hiring practices by Western companies in China pursuant to so-called "Sons and Daughters Programs" (as coined by the New York Times, when the newspaper initially revealed such practices by JPMorgan Chase). Indeed, Qualcomm allegedly offered full-time employment and paid internships to family members and referrals of foreign officials, designating some of these individuals as "must place" or "special" hires, despite the fact that they did not always meet the Company's hiring standard and had, in some cases, previously failed to be hired through the regular hiring process.

For example, in one case, where Qualcomm had initially decided to reject the son of an executive at a Chinese state-owned telecommunications operator because he did not have the requisite skills for the open position, the Human Resources director intervened, stating that the Company was "operating under a different paradigm here than a normal 'hire'/'no hire' decision tree." The company subsequently offered the son a $75,000 research grant, an internship, followed by permanent employment at Qualcomm, and a business trip to China, notwithstanding concerns of other employees regarding his qualifications for these positions and assignments. The executive vice president and president of Qualcomm's Global Business Operations also personally provided the son with a $70,000 loan to purchase a home.

When discussing Qualcomm's failure to devise and maintain adequate internal controls, the SEC in particular pointed to the fact that Qualcomm did not employ a chief compliance officer for its global operations, nor, specifically, for its Chinese operations, which generated almost half of the Company's revenues in 2012. While Qualcomm did not officially report the hiring of additional compliance staff, its press release following the SEC order indicates that the company had "taken additional steps to enhance its existing internal controls and procedures. For example, although like most organizations Qualcomm appreciates referrals of job candidates by those who know the candidates well, the Company now closely monitors to determine if a candidate has any relationship with an employee of a government agency or state-owned entity, and applies a stricter standard of scrutiny in an effort to avoid potential FCPA risks in the future."

The settlement with the SEC concluded what had been a long period of FCPA scrutiny regarding the Qualcomm's Chinese operations, not only by the SEC but also by the DOJ, during which the Company appeared to stand its ground. Indeed, pursuant to contemporaneous company filings, "on January 27, 2012, [Qualcomm] learned that the U.S. Attorney's Office for the Southern District of California/DOJ has begun a preliminary investigation regarding the Company's compliance with the

Foreign Corrupt Practices Act (FCPA), a topic about which the SEC is also inquiring. The Company believes that it is in compliance with the requirements of the FCPA and will continue to cooperate with both agencies." In its March 2014 10Q, the Company disclosed that it had "received a Wells Notice from the SEC's Los Angeles Regional Office indicating that the staff has made a preliminary determination to recommend that the SEC file an enforcement action against the Company for violations of the anti-bribery, books and records and internal control provisions of the FCPA." According to the 10Q, Qualcomm, which had conducted an internal review led by the company's audit committee (with the assistance of outside counsel and forensic accountants) responded to the SEC on April 4, 2014 explaining "why the Company believes it has not violated the FCPA and [concluding that] therefore enforcement action is not warranted." While the DOJ notified Qualcomm on November 19, 2015 that it would not pursue the matter, the SEC persisted, eventually leading to the above-mentioned 7.5 million settlement.

15. SciClone Pharmaceuticals

On February 4, 2016, SciClone Pharmaceuticals, Inc. ("SciClone"), a California-based pharmaceutical company, agreed to pay more than $12.8 million to settle Securities and Exchange Commission ("SEC") charges that it violated the anti-bribery, internal accounting controls and books and records provisions of the FCPA. The settlement consisted of $9.426 million in profit disgorgement, prejudgment interest of $900,000, and a $2.5 million civil penalty; SciClone consented to the SEC's cease-and-desist order without admitting or denying the SEC's findings.

SciClone's products are primarily sold in China. The company's wholly owned, Cayman Islands-incorporated subsidiary, SciClone Pharmaceutical International, Ltd. ("SPIL") and other subsidiaries are responsible for marketing and sales of SciClone products in China. The SEC found that, between 2007 and 2012, employees of SPIL and other SciClone subsidiaries offered money, excessive gifts, lavish vacations and travel, and other benefits and things of value to Chinese public officials, including healthcare professionals ("HCPs") employed at state-owned or -controlled hospitals, for the purpose of increasing pharmaceutical sales. The SEC also found SciClone directed and oversaw the operations of SPIL and other subsidiaries, including by appointing their directors and officers, reviewing and approving annual budgets, and conducting direct oversight of the subsidiaries' legal, audit and compliance functions. SciClone consolidated SPIL's books and records and reported them in its financial statements.

a. Anti-Bribery Violations

The SEC alleged that, between 2007 and 2012, employees of SciClone subsidiaries provided "weekend trips, vacations, gifts, expensive meals, foreign language classes, and entertainment" to public official HCPs. Those who purchased the most SciClone products were designated as "VIP clients" and received special benefits, including vacations and trips to an annual golf- and beer-themed festival. Sales representatives reported information about these activities and their effects on sales to SPIL and SciClone officers; one report submitted by a sales representative explained how he dramatically increased sales to one HCP by paying for that HCP's family vacations and regular family dinners.

SPIL also regularly hired Chinese travel companies to arrange transportation, accommodation, and meals for HCPs to attend ostensibly legitimate medical conferences and educational seminars, including in the United States, Japan, and on the resort island of Hainan, China. Many of these trips, however, did not actually include educational events, or the educational portion of the trip was dwarfed by

the time spent on tourist or recreational activities. One seminar in Japan, for example, to which SPIL paid to send several Chinese HCPs, included half a day of education regarding a SciClone product and six days of sightseeing, including a visit to Mt. Fuji.

One particular incident in 2007 led to a limited internal investigation by SciClone. A regulatory affairs specialist hired by the company to facilitate licensing for a new medical device with the Chinese State Food and Drug Administration planned a trip for two foreign officials, who had oversight over licensing approvals, to attend an academic conference in Greece relevant to the applications of the new device. The officials, however, were unable to obtain travel visas in time to attend the conference; in lieu of the trip to Greece, the regulatory affairs specialist provided the officials with $8,600 worth of lavish gifts. The specialist submitted expenses reimbursement requests for the gifts, one of which was approved by SPIL's senior vice president. Upon learning of these gifts, SciClone fired the specialist and conducted an internal investigation related to the specialist's activities; however, this review was ultimately of limited benefit to SciClone before the SEC because it did not extend to the company's sales and marketing practices in China generally and did not result in any further remedial measures.

b. Books and Records and Internal Controls Violations

The SEC alleged that SciClone violated the books and records provision based on SPIL's practice of recording payments and gifts made to HCPs as sales, marketing, or promotional expenses. These inaccurate records were consolidated by SciClone and reported in its financial statements.

Additionally, the SEC alleged violations of the FCPA's internal controls provisions. It found that SciClone and its subsidiaries lacked internal controls to ensure that the "educational" conferences and seminars, to which it paid to send Chinese HCPs, had an appropriate business purpose and that the purported educational events actually occurred. A SciClone internal review also identified a high number of violations of the company's policy regarding the use of promotional accounts, including excessive gift or meal payments, doctored honoraria agreements, and the use of falsified or inaccurate fapiao. A fapiao is a paper receipt or an official invoice recognized by Chinese tax authorities as proof of a transaction. For example, a fapiao obtained by an employee for business expenditures, such as meals and travel expenses, is submitted by the company to claim a tax deduction for business expenses.

c. Remedial Efforts and Undertakings

Following the launch of the SEC's investigation in 2010, SciClone took a number of steps to investigate and remediate its conduct in China. As discussed above, the company conducted an internal review of employee promotion expenses, as well as a review of its internal policies and procedures regarding employee travel and promotional reimbursements, and third-party due diligence and payments. SciClone created internal audit and compliance departments, and hired a dedicated compliance officer for its China operations. Additionally, the company changed its practices towards third parties by substantially reducing the number of suppliers providing it with travel and event planning services, providing anti-corruption training to its travel and event planning vendors, and incorporating anti-corruption provisions into contracts with third parties.

As part of this settlement, SciClone agreed to submit periodic written reports to the SEC, as well as to report any new credible evidence it discovers, over a three-year period, of additional FCPA

violations. The company agreed to submit to the SEC, within six months, an initial written report detailing its anti-corruption efforts to-date, as well as three follow-up reports during the three-year period.

A press release issued by the SEC acknowledged the assistance of the DOJ and FBI in conducting this investigation. In its own press release, SciClone stated that the DOJ had completed its own investigation and declined to pursue action against the company.

16. VimpelCom

On February 18, 2016, the DOJ, the SEC and the Public Prosecution Service of the Netherlands (“PPS”) announced that they had reached a Global Foreign Bribery Resolution for $795 million in penalties with VimpelCom Limited (“VimpelCom”), a multinational telecommunications company based in Amsterdam and publicly traded in the United States, and VimpelCom’s wholly owned Uzbek subsidiary, Unitel LLC (“Unitel”).

Between 2006 and 2012, VimpelCom paid over $114 million in bribes to an Uzbek government official who was also a relative of Uzbekistan’s President, Islam Karimov, and had substantial influence over the Uzbek Agency for Communications and Information (“UzACI”), the government agency with regulatory authority over the Uzbek telecommunications industry. According to widespread media reports, the recipient of the bribes was Karimov’s daughter, Gulnara Karimova.

Under the terms of the global settlement, VimpelCom agreed to pay a $460,326,398.40 fine and an additional $335 million in disgorgement of unlawful profits, to be split equally between the United States and the Netherlands. VimpelCom also agreed to implement a compliance and ethics program designed to detect and prevent future FCPA and anti-corruption violations, review and enhance its internal controls, policies and procedures, retain an independent compliance monitor for a period of three years.

a. The Bribery Scheme

VimpelCom’s bribery scheme involved a number of discrete stages of misconduct, starting with the process by which it initiated operations in Uzbekistan. Beginning in 2005, VimpelCom was looking to acquire an Uzbekistan subsidiary to expand its operations in the CIS region. VimpelCom decided to do so by purchasing two companies: Unitel and LLC Bakrie Uzbekistan Telecom ("Buztel").

At the time, Unitel was the second largest cellular service operator in the country with 300,000 subscribers, while Buztel had only 2,500 subscribers. From a commercial perspective, there was no clear need to purchase Buztel in addition to Unitel, and a VimpelCom Finance Committee member even noted that funds used to purchase Buztel could be better spent on developing Unitel. However, members of VimpelCom management were aware that Karimova held an indirect interest in Buztel, considered that for “political reasons,” purchasing it would be “an entry ticket into the Uzbekistan market” and thought failing to do so could lead to negative consequences for Unitel operations in the country. Furthermore, Karimova appeared to have influence over the price VimpelCom would have to pay for Unitel.

VimpelCom’s board raised corruption concerns but approved acquisition of Buztel subject to FCPA analysis and approval from an international law firm. However, members of VimpelCom’s management aware of Buztel’s connection to Karimova concealed those facts from the law firm, and the

FCPA analysis that resulted was favorable. In early 2006, VimpelCom purchased Buztel for approximately $60 million and Unitel for approximately $200 million, merging Buztel into Unitel shortly after the acquisitions.

The second stage of the bribery scheme involved VimpelCom entering into a partnership agreement in 2006 and 2007 with a Gibraltar-based company known as Takilant Ltd ("Takilant"), which was beneficially owned by Karimova through an associate. Under the partnership agreement, Takilant paid $20 million for an indirect 7% stake in Unitel, with a guaranteed option to sell those shares back for at least $57.5 million in 2009. As with the purchase of Buztel, VimpelCom's board conditionally approved the agreement, pending a positive FCPA opinion from an external law firm, and specifically required that the "the identity of the Partner . . . [be] presented to and approved by the Finance Committee." The legal analysis was again undermined by members of VimpelCom management, who failed to disclose that Takilant was controlled by Karimova, and Karimova's true identity was likewise not disclosed at the Finance Committee meeting, where the issue was described as "extremely sensitive." VimpelCom's board approved the agreement in March 2007 and Takilant transferred $20 million to VimpelCom in June 2007 for the 7% shares. Around September 2009, Takilant re-sold those shares for $57.5 million.

The third stage of the bribery scheme involved VimpelCom funneling a $25 million bribe to Karimova in November 2007 so Unitel could obtain licenses to operate a 3G cellular network in Uzbekistan. VimpelCom transferred $25 million to Takilant, and in exchange, its wholly owned subsidiary repudiated the 3G licenses assigned to it and UzACI re-assigned them to Unitel. Documents prepared for a VimpelCom board meeting acknowledged that these licenses were not transferrable between private parties in Uzbekistan, but the board nevertheless unanimously authorized the $25 million payment to Takilant. Members of VimpelCom management coordinated the transaction through the exchange of documents with government regulators, including a high-ranking official at UzACI, and the chief executive of Unitel's primary competitors, who was an associate of Karimova acting on behalf of Takilant.

The fourth stage of the bribery scheme involved VimpelCom and its subsidiary engaging Takilant pursuant to phony consulting service contracts in 2008 and 2011 to provide Karimova with an additional $32 million in bribes. In 2008, VimpelCom management crafted a sham consultancy agreement with Takilant covering nonexistent services in order to pay Karimova $2 million she had demanded since the acquisition of Unitel in 2006. VimpelCom management structured the agreement to avoid scrutiny, created fake Takilant documentation connected to the agreement including Takilant's invoice, and backdated other documentation to support the illusion that Takilant was providing legitimate services.

In 2011, VimpelCom executives again bribed Karimova by paying $30 million to Takilant from a VimpelCom subsidiary, as compensation ostensibly for consulting services in connection with securing licenses for 4G frequencies. This was despite the fact that Unitel had no need for, or ability to utilize 4G frequencies in the near future. The proposed transaction prompted strong anti-corruption concerns within VimpelCom, including from a consultant serving as a VimpelCom senior executive at the time, who said they could "see no rationale" for paying Takilant to assist with obtaining the license while paying nothing to the Uzbek government, and said they would be unable to approve the transaction without "absolute transparency of our consultants' Gibraltar company [and] its ownership structure."

The FCPA analysis conducted by an external law firm was again fatally undermined. VimpelCom management continued to conceal Karimova's ownership of Takilant. No attorney ever contacted Karimova's associate, the ostensible owner of Takilant, and FCPA questionnaires were sent to

intermediaries rather than directly to Takilant. In the face of the senior executive's concerns, VimpelCom in-house counsel claimed that additional due diligence was not warranted and that Takilant would be monitored to ensure real services were being provided. However, no one at VimpelCom made any such verification of Takilant's activities. Payment was made in September and October 2011 and on October 18, 2011 UzACI authorized Unitel to use 4G frequencies. Takilant provided activity reports pursuant to its consulting agreement that were almost wholly plagiarized from VimpelCom's own documents and internet sources, including Wikipedia entries.

In the fifth and final stage of the scheme, in 2011 and 2012, VimpelCom provided an additional $20 million in bribes to Karimova through transactions with Uzbek "reseller" companies, which were generally used to circumvent Uzbek currency restrictions and in this case, further disguise the prohibited payments. Unitel contracted with local companies to pay inflated fees, denominated in Uzbek som (Uzbekistan's currency), for incidental or unnecessary services. Offshore affiliates of the Uzbek companies then sent wire payments denominated in U.S. dollars to Takilant's bank account in Switzerland. In 2011, VimpelCom routed a $10 million payment to Takilant via the reseller mechanism, in return for which Takilant provided no legitimate services.

In 2012, VimpelCom executives executed transfer of an additional $10 million to Takilant through reseller transactions through multiple Uzbek entities, despite receiving a whistleblower complaint from a Unitel employee about the transactions. The employee said they had discovered that a reseller company used by Unitel was located in a dilapidated, unmarked building, devoid of any technical staff, and, upon recommending that Unitel not use the reseller, they were pressured to resign. This complaint did not deter VimpelCom from making the 2012 payment. Additionally, VimpelCom and Unitel executives interfered with an internal audit of Unitel reseller transactions to further conceal the bribery scheme. In 2012 and 2013, VimpelCom executives conspired to pay an additional $16 million in bribes to Karimova through reseller transactions in response to the threatened imposition of governmental and regulatory obstacles to Unitel's continued operations in Uzbekistan.

Finally, in addition to the over $114 million in bribes paid to Karimova, VimpelCom made over $500,000 in contributions to charities affiliated with Karimova. Unitel also paid $38 million in connection with sponsorships and charitable contributions in Uzbekistan without properly verifying whether they were made for the benefit of government officials.

VimpelCom's bribery of Karimova continued without intervention for six years because of widespread, systematic compliance program and control failures. VimpelCom had no system in place for conducting true due diligence on third parties, and was free to enter into sham consulting agreements providing for inflated remuneration, payable to bank accounts in jurisdictions with no connection to the consultant or services provided. It had no policy or structure to regulate and oversee single-source contract decisions like the above-mentioned reseller transactions, which were exploited by VimpelCom executives to pay bribes. VimpelCom failed to operate effective internal audit processes and failed to monitor and control its transactions for conflicts of interest.

VimpelCom's internal control failures were possible due to its lack of adequate compliance structures and personnel. At the time of its purchase of Unitel and Buztel, VimpelCom had no Chief Compliance Officer. The individual later selected to serve this role was underqualified and given drastically inadequate resources. VimpelCom conducted essentially no internal anticorruption program, and its legal department provided no substantive review of its transactions for FCPA compliance and

relied on analysis by external law firms. This created an environment where VimpelCom executives could easily manipulate the process to conceal their bribery.

b. Terms of the Global Resolution

VimpelCom admitted, pursuant to a deferred prosecution agreement, to conspiring to violate the FCPA's anti-bribery and books and records provisions and violating the FCPA's internal controls provision, and agreed to pay a $460,326,398.40 fine, split equally between the United States and the Netherlands. $40 million of the portion of the fine paid to the United States was designated forfeiture of proceeds from transactions in violation of the FCPA. Unitel pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA but was not separately fined in light of VimpelCom's fine and the interrelated nature of the conduct at issue.

VimpelCom's fine was 45% below the low end of the applicable United States Sentencing Guide fine range, reflective of: i) a "full cooperation and remediation credit" of 25% for, inter alia, providing the DOJ with evidence uncovered in its internal investigation and conducting additional investigative efforts; and ii) a 20% reduction for promptly acknowledging the misconduct of its personnel and exhibiting willingness to resolve criminal liability on an expedited basis after being notified it was subject to criminal investigation. The DOJ also took into consideration VimpelCom's extensive remediation efforts, including a complete overhaul of its compliance program, its agreement to be subject to an independent compliance monitor selected by the DOJ for three years, its continued cooperation with further investigations related to the company, and the absence of any prior criminal history.

The DOJ noted that VimpelCom's fine would have been reduced further and/or would have had fewer remedial measures imposed upon it had it voluntarily self-reported the misconduct it had discovered through its original internal investigation.

The SEC separately reached a settlement with VimpelCom, entered as a final judgment, on February 22, 2016, for disgorgement of $375 million in profits derived from VimpelCom's unlawful conduct – less a credit for $40 million related to the forfeiture portion of the fine paid pursuant to the VimpelCom DPA – to be paid equally to the United States and the Netherlands.

Finally, the DOJ also filed a civil complaint in the Southern District of New York seeking forfeiture of more than $550 million in Swiss bank accounts constituting alleged corrupt payments made by VimpelCom and other telecommunications companies. This follows a prior complaint filed January 11, 2016 that sought forfeiture of $300 million in corrupt payments in bank accounts in Belgium, Luxembourg and Ireland.

In announcing the global resolution, the DOJ and the SEC acknowledged the significant cooperation and assistance it had received from – in addition to the Dutch PPS – the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland, the Corruption Prevention and Combating Bureau in Latvia, and the National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway. The DOJ expressed its gratitude for the support provided by law enforcement in Belgium, France, Ireland, Luxembourg and the United Kingdom. The SEC similarly thanked financial regulators in the British Virgin Islands, the Cayman Islands, Bermuda, Ireland, Estonia, Spain, Latvia, UAE, the Marshall Islands, and Gibraltar for their assistance.

B. 2015

1. BHP Billiton

On May 20, 2015, the Securities and Exchange Commission filed an order instituting cease and desist proceedings against B.H.P. Billiton Ltd. and B.H.P. Billiton Plc. (together "BHPB") for violations of the FCPA's accounting provisions. Both entities settled with the SEC without admitting or denying the allegations contained within the SEC's order. The settlement agreement required BHPB to pay a fine of $25,000,000 and report to the SEC about the implementation of its new compliance program for a one-year period. In August 2016, certain news media published unverified reports that the SEC had issued its first FCPA-related award—$3.75 million—to an Australian whistleblower in relation to the BHPB settlement, although the company responded to Reuters news agency that it was "not aware of the involvement of any whistleblower as part of the SEC's or DOJ's investigation."

This enforcement proceeding highlights the care that must be given not only to the design of internal controls, but also to controls' actual implementation. Here, BHPB had identified the potential risk that its Olympic hospitality program could be used to improperly influence the awarding of business to BHPB. However, BHPB failed to adopt sufficient internal controls to account for this risk and also failed to properly implement the controls it already had in place, ultimately leading to the $25,000,000 civil fine.

BHPB is a global resource company with over 128,000 employees and contractors that deals in iron ore, aluminum, petroleum, base metals, diamonds, stainless steel, manganese, and different types of coal. The business of managing each of these resources was left to a specific Customer Sector Group ("CSG," or "business unit"). BHPB also has a Mineral Exploration Group ("MinEX"). Each of these entities reported to BHPB's Group Management Committee. Compliance at BHPB was managed in much the same way: the president of each business unit was responsible for compliance with BHPB's "Guide to Business Conduct." BHPB did not have any independent or centralized compliance department, either within or apart from its legal department. The only compliance oversight within BHPB came from its independent "Global Ethics Panel," although that panel functioned as an advisory body providing high-level compliance advice to BHPB business leaders, not a compliance department providing daily, detailed oversight and guidance.

Under this compliance structure, BHPB allegedly ran afoul of the FCPA's accounting provisions when BHPB sponsored the 2008 Summer Olympic Games in Beijing. BHPB emails reviewed by the SEC allegedly indicate that BHPB viewed its sponsorship of the Beijing Games as an opportunity to increase or maintain its business opportunities in various countries. BHPB extended hospitality packages to 176 government officials and executives working for government-run businesses and 105 of those officials' spouses. Of these, 64 officials accepted their invitations along with 24 spouses or other guests. These hospitality packages ranged in value from $12,000 to $16,000 and included tickets to Olympic games, stays at luxury hotels, excursions, and business-class travel accommodations.

a. Accounting Deficiencies

The crux of the allegations contained within the SEC's order is that, although BHPB recognized the increased risk that accompanied its sponsorship of the Beijing Games, it failed to implement or adopt sufficient internal controls to account for that risk. The SEC cited five specific compliance failures: First, BHPB did not require an independent review of hospitality applications by any legal or compliance

advisor. BHPB required only that each employee extending an invitation to a government official fill out a hospitality application to identify any potential compliance issues that might arise, such as any contracts that were being negotiated by invitees—or even the possibility that the invitation might be perceived as a violation of BHPB's Guide to Business Conduct. This problem was compounded by the fact that BHPB's website led its employees to believe that the Global Ethics Panel was reviewing the applications, when, in fact, the Panel only reviewed 10 hospitality applications for government officials in order to review BHPB's overall invitation process.

Second, many of the hospitality applications were incomplete, contained incorrect answers that failed to identify compliance issues, or contained incorrect answers that were allegedly distributed to BHPB employees as examples of compliant answers.

Third, BHPB failed to provide its employees with sufficient training on how to handle potential compliance issues. For example, while BHPB's Guide to Business Conduct identified compliance issues and instructed its employees to reach out to their managers in the event they came across such an issue, the senior managers allegedly received no training on how to respond when confronted with those compliance issues in the context of the Olympic hospitality program.

Fourth, BHPB did not require employees to update Olympic hospitality applications in the event of a change in relevant conditions. The SEC alleged that such revisions should have been undertaken in a number of specific cases because direct interactions or negotiations involving an invited government official were instigated after the initial hospitality application had been submitted.

Finally, BHPB's individual business units allegedly had no mechanism by which they could check if their hospitality application created compliance issues for BHPB's other business units.

b. Specific Alleged Violations

The SEC cited four instances in which BHPB's insufficient internal controls resulted in Olympic invitations being extended to government officials who had the direct power to influence BHPB business. Illustrating that the accounting provisions can be violated even when a bribe is not ultimately paid, in only one of these cases (Burundi) did the government official eventually attend the Olympics as a guest of BHPB. The DRC and Guinean officials both accepted their invitations but cancelled before the Olympics. BHPB rescinded the invitation given to the Philippine official, although not because of FCPA compliance concerns.

The four specific instances cited by the SEC involved Burundi, the Philippines, the DRC, and Guinea. All of the following allegations are taken from the SEC Order, and were neither admitted nor denied by BHPB:

- **Burundi**: MinEX extended an invitation to Burundi's Minister of Mines and his spouse. While the minister was not in a position to influence BHPB's business at the time that the initial hospitality application was extended, soon thereafter BHPB's MinEX group entered into negotiations to extend one of its JVs' mining permits, and the invited Minister was personally responsible for reviewing the permit application. BHPB did not require employees to amend or re-submit hospitality applications when circumstances changed. The Minister and his wife attended the Beijing Games for four days.

- **DRC**: MinEX extended an Olympic invitation that included the cost of airfare to the Governor of Katanga and his spouse. The hospitality application was one of the 10 applications that were reviewed by the Global Ethics Panel during its review of BHPB's invitation process. The Panel advised MinEX to include information about whether the Governor was in a position to influence MinEX's negotiations with a state-owned entity, Gecamines, for a copper exploration deal. In response to inquiries by the panel, MinEX responded that the Governor of Katanga was not in a position to influence the outcome of those negotiations. However, later that year, the Governor met with BHPB employees, whose minutes of the meeting indicated that the Governor was a "close ally" of the DRC President and might serve as the "key to unlock a successful entry in a deal with Gecamines." BHPB's internal controls did not require the relevant hospitality application to be re-reviewed or updated, and BHPB employees failed to do so. The Governor of Katanga initially accepted his invitation, but he later cancelled in advance of the Olympics.

- **Guinea**: MinEX also submitted an Olympic invitation to Guinea's Minister of Mines and his spouse. The relevant hospitality application indicated that (1) BHPB was not in the process of negotiations with a third party where the Minister could influence the outcome of the negotiations; and (2) that the invitation would not create the impression of impropriety because "[a] sound professional relationship with the Guinea Ministry of Mines is key for the success of the exploration and mining business in this country." This hospitality application was also one of the 10 applications reviewed by the Global Ethics Panel.

  As it did in the DRC case, the Panel requested additional information about any ongoing negotiations with the Minister. The local BHPB country president responded that BHPB would be engaging in upcoming negotiations with the Government of Guinea, but this response was not communicated to the Global Ethics Panel, and in the ensuing silence, MinEX wrongly assumed that the Olympic invitation had been approved. The Minister and his wife accepted the Olympic invitations, but they later cancelled in advance of the Olympics.

- **Philippines**: BHPB extended an Olympic invitation to the Philippines's Secretary of the Department of Environment and Resources. At the same time, BHPB had been sued in local court by its local JV partner, which was fighting in local courts to take back the mining rights that it had previously assigned to the JV. The local JV partner had also filed requests directly with the invited Secretary, also asking for the reversion of its mining rights. Additionally, the President of the Philippines had delegated the responsibility of mediating this dispute to the Secretary. The Secretary's role in this conflict was not disclosed in the Olympic hospitality application. After receiving and accepting the Olympic invitation, the Secretary ruled in favor of BHPB, and BHPB subsequently rescinded the Olympic invitation after it grew fearful that its JV partner had become aware of the invitation.

c. Cooperation and New Compliance Program

In response to the SEC's initial inquiries, BHPB hired outside counsel to conduct an investigation, informed the SEC of its findings, and voluntarily produced relevant documents. Additionally, BHPB created a new compliance group within its legal department and embedded independent anti-corruption managers within its business units. Finally, BHPB strengthened its FCPA policies and procedures and implemented risk-based financial and auditing controls.

2. BNY Mellon

On August 18, 2015, the SEC entered an administrative order against the Bank of New York Mellon ("BNY Mellon"), a Delaware-based bank, based on violations of the anti-bribery and internal controls provisions of the FCPA. BNY Mellon's stock trades on the New York Stock Exchange and,

because its stock must be registered with the SEC under Section 12(b) of the Securities Exchange Act of 1934, BNY Mellon is an “issuer” subject to the FCPA.

The SEC found that BNY Mellon violated the FCPA by awarding internships to family members of foreign sovereign wealth fund officials with the intent to win and retain fund business. Without admitting or denying the SEC’s findings, BNY Mellon consented to cease-and-desist proceedings and agreed to pay $14.8 million, including $8.3 million in disgorgement, $1.5 million in pre-judgment interest, and a $5 million civil penalty to settle the matter. With this settlement, BNY Mellon became the first bank to settle charges arising from the DOJ and SEC’s multi-year investigation of financial institutions’ hiring practices first brought to light through public reports of government investigations into JP Morgan’s Sons & Daughters Program and related industry practices.

In 2011, the SEC first informed BNY Mellon, along with several other banks, that it was investigating the institutions’ hiring practices as well as their business relationships with foreign sovereign wealth fund clients. The alleged misconduct took place during 2010 and 2011, and was tied to financial management services provided by BNY Mellon to the sovereign wealth fund of a Middle Eastern country. According the SEC, two different officials from the sovereign wealth fund client made requests, following business meetings with BNY Mellon employees, that the bank provide internships for the officials’ close family members. In both instances, the sovereign wealth fund official making the request had the authority to make decisions affecting BNY Mellon’s business, including regarding the amount of assets that the fund allocated to the bank for management. Internal BNY Mellon emails indicate that employees believed that complying with the officials’ requests could lead to increased business from the sovereign wealth fund, while failure to award the internships would have a negative impact on the bank’s business. Indeed, after each internship was awarded, the sovereign wealth fund increased its amount of funds under management by BNY Mellon.

At the time these internships were awarded, BNY Mellon had a highly selective internship program. Successful applicants had to pass through multiple rounds of interviews and possess certain professional and academic accomplishments, such a minimum grade point average. The three family members of the sovereign wealth fund officials who received internships from BNY Mellon did not meet the criteria for the bank’s existing internship program; they were not enrolled in a graduate or postgraduate academic program, and lacked the academic and professional profile of the bank’s other interns. The three family members were not required to interview or meet with anyone from the bank, and their internships were not part of BNY Mellon’s established internship program but rather “customized one-of-a-kind training programs.” BNY Mellon incurred legal costs to help the three family members obtain visas, and paid two of them salaries during their six-month internship programs. The interns turned out to be below-average interns; two were confronted by a bank HR employee regarding repeated absences from work, while the other was described by a BNY Mellon manager as “[not] actually as hardworking as I would have hoped.”

At the time these internships were provided, BNY Mellon had a code of conduct and an FCPA policy warning employees that “any money . . . gift . . . or anything of value” provided to a foreign official might constitute a bribe. However, according to the SEC, the bank’s existing compliance program was not sufficiently tailored to the types of risks inherent in its international work, and while BNY Mellon provided training to employees on the company’s policies and the FCPA, it did not have sufficient systems in place to ensure that all employees completed the training or understood the bank’s policies.

The SEC also noted that BNY Mellon's internal controls failed to address specific risks related to hiring, particularly hiring client referrals, relatives of customers, and government officials, and criticized the bank for lacking a centralized hiring system or standard reporting requirements.

The SEC acknowledged remedial acts taken by BNY Mellon. The SEC noted that BNY Mellon fully cooperated with investigators and enacted new compliance policies tailored to address hiring-related risks, including: rules on hiring applicants related to government officials, a centralized process for all employment applications including for the bank's internship program, and the requirement that all applicants disclose whether they or any of their close family members are or have recently been a government official.

The BNY Mellon case demonstrates, once again, that companies must recognize that regulators take a broad view regarding what is considered something "of value" under the FCPA. Here, the thing of value was internships for public officials' family members. Although the SEC highlighted the fact that the internships at issue deviated from a normal internship in having below-standard selection criteria and performance expectations, the fact of giving the internship alone carried value. In other words, nothing about the SEC's administrative order suggests that it would be a defense to an FCPA prosecution for the interns to have met the standard program qualifications or to have been held to the same performance standards, even though both elements' absence in the present case were further indicia of the internships' impropriety. This enforcement action accordingly also highlights the need for human resources personnel to be sensitive to potential corruption risks and for organizations to scrutinize the ultimate sources for any referrals for employment or other work.

3. Bristol-Myers Squibb

On October 5, 2015, the SEC entered an administrative cease-and-desist order against New York-based pharmaceutical company Bristol-Myers Squibb ("BMS") for violations of the record keeping and internal controls provisions of the FCPA. Without admitting or denying the SEC's findings, BMS agreed to pay over $14 million in civil penalties, disgorgement, and prejudgment interest to settle charges related to the actions of employees of Bristol-Myers Squibb (China) Investment Co. Limited ("BMS China") and BMS's majority-owned (60%) Chinese joint venture, Sino-American Shanghai Squibb Pharmaceuticals Limited ("SASS"). BMS also agreed to submit an initial written report and two follow-up reports to the SEC, over a two-year period, regarding the status of its ongoing compliance implementation and remediation efforts.

The SEC Order indicates that BMS formed SASS in 1982, and that it conducted its activities in China through BMS China and SASS. In 2009, BMS obtained a majority of SASS's Board of Directors along with the right to name its President, from which point forward the SEC described it as having operational control. Beginning in 2009, and continuing through 2014, BMS "failed to design and maintain effective internal controls relating to interactions with health care providers ("HCPs") at state-owned and state-controlled hospitals in China." As a result of this failure, the SEC found that certain employees of SASS BMS China achieved their sales targets in part by providing HCPs and other government officials with corrupt inducements, including "cash payments, gifts, meals, travel, entertainment, and sponsorships for conferences and meetings." The SEC also alleged that many of these inducements were facilitated by non-compliant or false reimbursement claims submitted by BMS China employees, including faked and altered receipts, purchase orders, invoices, and agenda and attendance sheets for meetings that may not have occurred. According to the SEC Order, BMS China then "inaccurately recorded the reimbursement

of these false claims as legitimate business expenses in its books and records, which were then consolidated into the books and records of BMS."

The SEC cited internal BMS documents proposing "activity plans," "action plans," and plans for "investments" in HCPs to increase prescription sales. These plans allegedly illustrated how BMS China sales managers used funds derived from falsified travel and expense claims "to make cash payments to HCPs and to provide gifts, meals, entertainment, and travel to HCPs in order to induce them to prescribe" BMS products. Specific benefits included items ranging from "small food and personal care items to shopping cards, jewelry, sightseeing, and cash." The SEC's Order also describes "investments" made in order to obtain sales, including offering and making payments to HCPs for speaking engagements and conference sponsorships, as well as "hosting cash promotions and events for pharmacy employees" in order to "increase prescription sales and maintain drug listings" at certain pharmacies.

The SEC Order identified several instances whereby BMS China failed to respond to information that should have alerted it to the improper activities of certain BMS China or SASS employees. These included an internal review of employee travel and entertainment expenses submitted for reimbursement, which led to the discovery of non-complaint and false claims. A local Chinese accounting firm as well as BMS China's internal staff identified numerous irregularities and instances of false or altered documentation submitted to support travel or entertainment expense claims. The results of these audits were brought to the attention of BMS China management and "regional compliance and corporate business managers who reported directly to senior management of BMS" who failed to respond effectively.

The Order also noted that current and former BMS China employees admitted to using the proceeds from false reimbursement claims to fund improper benefits to HCPs. For example, in November 2010 and January 2011, BMS China received emails from terminated employees which stated that they had used such "funds to pay rebates, provide entertainment, and fund gift cards for HCPs, as there was no other way to meet their sales targets," and cited the "open secret" that "HCPs in China rely upon the 'gray income' to maintain their livelihood." Despite receiving this information, BMS China failed to properly investigate the allegations.

The SEC found that BMS lacked a formal FCPA compliance program until April 2006, and that compliance audits conducted on its China operations beginning around that time identified weaknesses in the monitoring of payments made to HCPs, the lack of formal process surrounding the selection of speakers, deficiencies in obtaining approvals for donations, sponsorship, and consulting agreements, and failure to conduct post-event verification of meetings. Though these findings were reported to senior management as well as BMS's compliance department, the SEC alleged that BMS management failed to remediate these deficiencies in a timely manner. It also noted that, although BMS China first employed a compliance officer in 2008 (this became a permanent position in 2010), until 2012 the BMS corporate compliance officer responsible for the Asia-Pacific region was based in the U.S. and rarely traveled to China. The SEC also found that the BMS sales force in China received "limited training" which many employees could not access; indeed, even when "BMS rolled out mandatory anti-bribery training in late 2009, 67% of employees in China failed to complete the training by the due date."

The SEC did, however, highlight the remedial actions taken by BMS in the wake of the investigation. In addition to enhancing its anti-bribery and general compliance training, BMS China implemented a number of enhanced compliance controls. Examples cited in the SEC Order include a

pre-reimbursement review of all expense claims, the use of an enhanced accounting system which tracks the request, approval, and payment of all such claims, and the retention of an outside vendor to conduct supplemental "surprise checks" at events sponsored by sales representatives. BMS also terminated 90 employees and disciplined an additional 90 who failed to comply with relevant policies. Additionally, BMS China altered its compensation structure in order to reduce incentive-based sales compensation, eliminated its practice of providing gifts to HCPs, enhanced its due diligence procedures for third-party agents, implemented a system to monitor the company's participation in third-party events, and incorporated data-driven risk management processes into its compliance program.

In accordance with the Order, BMS agreed to pay a fine totaling $14,692,000, consisting of: i) a disgorgement of $11,442,000, representing profits gained as a result of the alleged conduct, ii) prejudgment interest of $500,000, and iii) a civil penalty of $2,750,000. In its 10-Q Form for the period ending September 30, 2015, BMS disclosed the settlement with the SEC and indicated that the DOJ had closed its inquiry into the matter.

4. Chestnut Group and Dmitrij Harder

On April 20, 2016, Dmitrij Harder ("Harder"), the former owner and president of Pennsylvania-based consulting firm Chestnut Consulting Group ("Chestnut Group"), pleaded guilty to two counts of violating the FCPA related to $3.5 million in bribes he paid to a senior official of the European Bank for Reconstruction and Development ("EBRD"). In announcing the plea agreement, the DOJ noted the assistance provided by regulators in the U.K., Germany, Jersey and Guernsey.

The EBRD is a multilateral development bank owned by 60 countries that provides debt and equity financing for development projects in emerging economies located mainly in Eastern Europe. According to the indictment, Harder, through the Chestnut Group, facilitated bribes to a senior EBRD official, publicly reported to be Andrej Ryjenko, whose responsibilities included overseeing the review of applications submitted by companies requesting project financing from the EBRD. The bribes were paid by Harder and Chestnut Group on behalf of two of Chestnut Group's clients operating in Russia. Between 2007 and 2009, in order to influence the recommendation of Ryjenko, the Chestnut Group facilitated $3.5 million in bribe payments to Ryjenko's sister, Tatjana Sanderson, and disguised the bribes as payments for consulting services when no such services were actually rendered.

Harder was indicted in January 2015 (with a Superseding Indictment filed in September 2015) in the Eastern District of Pennsylvania on one count of conspiracy to violate the FCPA, five counts of violating the FCPA, five counts of violating the Travel Act, one count of conspiracy to commit money laundering, and two substantive money laundering counts. Harder initially pleaded not guilty to all charges and filed two motions to dismiss arguing, among other things, (i) that the DOJ's substitution of "public international organization" for "foreign government or instrumentality thereof" in the indictment was improper, (ii) that "public international organization," as used in the FCPA is impermissibly vague, (iii) that the designation of EBRD as a "public international organization" by Executive Order was unconstitutional, and (iv) that the FCPA and money laundering charges should be "merged" to form a single offense. The U.S. District Court for the Eastern District of Pennsylvania denied Harder's motions to dismiss in their entirety on March 2, 2016. The court held that the definition of "foreign official" in the FCPA clearly applies to officials of "public international organizations," and that EBRD had been legally designated as a "public international organization" by Executive Order. The court similarly found that the term "public international organization" was not vague, noting in particular that a list of institutions that have been

designated as public international organizations is publicly available. Finally, the court found that the money laundering and FCPA charges are separate charges that do not necessitate merger.

According to the indictment, in 2007 a Russian oil and gas company (later identified to be Irkustsk Oil and Gas Company ("Irkustsk")) approached Harder about assisting Irkustsk in obtaining financing from the EBRD for a natural gas development project in Russia. Chestnut Group and Irkustsk subsequently entered into an agreement whereby Chestnut Group would be paid a "success fee" percentage of the funds ultimately obtained by Irkustsk from the EBRD. Ryjenko served as the EBRD Operations Leader for Irkustsk's application for financing. In 2009, after receiving from the EBRD financing of almost $200 million (approved by Ryjenko), Irkustsk allegedly paid Chestnut Group a success fee of approximately $2.9 million. Following this payment, the indictment alleges that Chestnut Group paid a total of $1.06 million over four wire transfers from its bank accounts in Frankfurt, Germany and Pennsylvania, USA to the Citibank account of Sanderson in Jersey, Channel Islands. The indictment alleges that the funds were ostensibly paid to Sanderson for providing consulting services, although Sanderson provided no such services but rather passed the funds on to her brother, Ryjenko, in return for his approval of the financing.

In a nearly identical scheme, in 2009 an oil and gas company registered in the U.K. but operating in Russia (later identified as "Vostok Energy") entered into an agreement with the Chestnut Group to assist Vostok in obtaining financing for a gas development project in Russia. After Ryjenko approved financing of approximately $100 million, Vostok allegedly paid Chestnut Group a success fee $5.0 million. According to the indictment, Harder then caused payment of almost $2.5 million to Sanderson, who passed a portion of the funds to Ryjenko.

After the fact and in order to help disguise the payments, in 2009 Sanderson sent at least two invoices to Chestnut Group requesting fees for serving as Chestnut Group's "producing agent." Similarly, Chestnut Group sent a "Confirmation of Services" letter to Sanderson discussing a pre-agreed brokerage fee of up to $2.6 million.

After being indicted, Harder was released on $100,000 bail, secured by his home in Pennsylvania. He surrendered his passport and his travel was restricted to the East Coast of the United States. Following his failed motions to dismiss, Harder and his counsel filed a series of pre-trial motions that the court suspected were filed solely to delay trial, scheduled to begin May 3, 2016. These motions, each of which was denied, included requests to conduct foreign depositions, for the production of over one million pages of documents, and for the appointment of a "special master." Believing that the failure to delay trial might make Harder more likely to flee, in March 2016 the district court revised the conditions of Harder's release to restrict Harder's travel to within the Eastern District of Pennsylvania.

Harder entered into the plea agreement just weeks before his case was scheduled to go to trial. Harder requested that the court continue his conditions of bail, a request joined by the Government pursuant to the plea agreement. However, on April 21, 2016, the court denied the request and revoked Harder's bail, finding that Harder had failed to meet his burden of demonstrating that he did not pose a flight risk, particularly given his extensive international contacts and the prospect of significant prison time related to his plea. Harder remains detained awaiting sentencing, currently scheduled for November 2016.

Ryjenko and Sanderson, joint Russian and U.K. nationals residing near London, were initially arrested in February 2010 by the City of London Police for their respective roles in the scheme. Ryjenko and Sanderson have been charged by the U.K.'s Crown Prosecution Service for corruption-related offenses and are awaiting trial.

5. FLIR Systems

On April 8, 2015, the SEC issued a settled cease-and-desist order against FLIR Systems, Inc. ("FLIR") in connection with allegations that FLIR violated the anti-bribery and accounting provisions of the FCPA. FLIR is an Oregon-based defense contractor that makes thermal imaging and night vision products, infrared camera systems and other sensing products. As part of the settlement, FLIR agreed to disgorge $7,534,000, pay prejudgment interest of $970,584 and a civil penalty of $1,000,000, for a total of $9,504,584. FLIR also agreed to cease and desist from causing or committing future violations of the FCPA's anti-bribery, books and records and internal controls provisions, and to adopt a more comprehensive compliance program and self-report on its compliance efforts for a period of two years.

FLIR had previously agreed to cease and desist from violations of the federal securities anti-fraud and related provisions in connection with a 2002 settlement for accounting fraud. Perhaps as a result of having received a second cease-and-desist order, FLIR will be required to report to the SEC each nine months for a two-year period on the status of its compliance review of its overseas operations and the status of its remediation and implementation of compliance measures. During this two-year period, FLIR is required to conduct an initial review and submit and initial report to the SEC, and conduct and prepare at least two follow-up reports. If FLIR identifies "credible evidence" of improper conduct during this time, such conduct must be reported "promptly" to the SEC.

As discussed in greater detail in the 2014 enforcement actions section of this book, two former FLIR employees, Stephen Timms and Yasser Ramahi, had previously settled charges with the SEC arising from the same conduct. Timms was responsible for FLIR's Middle East regional office in Dubai and Ramahi was employed in its business development department, reporting to Timms. In November 2014, Timms and Ramahi settled allegations that they had engaged in a scheme to provide expensive gifts, travel and entertainment to Saudi Arabian government officials in an effort to win business for FLIR. The SEC accepted an offer from Timms and Ramahi that required them to pay civil penalties of $50,000 and $20,000 respectively and to cease and desist from engaging in further violations of the FCPA.

According to the SEC, in November 2008 FLIR entered into a $12.9 million contract with the Saudi Arabian Ministry of Interior ("MOI") to supply the MOI with infrared binoculars. As part of the contract, FLIR agreed to provide a "Factory Acceptance Test" attended by MOI officials. Timms and Ramahi were the primary sales employees responsible for the contract and for planning the Factory Acceptance Test, which they began doing in February 2009. Timms and Ramahi agreed to send the officials on what Timms referred to as a "world tour," with visits to locations such as Casablanca, Paris, Dubai and Beirut, before and after visiting FLIR's facility near Boston, Massachusetts. In planning and arranging for the visit, the SEC states that the Factory Acceptance Test was a key condition to the contract being fulfilled, and that Timms and Ramahi hoped that a successful delivery of this contract would result in additional business within Saudi Arabia during 2009 and 2010.

In July 2009, MOI officials visited FLIR's facility to perform the equipment inspection, which lasted approximately 5 hours. During the remaining seven days in Boston, MOI officials attended several 1-2

hour meetings at FLIR's facility as well as some meetings at their hotel. While in Boston, the MOI officials were also provided with a weekend visit to New York. Altogether, the officials travelled for 20 nights, with air fare and luxury hotel accommodations paid for by FLIR. The SEC asserted that there was no business purpose for the stops outside of Boston.

The SEC indicated that Timms initially submitted an expense report with a full description of the trip to his manager, who approved the expenses, but directed Timms to make two expense submissions in an effort to make the expenses appear smaller. Timms' manager appears to have later questioned the expenses, at which time Ramahi and Timms claimed that the MOI officials had used FLIR's travel agent in Dubai and that the costs had then been accidentally charged to FLIR. Timms and Ramahi then used FLIR's third party agent to give the appearance that the MOI officials had paid for their own travel, which included the preparation of false and misleading documentation to support the travel expenses.

The SEC Order included allegations that additional travel was provided to Saudi, and in one instance Egyptian, officials, which lacked sufficient business purposes or documented support of such business purposes. With respect to Saudi officials, this additional travel was valued at approximately $40,000, which included two trips to Dubai and travel within Saudi Arabia for MOI officials, including some of those who participated in the world tour. In Egypt, FLIR provided a trip for nine officials from the Egyptian Ministry of Defense that was centered on a legitimate Factory Acceptance Test at FLIR's Stockholm factory, but also included what the SEC described as a "non-essential" visit to Paris. The SEC noted that this trip lasted 14 days, even though most of the officials only participated in legitimate business activities on four of those days.

The SEC also faulted FLIR (and Timms and Ramahi) for providing five watches valued at approximately $7,000 to officials from the MOI, including two officials who participated in the world tour. Timms initially submitted a legitimate expense report for these gifts, which correctly identified the cost of the watches ($1,425 each) and noted that they were "executive gifts." Timms also later identified the specific MOI officials who received watches. Timms' manager approved reimbursement for the watches and FLIR's finance department repaid Timms for the expense. When the expense was subsequently questioned by FLIR's finance department, however, Timms incorrectly indicated that the watches cost only $1,900. Ramahi and FLIR's third party agent corroborated Timms' story when questioned by FLIR investigators, and Timms and Ramahi obtained and submitted a false invoice in the revised (incorrect) amount to FLIR's finance department.

The SEC charged FLIR with violating the anti-bribery, books and records, and internal controls provisions of the FCPA. The SEC acknowledged that at the time of the conduct, FLIR had a code of conduct, as well as a specific anti-bribery policy, which prohibited FLIR employees from violating the FCPA, and that FLIR employees, including Timms and Ramahi, had received FCPA training. The SEC indicated, however, that FLIR had few and insufficient internal controls over foreign travel and gift and entertainment activities. Among other things, the SEC appeared to take issue with the fact that FLIR's non-U.S. sales staff were not sufficiently overseen by management in the U.S., and that certain employees (including accounts payable employees) were not sufficiently attuned to spot red flags (such as expensive gift reimbursements) and raise such issues with management.

The SEC did credit FLIR for self-reporting the alleged misconduct after receiving a compliant letter and conducting an internal investigation, which resulted in substantial remedial actions, including (i) terminating certain personnel and vendors, (ii) expanding its relevant policies and trainings, (iii)

implementing a gifts policy; and (iv) enhancing its travel approval process in its non-U.S. offices (including by requiring all non-employee travel to be booked through designated travel agencies, and mandating advance written approval from senior business personnel and the legal department). The SEC noted positively that FLIR had engaged outside counsel and a forensic firm to review non-U.S. travel and entertainment expenses, and that travel agencies used in the future would be vetted through FLIR's full FCPA due diligence and trained on the FCPA.

6. Goodyear

On February 24, 2015, the SEC entered a cease-and-desist order in an administrative proceeding against The Goodyear Tire & Rubber Company ("Goodyear"), listed on NASDAQ as one of the world's largest tire manufacturers, in a settlement for alleged violations of the FCPA's books and records and internal accounting controls provisions. According to the cease-and-desist order, in which Goodyear neither confirmed nor denied the SEC's allegation, Goodyear failed to "prevent or detect" more than $3.2 million in bribes paid by its Kenyan and Angolan subsidiaries, Treadsetters Tyres Ltd. ("Treadsetters") and Trentyre Angola Lda. ("Trentyre"). Without admitting or denying the SEC's findings, Goodyear agreed to pay $14,122,525 in disgorgement and $2,105,540 in prejudgment interest, which places this settlement as the fourth-largest FCPA enforcement action brought by the SEC without a parallel DOJ enforcement action. The company also agreed to report to the SEC for three years on the status of its remediation and implementation of compliance measures. During this three-year period, Goodyear will conduct at least three reviews and submit at least three reports detailing its anti-corruption remediation efforts and compliance program proposals.

According to the cease-and-desist order, from 2007 to 2011, Treadsetters made over $1.5 million in improper payments to employees of government-owned or affiliated entities and agencies, such as the Kenyan Air Force, the Kenya Ports Authority, and the Ministry of State for Defense, and paid approximately $14,457 in bribes to Kenyan local government officials. Specifically, Treadsetters' general manager and finance director allegedly "approved payments for phony promotional products, and then directed the finance assistant to write-out the checks to cash." The staff at Treadsetters would then cash the checks and use the funds to bribe customers' employees. The SEC made similar allegations with respect to Trentyre. Also, according to the cease-and-desist order, from 2007 to 2011 the Angolan subsidiary paid bribes of (i) approximately $1.4 million to employees of government-owned or affiliated entities in Angola, such as the Catoca Diamond Mine, the Electric Company of Luanda, and the national oil company Sonangol, and (ii) $64,713 to local Angolan government officials. Trentyre's former general manager allegedly implemented a bribery scheme under which the company "falsely marked-up the costs of its tires by adding to its invoice price phony freight and customs clearing costs." In turn, the company improperly recorded bribes to customers' employees as freight and clearing costs on its balance sheet account.

In determining to accept Goodyear's settlement offer and not impose civil penalties, the SEC considered the company's cooperation with the Commission and remedial acts undertaken. Goodyear uncovered both the Kenya and Angola schemes from internal reporting, as the company received an anonymous complaint on its confidential ethics hotline regarding Treadsetters and an employee tip regarding Trentyre. Goodyear addressed these reports by launching an internal investigation, promptly stopping improper payments, voluntarily disclosing these matters to the SEC, and subsequently cooperating with the SEC's investigation by, among other things, voluntarily producing documents.

Goodyear's remedial efforts included divesting its ownership interests in Treadsetters and Trentyre and initiating disciplinary action against relevant Goodyear employees with oversight responsibilities over the sub-Saharan subsidiaries. Moreover, for both its Africa and global operations, Goodyear reinforced its compliance and audit personnel and improved its compliance programs, including by expanding on-line and in-person anti-corruption training and having regular audits focused on anti-corruption compliance.

Two aspects of the Goodyear settlement attracted particular attention. First, the SEC applied a broad legal standard to determine Goodyear's liability for the conduct of its subsidiaries. In its cease-and-desist order, the SEC stated that Goodyear failed to "detect and prevent" improper payments made by its subsidiaries because of insufficient anti-corruption compliance due diligence, training, and controls. The statutory text of the FCPA; however, does not contain a "failure to detect and prevent" internal controls standard. The plain language of the FCPA states that covered issuers shall "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer" and "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" regarding the disposition of the issuer's assets and the preparation of the issuer's financial statements.

The SEC appears to have borrowed the "failure to prevent and detect" standard from the U.S. Federal Sentencing Guidelines. Specifically, §8B2.1 of the Guidelines provides that, in order to have an effective compliance and ethics program, an organization shall "exercise due diligence to prevent and detect criminal conduct." Indeed, a compliance and ethics program "shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct." The Guidelines further state that "[d]ue diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law" requires that the organization "establish standards and procedures to prevent and detect criminal conduct" and implement "appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."

The DOJ and SEC's Resource Guide to the FCPA also echoes this "prevent and detect" language. The Guide notes that "an effective compliance program is a critical component of a company's internal controls and is essential to detecting and preventing FCPA violations." Moreover, the Guide indicates that a proper compliance program "will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately."

The second aspect relates to the remedies invoked by the SEC in this matter. As noted above, the SEC did not impose any monetary fines on Goodyear, but instead ordered prejudgment interest and disgorgement of ill-gotten gains. The absence of monetary fines could be seen as a reward for Goodyear's exemplary internal handling of the matter and subsequent cooperation with the SEC; however, the use of the equitable remedy of disgorgement in the absence of alleged anti-bribery violations has been subject to criticism. Notably, on January 29, 2016, the IRS Office of Chief Counsel issued a memorandum suggesting that the SEC's disgorgement powers principally serve a punitive, as opposed to an equitable, purpose. In an unnamed FCPA case, the IRS concluded that a company's SEC-ordered disgorgement payment was not tax deductible under §162(f) of the Code because, instead of going "to compensate the United States government or some non-governmental party for its specific losses caused by [the] Taxpayer's violations of the FCPA," the payment was "primarily punitive."

Regardless of the academic debate potentially surrounding the SEC's "failure to detect and prevent" standard and use of "no-charged bribery disgorgement," U.S. authorities have made their position on these matters clear, having also applied both in the DOJ and SEC's December 2013 enforcement actions and settlements with Archer Daniel Midlands Company ("ADM") for the conduct of ADM's subsidiary in the Ukraine (*see* p.155).

7. Hitachi

On September 28, 2015, Tokyo-based conglomerate Hitachi, Ltd. ("Hitachi") agreed to pay $19 million to settle allegations by the SEC that it violated the books and records and internal accounting controls provisions of the FCPA with respect to its activities in South Africa and payments made to a politically connected South African company. Hitachi neither admitted nor denied the SEC's allegations, and was permanently enjoined from future violations.

The SEC's complaint, filed in the U.S. District Court for the District of Columbia, focused on Hitachi's activities in South Africa between 2003 and 2012. In 2005, Hitachi, acting through its European subsidiary Hitachi Power Europe GmbH ("HPE"), created a South African subsidiary, Hitachi Power Africa (Pty) Ltd. ("HPA"), in order to compete for projects in the South Africa. These projects included two power stations planned for construction by Eskom Holdings SOC Ltd. ("Eskom"), South Africa's largest public utility, which is 100% owned by the South African state through the Ministry of Public Enterprises.

Shortly after founding HPA, Hitachi sold 25% of the subsidiary to Chancellor House Holdings (Pty) Ltd. ("Chancellor"), a South African investment firm and funding vehicle for South Africa's ruling African National Congress ("ANC") political party.

The SEC's complaint alleges that (i) Hitachi knew and later confirmed that Chancellor was an ANC funding vehicle, (ii) Hitachi nevertheless continued to partner with and encourage Chancellor to use its government contacts to help Hitachi obtain contracts with a state owned and operated utility company, and (iii) Hitachi paid Chancellor "success fees" and issued "dividends" in exchange for Chancellor exerting its political influence during the public tender process. These payments were inaccurately recorded in Hitachi's books and records.

a. Knowledge that Chancellor was an ANC Funding Vehicle

The SEC alleged that Hitachi was interested in partnering with a South African company in order to receive the preferential status granted, under South African law, to companies that were at least 25% owned by black South Africans. According to the SEC, Hitachi selected Chancellor as a partner due to the company's ties to the ANC, its extensive political influence in South Africa, and because Chancellor lacked any engineering expertise and as a result stayed out of its partners' operational business.

The SEC alleged that the minimal due diligence which Hitachi conducted on Chancellor did not conform to Hitachi's ordinary compliance procedures. An expert consultant that Hitachi hired in 2003 to interview power producers in South Africa, who later became an executive with HPA, never received FCPA-specific compliance training, and neither HPE nor HPA provided any such training to their officers or employees during the relevant time period—between 2005 and 2008. Hitachi's due diligence review of Chancellor lasted only a few days and, during the SEC's investigation, Hitachi was unable to locate the due diligence report it had prepared on Chancellor. However, internal Hitachi documents indicated that

the company was aware of Chancellor's political influence, and that Chancellor's political connections with the South African Government, the ANC, and Eskom were common knowledge in South Africa. Specifically, the SEC alleged that Hitachi knew or could have learned through proper due diligence that an administrator of Chancellor was a member of the ANC National Executive Committee, that Chancellor's chairman co-owned an investment company with the chairman of Eskom's board of directors, that a Chancellor administrator was also the director of an Eskom subsidiary, and that Chancellor's chairman was married to a family member of Eskom's CEO.

In 2006, Hitachi was contacted by local reporters in South Africa regarding the connection between Chancellor and the ANC. From late 2006 to early 2007, a series of stories in the South African press reported Chancellor's affiliation with the ANC. A January 2007 article quoted the ANC's Secretary General who confirmed that Chancellor's sole purpose was to be an ANC funding vehicle. Copies of articles reporting on the links between Chancellor and the ANC were internally circulated among executives at HPA. Ultimately, Chancellor's Chairman confirmed the company's connection with the ANC to an HPA Director.

In October 2007, HPE adopted a code of conduct specifically prohibiting contributions to political parties; despite this, Hitachi maintained its pre-existing relationship with Chancellor. A December 2007 news story even quoted an HPE executive denying that Chancellor was an ANC front company, and saying that, if it were true, Hitachi's relationship with Chancellor would violate Hitachi's own governance rules.

b. Use of Chancellor to Obtain Government Contracts

From 2006 to 2007, HPA/HPE participated in public tenders for work on the Medupi and Kusile power station projects. The SEC alleged that, despite learning during this period that Chancellor was affiliated with the ANC, Hitachi continued to encourage Chancellor to use its contacts and influence with the ANC and Eskom to encourage them to award the contracts to Hitachi. The company placed high importance on Chancellor's political assistance; an internal Hitachi memorandum circulated in October 2007 expressed confidence in winning the contracts, noting that the "balance of political power" on Eskom's Board of Directors favored Hitachi because the ANC was being "driven currently in our favour." In late 2007, Hitachi won both contracts, worth a combined $5.62 billion, making them "among the largest government contracts ever awarded in South African history."

c. "Success Fees" and Other Payments Made to Chancellor

On November 24, 2005, Hitachi entered into a shareholders' agreement with Chancellor in which Chancellor paid $190,819 for 25% equity in the newly formed HPA and also received a seat on HPA's Board of Directors. The SEC alleged that an early draft of the shareholders' agreement contained a "success fee" provision, rewarding Chancellor if Hitachi won government contracts substantially due to Chancellor's contributions. This provision was removed from a revised draft of the agreement but was memorialized in an unsigned side agreement, or "side letter", apparently so that this "success fee" arrangement would not need to be disclosed to Hitachi's customers during a potential audit. Nevertheless, an HPE executive reported to the company's Board of Directors that Hitachi had agreed to pay its local partners success fees as an incentive to help Hitachi win contracts.

In 2008, HPA paid Chancellor approximately $1,123,382 in success fees for its assistance in securing the Eskom contracts. However, HPA recorded these success fees as "consulting fees" in its expense account, and included them in the "Administrative and other expenses" line item in its 2008 Annual Financial Statement. In 2012, Hitachi paid Chancellor approximately $5,027,170 in dividends and interest for HPA's profits in 2010 and 2011. In February 2014, HPE bought back Chancellor's shares in HPA for $4.4 million (which Chancellor had purchased in 2005 for $190,819). In total, Chancellor received approximately $10.5 million in success fees, dividends, and the share buyback, an over 5,000% return on Chancellor's initial investment in HPA.

The SEC alleged that HPA and HPE both knew that these amounts were paid, through Chancellor, to the ANC—a foreign political party—in exchange for assistance in securing government contracts, and that the company's internal books and records did not accurately describe these transactions. The Commission alleged that Hitachi lacked sufficient internal accounting controls to prevent the "success fee" payments to Chancellor from being inaccurately recorded as "consulting fees." It also alleged that Hitachi did not adequately conduct and maintain records of the due diligence it performed on Chancellor, and that its controls were inadequate to "provide reasonable assurances" that Hitachi would enforce its internal compliance policies against making payments to foreign political parties.

In addition to a reminder of the risks companies face when engaging politically connected third parties as partners, this case was notable as the first SEC investigation involving collaboration with the African Development Bank's Integrity and Anti-Corruption Department. The SEC also received assistance from the Justice Department's Fraud Section, the Federal Bureau of Investigation, and the South African Financial Services Board.

8. Hyperdynamics Corporation

On September 29, 2015, the SEC issued a cease-and-desist order in a settlement with Hyperdynamics Corporation ("Hyperdynamics"), an emerging exploration and production company based in Houston. Hyperdynamics was established in 1996 as a commercial communications service provider and transitioned into the oil and gas sector in 2001. The settlement, pursuant to which Hyperdynamics, without admitting or denying the SEC's findings, agreed to pay a civil money penalty of $75,000 related to alleged books and records and internal controls violations arising out of Hyperdynamics' operations in the West African Republic of Guinea from July 2007 to October 2008. At the time of the alleged misconduct, Hyperdynamics was listed on the American Stock Exchange (which joined the NYSE Group of exchanges on October 1, 2008) as well as on the OTCQX, an over-the-counter market operated by the OTC Market Group.

A DOJ investigation of Hyperdynamics had begun at least by September 2013 into potential FCPA and anti-money laundering violations relating to the conditions in which Hyperdynamics received its Guinean concession rights and its relationship with various charitable organizations. According to a media report, the DOJ investigation was launched after Guinea had asked G8 countries for help in cracking down on corrupt deals in Guinea. In May 2015, however, the DOJ closed its investigation without pursuing any charges. Deviating from its usual practice to keep declination decisions confidential, the DOJ issued a declination letter which, without providing any more detail, simply noted that Hyperdynamics had "provided certain information to the Department" and "described the results of the Company's internal investigation into this matter." The declination letter concluded by stating that "the Department values cooperation with investigations, such as shown here" and "[b]ased upon the

information known to the Department at this time", the Department had decided to close its inquiry into the matter. The SEC had started its own investigation, however, and concluded its investigation through a settlement with the company.

The alleged misconduct described in the SEC's cease-and-desist order centers around payments made by Hyperdynamics through its subsidiary in Guinea ("Guinean Subsidiary"). According to the SEC, from July 2007 to October 2008, the Guinean Subsidiary paid $130,000 to two third-party entities for purported public relations and lobbying services. In late 2008, Hyperdynamics discovered that the two entities were in fact controlled by an employee of its Guinean Subsidiary; however, the payments continued to be recorded as unrelated party transactions in the Guinean Subsidiary's books and records, which were subsequently consolidated with Hyperdynamics' books and records. Moreover, the purpose of these payments was recorded as lobbying and promotional services even though Hyperdynamics lacked sufficient supporting documentation to determine whether the services were actually provided.

The relatively small amount of civil penalties imposed by the SEC ($75,000, as noted above) is in part attributed by the SEC to Hyperdynamics' remedial efforts, which included a complete reorganization of its managers, an increase in accounting personnel and a first-time hiring of in-house legal counsel. The SEC's cease-and-desist order also noted the company's "cooperation afforded to the Commission staff" but, just as the DOJ's declination letter (mentioned above), did not provide any more detail on the degree or manner in which Hyperdynamics cooperated.

The DOJ and SEC investigations had a significant commercial impact. One of Hyperdynamics' partners in the Guinean offshore exploration project invoked force majeure for two months during the ongoing investigations. The company also delisted from the NYSE in January 2015, after its stock price had been trading low for 30 consecutive days. Today, Hyperdynamics' shares are therefore traded only on the over-the-counter market OTCQX. Moreover, the investigations by the DOJ and the SEC triggered a shareholders' suit brought against Hyperdynamics, which is currently in its initial stages.

9. IAP Worldwide Services and James Rama

On June 16, 2015, IAP Worldwide Services Inc. ("IAP"), a privately held defense and government contracting company incorporated in Delaware and headquartered in Cape Canaveral, Florida, entered into a non-prosecution agreement ("NPA") with the DOJ and the U.S. Attorney's Office for the Eastern District of Virginia to resolve the government's investigation into whether the company had conspired to bribe Kuwaiti government officials in order to secure a government contract. IAP agreed to pay a fine of $7.1 million as part of the NPA. The same day, James Michael Rama, a former IAP vice president turned commercial consultant, pled guilty in the Federal District Court for the Eastern District of Virginia to one count of conspiracy to violate the anti-bribery provisions of the FCPA. In October 2015, Mr. Rama was sentenced to 120 days in federal prison.

a. Payments in Kuwait

In or around August 2004, while employed in Kuwait by an American defense contractor not affiliated with IAP, Mr. Rama became familiar with several local individuals that acted as local "sponsors," Kuwaiti businessmen with whom foreign companies were required to partner in order to legally conduct business in the country. In 2004, one such local sponsor invited Mr. Rama to meet with Kuwaiti government officials to discuss a new business opportunity. At this meeting, Mr. Rama learned that the

Kuwaiti Ministry of the Interior ("MOI") was planning to build a "large-scale, homeland security system" that was intended to "provide nationwide surveillance for several Kuwaiti government agencies primarily through the use of closed-circuit television cameras," called the Kuwaiti Security Program ("KSP"). At this meeting with Kuwaiti government officials, Mr. Rama also met an individual referred to in the NPA only as "Kuwaiti Consultant." Kuwaiti Consultant was a middleman with important connections to MOI officials and he explained to Mr. Rama that the MOI had a two-phase plan for implementing the KSP. Phase I consisted of planning and designing the KSP, while the substantially more lucrative Phase II encompassed installation of the equipment, methods, and programs recommended in Phase I.

In August 2005, Rama was hired as IAP's Vice President of Special Projects and Programs and began to pursue the KSP Phase I contract. IAP's goal was to win both the Phase I and Phase II contracts by first winning the Phase I contract and leveraging its position to tailor to the requirements for the Phase II contract to its own strengths. IAP planned to hide its role in Phase I to avoid the appearance of a conflict of interest when it bid for Phase II. Kuwaiti Consultant became key to accomplishing this plan.

In November 2005, before the formal bidding process for the Phase I contract had even begun, Rama "received non-public indications" that the MOI would award the Phase I contract to IAP. In February 2006, at the direction of the MOI and the Kuwaiti Consultant, Rama and others at IAP agreed to set up Ramaco—a Delaware company headquartered in Odenton, Maryland that was owned by Rama and whose only employee was Rama—to act as a shell company to bid on the Phase I contract in IAP's place to hide IAP's involvement and avoid the appearance of any conflict of interest. In March 2006, IAP purchased G3, a U.K-based defense contracting company, and put (former) G3 personnel to work planning and implementing Phase I of the KSP. In April 2006, Rama opened a Ramaco bank account in Kuwait, and in May 2006, Ramaco signed the $4 million Phase I contract with MOI. The next month, in June 2006, Ramaco entered into a subcontract with IAP under which IAP would perform all of the Phase I work.

In return for the award of the Phase I contract, IAP and Rama had agreed to inflate the contract price for Phase I by approximately $2 million and to divert this amount through the Kuwaiti Consultant to Kuwaiti government officials. Ramaco submitted invoices reflecting the inflated price to the MOI. When the MOI paid the invoices, Ramaco then transferred the funds to its "subcontractor," IAP, which performed the Phase I work. IAP then funneled about half of the Phase I payments that it received from MOI to individual Kuwaiti government officials. This was accomplished through a Kuwaiti general trading company ("Kuwaiti Company") that acted as an agent for IAP and Ramaco and submitted falsified invoices to IAP. The Kuwaiti Company then transferred the funds it received from IAP to Kuwaiti Consultant. Kuwaiti Consultant subsequently used these funds to make bribe payments to Kuwaiti government officials, often after taking further steps to disguise the nature and source of the payments. At all times, IAP, Ramaco, and Rama were fully aware that they were transferring money from MOI to Kuwaiti Consultant through Ramaco, IAP, and Kuwaiti Company in order to bribe Kuwaiti government officials. Between September 2006 and March 2008, IAP and its co-conspirators paid at least $1.78 million to Kuwaiti Consultant with the understanding that some or all of the money would be used to pay bribes to Kuwaiti government officials to help IAP obtain the KSP Phase I and Phase II contracts.

b. NPA Considerations

Under the terms of the NPA, in addition to paying a $7.1 million penalty, IAP also agreed to cooperate with the government in all relevant matters, to continue to implement a compliance and ethics

program, to review its existing internal controls, policies, and procedures, and to periodically report to the DOJ on the implementation of those policies and procedures for a period of three years. The company also publicly admitted the truth of and accepted responsibility for all of the allegations contained in the NPA's Statement of Facts.

In deciding to enter into an NPA with IAP, the DOJ stated that it had considered several factors, including: (a) the Company's cooperation with the government by conducting an extensive internal investigation, voluntarily producing U.S. and international employees for interviews, and collecting, analyzing, and organizing large amounts of evidence and information for the government; (b) the Company's remediation efforts, including disciplining or terminating the officers and employees responsible for the corrupt payments, enhancing its due diligence protocol for third-party agents or consultants, and instituting heightened review of proposals and other transactional documents; (c) the Company's commitment to continuing to enhance its compliance program and internal controls, including ensuring that they meet the requirements laid out in the NPA; and (d) the Company's continued cooperation in any ongoing investigation of the company and its representatives in relation to investigations of possible violations.

c. Age of James Rama's Alleged Conduct

In an October 2015 statement, IAP reported that in 2008 it had discovered the scheme of payments surrounding its work on the KSP project and began cooperating with the DOJ that year. IAP's NPA and James Rama's Plea Agreement were subsequently submitted to the U.S. District Court for the Eastern District of Virgina in June 2015, almost seven years after the KSP payment scheme was discovered by IAP. Furthermore, the last overt act allegedly performed by James Rama in furtherance of the alleged conspiracy to violate the anti-bribery provisions of the FCPA occurred on or about March 10, 2008.

Despite the age of the offenses alleged by the DOJ, Mr. Rama did not raise any statute of limitations defenses before agreeing to plead guilty. His plea agreement acknowledged that federal law generally requires the government to return an indictment within five years of the completion of a non-capital offense. This standard five-year statute of limitations is, however, extended by statute to eight years in cases in which the government seeks evidence from overseas. Mr. Rama's plea agreement is a reminder that U.S. authorities' practice is to prosecute within the fullest extent of the law, including applicable statutes of limitation.

d. Sentencing Considerations for James Rama

At sentencing, the DOJ argued that Mr. Rama's crime had not been a momentary lapse of judgement or an unconsidered action. Mr. Rama and his co-conspirators, it argued, had repeatedly funneled money through Kuwaiti Consultant in a concerted effort to hide the money's eventual payment as bribes to MOI officials. Furthermore, the suggestion that Mr. Rama and his co-conspirators had set up Ramaco and the convoluted system of payments at the direction of MOI officials and Kuwaiti Consultant did not outweigh the fact that Mr. Rama's day-to-day involvement in the scheme over the course of several years was integral to its success. In the end, however, the DOJ recognized, among other mitigating factors, Mr. Rama's cooperation with the government's investigation and that Mr. Rama had not personally benefited from the bribe payments other than receiving his normal IAP salary and bonuses. As a result, the DOJ requested a final sentence of 366 days in federal prison.

The Court agreed that the federal sentencing guideline range of 57 to 60 months was "dramatically disproportionate" to the facts of Mr. Rama's case. The court recognized that, at the time of his sentencing, James Rama was 69 years old and had been reduced to a "broken man" according even to his own counsel. During the almost ten years that he had been under investigation, Mr. Rama lost his job and all of his personal possessions, declared bankruptcy, suffered a $350,000 decline in annual income, become separated from his wife, and spent the end of his career working as a cashier and washing trucks at a U-Haul dealership. Instead of the requested 366 days in federal prison, the Court ordered an even larger reduction from the guideline range, ordering Mr. Rama to serve only 120 days in prison with a subsequent 2-year term of supervised release. Characterizing Mr. Rama as "financially ruined" and "broke," the court also declined to not impose a fine, cost of incarceration, or cost of supervision on Mr. Rama.

James Rama remains the only individual to be prosecuted in relation to this investigation, despite arguments from his attorney that he was a "minor, albeit integral part of a larger scheme concocted by more senior executives at IAP," none of whom were prosecuted.

10. ICBC Standard Bank

On November 26, 2015, the London-based ICBC Standard Bank PLC ("Standard Bank"), entered into a Deferred Prosecution Agreement with the U.K. Serious Fraud Office under Section 7 of the U.K. Bribery Act for failure to prevent persons associated with its affiliate, Stanbic Bank Tanzania Ltd. ("SB Tanzania"), from committing bribery in connection with a $600 million sovereign debt security private placement by the Government of Tanzania in 2013. Four days later, on November 30, 2015, Standard Bank was subject to an administrative cease-and-desist order by the U.S. Securities and Exchange Commission for violating Section 17(a)(2) of the Securities Act of 1933 related to the same conduct. In total Standard Bank agreed to pay approximately $33 million in fines, compensation, restitution and disgorgement related to the U.K. action and an additional $4.2 million related to the SEC's order.

a. Underlying Facts

The actions against Standard Bank arose from Standard Bank's role in a 2013 sovereign debt offering by the Government of Tanzania, which are set forth in great detail in the Statement of Facts included as part of the U.K's DPA. In the context of Tanzania's 'Five Year Development Plan' (2011-2016), the government sought funding in order to develop energy, transport, water and sanitation projects in the country. SB Tanzania, which had previously participated in a sovereign loan transaction for the Government of Tanzania, started pursuing a second deal jointly with Standard Bank in October 2011.

The initial fee suggested by SB Tanzania and Standard Bank to the Tanzanian Ministry of Finance for the placement amounted to 1.4% of the gross proceeds raised. After a stalemate in negotiations during 2012, SB Tanzania introduced Enterprise Growth Market Advisors ("EGMA") as a "local partner" to assist with the transaction. The negotiations concluded and the proposed fee was increased to 2.4%, with 1% ($6 million) allotted to be paid by SB Tanzania to EGMA.

EGMA was owned in part by Mr. Harry Kitilya, then-Commissioner of the Tanzania Revenue Authority, a key advising agency regarding the Government's financing needs. Mr. Kitilya was apparently acquainted with SB Tanzania's then-CEO, and had apparently met SB Tanzania representatives at an

International Monetary Fund meeting around the time of the negotiations, which Mr. Kitilya had attended as part of a Government of Tanzania delegation.

Standard Bank and SB Tanzania agreed that EGMA would not be a party to or mentioned in the Mandate Letter with the Government of Tanzania regarding the financing. Instead, EGMA's purported duties and compensation were described in a side letter or 'collaboration agreement' signed between SB Tanzania and EGMA. Although Standard Bank was not a party to the agreement between SB Tanzania and EGMA, it was principally responsible for drafting this side agreement. According to the SEC and SFO, there is no evidence that EGMA performed any of the responsibilities listed in the side agreement nor was there any contemporaneous evidence of a legitimate business justification for including EGMA in the transaction. In SB Tanzania's previous sovereign loan transaction with the Government of Tanzania, no third-party assistance was required and SB Tanzania had charged a 1.4% fee (as initially suggested for the 2012 transaction).

The deal was closed in November 2012 and in February 2013 the Government of Tanzania issued and sold $600 million of sovereign bonds to private investors through a private placement in the U.S. Following the sale, the Government of Tanzania transferred $14.4 million (2.4%) to SB Tanzania in Tanzania. SB Tanzania, in turn, deposited EGMA's agreed $6 million fee to an account set up for EGMA at SB Tanzania.

Between March 18 and March 27, 2013, approximately $5.2 million was withdrawn in cash from EGMA's account at SB Tanzania in four separate transactions. According to the SFO, these transactions occurred with the knowledge of and support from SB Tanzania's CEO. SB Tanzania staff raised concerns about the cash transactions and reported the transactions to the Standard Bank compliance team by the end of March 2013. Standard Bank began an internal investigation with the assistance of counsel shortly thereafter, and disclosed the results of its investigation to the SFO within three weeks of its conclusion.

Although it was not alleged by either the SEC or SFO that Standard Bank had direct knowledge of the ownership of EGMA or any direct knowledge of a corrupt scheme, the SFO did allege that Standard Bank had inadequate systems to prevent SB Tanzania from committing the offense of bribery. The SFO and SEC indicated that Standard Bank failed to adequately respond to red flags suggesting a risk that a portion of the offering proceeds paid to EGMA was intended to induce the Government of Tanzania to grant the transaction to Standard Bank and SB Tanzania. The SFO and SEC noted that Standard Bank delegated responsibility for conducting Know-Your-Customer ("KYC") procedures on EGMA to SB Tanzania. According to the SFO, the KYC process on EGMA appeared to have been limited and did not adequately address the risks involved with retaining EGMA as a local partner.

b. SEC Order

The SEC's cease-and-desist order is based on the failure of Standard Bank to disclose to investors EGMA's role in the transaction, a violation of Section 17(a)(2) of the Securities Act of 1933. In its press release, the SEC clarified that it did not bring FCPA-related charges against Standard Bank because its jurisdiction under the FCPA is limited to "issuers" and Standard Bank was not an "issuer" as that term is defined in the FCPA.

In view of these findings, the SEC imposed a civil penalty of $4.2 million and required disgorgement of $8.4 million, which the SEC agreed would be satisfied upon Standard Bank's payment of that amount in disgorgement to the SFO in the related enforcement action.

c. U.K. Deferred Prosecution

The DPA between Standard Bank and the SFO is the first-ever DPA in the U.K. Under the agreement, Standard Bank (which has been controlled since February 2015 by the Industrial and Commercial Bank of China (ICBC)) was required to pay a $6 million in "Compensation" plus interest of $1,046,196.58. This amount will be initially held by the SFO for the benefit of the Government of Tanzania. The DPA also requires disgorgement of profit of $8.4 million, payment of a financial penalty of $16.8 million, and a payment of costs of £330,000. In detailing how the size of the financial penalty was determined, the Crown Court at Southwark (which scrutinized the DPA to ensure that it comported with the interests of justice), indicated that it should be 300% of the total fee earned by Standard Bank with a 1/3 reduction to credit the bank's early admission of responsibility.

Standard Bank also committed to (i) cooperate with the SFO and any other U.K. or foreign authorities and to disclose any relevant information relating to the underlying conduct; and (ii) submit to an independent review of its corporate compliance program. The materials supporting the DPA also noted that SB Tanzania's CEO had been dismissed for failing to cooperate with the investigation, and that SB Tanzania's Head of Legal Services & Compliance was dismissed for failing to comply with a board instruction relating to required reporting on EGMA and its fee.

In accepting the DPA, the Crown Court also highlighted the fact that upon learning of the issue from staff at SB Tanzania, Standard Bank retained an external law firm to conduct a thorough internal investigation and, within three weeks of receiving the first report from the investigation, disclosed the matter to the SFO. The Statement of Facts noted that the law firm made available to the SFO (i) email servers and shared drives; (ii) email inboxes of relevant individuals; (iii) hard copy documentation; (iv) CCTV images recovered from Africa; and (v) recorded telephone conversations relating to the transaction, and that both the law firm and the SFO conducted a detailed review of this data as part of the investigation.

11. Louis Berger International, Richard Hirsch, and James McClung

On July 7, 2015, Louis Berger International Inc. ("LBI"), a New Jersey-based construction management company, agreed to pay a $17.1 million criminal penalty pursuant to a Deferred Prosecution Agreement ("DPA") with the DOJ related to one count of conspiracy to violate the FCPA. LBI is a wholly-owned subsidiary of Berger Group Holdings, Inc. ("BGH"). Although LBI was not formed until after the misconduct described in the DPA occurred, in 2012 LBI assumed responsibility for all international operations and liabilities of BGH subsidiaries and affiliates (the "Company"). In addition to the criminal penalty, LBI and BGH agreed to implement enhanced internal controls, to continue to cooperate fully with the DOJ and to retain an independent compliance monitor for at least three years.

Two of the Company's former executives, Richard Hirsch and James McClung, each also pleaded guilty in July 2015 to one count of conspiracy to violate the FCPA and one count of violating the FCPA. Hirsch, who was located in the Philippines during the relevant period and at times oversaw the Company's overseas operations in Indonesia and Vietnam, was sentenced on July 8, 2016 to two years'

probation and was ordered to pay a $10,000 fine. McClung, located in India, oversaw the Company's overseas operations in India and eventually Vietnam. He was sentenced on July 7, 2016 to a prison term of one year and one day.

According to the DPA, from 1998 to 2010, the Company and its employees, including Hirsch and McClung, orchestrated approximately $3.9 million in bribe payments to foreign officials in India, Indonesia, Vietnam, Kuwait and elsewhere to secure construction management contracts with government agencies. The Criminal Complaint against LBI included a signed affidavit by a Special Agent of the FBI which referenced bribe payments to foreign officials and the ways in which the Company attempted to conceal such payments. For example, employees and agents of the Company used terms such as "commitment fee," "counterpart per diem," "marketing fee" and "field operation expenses" to describe payments that were made to obtain contracts. The Company then used various methods to make the improper payments, including by having employees, or companies owned by employees, generate inflated and fictitious invoices to create a source of cash that was used for the payment of bribes. In Vietnam, the Company made donations and payments to a non-governmental organization (referred to in the DPA as the "Foundation" and identified in court documents filed by the Company in a civil case against Hirsch as COFTIBD (Consultancy Foundation for Training in Business Development)) through which payments were funneled to government officials.

In agreeing to a DPA, the DOJ considered: (i) the fact that BGH conducted an internal investigation and, when it discovered potential FCPA violations, voluntarily self-reported the misconduct to the DOJ; (ii) the Company's cooperation in the investigation, including making employees outside of the U.S. available for interviews and extensively assisting in the collection, analysis and organization of evidence and information for federal investigators; (iii) the Company's remediation, including terminating the employment of officers and employees responsible for the corrupt practices; and (iv) the Company's stated commitment to improve its compliance program and internal controls.

However, the extent of the Company's cooperation was called into question at the July 2016 sentencing hearing of Hirsch. At that hearing, prosecutors with the FCPA unit indicated that although LBI voluntarily disclosed the misconduct, the Company initially was unwilling to concede that any bribery had occurred and challenged whether prosecutors had jurisdiction over the misconduct. According to the prosecutors, it was only after Hirsch began offering significant cooperation that the dynamic with the Company changed. This could potentially explain why LBI received a criminal fine that matched the lower threshold of the calculated U.S. Sentencing Guidelines Fine Range, rather than a reduction off of that lower end as may be granted to companies that voluntarily disclose FCPA violations.

a. Corrupt Conduct in Indonesia

According to the DPA, the Company paid "commitment fees" and "counterpart per diems" to Indonesian government officials in return for government contracts. These payments ranged from 3% to 20% of the contract value. In one instance, in order to avoid paying the "commitment fees" directly, the Company arranged for a consultant (who was a former employee of the Company) to serve as the prime contractor with the Company serving as a subcontractor in order for the consultant to be responsible for "client relations." According to the Statement of Facts in the DPA, when the Company launched an internal review in 2008, Hirsch and others attempted to obstruct the review. In particular, Hirsch and an agent of the company drafted language for a former employee to send to the outside lawyers conducting the review indicating that she did not wish to be contacted regarding the review due to age, health and

memory problems. Moreover, Hirsch took steps to limit email communication regarding the corrupt scheme and instructed an agent not to send any further emails regarding the improper payments for fear that the emails might be audited or intercepted.

b. Corrupt Conduct in Vietnam

In Vietnam, the Company paid bribes to Vietnamese officials in a variety of ways. For example, the Company made "donations" to the Foundation, which were paid into an account jointly held by the Foundation and the Company in Vietnam. The money was then withdrawn in cash and paid directly to Vietnamese government officials by Hirsch and other employees. Once McClung took over responsibility for the region in 2005, the funds for improper payments were generated through ostensibly legitimate payments to vendors for services that were ultimately never rendered. Through these schemes, the Company is alleged to have paid hundreds of thousands of dollars in bribes to government officials in Vietnam in return for contracts.

c. Corrupt Conduct in India

The Statement of Facts indicates that the Company, in a consortium with several other companies in India, won at least two water development projects through corrupt means. In a scheme developed with its consortium partners, bribe payments were disguised as legitimate payments to vendors for services that had, in fact, not been rendered. These funds were then transferred to government officials. The Company and consortium partners kept track of the payments by circulating a spreadsheet identifying the share of each bribe made to foreign officials for the two projects. For example, in August 2010, a tracking schedule prepared by one of the consortium partners stated that the Company had paid $976,630 in bribes in connection with one of the water treatment projects up to that point.

d. Corrupt Conduct in Kuwait

In Kuwait, the Company won a $66 million road construction project with the Kuwait Ministry of Public Works. According to the DPA, in order to secure the award, the Company and its joint venture partner made approximately $71,000 worth of payments to an official with the Ministry of Public Works. A portion of the $71,000 was paid up front in connection with the contract award and described as "proposal costs." Other payments were apparently made through a contract for "business development" with a third party.

12. Mead Johnson

On July 18, 2015, the SEC instituted cease-and-desist proceedings against Mead Johnson Nutrition Company ("Mead Johnson"), an Illinois-based global manufacturer and marketer of infant formula and childhood nutritional products. The SEC charged Mead Johnson with FCPA books and records and internal controls violations stemming from improper payments that its Chinese majority-owned subsidiary, Mead Johnson Nutrition (China) Co., Ltd. ("Mead Johnson China"), made to health care professionals ("HCPs") at government-owned hospitals in China. Mead Johnson agreed to cease and desist from further violations and pay $7.77 million in disgorgement, $1.26 million in prejudgment interest, and a civil monetary penalty of $3 million, for a total of $12.03 million. Mead Johnson neither admitted nor denied the allegations.

According to the SEC, Mead Johnson China, in violation of Mead Johnson's internal policies, gave cash and other undisclosed incentives to HCPs working at government-owned hospitals in return for the HCPs recommending Mead Johnson's infant formula to expectant and new mothers, and for providing Mead Johnson with contact information for these potential customers. From 2008 through 2013, Mead Johnson China allegedly made $2.07 million in improper payments to HCPs and derived profits from such conduct totaling approximately $7.77 million.

Mead Johnson China was found to have funded these improper payments using money generated by discounts provided to a network of third party distributors. Mead Johnson China used such distributors to market, sell and distribute its products in China, including to HCPs. Under the terms of its contracts with these third parties, Mead Johnson China provided the distributors with products at a discounted rate, with the understanding that the earnings from the discounts were to be used in part to fund legitimate marketing and sales efforts. Although the funds generated through the discounts contractually belonged to the distributors, the SEC indicated that Mead Johnson China in fact exercised substantial control over these funds. The SEC noted that certain members of Mead Johnson China's workforce provided specific guidance to the distributors concerning the use of these funds, and that some of the funds were used to reimburse Mead Johnson China's sales personnel for a portion of their marketing and other expenditures—a practice that the SEC Enforcement Division's FCPA Unit Chief described in a press release as allowing Mead Johnson China to use "off-the-books slush funds" to make these payments. The SEC claimed that in addition to being used for legitimate marketing expenses, funds generated by the discounts were also used by Mead Johnson China sales personnel themselves to make improper payments to the HCPs. Mead Johnson China was also found to have maintained internal records related to Distributor Allowance expenditures, which the SEC considered inaccurate because they did not reflect the fact that a portion of such discounts were used contrary to Mead Johnson's policies.

The SEC Order highlights the fact that in 2011, Mead Johnson was alerted to possible FCPA violations in connection with Mead Johnson China's use of distributors, and that the company conducted an internal review in response to such allegations. The SEC Order indicates that such review failed to find evidence that funds generated by the distributor discounts were being used for improper purposes, but that Mead Johnson China nonetheless discontinued the distributor discount funding to mitigate its risk of improper payments to HCPs. Despite the fact that this review did not reveal evidence of FCPA violations, the SEC Order is seemingly critical of Mead Johnson's failure to self-disclose the 2011 allegation or to "promptly disclos[e] the existence of this allegation in response to the Commission's inquiry" into the matter.

The SEC did, however, credit Mead Johnson with subsequently providing extensive and thorough cooperation and instituting "significant remedial measures" following a second review conducted in 2013. The Company's cooperation included providing reports of its investigative findings, sharing its analysis of documents and summaries of witness interviews with the SEC and responding to the Commission's request for documents and information (and providing translations of such materials). Mead Johnson's remedial measures included (i) personnel changes, such as the termination of senior staff at Mead Johnson China, the hiring of an additional senior-level compliance officer, and the establishment of a unit in China devoted to monitoring compliance and controls; and (ii) updating and enhancing the Company's compliance and control environment, including revisions to its compliance program, establishing new

business conduct controls and third party due diligence procedures, and providing employees with immediate access to the company's policies and procedures.

13. PBSJ and Walid Hatoum

On January 22, 2015, PBSJ Corporation ("PBSJ"), formerly a U.S.-based, publicly listed engineering and construction company, entered into a DPA with the SEC and agreed to pay $3.4 million in disgorgement and penalties to resolve charges that it violated the anti-bribery, internal accounting controls, and books and records provisions of the FCPA in connection with contracts awarded by a Qatari government agency. Additionally, the company agreed to implement a Code of Conduct and FCPA compliance procedures, to conduct compliance training for officers and key staff, and to cooperate fully with any related investigations for the two-year DPA period. PBSJ is currently a subsidiary of WA Atkins PLC ("Atkins"), a British engineering firm.

The charges resulted from an alleged bribery scheme relating to two multi-million dollar development contracts in Qatar and Morocco awarded by Qatari Diar Real Estate Investment Company ("Qatari Diar"), a subsidiary of the Qatari Sovereign Wealth Fund responsible for coordinating the country's real estate investments. The SEC alleged that the former President of PBS&J International, Inc. ("PBS&J International"), a wholly-owned subsidiary of PBSJ, offered a total of nearly $1.4 million in bribes to the former Director of International Projects at Qatari Diar (the "Public Official"). In exchange, the Public Official provided PBS&J International with non-public information, enabling the company to win both contracts.

a. Lack of Due Diligence or Attention to Red Flags

According to the allegations contained in the DPA, PBS&J International disguised the bribes as "agency fees" paid to a local company which was owned and controlled by the Public Official and which employed the Public Official's wife (the "Local Company"). The SEC alleged that PBS&J International's President, Walid Hatoum, was the only manager or employee who knew that the Public Official owned the Local Company; however, this fact could have been uncovered had PBSJ conducted meaningful due diligence. Neither PBSJ nor PBS&J International requested a due diligence questionnaire from the Local Partner, or made inquiries about the Local Partner's financial statements, work experience, ability to perform its share of work, external auditors, or owners.

The SEC also alleged that PBSJ and PBS&J International managers and employees ignored numerous red flags that should have alerted them to the bribery scheme. For example, employees were aware that the Local Company was providing them with confidential bid information, and that Mr. Hatoum was receiving information from a "good friend" who happened to be a "top executive" at Qatari Diar. Additionally, one PBS&J International officer learned that an employee of the Local Company was married to a government official involved in one of the projects for which PBS&J International was competing.

b. Projects Pursued

In January 2009, PBS&J International first pursued a $35.6 million light-rail transit project in Qatar (the "LRT Project") through a competitive bidding process conducted by Qatari Diar. PBS&J International included the Local Company in its bid as a local subcontractor, and agreed to pay the Public Official 40%

of the profits realized from the LRT Project. The Public Official assumed the alias of an "employee" of the Local Company to correspond with PBSJ, PBS&J International, and even the Qatari Diar. He provided confidential bid information to PBS&J International and, in his role within the Qatari Diar, made strategic and technical decisions on various aspects of the LRT Project which favored PBS&J International.

After being awarded the LRT Project in August 2009, Mr. Hatoum offered the Public Official an "agency fee" worth 1.8% of the contract amount (about $640,000) and agreed that PBS&J International would also pay half of the Public Official's wife's salary at the Local Company. PBS&J International also opened a joint bank account with the Local Company and deposited the first contractual payment from the Qatari Diar, worth $3.6 million, into that account.

Shortly after winning the LRT Project, PBS&J International entered a second competitive bidding process with Qatar Diar for a $25 million Morocco hotel resort development (the "Morocco Project"). The Public Official was the Qatari Diar's project manager for this project. Mr. Hatoum offered the Public Official 3% of the contract amount (about $750,000) as an "agency fee," and instructed PBS&J employees to inflate costs within the company's bid in order to hide this amount. The Public Official again made decisions which favored PBS&J International's bid, and also suggested changes to the company's original bid, including instructing it to lower its bid to a specific dollar amount. PBS&J International won the contract for the Morocco Project in October 2009.

c. Discovery of Bribery Scheme and Self-Reporting

PBSJ discovered the bribery scheme through an internal investigation launched by its then-General Counsel immediately after learning that Mr. Hatoum had offered "agency fees" in order to win the two contracts. Separately, the Qatari Diar discovered the Public Official's ownership of the Local Company, rescinded the award of the Morocco Project to PBS&J International, and negotiated a termination of the LTR Project contract. Though the bribes were never paid, PBSJ earned approximately $2.9 million in illicit profits as a result of its initial work on the LRT Project.

PBSJ self-reported the findings of its internal investigation to the SEC. The SEC cited PBSJ's response, including a rapid internal investigation, self-reporting, taking steps to end the misconduct, and a review and enhancement of its pre-existing compliance program, as justification for entering a Deferred Prosecution Agreement. The SEC also recognized and lauded PBSJ's substantial cooperation in its investigation. While the DOJ regularly employs DPAs and NPAs to resolve enforcement actions, this settlement was only the third time that the SEC used either a DPA or a NPA to resolve a FCPA enforcement action.

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d. Related Actions

Mr. Hatoum agreed to pay a $50,000 penalty to the SEC under an administrative proceeding charging him with violating the anti-bribery, internal accounting controls, and books and records provisions of the FCPA and the false records provisions of the Securities Exchange Act of 1934 for his role in the scheme. Mr. Hatoum neither admitted nor denied the SEC's findings in the administrative proceeding, which is based on the same core allegations as the DPA.

The SEC alleged that Mr. Hatoum, a U.S. citizen, caused PBSJ's inaccurate books and records and internal accounting control failure. For example, he "directed subordinates to conceal some of the payments he offered and authorized," and "repeatedly exploited the company's internal accounting control deficiencies to offer and authorize payments." Additionally, as the bribery scheme began to unravel and the Qatari Diar threatened to rescind one of the contracts, Mr. Hatoum allegedly made a secret offer of employment to a Qatari public official in exchange for influencing the Qatari Diar to reinstate the contract.

The SEC also noted that Mr. Hatoum had not completed PBSJ's FCPA training until after the scheme was uncovered. However, it noted that Mr. Hatoum signed a "Business Conduct Standards" agreement, stating that he would "neither accept nor give bribes or kickbacks of any value for services or favorable treatment for contracts," and that he had also received annual FCPA training from a previous employer.

14. Petrotiger Former Executives Joseph Sigelman, Gregory Weisman, and Knut Hammarskjold

In late 2013 and early 2014, Gregory Weisman, Knut Hammarskjold, and Joseph Sigelman, three former executives of British Virgin Islands-based oil and gas company PetroTiger Ltd. ("PetroTiger"), were arrested in connection with an alleged scheme to bribe an employee of Ecopetrol (the large, majority state-owned petroleum company of Colombia) in order to obtain approval for a pending oil services contract. The three individuals were also charged with defrauding PetroTiger's investors by accepting kickbacks themselves from officials of a company that PetroTiger was seeking to acquire. While Weisman and Hammarskjold both pleaded guilty, Sigelman pleaded not guilty and went to trial in in U.S. federal court.

The DOJ alleged that in 2010 PetroTiger sought to secure a $39.6 million contract to provide oil services in Colombia from a private Colombian company. Ecopetrol, however, had to approve the contract award. The DOJ alleged that Weisman, Hammarskjold, and Sigelman paid bribes of $333,500 between September and December 2010 to an official from Ecopetrol to secure that approval.

The underlying complaints alleged that PetroTiger made these payments pursuant to falsified invoices from the Ecopetrol official's wife, which falsely claimed that she had provided finance and management consulting services for PetroTiger. The DOJ alleged that the executives initially sought to

wire $133,400 to the account of the Ecopetrol official's wife, but after these attempts failed, they instead wired it directly to the official's account.

PetroTiger had initially self-reported the conduct that formed the basis of the charges against Weisman, Hammarskjold, and Sigelman. In the wake of a feud between the company's Board and then-co-CEOs Sigelman and Hammarskjold, the Board ousted the three executives and launched a review of the PetroTiger's books and records. When the Board discovered the invoices from the wife of the Ecopetrol official, it hired an outside law firm to conduct an internal investigation and subsequently disclosed the conclusions of that review to both U.S. and Colombian authorities.

As a result of PetroTiger's disclosure of this issue, coupled with other factors including PetroTiger's cooperation and remediation efforts, the DOJ declined to prosecute PetroTiger. This was only the second time the DOJ had publicly announced a specific declination to prosecute an FCPA case, the first time being in April 2012 when the DOJ declined to prosecute Morgan Stanley.

The DOJ did, however, pursue cases against the three ousted executives. Gregory Weisman, PetroTiger's former general counsel, pleaded guilty on November 8, 2013, to one count of conspiracy to violate the FCPA and commit wire fraud. On the same day, sealed charges were filed against former PetroTiger co-CEOs Knut Hammarskjold and Joseph Sigelman. Hammarskjold was arrested on November 20, 2013 at Newark International Airport in New Jersey, and he pleaded guilty on February 18, 2014 to one count of conspiracy to violate the FCPA and the wire fraud statute.

Sigelman was arrested in the Philippines on January 3, 2014, and extradited to Guam, where he appeared in federal court on January 6, 2014. Sigelman was indicted in federal court in New Jersey on May 9, 2014 on counts of (i) conspiracy to violate the FCPA and the wire fraud statute, (ii) three counts of substantive violations of the FCPA, (iii) conspiracy to commit money laundering, and (iv) transacting in criminal proceeds. The DOJ also sought forfeiture of any property derived from these offenses. On May 14, 2014, Sigelman pleaded not guilty to all charges.

Sigelman subsequently moved the court to dismiss the government's FCPA-related charges against him on the theory that Ecopetrol was not a government instrumentality in 2010 and that, therefore, the individual whom Sigelman allegedly paid was not a government official. Relying on the government's brief in the Esquenazi case, Sigelman argued that Ecopetrol could only be an instrumentality if it performed a government function. According to Sigelman, although Ecopetrol previously performed both governmental and commercial functions, the Colombian government split the company in 2003, with the newly created National Hydrocarbon Agency performing the governmental functions and Ecopetrol retaining only its former commercial functions. Sigelman also argued that, in this instance, Ecopetrol only had authority to approve private oil services contracts because it had entered into a joint venture agreement with PetroTiger's client that gave Ecopetrol a private right to make such approvals.

In its brief in opposition to the motion to dismiss, the government argued principally that Ecopetrol's status as an instrumentality was a question of fact to be decided by a jury. The government added that it would present evidence at trial to establish that the entity was a government instrumentality, including that the joint venture agreement that provided Ecopetrol with contract approval rights had been signed prior to 2004 at a time that the private company was legally mandated to do so.

On January 8, 2015, Judge Joseph E. Irenas denied Sigelman's motion, finding that the DOJ's indictment contained sufficient alleged facts to support the charges against Sigelman. June 1, 2015 was set as the opening date for a jury trial.

The DOJ's case relied heavily on testimony from Weisman and evidence he had helped the government gather, including videotapes of his interactions with Sigelman, recorded through a "button camera" with which the FBI had equipped Weisman. In one dramatic episode, highlighted by the DOJ in its opening remarks, Sigelman demanded that Weisman, who was wearing the button camera, lift his shirt to demonstrate that he was not wearing a wire.

The trial contained some surprises. The DOJ called Weisman, who had cooperated with the DOJ and FBI, to testify. As mentioned above, at the FBI's direction Weisman had secretly recorded conversations with Sigelman in which he attempted to induce Sigelman to incriminate himself. During his fifth day of testimony, Weisman stated that, following Sigleman's and his departure from PetroTiger, he had become General Counsel of Sigelman's new company, Atlantic Gulf Pacific Co., at the direction of the FBI. However, two days later, on June 11, 2015, Weisman admitted that he "may have misspoken" and was unsure whether FBI agents actually instructed him to continue working with Sigelman at Atlantic Gulf Pacific Co, and then agreed with defense counsel's suggestion that this meant he had made a false statement under oath.

Following Weisman's admission, the trial ended early for the week to allow Sigelman and the DOJ to discuss a potential plea deal. On June 15, 2015, Sigelman pleaded guilty to one count of conspiracy to violate the FCPA. The remaining five counts against Sigelman were dropped. Judge Irenas sentenced Sigelman to three years' probation, imposed a fine of $100,000, and ordered him to pay restitution of $239,015.45. However, Judge Irenas declined to sentence Sigelman to jail time and criticized the DOJ's attempts to persuade the Court to sentence Sigelman to at least one year in prison, stating that these efforts conflicted with the plea agreement where the parties agreed to a sentence with "a range from a non-custodial term of probation up to 12 months and one day of incarceration." Additionally, Judge Irenas rejected the DOJ's argument that a term of imprisonment was warranted because this and other FCPA cases are difficult to prosecute, pointing to the fact that, in this case the DOJ had cooperating co-conspirators and thousands of pages of documents handed to it directly from an earlier investigation conducted by PetroTiger's outside counsel, yet still made the decision to end the trial early.

This case illustrates the types of tactics that the government may use to gather evidence against the subject of an FCPA investigation, including traditional white-collar investigation tactics like the use of information gathered by cooperating witnesses wearing a wire (or a button camera). Sigelman's arrest in and extradition from the Philippines also demonstrates that U.S. authorities may be able to obtain international cooperation in pursuing criminal FCPA actions against individuals. Finally, the result in Sigelman's case exemplifies the unpredictability of criminal trials and illustrates how a defendant may be able to use favorable developments before or even during trial to negotiate an acceptable resolution to FCPA charges.

15. PDVSA Procurement Prosecutions: Rincon, Shiera, & Millan, and Ramos, Gravina, & Maldonado

In December 2015 and January 2016, the DOJ prosecuted three bribe-payers and three bribe-receivers for FCPA-related and money laundering violations, all in connection with bribes paid to influence procurement processes at Petroleos de Venezuela S.A. ("PDVSA"). The bribe-payers were (1) Roberto Enrique Rincon Fernandez ("Rincon"), (2) Abraham Jose Shiera Bastida ("Shiera"), and (3) their employee/agent Moises Abraham Millan Escobar ("Millan"). The bribe-takers—all PDVSA officials at the time of the conduct—were (1) Jose Luis Ramos Castillo ("Ramos"), (2) Christian Javier Maldonado Barillas ("Maldonado"), and (3) Alfonzo Eliezer Gravina Munoz ("Gravina").

All six individuals pleaded guilty in the U.S. District Court for the Southern District of Texas: Rincon, Shiera, and Millan pleaded guilty to FCPA and conspiracy charges, while all six pleaded guilty to money laundering-related charges. Sentencing is scheduled for September 30, 2016.

a. The Bribe Payers: Shiera, Rincon, and Millan

In December 2015, both Shiera and Rincon were arrested in Miami and Houston, respectively, and charged with FCPA- and money laundering-related offences for alleged involvement in a bribery scheme to secure energy contracts from Venezuela's state-owned energy company, PDVSA. In March and June 2016, respectively, Shiera and Rincon pleaded guilty in U.S. Federal Court in Houston to conspiracy to violate and violating the FCPA.

Rincon and Shiera controlled a number of closely held companies, including several U.S. companies qualifying as "domestic concerns" under the FCPA, many of which they used to secure contracts with PDVSA. Shiera and Rincon worked together, as well as independently, on numerous bids to provide equipment and services to PDVSA.

In their pleas, Shiera and Rincon admitted that beginning in 2009 and continuing through at least 2014, in return for various bribes paid, PDVSA officials: (1) assisted their companies in winning PDVSA contracts; (2) provided them with inside bid information; (3) placed one or more of their companies on certain bidding panels for PDVSA projects; (4) helped to conceal the fact that Rincon and Shiera controlled more than one of the companies on certain bidding panels for PDVSA projects; (5) supported their companies before an internal PDVSA purchasing committee; (6) prevented interference with the selection of their companies for PDVSA contracts; and (7) updated and modified contract documents, including change orders to PDVSA contracts awarded to Rincon's and Shiera's companies; and (8) ensured that their companies were placed on PDVSA approved-vendor lists and given payment priority ahead of other PDVSA vendors.

The bribe payments were made from Rincon, Rincon's companies, and Shiera's companies to the bank accounts of PDVSA officials, their relatives or other individuals or entities designated by the PDVSA officials who received the bribes. They also bribed the officials by providing recreational travel, meals, and entertainment. The Indictment includes similar allegations involving four Rincon companies, six Shiera companies, two Rincon & Shiera associates, and five PDVSA officials.

The scheme started in October 2009 when Rincon and Shiera reached an agreement to work together to pay bribes to PDVSA officials. Around that time, "Associate 2," an employee or independent

contractor for Shiera (possibly Millan, discussed below), sent an email to "Official C," a PDVSA employee whose job responsibilities included selecting companies for bidding panels and selecting which companies would win the economic portion of the bid process. The email explained the strategy for rigging PDVSA bids to ensure that Shiera companies would win. It stated when Shiera's "Company 1" was invited to submit bids, Official C needed to first ensure that Shiera's Company 1 would meet certain conditions and that Official C would be the PDVSA employee responsible for assembling the panel, and then:

> If that is the case, tell me so I can send you a panel of companies that I know will not make an offer, or they will make offers higher than ours. It is indispensable to have the complete description of the request to seek out pricing beforehand. When starting the process, it is also indispensable that you require a short submission offer timeframe (3days). Well buddy, I believe that if we follow these strategies, that shit is ours.[33]

Later in 2010, Shiera sent Official C information about how to open a bank account in Panama, and Rincon helped Official C open a bank account in Texas into which bribes were paid. For example, after Official C helped ensure that a Shiera Company won a $2.65 million contract, Shiera transferred $100,000 from a different Shiera company into Official C's Texas bank account. Rincon later made another $100,000 payment into Official C's Texas bank account.

In October 2011, Associate 2 sent an e-mail to Shiera with the subject line "Outstanding [commission] for [Official A]", attached was a spreadsheet listing numerous PDVSA contracts that had been awarded to Shiera's companies between September 1, 2010 and September 30, 2011 by various PDVSA buyers that were supervised by Official A. The spreadsheet listed an "outstanding commission" of $188,276.61 USD owed to Official A.

Between 2009 and 2014, other payments were made to PDVSA officials, including: a transfer made in 2010 to pay off the balance of a mortgage loan of a PDVSA official's residence in Texas; a $14,502.29 hotel reservation for "Official D" at the Fontainebleau Hotel in Miami Beach, Florida, approval by Shiera of an invoice for whiskey, and the payment for a hotel and a rental car in Venezuela, all to the benefit of several PDVSA officials.

Rincon & Shiera often agreed on who should win which projects and would pay or allocate commissions to each other accordingly. For example, in late April 2012, Shiera emailed a PDVSA official and instructed the PDVSA official to "assign" a specific PDVSA contract to another PDVSA official to assemble the bid panel, and then dictated that a specific Shiera Company should win that project.

In another instance, in March 2012, a PDVSA official sent Rincon & Shiera certain procurement panel lists, all of which included some of Shiera's and Rincon's companies. Shortly after, they exchanged emails taking about how "[Rincon Company 1] should win the process. According to what [Rincon] approved, the commission to [Shiera Company 1] is 5% of the purchase price. That is fair . . . [Rincon] pays the commissions to the allies." A few days later, Shiera sent an email saying that Rincon's

[33] Indictment p. 16.

companies "will excuse themselves from these two processes. From ours, [Shiera's Company 1] wins both."

b. Millan: Shiera's and Rincon's Agent

In January 2016, Millan, Shiera's former employee who acted as an agent of both Shiera and Rincon's various companies, pleaded guilty to conspiracy to violate the FCPA for bribing PDVSA officials. Between 2009 and at least 2012, Millan discussed with Rincon/Shiera (i) the need to provide things of value to PDVSA officials, (ii) the PDVSA officials they would target, (iii) the particular things of value to provide (including travel, meals, and entertainment) and (iv) how they would be provided. He helped all parties coordinate which Rincon/Shiera companies would pay which bribes, he helped PDVSA officials open bank accounts in Panama and the U.S. to receive the bribes, and he sent emails to Rincon and Shiera about improper payments, including spreadsheets tracking benefits such as travel to be provided to PDVSA officials.

The Shiera & Rincon indictment discusses the involvement of two associates to Shiera & Rincon, while Millan is the only associate to be named and prosecuted thus far.

c. Prosecution of Former PDVSA employees Ramos, Maldonado, & Gravina

In December 2015, former PDVSA employees Ramos, Maldonado, and Gravina also pleaded guilty to conspiracy to commit money laundering in connection with receiving bribes from Rincon, Shiera, and Millan. They admitted that while they were employed by PDVSA or its wholly owned subsidiaries or affiliates, they accepted bribes from Rincon and Shiera in exchange for helping them win PDVSA contracts, and they admitted having conspired with Rincon and Shiera to launder the proceeds of the bribery. At the time of writing, the defendants had not yet been sentenced, their plea agreements remain sealed, and forfeiture orders had been filed as noted below. Note that the Shiera & Rincon indictment discusses the corruption of five PDVSA officials whose identities were known to the Grand Jury, indicating that two additional current or former PDVSA officials have not yet been charged.

Ramos was employed by PDVSA from 2002 until September 2012; he was a former resident of Venezuela and then more recently a resident of Texas. He held a number of positions related to purchasing, including purchasing manager and superintendent of purchasing. His duties included selecting companies for bidding panels and selecting wining companies. From 2009 and until at least 2013, Rincon and Shiera bribed Ramos to help their companies be selected as winning vendors. Bribes were concealed by creating false documents, including invoices for services that were never performed. Certain bribes were paid into a U.S. bank account that Rincon helped Ramos open in the name of a company Ramos owned with a relative. Ramos received numerous bribe payments; for example, in exchange for Ramos' assistance in awarding PDVSA contracts to one of Rincon's companies, Rincon transferred $150,000 on September 23, 2010 to Ramos' bank account in the U.S. Although he has not yet been sentenced and the details of his plea agreement remain sealed, Ramos was ordered to forfeit several properties and more than $10 million on July 12, 2016.

Maldonado was first employed by PDVSA around 2005, serving as a purchasing analyst responsible for equipment purchases and selecting companies for bidding panels. Between 2009 and at least 2012, Maldonado received bribes in exchange for helping Rincon's and Shiera's companies win and

receive payment for PDVSA contracts. He also provided them with inside bid information and documents including change orders awarded to Rincon's and Shiera's companies, and he gave their companies payment priority. Maldonado created a private email account to communicate with Shiera and Rincon and opened a Panamanian bank account into which he received several payments. Although Maldonado's plea agreement remains sealed at the time of writing, the DOJ moved unopposed for a money judgment of $165,000 against Maldonado on July 12, 2016.

Gravina held PDVSA positions related to the purchase of energy services equipment and services between 1998 and March 2014; he was a resident of Texas and a naturalized U.S. citizen since 2006. His responsibilities included selecting companies for bidding panels. From 2007 until at least 2014, Gravina received bribes from Rincon and Shiera in exchange helping to place their companies on bidding panels. He supported Rincon's and Shiera's companies before an internal purchasing committee and provided them with inside information about PDVSA projects and bids. Gravina, together with the other conspirators, tried to conceal the source of the bribes, which they referred to as "commissions," by having them paid from bank accounts belonging to unrelated Shiera and Rincon companies, and he directed payments to recipients other than himself. In addition to a number of payments of around $15,000 each, Rincon also paid off the mortgage on Gravina's Texas home in exchange for inside information and support before an internal purchasing committee. Although Gravina's plea agreement remains sealed at the time of writing, the DOJ moved unopposed for a money judgment of $590,446 against Gravina on July 12, 2016.

The prosecutions of Ramos, Maldonado, & Gravina serve as a reminder that while the FCPA does not prohibit or punish the receiving of bribes, other U.S. federal statutes are available for the prosecution of bribe-receivers. In addition, these prosecutions illustrate the growing trend of cross-border cooperation among enforcement agencies. Here, while the conduct at issue most obviously involved the United States and Venezuela, the government of Switzerland also provided assistance, and in its Press Release announcing Rincon's guilty plea, the DOJ noted the assistance provided by the Swiss Federal Office of Justice as well as the DOJ Criminal Division Office of International Affairs, which is responsible for handling requests for information from foreign governments, among other tasks.

16. SAP SE and Garcia

On August 12, 2015, Vicente Garcia, a former senior executive of German technology company SAP SE ("SAP") pleaded guilty in the U.S. District Court for the Northern District of California to one count of conspiracy to violate the Foreign Corrupt Practices Act related to a four-year scheme to bribe Panamanian government officials in connection with the sale of SAP software contracts. Garcia was sentenced on December 16, 2015 to 22 months in federal prison. Separately, on July 15, 2015, Garcia had entered into a settlement with the SEC in which he agreed to pay $92,395, representing $85,965 in disgorgement of kickback payments he received plus $6,430 in prejudgment interest. Related to the same conduct, on February 1, 2016, SAP settled with the SEC to resolve violations of the books and records provisions of the FCPA. SAP agreed to disgorge $3.7 million in ill-gotten gains plus pay $188,896 in prejudgment interest.

SAP's settlement with the SEC notably did not include a financial penalty beyond disgorgement and interest. In choosing not to impose an additional financial penalty, the SEC noted SAP's cooperation with the investigation and its remediation efforts. Specifically, upon being advised of the SEC inquiry, SAP immediately conducted an internal investigation that included an audit of all recent public contracts

in Latin America, with heightened scrutiny toward those that involved large discounts. SAP also voluntarily disclosed approximately 500,000 pages of documents, identifying relevant portions and providing translations from Spanish to English; conducted witness interviews; facilitated an at-work interview of Garcia without alerting him of the SEC investigation; and arranged for a third-party audit of its local business partner.

Garcia, a U.S. citizen based in Miami, was the former Vice President of Global and Strategic Accounts at SAP, serving as Regional Director for Latin America and the Caribbean of SAP's "Premier Client Network." From approximately June 2009 to December 2013, Garcia participated in a scheme to sell heavily discounted software technology contracts from SAP's wholly-owned Mexico subsidiary through middlemen, who resold the services for full price to agencies of the Panamanian Government. The difference between the price that SAP sold the technology to the middleman and the price paid by the Panamanian Government was used to finance bribes to three Panamanian officials and kickbacks to Garcia and the middlemen involved.

The first contract obtained through this method was a technology upgrade for the Panamanian Social Security Agency. According to court documents, obtaining the initial contract was considered critical for SAP as it was believed that the Government of Panama would seek to harmonize its software solution across state agencies after choosing the supplier for the first contract. Leading up to this contract, Garcia was apparently informed by a local partner that in order to obtain the contracts from the government of Panama, three Panamanian government officials would likely need to be bribed: Eduardo Jaen (Director, National Authority of Government Innovation), Carlos Tason (Director of Technology, Social Security Agency), and Aaron "Roni" Mizrachi (then-President Ricardo Martinelli's brother-in-law), who is understood to have acted as President Martinelli's agent in this scheme. In June 2010, Garcia agreed on an arrangement whereby the participants, including Garcia himself, would each receive 2% of the value of the contract except for Mizrachi, who would receive 10%.

Initially, Garcia attempted to execute the arrangement through direct sale to the Social Security Agency using a different local agent than the one that SAP customarily used. However, the last-minute nature of the appointment and other red flags led the SAP compliance department to reject the proposed commission to the agent. As a result, Garcia arranged for SAP to sell the $14.5 million technology package at a heavily discounted rate of $2.1 million to a third-party intermediary firm, Advanced Consulting Panama, which in turn resold the technology at full price to the Social Security Agency. According to SEC documents, SAP routinely provided large discounts to local partners for legitimate reasons and Garcia used his knowledge of that process to justify the discounts and create a slush fund from which to fund the corrupt scheme. As part of Garcia's additional efforts to circumvent SAP's controls, Garcia used a personal Yahoo email address to send emails to the middlemen and two of the government officials involved in the scheme.

Following the success on the Social Security Agency contract, SAP obtained three further contracts from Panamanian state agencies broadly using the same scheme as above. The total value received by SAP for these three contracts was approximately $1.6 million, and the amount paid by the Panamanian Government was approximately $13.5 million.

The SEC determined that SAP committed two violations of the FCPA. Firstly, by improperly recording bribe payments as legitimate discounts in SAP's Mexico subsidiary's accounts, which are consolidated into SAP's financial statements that are publicly disclosed pursuant to U.S. exchange

requirements, SAP failed to comply with the books and records provisions of the FCPA. Secondly, SAP failed to have adequate internal controls in place relating the granting of sales discounts.

17. Tenam/Tenex/Rosatom Executive Vadim Mikerin, and Boris Rubizhevsky (NexGen Security), and Daren Condrey (Transport Logistics International)

On December 15, 2015, Vadim Mikerin, the former President of a U.S.-based subsidiary of Russia's State Atomic Energy Corporation ("ROSATOM"), was sentenced to four years' imprisonment and made to forfeit $2,126,622.36 following his guilty plea in August 2015 to conspiracy to commit money laundering. Mikerin, whom the DOJ considered a Russian foreign official, engaged in a widespread scheme to obtain bribes from U.S. companies seeking to win lucrative contracts from subsidiaries of ROSATOM. In June 2015, one of Mr. Mikerin's co-conspirators, Daren Condrey (Transport Logistics International), pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit wire fraud, while a second co-conspirator, Boris Rubizhevsky (NexGen Security Corporation), pleaded guilty to conspiracy to commit money laundering. Condrey and Rubizhevsky have not yet been sentenced.

In 1992, the U.S. and Russia executed an agreement to dispose of highly enriched uranium from disassembled nuclear warheads in Russia and for the sale of these materials, once they had been down-blended into low-enriched uranium, to U.S. nuclear utility providers. This initiative was commonly referred to as the "Megatons to Megawatts" project. From 1995 until 2013, a total of 475 metric tons of Russian warhead grade highly-enriched uranium, equivalent to 19,000 nuclear warheads, was converted in Russia to low-enriched uranium and sold in the United States for use as fuel. As much as ten percent of electricity produced in the United States was generated from fuel obtained through this arrangement.

JSC Techsnabexport ("TENEX"), a subsidiary of ROSATOM based in Russia, was responsible for the sale and transportation of this material to the U.S. TENEX operated as the sole supplier and exporter of Russian uranium to nuclear power companies worldwide. In 2010, TENEX established TENAM Corporation ("TENAM"), based in Maryland, as its subsidiary and official representative in the U.S. TENAM directly contracted with companies in the U.S. nuclear power industry for the shipment of low-enriched uranium to U.S. power plants. The DOJ maintained in its charging documents that both TENEX and TENAM should be considered "agencies" and "instrumentalities" of a foreign government as defined in the FCPA.

Mikerin, a Russian national who resided in Maryland, served as the Director of the Pan American Department of TENEX from at least 2004 through 2010, and was the President of TENAM from approximately October 2010 through October 2014. The DOJ therefore considered Mr. Mikerin a "foreign official" under the FCPA.

Daniel Condrey was an executive and owner of Transport Logistics International, Inc. ("TLI"), a Maryland-based transportation services company. TLI contracted with TENEX to transport uranium from Russia to the U.S. According to Condrey's plea agreement and other court documents, between 2004 until 2014 Condrey, as well as another former executive of TLI and others, caused TLI to make a series of payments "at the direction of, and for the benefit of" Mikerin in an effort to win contracts with TENEX without going through the ordinary competitive tender process. The payments were made to three different shell entities that maintained bank accounts in Cyprus, Latvia and Switzerland, but were in fact intended for Mikerin. Condrey also caused TLI to act as an intermediary for at least one other company

that sought to bribe Mikerin. In order to disguise their scheme, Condrey and Mikerin referred to these bribe payments as "cake," "lucky figure" and other code terms in their communications. Condrey also caused TLI to inflate the price of its contracts with TENEX in order to fund the bribe payments. In total, TLI paid more than $1 million in bribes during this ten-year period. Condrey, along with his wife, who was TLI's financial manager, were initially charged with conspiracy to commit wire fraud. Mr. Condrey was later charged with conspiracy to violate the FCPA and commit wire fraud, while the charges against Mrs. Condrey were dismissed.

Boris Rubizhevsky was the owner and sole employee of a New Jersey-based consulting company called NexGen Security Corporation ("NexGen"). From approximately October 2011 through February 2013, Rubizhevsky acted as a conduit for bribe payments to Mikerin made by an Ohio-headquartered company (unnamed in the charging documents) that manufactured cylinders used for transporting and storing uranium. Press reports indicate that this company is Westerman Companies, which was acquired by Worthington Industries, Inc. in 2012. NexGen entered into sham consulting agreements with this company and then passed on its consulting fees to bank accounts in Switzerland and Latvia for the benefit of Mikerin. In total, Rubizhevsky was responsible for laundering between $70,000 and $120,000 in bribe payments.

Mikerin's conduct appears to have come to U.S. enforcement authorities' attention in 2009, when Mikerin allegedly offered to help an unnamed individual win contracts to provide lobbying and consulting services for TENEX in exchange for bribes. According to court documents, the individual was uncomfortable with this arrangement and approached the FBI to disclose the scheme. The FBI and DOJ subsequently authorized this individual to participate in the scheme and report on Mikerin's illegal activities. According to an affidavit submitted by a U.S. Department of Energy Special Agent in connection with the initial criminal complaint against Mikerin, this individual entered into a series of contracts with TENEX and was forced by Mikerin to pay approximately $360,000 in bribes by wire transfer, and approximately $100,000 in bribes in cash. The wire transfer payments were made to the same shell companies that were used in connection with the schemes involving Condrey and Rubishevsky. The affidavit also alleges that on one occasion, Mikerin informed the individual that certain cash payments were going to be given to TENEX officials who were visiting the United States.

Ultimately, only Mr. Condrey pleaded guilty to an FCPA-based offense. Mikerin, who was considered a foreign official, is not subject to liability under the FCPA, although his prosecution is an example of how the DOJ can successfully pursue criminal charges against government officials who accept bribes. As discussed elsewhere in this Alert, the DOJ has previously charged foreign officials with money laundering related offenses, such as when it charged a number of officials of Telecommunications D'Haiti with conspiracy to commit money laundering in connection with their acceptance of bribes from a U.S. telecommunications company; and with Travel Act violations, such as when it charged Maria de Los Angeles Gonzalez, a Venezuelan state bank official, with a Travel Act violation in connection with her acceptance of bribes from former employees of Direct Access Partners.

C. 2014

1. Alcoa / Alcoa World Alumina

On January 9, 2014, Alcoa World Alumina LLC ("Alcoa World"), a subsidiary of the world's third-largest Aluminum producer Alcoa Inc. ("Alcoa"), pleaded guilty to one count of violating the FCPA's anti-

bribery provisions. Under the terms of the plea agreement, Alcoa World agreed to pay a criminal fine of $209 million and an administrative forfeiture of $14 million. Additionally, pursuant to the plea agreement, the final judgment placed Alcoa World on probation for a period of four years, during which time the company is required to maintain contact with a probation officer, answer all inquiries from the officer truthfully, and provide any other information or documentation requested by the officer.

On the same day, the SEC issued a cease-and-desist order against Alcoa, charging the company with violations of the anti-bribery and accounting provisions of the FCPA. In settling those charges, Alcoa agreed to pay $175 million in disgorgement (offset partially by the $14 million administrative forfeiture included in the judgment against Alcoa World).

The combined $384 million in fines and disgorgement, though substantial, could have been much higher. The U.S. Sentencing Guidelines provided a range of $446 million to $892 million for the criminal fine alone. The DOJ stated, however, that the penalty was appropriate due to the fact that "a penalty within the guidelines range" could impact Alcoa's financial condition such that it would "'substantially jeopardize[e]' Alcoa's ability to compete," particularly given the fact that the SEC was imposing its own significant penalty. The DOJ also noted the external investigation that Alcoa's outside counsel had conducted, the "substantial cooperation" Alcoa provided, and the company's remedial efforts and commitment to upgrading its compliance program.

The settlements relate to Alcoa's business practices in Bahrain. Since 1989, Alcoa and its various subsidiaries had engaged a London-based consultant to assist with its business with Aluminium Bahrain B.S.C ("Alba"), a large aluminum plant owned and operated by the government of Bahrain.

In 2002 and 2004, Alcoa World entered into purported distributorship agreements with the consultant in connection with the sale of alumina to Alba, even though Alcoa's Australian subsidiary (and not the consultant) shipped the alumina directly to Alba. Instead, the sham contracts enabled Alcoa World to provide its consultant with excess mark-up funds that could be paid on to government officials in Bahrain. Between 2002 and 2009, payments made to the consultant generated more than $267 million in excess mark-up, of which at least $110 million was passed on to Bahraini government officials.

In addition to failing to conduct appropriate due diligence or determining whether there was a legitimate business reason for entering into the distributorship agreements, Alcoa extended the consultant a line of credit that reached as high as $58 million to enable the intermediary to meet its required financial obligations in connection with the agreements, despite their refusal to provide Alcoa with financial statements as required under the company's policies and procedures.

Although the various individuals in the underlying documents were not identified, former Alba CEO Bruce Allan Hall pleaded guilty on June 25, 2012 in the U.K. to conspiring to violate and violating the Prevention of Corruption Act and the Proceeds of Crime Act. Hall stated that he had entered into a conspiracy with Viktor Dahdaleh (the consultant engaged by Alcoa) and Sheikh Isa bin Ali al-Khalifa (Alba's Chairman and the brother-in-law of the Bahraini Prime Minster), and that he received payments as part of a deal to allow the existing corrupt scheme between Dahdaleh and Sheikh Isa to continue. On July 22, 2014, Hall was sentenced to 16 months in prison and required to pay £3.67 million in disgorgement, compensation and contribution to prosecution costs.

According to public media reports, Sheikh Isa insisted on personally selecting and approving any supply contract valued at over 100,000 dinars ($265,000) so that he could organize and control the flow of kickbacks for himself and others, and reportedly worked very closely with Mr. Dahdaleh, whom he called his "friend in London." Sheikh Isa has denied any wrongdoing and has not been charged.

Dahdaleh had been charged by the SFO with seven counts of corruption based on allegations that he paid $67 million in bribes to Alba officials in exchange for contracts awarded to Alcoa and other companies. As discussed further below, Dahdaleh was initially arrested in the U.K., but authorities later dropped the case for various reasons.

The origins of the Alcoa settlement can be traced back to 2005, when Bahraini Crown Prince Sheikh Salman bin Hamad Isa al-Khalifa vowed to root out corruption in government contracting. In 2006, Bahrain commissioned a two-year investigation into Alba that unearthed indications of widespread corruption and bribery. That same year, Hall and Sheikh Isa were both removed from their positions.

2. Alstom S.A.

On December 22, 2014, the DOJ resolved its investigation of Alstom S.A. ("Alstom"), a French multinational design, construction, and services company in the power generation, power grid, and rail transport sectors. Alstom paid a $772,290,000 criminal fine and pleaded guilty to criminal books and records and criminal internal accounting controls violations. A Swiss subsidiary, Alstom Network Schweiz AG (f/k/a Alstom Prom AG), pleaded guilty to a criminal conspiracy to violate the FCPA's anti-bribery provisions. Two U.S. subsidiaries, Alstom Power Inc. and Alstom Grid Inc., each entered DPAs related to criminal informations charging them with conspiracies to violate the FCPA's anti-bribery provisions. Alstom was not required to retain a compliance monitor as part of its agreement with the DOJ. Rather, the agreement allowed Alstom to self-report to the DOJ regarding its compliance program provided that it satisfied the then-existing compliance-program related obligation of Alstom's settlement with the World Bank Group (under which Alstom had already been subject to an independent compliance monitor). In February 2015, Alstom satisfied the compliance-program related obligations of its settlement with the World Bank Group and was released from its period of debarment.

Alstom's fine was, according to its plea agreement with the DOJ, in the middle of the Guidelines' recommended sentencing range and was based on five factors: (1) the failure to self-report after a 2008 criminal resolution in Italy, (2) the failure to meaningfully cooperate until after the U.S. arrested former executives, (3) the nature and seriousness of the misconduct, (4) the lack of an effective compliance program at the time of the misconduct, and (5) prior criminal misconduct, including that underlying prior settlements with the Swiss Attorney General and the World Bank Group. The DOJ noted, however, that:

The Defendant lacked an effective compliance and ethics program at the time of the offense. Since that time, the Defendant has undertaken substantial efforts to enhance its compliance program and to remediate prior inadequacies, including complying with undertakings contained in resolutions with the World Bank (including an ongoing monitorship) and the government of Switzerland, substantially increasing its compliance staff, improving its alert procedures, increasing training and auditing/testing, and ceasing the use of external success fee-based consultant.

The Alstom plea agreement provides several examples of criminal books and records or internal control violations that occurred prior to Alstom's substantial efforts to enhance its compliance program

and remediate prior inadequacies. Alstom was subject to these provisions of the FCPA from its 1998 listing on the New York Stock Exchange until its delisting in August 2004.

Regarding the books and records violation, Alstom admitted in its plea agreement that it disguised on its books and records millions of dollars in payments and other things of value given to foreign officials in exchange for those officials' assistance in securing projects, keeping projects, or otherwise gaining other improper advantages. In some instances, Alstom hired consultants to "conceal and disguise" such payments and recorded the payments as "commissions" or "consultancy fees." Alstom created, or caused to be created, false records to justify these payments in the form of consultancy agreements for purportedly legitimate services and in the form of false invoices and supporting documentation, even when Alstom employees knew that such services were not actually performed. Alstom also falsely recorded improper payments made directly by Alstom as "consultant expenses," "donations," or other purportedly legitimate expenses.

Regarding the criminal internal accounting controls violation, Alstom admitted to knowingly failing to implement and maintain adequate controls to ensure compliance with corporate policies prohibiting direct or indirect unlawful payments to foreign officials. These internal accounting controls failures included:

- Failing to implement and maintain adequate controls to ensure meaningful due diligence for the retention of third-party consultants;

- Retaining consultants without meaningful scrutiny even after due diligence uncovered "red flags," such as a proposed consultant's lack of relevant expertise, a proposed consultant's location in a country other than the project country, or a proposed consultant's request to be paid in a country other than the country where the consultant and the project were located;

- Certain executives who "had the ability to ensure appropriate controls surrounding the due diligence process" either "knew, or knowingly failed to take action that would have allowed them to discover" that the purpose of hiring certain consultants was to conceal payments to foreign officials;

- Failing to implement adequate controls over the approval of consultancy agreements, such that inadequate scrutiny was given to changes to the amount and terms of payments to consultants, made in violation of the company's own internal policies in order to make cash available to bribe foreign officials;

- Failing to implement adequate controls over payments to consultants, such that payments were made in multiple instances without adequate or timely documentation of the services performed or based on false "proofs of services" prepared long after the purported services were rendered; and

- Failing to engage in auditing or testing of consultant invoices or payments.

Regarding the bribery conspiracy to which Alstom Network Schweiz pleaded guilty and that was the basis for the criminal informations filed against the two U.S. subsidiaries, Alstom admitted that it paid "approximately $75 million in consultancy fees knowing that this money would be used, in whole or in

part, to bribe or provide something of value to government officials to secure approximately $4 billion in projects in multiple countries, with a gain to Alstom of approximately $296 million." The admitted misconduct involved conduct in the power sector in Indonesia (2002-2009), Saudi Arabia (1998-2003), and the Bahamas (1999-2004), the power and grid sectors in Egypt (2002-2011), and the transport sector in Taiwan (2001-2008). Alstom's admitted misconduct in Indonesia is related to the same power project underlying the DOJ's prior resolution with Marubeni and the DOJ's prosecution against several former Alstom executives, discussed immediately below. Related to Alstom's conduct in the Bahamas, in May 2016 a Board Member of the Bahamas Electricity Corporation was convicted in the Bahamas of accepting hundreds of thousands of dollars in bribes from Alstom.

a. Individual Prosecutions

Pierucci: On April 14, 2013, U.S. authorities arrested Alstom vice president Frederic Pierucci at New York's John F. Kennedy International Airport. Following his arrest, the criminal indictment that a grand jury had returned against Pierucci nearly six months before was unsealed. The indictment charged Pierucci with 10 separate offenses, alleged to have been committed when he held executive-level positions at a U.S. subsidiary of Alstom and other entities in the Alstom Group, including: (i) four counts of violating the FCPA related to four payments totaling $360,000 made to a U.S. consultant in connection with a project in Indonesia; (ii) one count of conspiracy to violate the anti-bribery provisions of the FCPA; (iii) four counts of money laundering related to the four payments to the U.S. consultant; and (iv) one count of conspiracy to commit money laundering. On July 29, 2013, Pierucci pleaded guilty to one count of violating the FCPA and one count of conspiracy to violate the FCPA. Pierucci is awaiting sentencing as related cases continue.

Pomponi: On July 17, 2014, Pierucci's co-defendant, another former Alstom vice president of the U.S. subsidiary, William Pomponi, pleaded guilty to one count of conspiracy to violate the FCPA related to the same scheme in Indonesia. On May 24, 2016, Pomponi passed away while awaiting sentencing

Hoskins: On July 30, 2013, a third Alstom senior vice president, Lawrence Hoskins, was indicted on six counts of violating the FCPA's anti-bribery provisions, four counts of money laundering, one count of conspiracy to violate the FCPA, and one count of conspiracy to commit money laundering. Hoskins was a Senior Vice President of Alstom U.K. in charge of the Asia Region who had been assigned to Alstom Resources Management S.A. in France at the time of the misconduct. The relevant indictment against Hoskins charged him with four counts of violating the FCPA as an "agent of a domestic concern." However, with respect to the conspiracy to violate the FCPA, the indictment charged that Hoskins acted "together with a domestic concern" to conspire to violate the FCPA. The government indicated that its theory was that even were the jury to find that Hoskins was not an agent of a domestic concern, it may still convict him for conspiracy on accomplice liability theories. Hoskins filed a motion to dismiss the conspiracy charge, arguing that non-resident foreign nationals that commit no acts within the U.S. and that are not agents of a domestic concern could not be subject to liability simply by virtue of conspiracy or aiding and abetting principles. On August 13, 2015, the United States District Court for the District of Connecticut agreed and dismissed the conspiracy count against Hoskins. The court found that Congress had excluded non-resident foreign nationals that were not agents of a domestic concern from the FCPA, and that the government could not circumvent this intent by using conspiracy or accomplice theories. The government filed an interlocutory appeal and Hoskins' trial has been stayed until the Court of Appeals rules on the issue.

Rothschild: On April 16, 2013, a November 2012 plea agreement with David Rothschild, a former Alstom vice president of sales for the same U.S. subsidiary, was unsealed. Rothschild pleaded guilty to a single count of conspiring to violate the FCPA's anti-bribery provisions. Like Pierucci and Pomponi, Rothschild admitted to participating in the conspiracy and that, in furtherance of the conspiracy, he and others had engaged in telephone and electronic mail communications to bribe Indonesian officials in order to obtain a contract on the Tarahan project from the state-owned electricity company Perushaan Listrik Negara ("PLN"). Rothschild also admitted that corrupt payments were made to Indonesian officials through two consultants, one of whom received wire transfers from the company to a U.S. bank account in Maryland.

b. SFO Actions

The U.K. Serious Fraud Office ("SFO") has announced a series of investigations and charges against British companies and individuals within the Alstom Group (described more fully in CHAPTER 4: U.K. Anti-Bribery Developments at p.481).

3. Asem M. Elgawhary

On December 4, 2014, Asem Elgawhary pleaded guilty to mail fraud, conspiracy to launder money, and obstructing and interfering with the administration of tax laws in the U.S. District Court for the District of Maryland in connection with his role in a corrupt scheme to steer more than $2 billion in Egyptian power contracts to three different international power contractors over the course of a decade. On March 23, 2015, Elgawhary was sentenced to 42 months in prison and ordered to forfeit the $5.2 million that he admitted accepting as kickbacks.

Elgawhary is a dual U.S. and Egyptian citizen who was a long-time employee of Bechtel Corporation ("Bechtel"), a U.S.-based international engineering, construction and project management company. From 1996 to 2011, Elgawhary was assigned by Bechtel to serve as the general manager of Power Generation Engineering and Services Company ("PGESCo"), an Egyptian-based joint venture between Bechtel, the state-owned Egyptian Electricity Holding Company ("EEHC"), and an international bank. PGESCo assisted EEHC in, among other things, identifying subcontractors, soliciting bids from such subcontractors, and awarding contracts to perform work on behalf of EEHC.

As general manager of PGESCo, Elgawhary oversaw this competitive tender process, including for EEHC projects. Elgawhary misused his position, however, and accepted kickbacks from three international power companies that had sought to obtain unfair advantages during various bid processes. According to the indictment, these three international power companies included (i) "a French company engaged in the business of providing power generation and transportation related services around the world,"—later identified by the DOJ as Alstom S.A., (ii) "a Japanese company engaged in power-related services around the world," and (iii) "a Kuwaiti company engaged in power-related services in the Middle East."

According to the DOJ, Elgawhary's improper assistance included providing non-public information about competing companies and the bidding process, manipulating the timing of the bidding process to favor those companies which had paid him kickbacks, and expediting payments from EEHC. In return, the power companies paid kickbacks to Elgawhary through various third-party consultants. The DOJ alleged that the French and Japanese companies each engaged their own consultants for this purpose.

The Kuwaiti company's consultant was a BVI incorporated company located in the UAE that "purportedly performed oil-and-gas-related consulting services." This consultant further engaged a subconsultant who allegedly acted as "a representative of [the BVI company], but in reality negotiated kickback payments from [the Kuwaiti company] on behalf of Elgawhary."

In describing the means through which Elgawhary attempted to conceal his conduct, the DOJ identified his purchase of a nearly $1.8 million home in Maryland for two close family members. In order to disguise the source of the funds used to purchase the home, Elgawhary characterized the money as an unsecured loan from a Saudi lender that was owned and operated by Elgawhary's relative. Additionally, Elgawhary failed to disclose the existence of non-U.S. bank accounts and also failed to report his receipt of the kickback payments to the Internal Revenue Service for tax purposes. The DOJ also cited Elgawhary's false representations to Bechtel executives as a basis for his conviction, including through (i) mailed and emailed "representation letters" – in which Elgawhary falsely certified that he was not aware of any fraud or inaccurate books and records; and (ii) Elgawhary's false statements to Bechtel's lawyers during an April 2011 interview.

In Elgawhary's Criminal Complaint – filed on November 27, 2013 – the government details some of the sources of information on which it relied to bring charges against Elgawhary, which included (i) information received from Bechtel; (ii) emails, including from Elgawhary's Gmail account, obtained by search warrant; (iii) public source data; and (iv) bank records from Germany, obtained through a Mutual Legal Assistance Treaty ("MLAT").

4. Avon Products.

On December 17, 2014, Avon Products, Inc. ("Avon"), a global manufacturer and marketer of beauty and related products, agreed to pay $134.95 million to settle charges with the DOJ and SEC that it violated or conspired to violate the accounting provisions of the FCPA with respect to the activities of Avon and its Chinese subsidiary Avon Products (China) Co. Ltd ("Avon China") in China. Separately, Avon China pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA.

Avon entered into a DPA with the DOJ in connection with charges that Avon conspired to violate the accounting provisions of the FCPA. Together, the terms of the DPA and the final judgment against Avon China imposed a criminal penalty of $67.6 million.

The SEC filed a complaint against Avon, alleging that it committed violations of the books and records and internal controls provisions of the FCPA. The company consented to a proposed final judgment that would require it to pay disgorgement of $52.85 million and prejudgment interest of $14.5 million.

The DPA and proposed final judgment with the SEC also required Avon to retain an independent corporate monitor for a period of 18 months, followed by an additional 18-month reporting period that required the company to report to both enforcement agencies at six-month intervals thereafter until the expiry of the DPA.

The settlement and plea agreements focus on Avon and Avon China's activities in China between 2003 and 2008, during which time the companies (i) conspired to disguise numerous gifts and other

things of value that it provided to the Chinese government officials, (ii) falsely recorded payments to a third-party consulting company, and (iii) sought to conceal concerns about these practices that had been raised by its internal audit department.

In addition to all of the above, Avon reached a settlement in August 2015 in which it agreed to pay an additional $62 million to shareholders who claimed that the company had falsely inflated the price of its stock by concealing FCPA violations. According to the shareholders' suit in the U.S. District Court for the Southern District of New York, Avon had falsely implied that its success in China and Latin America was due to growth in direct sales rather than bribes paid to foreign officials. The plaintiffs asserted that they were likely filing suit on behalf of tens of thousands of class members, as there were more than 420 million Avon shares outstanding during the relevant period.

a. Gifts, Travel, and Other Things of Value

First, Avon and Avon China conspired to conceal more than $8 million in gifts, cash, and non-business meals, travel and entertainment that it provided to Chinese government officials in order to obtain and retain business benefits for Avon China, such as obtaining its direct selling license or other approvals. The company provided officials with various personal luxury items, such as designer wallets, bags, and watches, but recorded these expenses using incorrect labels such as "public relations entertainment" expenses. Among other reasons, Avon employees believed that they needed to disguise the nature of the gifts and the corresponding recipients because the government officials who received such items did not want a "paper trail" reflecting their acceptance of such items.

The company also paid for personal travel for officials (and sometimes their families), such as a $90,000 trip for four Chinese officials of the Guandong Food & Drug Administration to the United States that combined a half-day visit to an Avon research and development facility with an 18-day sightseeing tour that included locations in New York, Canada, Las Vegas, and Hawaii. Some of the personal travel expenses were recorded as "study visits."

Although not all of the improper gifts and expenses were as extravagant, they appear to have been given frequently. The SEC Complaint, for example, notes that Avon China made 9,600 separate payments for meals and entertainment between 2004 and the third quarter of 2008—meaning that, on average, the cost of each expense was approximately $172 but that there were 39 such transactions per week for four and half years.

The company also made cash payments to government officials. Avon China executives and employees obtained the money to make these payments by submitting receipts for reimbursement that had been provided to them by the government officials, or by making the payments directly and falsely reporting them as fine payments.

b. Third Party Consultancy Payments

In October 2003, an Avon China executive engaged a third-party consulting company to provide, upon request, services relating to "(1) crisis management; (2) government relations; and (3) (to) coordinate with public security authorities" in exchange for payments of $2,000 - $7,000 per month plus expenses. Avon China also paid the consulting company nearly $1.2 million for other apparently fictitious services, including $43,000 for "PR Fees" and "sponsorship" in connection with an art exhibition that

never occurred, and $25,900 for unknown services (described as "communication service fee; business entertainment; hotel/lodging; telecommunications' material preparation") in connection with a threatened fine of $66,000.

The DOJ and the SEC both criticized Avon and Avon China for failing to conduct any due diligence review of the consulting company or to require that the consulting company agree in writing to comply with the anti-bribery compliance provisions of Avon's Code of Conduct.

c. Initial Efforts to Conceal Nature of Concern

As early as June 2005, a senior Avon audit manager reported Avon China executives and employees were intentionally failing to maintain proper records of entertainment expenses given the sensitivity expressed by government officials. Several months later, Avon's internal auditors issued a draft audit report of Avon China's travel, entertainment, and discretionary expenses that, according to the charging documents, found that:

(1) high value gifts and meals were offered to government officials on an ongoing basis; (2) the majority of the expenses related to gifts, meals, sponsorships, and travel of substantial monetary value for Chinese government officials to maintain relationships with the officials; (3) a third party consultant was paid a substantial sum of money to interact with the government but was not contractually required to follow the FCPA, was not actively monitored by AVON CHINA, and was paid for vague and unknown services; and (4) the payments, and the lack of accurate, detailed records, may violate the FCPA or other anti-corruption laws.

After reading the draft audit report, multiple Avon and Avon China executives instructed the internal audit team to retrieve and physically destroy every copy of the draft report that had been made, and to issue a new report that removed any discussion of the provision of gifts, meals, travel, or other things of value to Chinese government officials.

The charging documents note, however, that Avon executives did not instruct any Avon China executives or employees to stop any of the conduct that had been identified in the draft report, and that it failed to put proper controls in place that would prevent such activity from occurring or ensure the accuracy of its books and records. Moreover, the SEC Complaint added that Avon declined to provide FCPA-specific training for its employees in China, as its internal audit department had recommended, because of budgetary concerns.

Likewise, when a second audit in December 2006 revealed that the improper practices had continued unabated, no one at Avon or Avon China took any steps to stop them. Instead, one Avon executive falsely reported to the company's compliance committee that the earlier concerns reported in 2005 had been "unsubstantiated," which as a result terminated Avon's own internal investigation of Avon China at that time.

A subsequent internal investigation began in June 2008 when Avon's CEO received a letter from an employee alleging improper travel spending related to Chinese government officials. Avon voluntarily contacted the SEC and DOJ to advise them of the allegations and of its own internal investigation.

Although there appear to have been some difficulties in reaching a final settlement—Avon reported in August 2013, for example, that the enforcement agencies had rejected its $12 million settlement offer—both the DOJ and SEC noted Avon's extensive cooperation, disclosure, and remediation efforts.

5. Bio-Rad Laboratories.

On November 3, 2014, Bio-Rad Laboratories, Inc. ("Bio-Rad"), a medical diagnostics and life sciences manufacturing and sales company that is based in California and listed on the NYSE, settled charges with the DOJ and SEC that it had violated the FCPA and agreed to pay over $55 million total. The company had self-reported the events that led to these charges.

Bio-Rad entered into an NPA with the DOJ, under which it agreed to pay $14.35 million in penalties to resolve allegations that it violated the accounting provisions of the FCPA by falsifying its books and records and failing to implement adequate internal controls in connection with sales made in Russia, as well as failing to maintain "an adequate compliance program."

Separately, the SEC instituted cease-and-desist proceedings against Bio-Rad for violating the internal controls, anti-bribery, and books and records provisions of the FCPA in connection with conduct in Russia, Thailand and Vietnam. In anticipation of the cease-and-desist order, the SEC agreed to accept Bio-Rad's settlement offer of $40.7 million in disgorgement and prejudgment interest.

a. Russia

From 2005 through 2010, Bio-Rad's French subsidiary used the help of a third-party "Agent" to assist it and Bio-Rad's Russian subsidiary with sale of clinical diagnostics products (such as HIV-testing kits and blood bank equipment) to government customers in Russia. Specifically, the French subsidiary engaged three intermediary companies, which the Agent had established in Panama, the United Kingdom, and Belize.

The DOJ and SEC criticized Bio-Rad for failing to conduct any due diligence on these intermediary companies, and for ignoring significant red flags that suggested a high probability that Bio-Rad's payments to these intermediaries were being passed through to Russian government officials.

The settlement documents provide a litany of classic red flags, including (i) poor qualifications, (ii) a lack of business justification, (iii) unexplored connections of the Agent to government officials, and (iv) unreasonable compensation.

First, the enforcement agencies noted that the intermediary companies did not have adequate qualifications or experience to perform the tasks listed in their contracts, which included business development, the creation and distribution of marketing materials, product distribution and installation services, and training. In fact, the intermediary companies had all been recently created, and they had no employees besides the Agent himself. One of the intermediary companies listed the address of a Russian government building as its own office address.

Second, the settlement documentation indicates that Bio-Rad did not have a sufficient business justification for engaging the intermediary companies. To the contrary, Bio-Rad managers knew that

some of the intermediary contracts called for the provision of installation and training activities that were not required given the type of products being sold. In other instances, Bio-Rad had engaged the intermediary companies to perform product distribution services even though Bio-Rad was separately using the services of another bona fide distributor to provide such services.

Third, Bio-Rad failed to investigate purported connections that its Agent had with Russian government officials. The SEC cease-and-desist order, for example, notes specifically that Bio-Rad's new Russia country manager continued to engage the intermediary companies without conducting any further due diligence even though he "knew from discussions with colleagues in the Russian health care industry that the [Agent] had important contacts at the Russian Ministry of Health, and could influence the tender offer specifications and selection process."

Fourth, the payment terms were unreasonable and not consistent with market rates. In one instance a Bio-Rad Russia Country Manager estimated that true distribution costs for Bio-Rad products in Russia cost between 2% and 2.5% of the value of the products; nevertheless, Bio-Rad's French subsidiary paid the Russian Agent 15-30% commissions. Moreover, the payments were transferred to bank accounts that the Agent had set up in Lithuania and Latvia. In some instances, the Russian Country Managers requested pre-payment of commissions before Bio-Rad received its own payment from the underlying sales contracts.

The DOJ and SEC also criticized Bio-Rad for its "extensive efforts to conceal matters relating to the [Agent]." Among other things, only the Russia Country Managers were permitted to communicate with the Agent, and one did so by using ten different personal email accounts, with aliases. One employee of Bio-Rad's French subsidiary was specifically told that she should "talk with codes" when communicating about invoices from the intermediary companies. Along those lines, the Russia Country Manager used the code phrase "bad debts" to refer to the Agent's commissions in email communications. The Country Managers did not keep any records related to the agents, and the second Russia Country Manager used and used code words including "bad debts" to reference the Russian Agent's commissions.

Several managers from Bio-Rad's Emerging Markets division, who were located for the most part in California, were responsible for negotiating and approving the contracts with the intermediary companies and for approving all related invoices for payment. The DOJ and SEC stated that these Emerging Markets Managers participated in concealing activities related to the Agent, or failed to apply appropriate internal controls, by approving payments even though they knew that some of the invoices had been fabricated internally by Bio-Rad's Russia subsidiary, and that the Russia Country Managers often requested commissions to be paid in increments less than $200,000, which was the threshold that would have triggered additional scrutiny and required additional approvals under Bio-Rad's signature authority matrix. The Emerging Markets Managers also approved payments above $200,000 without reviewing the underlying documentation, and they failed to provide the legal and finance departments with translated copies of the contracts with the intermediary companies, as was required by Bio-Rad's internal policies and procedures.

According to the NPA, the Emerging Markets Managers "failed to implement adequate controls for Bio-Rad's Emerging Markets sales region, including controls related to its operations in Russia where those managers knew that the failure to implement these controls allowed [the Agent] to be paid significantly above-market commissions for little or no services that were supported by false contracts and

invoices. For example, [the Emerging Markets Managers] did not put in place a system of controls to conduct due diligence on third party agents, such as the Intermediary Companies, to ensure documentation supporting payments to third parties, or to monitor such payments. Nor did the company implement adequate testing of the controls that should have been in place."

Bio-Rad paid the Agent a total of $4.6 million through payments to these intermediary companies, which Bio-Rad falsely recorded as "commission payments" in the books and records of its French subsidiary (and ultimately consolidated into Bio-Rad's reported financial statements). Bio-Rad's French and Russian subsidiaries won every government contract on which it bid on with the support of the Agent, generating $38.6 million in sales revenue. After cancelling its agreements with the intermediary companies, Bio-Rad lost its first bid in Russia.

b. Vietnam

In its cease-and-desist order, the SEC also alleged that Bio-Rad violated the accounting provisions of the FCPA through the activities of its Vietnam Office. The SEC stated that Bio-Rad's Vietnamese employees initially made cash payments to officials of state-owned hospitals and laboratories so that those entities would purchase Bio-Rad products.

The SEC alleged that Bio-Rad continued to make improper payments to Vietnamese officials after the conduct was discovered by the company's Regional Sales Manager and Asia Pacific General Manager in 2006, because the Vietnamese Country Manager had explained in an email that the company otherwise would lose 80% of its Vietnamese sales. Instead, the Country Manager proposed to make the improper payments by discounting sales to distributors, who could resell the products to their government customers at full price and provide a portion of the difference as a bribe.

The SEC stated that Bio-Rad made improper payments of $2.2 million to Vietnamese government officials through agents and distributors between 2005 and 2009. The company recorded these payments as "commissions," "advertising fees," and "training fees."

Although the SEC and DOJ both characterized the activities of Bio-Rad in Vietnam as involving "improper payments," neither enforcement agency alleged that the company had violated the anti-bribery provisions of the FCPA. Although the SEC alleged that Bio-Rad had violated the accounting provisions of the FCPA, it noted that "[t]he payment scheme did not involve the use of interstate commerce, and no United States national was involved in the misconduct." The DOJ did not discuss the Vietnamese activity at all except to note that Bio-Rad's "failure to maintain an adequate compliance program significantly contributed to the company's inability to prevent . . . improper payments to government officials in Vietnam."

In the wake of the settlement, Vietnamese authorities announced that they would review the conduct as well. In November 2014, the Ministry of Health launched an investigation into eight public hospitals that purchased Bio-Rad medical equipment.

c. Thailand

In connection with its October 2007 acquisition of Switzerland-based Diamed AG, Bio-Rad acquired a 49% stake in Diamed Thailand (the remaining 51% of which was retained by local Thai

owners). The SEC alleged that Diamed Thailand had engaged in a bribery scheme prior to the acquisition (using Thai agents and distributors to pass on portions of an inflated commission to Thai government officials), and that Bio-Rad conducted "very little due diligence" on the company prior to the acquisition.

The SEC stated that Bio-Rad's Asia Pacific GM learned of the activities in 2008, but that he nevertheless did not instruct Diamed Thailand to stop making the improper payments. In total, Diamed Thailand paid $708,600 to its local distributor, which it recorded in its books as sales commissions.

As with the Vietnamese activities discussed above, the DOJ and SEC declined to allege any violations of the FCPA's anti-bribery provisions.

d. Settlement Notes

The DOJ and SEC both lauded Bio-Rad's self-disclosure, extensive cooperation, and remedial efforts. The enforcement agencies emphasized that, immediately after Bio-Rad's audit committee learned of the potential FCPA violations, it retained independent counsel to conduct an investigation that covered multiple countries and included over 100 in-person interviews, the review of millions of documents, and forensic auditing.

Bio-Rad's cooperation with the DOJ and SEC further involved voluntarily producing overseas documents, translating documents, producing witnesses from foreign jurisdictions, and providing timely reports on witness interviews. Bio-Rad also voluntarily remediated many issues by terminating problematic processes, terminating employees involved in misconduct, comprehensively reevaluating and supplementing its anti-corruption policies on a world-wide basis, enhancing its internal controls and compliance functions, developing FCPA compliance and due diligence procedures for intermediaries, and conducting anti-corruption training throughout the organization worldwide. Bio-Rad also closed its Vietnam office.

Under the terms of the settlement, Bio-Rad is required to report to the SEC and DOJ for two years as to its remediation efforts and plans to improve its FCPA and anti-corruption compliance procedures.

6. Bruker

On December 15, 2014, Bruker Corporation ("Bruker"), a NASDAQ-listed, Massachusetts-based manufacturer of life-sciences instruments, settled allegations with the SEC that it had violated the books and records and internal controls provisions of the FCPA. The SEC entered a cease-and-desist order, concluding its investigation and the resulting administrative proceeding. Under the terms of the settlement, Bruker agreed to pay $2.4 million, including $1.7 million in disgorgement, $310,000 in prejudgment interest, and a civil monetary penalty of $375,000.

According to the SEC, Bruker's failure to implement internal controls at the offices of its four Chinese subsidiaries (collectively the "Bruker China Offices") allowed the Bruker China Offices to make unlawful payments of approximately $230,938 to Chinese government officials employed at State Owned Enterprises ("SOEs") that were Bruker customers. These payments were allegedly entered into the

Bruker China Offices' books and records falsely as legitimate business and marketing expenses and consolidated into Bruker's books and records. Bruker neither admitted nor denied the charges.

According to the SEC, the Bruker China Offices paid approximately $230,938 to several Chinese government officials from 2005 through 2011 in order to increase Bruker's sales. Approximately half of these alleged payments related to vacations for government officials to the United States, the Czech Republic, Norway, Sweden, France, Germany, Switzerland, and Italy. According to the SEC, Bruker improperly profited by $1,131,740 from contracts obtained from SOEs whose officials participated in these trips.

Some of these trips followed business-related travel funded by the Bruker China Offices. For instance, in 2006 as part of a sales contract with a Chinese SOE, the Bruker China Offices paid for training for the government official who signed the sales contract on behalf of the SOE. However, in addition to the training, the Bruker China Offices paid the government official's expenses related to sightseeing, shopping and leisure activities in Paris and Frankfurt. Similarly, in 2007, the Bruker China Offices paid for certain Chinese government officials to attend a conference in Sweden, but also leisure travel in Sweden, Finland, and Norway.

In other instances, the trips had no legitimate business component at all, including one instance in 2009 where the Bruker China Offices paid for two Chinese government officials to visit New York and Los Angeles even though Bruker had no facilities there.

The other half of the alleged payments were made through twelve Collaboration Agreements between the Bruker China Offices and SOEs. Under the Collaboration Agreements, SOEs allegedly were required to provide research on Bruker products, however the SEC alleged that the Bruker China Offices paid the SOEs regardless of whether they provided any work product. In some cases, the Bruker China Offices allegedly made these payments directly to the government officials rather than to the SOEs. According to the SEC, the Bruker China Offices profited by approximately $582,112 from contracts obtained from SOEs whose officials received these payments.

During this period, the SEC alleges that Bruker's internal controls system was completely inadequate. According to the SEC, Bruker did not translate any of its compliance materials including FCPA trainings, ethics trainings, FCPA policy, Code of Conduct, or its toll-free employee reporting hotline into local languages, including Mandarin. Furthermore, according to the SEC, the Bruker China Offices had no independent compliance or internal audit staff to monitor the activities of Bruker's management in China.

Bruker discovered the improper payments in 2011 during an internal review of certain of the Bruker China Office's employees. Upon discovery, Bruker immediately alerted its board of directors, initiated an internal investigation, and self-reported the preliminary results of the investigation to both the DOJ and SEC. Furthermore, Bruker provided extensive cooperation to the SEC by sharing reports of its investigative findings, analysis of important documents, summaries of witness interviews, and documents requested by the SEC. Bruker also expanded the scope of its investigation at the request of the SEC and undertook significant remedial measures, including terminating the senior staff at each of its China offices, implementing enhanced FCPA training in local languages, and implementing a new whistleblower hotline, among other things.

7. Dallas Airmotive

On December 10, 2014, Dallas Airmotive, Inc. ("DAI"), a Texas corporation specializing in the maintenance, repair, and overhaul of aircraft engines, entered into a DPA with the DOJ and agreed to pay $14 million to resolve criminal charges that it had violated and conspired to violate the anti-bribery provisions of the FCPA.

The charges resulted from bribes that DAI and its Brazilian affiliate, Dallas Airmotive do Brasil ("DAB"), made to government officials in Brazil, Argentina, and Peru. Specifically, from 2008 through 2012, employees of DAI and DAB engaged in a scheme to provide improper payments and other things of value to government officials in the Brazilian and Peruvian Air Forces, the Office of the Governor of the Brazilian State of Roraima, and the Office of the Argentinian State of San Juan in order to obtain contracts that generated over $2.5 million in revenue for DAI.

DAI and DAB paid the bribes through various front companies that were affiliated with or owned by government officials, as well as intermediary companies that would pass payments through to the government officials. In emails between one another, employees of DAI and DAB referred to these improper payments as "commissions" or "consulting fees," even though the employees knew that the payments were in fact intended as bribes.

The company's schemes were documented in candid emails among the participants over a number of years. These emails included explicit discussions between government officials and DAI employees that, among other things (i) confirmed that the payments to front companies were in fact intended for the government officials; (ii) discussed specific budgetary pricing information to assist with DAI's bid efforts; and (iii) referenced personal trips that DAI provided to a government official and his spouse.

First, in July 2010, a DAI sales agent asked one Brazilian government official to provide his personal bank account information so that it could be included in documentation submitted by one of the front companies. After providing that information to DAI, the company's sales director asked pointedly, "Who is getting commissions for engines that come to us from the [Brazilian Air Force]?" The sales agent responded that the commissions would go to the government official.

Second, in December 2010, a separate Brazilian government official sent an email from his private account to the private email address of a DAB manager, stating that the company should prepare a budget plus expenses of $350,000 and explaining that he was using private email accounts because "these issues involving amounts and decisions are 'sensitive'."

Third, during a vacation that DAI sponsored for another Brazilian Air Force official and his spouse in January 2012, a DAB manager emailed the official to ask whether "everything [is] alright there?? And the hotel is so-so or worth the expense??? I hope that you are enjoying it." The official responded, "When I said I had confidence in your good taste, I confess that I underestimated you….hehe The Hotel was excellent. I believe that it was a great present to [my wife]. She insists on passing on thanks to you. Great job, my good friend!!!"

As justification for deferring prosecution, the DOJ cited DAI's substantial cooperation, including conducting an internal investigation, voluntarily making U.S. and other employees available for interviews,

and collecting, analyzing, and organizing evidence. The DOJ also agreed to a decreased monetary penalty in light of DAI's substantial cooperation, accepting $14 million to settle the charges, a 20% reduction from the minimum penalty calculated under the U.S. Sentencing Guidelines.

As part of the DPA, DAI agreed to self-report annually to the DOJ for three years with respect to its remediation efforts and plans to improve its FCPA and corruption compliance procedures.

8. Dmitry Firtash et al.

On March 12, 2014, Dmitry Firtash, a prominent Ukrainian businessman, was arrested in Vienna, Austria after being charged by a U.S. federal grand jury of heading an international racketeering conspiracy that paid over $18.5 million in bribes to Indian state and central government officials. Also charged in the federal indictment were Andras Knopp (a Hungarian citizen), Suren Gevorgyan (a Ukrainian citizen), Gajendra Lal (an Indian citizen with U.S. permanent residency), Periyasamy Sunderalingam (a Sri Lankan citizen), and K.V.P. Ramachandra Rao (an Indian citizen and member of Indian Parliament).

Firtash is one of the most prominent gas traders in Europe. He leads Group DF, an international conglomerate of companies, and co-founded RosUkrEnergo, a joint venture between him and Russia's Gazprom. With a net worth reportedly as high as several billion dollars and with close ties to both former Ukrainian President Victor Yanukovych and current Ukrainian President Petro Poroshenko, Firtash is a hugely influential political and business figure in Ukraine. Reports also allege that Firtash has ties to Russian organized crime, including Semion Mogilevich, a member of the FBI's "10 Most Wanted" list.

a. DOJ Indictment

A five-count indictment filed in the U.S. District Court for the Northern District of Illinois against Firtash and his alleged co-conspirators was returned under seal in June 2013 and unsealed on April 2, 2014. It charged the six defendants with one count each of conspiracy to commit racketeering, money laundering, and FCPA violations, as well as two counts of interstate travel in aid of racketeering. (Rao was not charged with conspiracy to violate the FCPA.) All defendants but Firtash remain at large.

According to the indictment, Firtash directed subordinates to pay at least $18.5 million in bribes to Indian government officials to secure mining licenses for a joint venture project between a Swiss subsidiary of his Group DF and the state government of Andhra Pradesh. The joint venture was forecast to generate more than $500 million in revenue per year and would have allowed Group DF subsidiaries to supply 5-12 million pounds of titanium products per year to an unidentified U.S. company based in Chicago. Allegedly, Knopp helped supervise the enterprise while Gevorgyan and Lal signed falsified documents, monitored bribe payments, and coordinated money transfers. Sunderalingam allegedly worked to identify bank accounts outside of India that could be used to funnel money to Rao, who allegedly solicited bribes for himself and others for approving the required licenses. According to the indictment, from 2006 through 2010, the enterprise caused at least 57 transfers of funds within or through the United States totaling nearly $10.6 million in order to promote the illegal scheme.

Notably, in addition to the forfeiture of $10.6 million from all six defendants, the indictment also seeks forfeiture by Firtash of all property and contractual rights that afforded him a source of influence

over the enterprise, including his interests in Group DF and its assets, his interests in RosUkrEnergo, and his interests in over 150 subsidiaries of Group DF.

b. Release and Response

Firtash was released on €125 million bail, the largest in Austrian history, but he has agreed to remain in Austria pending resolution of extradition hearings remain pending. He has since released a video statement defending his innocence, calling the charges against him “absurd and unfounded” and “clearly politically motivated.” In a similar statement posted on the Group DF website, Firtash claims to be caught in the “geopolitical” struggle between Russia and the United States with respect to Ukraine.

Gajendra Lal, who reportedly fled the United States for Moscow to avoid pressure from U.S. federal investigators, has also spoken out since the indictment was unsealed. Lal claims that he was harassed by American law enforcement who demanded that he lie to entrap Firtash. Lal stated that he would also record a video statement detailing the prosecutorial and FBI misconduct that he witnessed.

9. Hewlett-Packard Co.

On April 9, 2014, Hewlett-Packard Co. (“HP”) settled civil charges with the SEC and three HP subsidiaries settled criminal charges with the DOJ in connection with its conduct in Russia, Poland, and Mexico.

The SEC instituted cease-and-desist proceedings against HP for violations of the FCPA’s accounting provisions, and it agreed to accept HP’s settlement offer of $29 million in disgorgement and $5 million in prejudgment interest (although the SEC agreed that a little more than $2.5 million of HP’s disgorgement obligations would be satisfied by payment of the same amount in forfeiture as part of HP’s Mexican subsidiary’s resolution with the DOJ).

HP’s subsidiary in Russia, ZAO Hewlett-Packard A.O. (“HP Russia”), pleaded guilty to the four-count Criminal Information that charged the subsidiary with violations of, and conspiracy to violate, the FCPA’s anti-bribery and accounting provisions. HP Russia was sentenced in the U.S. District Court for the Northern District of California on September 11, 2014 to pay a $58.77 million fine.

Hewlett-Packard Polska, SP Z.O.O. (“HP Poland”) entered into a three-year DPA with the DOJ with respect to a two-count criminal information that charged the subsidiary with violations of the FCPA’s accounting provisions. Under the terms of the DPA, HP Poland agreed to pay a $15.45 million penalty.

Finally, HP’s Mexican subsidiary, Hewlett-Packard Mexico, S. de R.L. de C.V. (“HP Mexico”) entered into an NPA with the DOJ that required it to pay over $2.5 million in forfeiture. As noted above, this amount offset the total amount of disgorgement that HP was required to pay pursuant to its settlement with the SEC.

In total, HP and its subsidiaries were required to pay more than $108 million to resolve the matters with U.S. enforcement agencies. Although the company was not required to obtain a corporate monitor, the various agreements specified that it must adopt or maintain a rigorous corporate compliance program, and that it must also provide annual reports to the DOJ and SEC for three years regarding the status of its remediation and implementation of compliance measures.

The settlements reflected wide-reaching cooperation efforts between domestic and international enforcement agencies. As reported in earlier Alerts, Russian authorities had raided the local offices of HP Russia on behalf of German prosecutors in April 2010. In its press releases, the DOJ noted the support of the German Public Prosecutor's Office in Dresden, as well as the Anti-Corruption Bureau and Appellate Prosecutor's Office in Poland and its other law enforcement partners in Hungary, Italy, Lithuania, Latvia, Mexico, Spain, and the United Kingdom.

a. Russia

As noted above, HP Russia pleaded guilty to committing and conspiring to commit substantive violations of the anti-bribery and accounting provisions of the FCPA. Although the DOJ and SEC's descriptions of the underlying misconduct are not entirely clear or consistent, they detail that HP Russia had engaged multiple intermediaries to pass through improper payments, created and used a slush fund, and made improper payments to government officials or their associates in order to obtain and retain the first phase of a project to automate the telecommunications and computing infrastructure of Russia's Office of the Prosecutor General (the "GPO Project").

According to an internal memorandum, HP Russia viewed the €35 million initial phase of the GPO Project as the "golden key" that would not only help the company to secure subsequent phases of the project (valued together at more than $100 million), but also lead to $150 million of other potential projects with the Russian Ministry of Justice and the Supreme Court. The company won the first phase of the project in January 2001 and executed the project contract later that year.

HP Russia engaged various intermediaries to serve as its principal "subcontractor" on the project and funnel improper payments to various entities. Initially, HP Russia engaged a Swiss firm operated by Russian nationals for this purpose, but later switched to an American intermediary when the Russian government sought to secure U.S. government-backed project financing which required that at least 85% of all goods and services provided be of U.S. origin. (The SEC's order stated that the American intermediary had initially approached HP Russia in December 2000 to inform the company that the GPO Project was in jeopardy and that HP Russia had agreed to pay the agent $1.2 million to ensure that the project moved forward and was awarded to HP Russia.)

The Russian government later sought and secured German government-backed financing in 2003, which resulted in the termination of HP Russia's contract. To prevent a re-opening of the bidding process—and potentially losing the project to German competition—HP Russia employees and representatives agreed to pay bribes to an official from the Russian foreign trade agency that had been assigned to the project, and also to replace the American intermediary with a German one as the principal "subcontractor" on the project. Specifically, HP Russia entered into an off-the-books contract with Burwell Consulting Ltd—a U.K. shell company linked to the Russian government official and his associate—valued at €2.836 million (equivalent to 8% of the GPO Project contract). HP Russia signed a renewed contract on August 1, 2003.

The Criminal Information filed against HP Russia stated that the company created and used an €8 million slush fund to make improper payments, and that it funneled most of €21 million of project proceeds to the bank accounts of multiple shell companies that were used for gifts, travel, and entertainment, among other things.

First, HP Russia employees created a slush fund of nearly €8 million by selling products to a Russian channel partner, which resold them to the German intermediary. HP Russia then bought the products back from the intermediary at a mark-up of nearly €8 million, and also paid the intermediary an additional €4.232 million. The amount of the slush fund corresponded to nearly €8 million in payment obligations that the HP Russia employees tracked in an additional, password-protected set of project pricing records, including the €2.836 million to be paid to Burwell Consulting Ltd. A flowchart included with the second set of financial records showed that the €8 million would flow through payments to the German intermediary and the Russian channel partner. HP Russia maintained a second, "clean" set of records that it provided to other HP officers.

Second, HP Russia had contracted with its German intermediary to provide €21 million worth of services on the €35 million contract. The SEC stated that some of this €21 million paid for "goods and services actually provided under the contract," but that the German intermediary paid "a portion of the €8 million [slush fund] . . . to shell companies that performed no services."

The DOJ, on the other hand, stated the German intermediary passed most of the entire €21 million to the bank accounts of shell companies that "laundered most of the money through multiple layers of additional shell companies." Specifically, the DOJ listed over $17.7 million in payments to bank accounts in the names of shell companies in Austria, Bosnia, the British Virgin Islands, Lithuania, Latvia, and Switzerland or to companies owned by Russian government officials. The DOJ stated that portions of these payments landed in accounts used for expensive jewelry, luxury automobiles, travel expenses, tuition costs, and other luxury purchases. Perhaps reflecting the difficulty in determining exactly how these funds were used, however, the DOJ only listed about $3.6 million of these payments as overt acts undertaken in furtherance of the conspiracy.

In April 2010, Russian authorities, acting on behalf of German prosecutors, raided the Moscow offices of HP. German prosecutors then brought criminal charges in 2012 against two former HP employees, one then-current HP employee and a local German politician and businessman related to the conduct of HP's Russian-based subsidiary.

b. Poland

Between 2006 and 2010, HP Poland provided a Polish government official with more than $600,000 worth of cash, gifts, entertainment, and travel in order to win contracts with the national police agency that were valued at approximately $60 million. In 2006, with several projects in the tendering process, HP Poland invited the official to an industry conference in San Francisco, where HP Poland employees paid for dinners, gifts, a trip to Las Vegas, and a private flight tour over the Grand Canyon. After the trip, an HP Poland executive provided the official with desktop and laptop computers, an HP Printer, iPods, TVs, and a home theater system. These expenses were not properly recorded in the company's books and records.

In January 2007, the official signed a $4.3 million sole-source contract award with HP Poland on behalf of the Polish government. He awarded HP Poland another $5.8 million sole-source contract the following month. HP Poland agreed to pay the official cash bribes and a percentage of net revenue from the contracts. In March 2007, an HP Poland executive left a bag with $150,000 in cash at the official's house and provided him with another $100,000 in cash at a Warsaw parking lot when HP Poland won another contract worth $15.8 million. In 2008, the HP Poland executive paid the official in bags of cash

worth a total of $360,000 on four different occasions, and the company won three contracts with a total value of $32 million.

The HP Poland executive and Polish official attempted to disguise and protect communications about upcoming tenders and bribe amounts in several ways. Using a practice employed in other bribery schemes, they created several anonymous email addresses and shared the passwords to exchange information with draft emails. They also used prepaid mobile telephones and conducted meetings in remote locations where they would communicate silently using a laptop.

Polish authorities and media outlets have identified the official and former HP executive in question as Andrzej Machnacz and Tomasz Ziolkowski. According to a March 2013 ProPublica investigative report, Machnacz was "released from prison and has agreed to cooperate and testify against others involved in the scheme." According to Polish newspapers, over 41 government officials, police officers, and private businessmen have been charged in connection with a related investigation by Poland's Central Anti-Corruption Bureau.

c. Mexico

HP Mexico paid more than $1 million in commissions to a consulting company that had close ties to senior government officials in an effort to win a software sales contract with Mexico's state-owned petroleum company, Pemex. HP Mexico agreed to pay the intermediary an "influencer fee" of 25% if awarded the $6 million contract. Because the company was not a pre-approved partner and had not been subject to due diligence, HP Mexico instead passed the funds through another previously approved partner, which kept a small percentage of the fee.

HP Mexico justified the increase in commission from the standard 1.5% to 25% by stating that the approved partner had put in extra work and successfully negotiated discounts with Pemex. HP's regional officers authorized the increase the same day, with little additional review. HP Mexico signed the contract with Pemex in December 2008 and wired $1.66 million several months later to the approved partner, which transferred $1.41 million to the consulting company. The consulting company paid $125,000 to Pemex's Chief Information Officer, the official who had signed the contract with HP Mexico.

10. Layne Christensen Co.

On October 27, 2014, the SEC instituted cease-and-desist proceedings against Layne Christensen Co. ("Layne"), a Delaware-incorporated and Texas-headquartered global water management, construction, and drilling company listed on the NASDAQ Global Select market.

The SEC charged Layne with violations of the accounting provisions of the FCPA in connection with the conduct of its wholly-owned subsidiaries in Africa and Australia. The SEC alleged that Layne had paid more than one million dollars to government officials in Mali, Guinea, the Democratic Republic of the Congo (the "DRC"), Burkina Faso, Tanzania, and Mauritania between 2005 and 2010 in return for improper tax benefits, customs clearance of a drilling rig, reduced custom duties and associated penalties, and work permits for its employees.

The SEC accepted Layne's offer to pay $5.1 million in disgorgement, penalties, and prejudgment interest to settle the charges. Layne was also required to retain a Monitor for a period of two years.

The SEC alleged that Layne's subsidiaries in Mali, Guinea, and the DRC hired third parties to forward improper payments to government officials to obtain favorable tax treatment. In Mali, Layne's subsidiary allegedly hired a local agent for this purpose, whereas the company's subsidiaries in Guinea and the DRC allegedly funneled the improper payments through lawyers that had been recommended by government officials.

In the DRC, for example, the CFO of the supervising Mineral Exploration Division sought approval of the subsidiary's President to hire a lawyer, explaining that he had spoken to the country manager and knew "more than can be written down." The President of the Mineral Exploration Division approved the arrangement without questioning. Payments to the lawyer, who obtained a revised tax assessment that was substantially lower than the original assessment, were falsely recorded as legal expenses. Similar payments in other countries were recorded as audit or freight service costs.

Layne's affiliates also allegedly made improper payments to custom officials in order to avoid paying customs duties and to obtain clearance for the import and export of its equipment. In Burkina Faso, for example, the local affiliate allegedly retained a customs agent who successfully reduced its assessed customs duties in 2009 from nearly $2 million to less than $300,000 and received $100,000 for his services. In 2010, the Layne affiliate made an arrangement to pay the agent 10% of the difference between the original assessment and the final assessment, resulting in a success fee of approximately $138,000. The SEC stated that the affiliate falsely recorded these payments as legitimate consultant fees.

Similarly, in the DRC, Layne's affiliate paid a total of $124,000 to a customs agent in 2007 and recorded the payments as "per diem," "intervention expenses," and "honoraires." In 2009, the subsidiary allegedly hired another agent when an initial one that it had engaged to arrange the expedited exportation of a drilling rig noted that a delay may occur due to a lack of documentation relating to the rig; the new agent allegedly made payments to customs officials and obtained the exportation as planned. The SEC also alleges that the affiliate made payments to unrelated third parties in the United States at the direction of its agent and also hired a local official's nephew (described in internal documents as a "protector") as its office manager.

The SEC stated that Layne made relatively minor payments (ranging from $4 to $1,700) between 2007 and 2010 through customs agents to African government officials to avoid penalties and obtain permits for equipment and employees under local immigration and labor regulations. Similarly, Layne's affiliates allegedly made more than $23,000 in cash payments to police, border patrol, immigration officials, and labor inspectors in Africa to avoid penalties and obtain permits for equipment and employees under local immigration and labor regulations.

In announcing the relatively light civil penalty, the SEC noted that Layne had conducted an internal investigation, immediately self-reported its preliminary findings to the SEC, and publicly disclosed its potential FCPA violations. Layne also terminated the contracts of four employees, including the Mineral Exploration Division's President and its CFO. The SEC also acknowledged that Layne issued a standalone anti-bribery policy, improved its accounting policies for cash disbursements, created an integrated accounting system worldwide, revamped its anti-corruption training, conducted extensive due diligence of business partners, and hired a chief compliance officer and three full-time compliance employees.

The SEC also took note of Layne's close cooperation, noting that Layne voluntarily provided real-time reports of its investigative findings, produced translations of documents to the English language, made foreign witnesses available for interviews in the United States, shared summaries of witness interviews and reports prepared by external consultants, and responded to the SEC's requests in a timely manner. This conduct allowed the SEC to gather information that otherwise would have been unavailable.

11. Marubeni

On March 19, 2014, Marubeni Corporation ("Marubeni"), pleaded guilty to criminal charges relating to improper payments to Indonesian government officials. The charges consisted of one count of criminal conspiracy to violate the FCPA and seven substantive anti-bribery violations. Marubeni agreed to pay a fine of $88 million for its role in the seven-year bribery scheme.

Marubeni is a Japanese trading company headquartered in Tokyo. The FCPA violations stemmed from a project known as the Tarahan Project, a $118 million contract to provide power-related services in Indonesia. The Tarahan Project was contracted through Indonesia's state-owned and -controlled electric company, Perusahaan Listrik Negara ("PLN"). Marubeni bid on the project as part of a consortium that consisted of Marubeni, Alstom, and various subsidiaries of each ("the Consortium Partners").

According to the plea agreement, the Consortium Partners retained two independent consultants prior to the awarding of the Tarahan Project contract. According to the facts to which Marubeni admitted as part of its guilty plea, the primary purpose of these consultants was "to pay bribes to Indonesian officials who had the ability to influence the award of the Tarahan Project Contract." The consortium was ultimately successful in obtaining the Tarahan Project contract, and the Consortium Partners subsequently made payments to the consultants, which were allegedly transferred in part to the bank accounts of Indonesian officials.

As part of the plea agreement, Marubeni agreed to address deficiencies in its internal controls and compliance programs. Specifically, Marubeni agreed to adopt or enhance a system of internal accounting controls designed to ensure the accuracy of the company's books and records, and to enforce a rigorous anti-corruption compliance program which includes policies and procedures designed to detect and prevent FCPA violations. Marubeni also agreed to ensure high level commitment from its senior management to create a culture of compliance, to engage in periodic risk-based review of the compliance program, and to ensure proper training, oversight, monitoring, enforcement, and discipline.

12. Smith & Wesson

On July 28, 2014, the SEC entered an administrative cease-and-desist order against Massachusetts-based firearms manufacturer Smith & Wesson Holding Corporation ("Smith & Wesson") for violations of the anti-bribery and accounting provisions of the FCPA. Without admitting or denying the SEC's findings, Smith & Wesson agreed to pay over $2 million in civil penalties, including nearly $108,000 in disgorgement. The company also agreed to report to the SEC for two years on the status of its compliance program implementation by submitting a written report and two follow-up reviews regarding its remediation and compliance efforts.

According to the SEC, Smith & Wesson sought to increase its international sales to foreign military and law enforcement agencies between 2007 and 2010 in high-risk markets such as Pakistan, Indonesia, Nepal, Bangladesh, and Turkey. The SEC alleged that Smith & Wesson aimed to do so, however, by engaging in "a systemic pattern of making, authorizing and offering bribes" through third-party agents to government officials in those countries in an effort to win contracts for the supply of firearms and other goods.

The SEC criticized Smith & Wesson for having "conducted virtually no due diligence of its third-party agents regardless of the perceived level of corruption in the country," as well as its failure to implement a compliance program designed to address the risks of working in such high-risk countries. In a press release announcing the settlement, Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit, characterized the settlement as "a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales."

In Pakistan, for example, Smith & Wesson's agent allegedly provided firearms and cash payments worth more than $11,000 to officials of a Pakistani police department in order to win a tender to provide pistols to the department.

Smith & Wesson also tried unsuccessfully to obtain contracts for the sale of firearms or handcuffs in Turkey, Nepal, and Bangladesh through the use of improper payments to local government officials conveyed by local agents. In Turkey, the company made improper payments to its agent, but only authorized but never made the payments to its agents in Nepal and Bangladesh. Although Smith & Wesson ultimately failed to secure any of the related sales contracts, the SEC noted that it nonetheless had "attempted to obtain the contract by using third party agents as a conduit for improper payments to government officials."

In Indonesia, Smith & Wesson authorized and made payments to its local third-party agent knowing that such would be provided to Indonesian police officials responsible for firearm sales to National Police Force. The payments, disguised as costs for firearm "lab tests," rose when the agent informed Smith & Wesson that the costs of the "tests" had increased beyond the level originally foreseen.

Following the announcement of the SEC settlement, Indonesia Corruption Watch (ICW), an Indonesian anti-corruption NGO, publicly called on the country's Corruption Eradication Commission (KPK) to open an investigation into any illegal payments made by Smith & Wesson to Indonesian officials. Although it is unclear whether the KPK will do so, the National Police have stated that controls are in place to guarantee the transparency of the bidding process, and that it would not award any further procurement contracts to Smith & Wesson.

On June 19, 2014, Smith & Wesson announced that the DOJ had closed its investigation into the company and declined to bring any FCPA charges. The DOJ investigation into Smith & Wesson began after the company's former Vice President of Sales to International & U.S. Law Enforcement was arrested as part of the DOJ's "SHOT Show" sting operation on January 18, 2010. As discussed below, the government's prosecution failed to result in any convictions, and charges against the former Smith & Wesson Vice President and a number of other defendants were dismissed on February 24, 2012.

13. Stephen Timms and Yasser Ramahi (FLIR Systems)

On November 17, 2014, the SEC announced that issued a Cease-and-Desist Order against Stephen Timms and Yasser Ramahi, two former employees of the Oregon-based defense contractor FLIR Systems, Inc. ("FLIR"), in connection with charges that they violated the anti-bribery and accounting provisions of the FCPA. The SEC accepted a settlement offer from Timms and Ramahi that required the two American expatriates to pay $50,000 and $20,000, respectively, but did not require them to admit or deny the SEC's findings.

FLIR makes thermal imaging and night vision products, infrared camera systems and other sensing products. During the relevant time period, Timms led the company's Middle East regional office in Dubai, and Ramahi worked in the company's business development department and reported to Timms. Both individuals were responsible for obtaining business from the Saudi Arabian Ministry of Interior.

In early February 2009, Timms and Ramahi allegedly instructed their Saudi commercial agent to purchase five watches that cost $1,425 each. The following month, Timms gave the five expensive watches to Ministry officials during a nine-day visit to Saudi Arabia to discuss various business opportunities with the Ministry, including a $12.9 million sales contract for thermal binoculars that FLIR had previously secured and another potential $17.4 million sales contract for the sale of FLIR security cameras. The SEC stated that the two men believed that the recipient officials were important to each sales contract, and they hoped that the two contracts would lead to additional future sales.

Timms submitted an expense report for reimbursement that labeled the purchases as "Executive Gifts," and properly reported the cost of each watch and the individual Ministry recipients. In July 2009, however, FLIR's finance department flagged the expense during an unrelated audit. The SEC stated that Timms tried to cover-up his conduct by falsely stating that he had made a mistake and that the watches had only cost $377 each. When his supervisors requested supporting documentation, Timms allegedly created and submitted a fabricated invoice, the accuracy of which Ramahi and the local Saudi agent both allegedly confirmed for FLIR's internal investigators.

Separately, FLIR had been preparing for a Factory Inspection Test in Massachusetts that was required to consummate the $12.9 million thermal binoculars contract with the Ministry. Ramahi allegedly arranged for a delegation of Ministry officials (including two of those who had received watches) to travel to Massachusetts in June 2009 for the test and product inspection. Although the trip included several site-visits to FLIR's inspection facility, it also allegedly included multiple other international locations both before and after the trip to Boston as part of an extensive "world tour" for the Ministry officials. From Saudi Arabia, the delegation first traveled to Casablanca and then spent several nights in Paris. The individuals then travelled to Boston, where they stayed for seven nights, including a weekend trip to New York City. Before returning to Saudi Arabia, the members of the group first flew to Dubai or Beirut. The Ministry subsequently approved of the product sale and also purchased an additional $1.2 million in thermal binoculars.

FLIR had paid for all expenses related to the twenty-day "world tour," which Timms and Ramahi had allegedly submitted for reimbursement. When questioned about these expenses during the same July 2009 internal FLIR financial review, however, the SEC stated that Timms and Ramahi claimed that this entry had been a mistake too, claiming that the Ministry officials had used FLIR's Dubai travel agent

and the expenses had been mistakenly billed to the company. Timms and Ramahi allegedly submitted additional false supporting documentation, including a false itinerary from the Dubai travel agent showing that the Ministry officials had traveled directly from Boston to Riyadh.

The SEC noted that, at all relevant times, FLIR had a code of conduct prohibiting FCPA violations and requiring accurate and honest record keeping in its books and records. The SEC also noted that FLIR had a compliance training program, that both Ramahi and Timms had received FCPA-specific training, and that their training had included as specific examples of prohibited conduct the provision of luxury watches, vacations and side travel during official business trips.

On April 8, 2015, FLIR agreed to pay the SEC a total of $9.5 million in disgorgement, prejudgment interest, and civil penalties to resolve FCPA charges. The FLIR settlement is discussed in greater detail in the 2015 section of this book.

14. Gregory Weisman, Knut Hammarskjold, and Joseph Sigelman

Gregory Weisman, Knut Hammarskjold, and Joseph Sigelman, three former executives of British Virgin Islands-based oil and gas company PetroTiger Ltd. ("PetroTiger"), have been arrested in connection with an alleged scheme to bribe an employee of Ecopetrol (the large, majority state-owned petroleum company of Colombia) in order to obtain approval for a pending oil services contract. (The three individuals were also charged with defrauding PetroTiger's investors by accepting kickbacks themselves from officials of a company that PetroTiger was seeking to acquire.) Weisman and Hammarskjold have both pleaded guilty, and Sigelman is challenging the charges in U.S. federal court.

According to documents filed by the DOJ, PetroTiger sought to secure a $39.6 million contract in 2010 from a private company in Colombia to provide oil services in that country. The contract required the approval of Ecopetrol, and the DOJ alleges that Weisman, Hammarskjold, and Sigelman paid bribes of $333,500 between September and December 2010 to an official from Ecopetrol to secure that approval.

The underlying complaints allege that PetroTiger made these payments pursuant to falsified invoices from the Ecopetrol official's wife, which falsely claimed that she had provided finance and management consulting services for PetroTiger. The DOJ alleged that the executives sought to wire $133,400 to the account of the Ecopetrol official's wife, but instead wired it directly to the official's account when their earlier attempts were rejected.

Gregory Weisman, PetroTiger's former general counsel, pleaded guilty on November 8, 2013 to one count of conspiracy to violate the FCPA and to commit wire fraud. On the same day, sealed charges were filed against former PetroTiger co-CEOs Knut Hammarskjold and Joseph Sigelman. Hammarskjold was arrested on November 20, 2013 at Newark International Airport in New Jersey, and he pleaded guilty on February 18, 2014 to one count of conspiracy to violate the FCPA and the wire fraud statute.

Sigelman was arrested in the Philippines on January 3, 2014, and extradited to Guam, where he appeared in federal court on January 6, 2014. Sigelman was indicted in federal court in New Jersey on May 9, 2014 on counts of (i) conspiracy to violate the FCPA and the wire fraud statute, (ii) three counts of substantive violations of the FCPA, (iii) conspiracy to commit money laundering, and (iv) transacting in

criminal proceeds. The DOJ is also seeking forfeiture of any property derived from these offenses. On May 14, 2014, Sigelman pleaded not guilty.

Sigelman subsequently moved the court to dismiss the government's FCPA-related charges against him on the theory that Ecopetrol was not a government instrumentality in 2010, and that the individual whom Sigelman allegedly paid was not a government official. Relying on the government's brief in the *Esquenazi* case, Sigelman argued that Ecopetrol could only be an instrumentality if it performed a government function. According to Sigelman, although Ecopetrol previously performed both governmental and commercial functions, the Colombian government split the company in 2003, with the newly created National Hydrocarbon Agency retaining the governmental functions, and Ecopetrol retaining only its commercial functions. Sigelman also argued that Ecopetrol only had authority to approve private oil services contracts because it had entered into a joint venture agreement with the client that gave it a private right to do so.

In its brief in opposition to the motion to dismiss, the government argued principally that Ecopetrol's status as an instrumentality was a question of fact to be decided by a jury. The government added that it would present evidence at trial to establish that point, including that the joint venture agreement that provided Ecopetrol with contract approval rights had been signed prior to 2004 at a time that the private company was legally mandated to do so.

On December 11, 2014, Sigelman filed a supplemental memorandum in support of his motion to dismiss, which at the time of publication of this Alert remained pending before the court.

PetroTiger had self-reported the conduct that formed the basis of the charges against Weisman, Hammarskjold, and Sigelman. In the wake of a feud between the Board and then-co-CEOs Sigelman and Hammarskjold, the Board ousted the three executives from the company and launched a review of the company's books and records. When the Board discovered the invoices to the wife of the Ecopetrol Official, it hired an outside law firm to conduct an internal investigation and subsequently disclosed the conclusions of that review to both U.S. and Colombian authorities.

D. 2013

1. Archer Daniel Midlands Company

On December 20, 2013, Illinois-based agricultural commodities and biofuel producer Archer Daniels Midland Company ("ADM") and its Ukrainian subsidiary Alfred C. Toepfer International (Ukraine) Ltd. ("ACTI Ukraine") agreed to pay over $53.8 million to resolve FCPA-related allegations with the DOJ and SEC.

First, ADM entered into an NPA with the DOJ under which it agreed to pay a criminal penalty of $9.45 million (but which was reduced and offset entirely by the criminal penalty paid by ACTI Ukraine).

Second, ADM consented to the entry of a final judgment with the SEC for violating the books and records and internal controls provisions of the FCPA in connection with the conduct of subsidiaries ACTI Ukraine, Alfred C. Toepfer International G.m.b.H. ("ACTI Hamburg"), ADM de Venezuela Compania Anonima ("ADM Venezuela"), and ADM Latin America. As part of the final judgment with the SEC, ADM was ordered to pay $33.3 million in disgorgement and $3.1 million in prejudgment interest.

Third, ACTI Ukraine pleaded guilty in federal court to charges that it had conspired to violate the anti-bribery provisions of the FCPA and agreed to pay a criminal penalty of $17.8 million.

ACTI Hamburg was also required to pay a $1.3 million fine in a related German action.

a. Ukraine

ACTI Ukraine sourced agricultural commodities in Ukraine to supply ACTI Hamburg's sales. The commodities purchased in Ukraine were subject to a 20% value-added tax ("VAT"), although the goods that were exported were eligible for VAT refunds. Between 2002 and 2008, however, the Ukrainian government did not refund the VAT collected on most exported goods because it lacked the funds to do so. In order to recover their refunds (totaling more than $100 million), ACTI Hamburg and ACTI Ukraine paid approximately $22 million to Ukrainian government officials.

Initially, ACTI Ukraine sold commodities to a U.K. exporting company ("Vendor 1") that subsequently resold the commodities to ACTI Hamburg at a higher price, which included a bribe for Ukrainian officials and contained a handling fee for Vendor 1. Later, ACTI Ukraine made payments through a Ukrainian insurance company ("Vendor 2") which purportedly had provided crop insurance but which actually forwarded nearly all of the money it received to government officials in Ukraine.

According to the DOJ and SEC, ADM failed to monitor and enforce adequate compliance procedures during this time period. According to the SEC Complaint, ADM did not implement any controls that required due diligence or ongoing monitoring of ACTI Hamburg's relationship with its third-party agents or dealings with the Ukrainian government.

The SEC also stated that ADM executives had multiple indications that ACTI Ukraine's ability to recover VAT refunds was the result of illegal activity. In July 2002, for example, executives from ACTI Hamburg traveled to ADM's headquarters in Decatur, Illinois and reported to ADM's tax department that ACTI Ukraine was able to recover VAT refunds by making charitable donations. In the follow-up investigation to this disclosure, an ADM executive sent an email in October 2002 expressing his suspicion that the payments being made by ACTI Ukraine were not donations but instead illegal payments to Ukrainian government officials against ADM compliance policy.

Similarly, ADM's accountants and auditors also discovered irregularities. In 2004, in connection with other business dealings, ADM retained an accounting firm to analyze possible tax issues in Ukraine, and it reported that there was widespread use in Ukraine generally of legally risky tactics to facilitate VAT refunds. In 2006, auditors discovered that ACTI Ukraine maintained a reserve that executives from ACTI Hamburg explained was the price that it paid to recover the VAT refunds from the authorities.

Despite these concerns, ADM failed to implement sufficient anti-bribery compliance policies and procedures, allowing payments to continue through 2008.

b. Venezuela

From 2004 to 2009, ADM Latin America handled the accounting and payments systems for ADM Venezuela, a joint venture between ADM Latin America and several Venezuelan partners. One executive at ADM Venezuela was also one of the joint venture partners.

During this period, several of ADM Venezuela's customers used purchases with ADM Venezuela, processed by ADM Latin America, to funnel money from corporate bank accounts to offshore, personal bank accounts.

At first, customers artificially inflated the contract costs with ADM Venezuela by including deferred credit expenses (costing that would purportedly cover uncertain future costs such as vessel delays). At the customers' request, an ADM Latin America executive would then have ADM Latin America's credit department refund the overpayment to the offshore bank accounts. When the scheme was discovered in 2004, ADM changed its policy to prohibit refunding such payments to bank accounts that were different from where the payment had originated.

The improper payments continued through 2009, however, as various employees at ADM Venezuela began to inflate payments instead with unearned "commissions" that were processed by ADM Latin America's accounting department rather than its credit department. Customers would instruct ADM Latin America to pay excess commissions to various brokers who transferred the funds to accounts controlled by the customers' employees.

c. Self-Disclosure, Cooperation, and Settlement Terms

ADM voluntarily reported its activities in Venezuela and Ukraine to the U.S. government. As part of its remediation efforts, ADM conducted a worldwide risk assessment and internal investigation, made numerous presentations to the DOJ about its investigation, and implemented significant enhancements to its compliance programs. The DOJ and SEC both emphasized ADM's timely disclosure, thorough remediation, and extensive cooperation as reasons for settling the charges and recommending a lower criminal penalty for ACTI Ukraine than would normally be calculated under the U.S. Sentencing Guidelines.

Under the terms of the settlement, ADM is required to report its remediation efforts and plans to improve its FCPA and anti-corruption compliance procedures to the DOJ and SEC for three years.

2. Bilfinger SE

On December 9, 2013, German engineering and services company Bilfinger SE ("Bilfinger") announced that it had reached a three-year DPA with the DOJ as a result of corrupt payments made by a Bilfinger consortium to Nigerian government officials in connection with the Eastern Gas Gathering System ("EGGS") project. As described in detail below, in 2008, Willbros Group, Inc. ("WGI") and several WGI subsidiaries (together, "Willbros") settled charges with the SEC and DOJ related to the same corrupt scheme. In addition, several Willbros executives (including Jim Bob Brown, Jason Steph, and James Tillery) and a Willbros consultant (Paul Novak) have been indicted, have pleaded guilty, or have settled civil charges related to the scheme. (*See* Willbros Group at p.328)

According to the DPA, from late 2003 to 2005, Bilfinger conspired with Willbros, employees of Willbros (including Brown, Steph, and Tillery), and a Nigerian consultant (Novak) to make corrupt payments totaling more than $6 million to Nigerian government officials. The DOJ filed a three-count criminal information with the U.S. District Court for the Southern District of Texas, charging Bilfinger with one count of conspiracy to violate the anti-bribery provisions of the FCPA, one count of violating the anti-bribery provisions, and one count of aiding and abetting a violation of the anti-bribery provisions.

Although Bilfinger was neither an U.S. issuer nor a domestic concern for purposes of the FCPA, the DOJ charged Bilfinger on the basis that (i) WGI was an issuer under the FCPA, (ii) Willbros International Inc. ("WII"), a Panamanian Corporation through which WGI conducted its international business, was a domestic concern (its principal place of business was in the U.S.), and (iii) certain acts in furtherance of the corrupt payments, including meetings and flights, occurred in the United States.

According to the DPA, in 2003, Bilfinger, its Nigerian subsidiary and WGI agreed to form a joint venture consortium to bid on and execute the EGGS project ("EGGS Consortium"). The EGGS Consortium agreed to inflate the price of its bid by 3% and use the additional revenue to fund bribe payments to Nigerian government officials, including employees of the Nigerian National Petroleum Corporation (the "NNPC") and National Petroleum Investment Management Services ("NAPIMS"). Within Bilfinger, these payments were often referred to as "landscaping." Employees of Bilfinger, its Nigerian subsidiary, and Julius Berger Nigeria (a Nigerian company owned 49% by Bilfinger) made these "landscaping" payments using cash kept in a safe at the offices of Julius Berger Nigeria.

WGI, for its part, funneled bribes to officials in Nigeria through sham agreements with third-party consultants. In 2005, WGI launched an internal investigation into unrelated tax irregularities, including an audit of WGI's Nigerian operations. As a result, WGI ceased paying its consultants in Nigeria. When these payments stopped, Willbros and Bilfinger became concerned that the EGGS Consortium could lose out on Phase 2 of the EGGS project. In response, Bilfinger employees caused Bilfinger's Nigerian subsidiary to loan Willbros' Nigerian subsidiary $1,000,000 in order for WGI to continue sending money through its consultants. The money was delivered to WGI employee Jim Bob Brown in Lagos, Nigeria in a suitcase filled with cash. The funds were then allegedly transferred to a new consultant to be paid to Nigerian government officials. In total, the EGGS Consortium made, or agreed to make, more than $6 million in corrupt payments.

As part of the DPA, Bilfinger agreed to pay a $32 million penalty and admit to violations of the FCPA's anti-bribery provisions. Bilfinger also agreed to implement rigorous internal controls, continue cooperating fully with the DOJ, and retain an independent corporate compliance monitor for at least 18 months.

3. Frederic Cilins

On April 14, 2013, Frederic Cilins, a French citizen, was arrested in Jacksonville, Florida, accused of attempting to obstruct an ongoing federal grand jury investigation into potential bribes paid by BSG Resources Ltd. ("BSGR"), the Guernsey-registered mining arm of the Beny Steinmetz Group, in exchange for the rights to the valuable mining concessions in the Simandou region of the Republic of Guinea. According to the three-count criminal complaint filed in U.S. District Court for the Southern District of New York, Cilins was charged with (i) tampering with a witness, victim or informant; (ii) obstructing a criminal investigation; and (iii) destroying, altering, or falsifying records in a federal investigation. In March 2014, Cilins pleaded guilty to one count of obstruction of a criminal investigation filed under a superseding information. The remaining counts were dismissed. On July 25, 2014, Cilins was sentenced to 24 months in prison, and ordered to pay a $75,000 fine and to forfeit $20,000.

The Simandou Mountains are rich with iron ore, and the exploitation rights of the region have been valued at $10 billion. According to press reports, Beny Steinmetz had acquired the rights to extract half the ore from the mountains by pledging an investment of only $165 million to develop the Simandou

mine. Steinmetz then sold 51% of the subsidiary that had acquired the rights to the Brazilian-based Vale S.A. for $2.5 billion, thereby recouping the entire investment cost while retaining over $2.3 billion in profit as well as 49% ownership.

The FBI launched an investigation in January 2013 into the circumstances surrounding the transaction. According to the complaint against Cilins, BSGR allegedly obtained the extraction rights through a bribery scheme that involved as much as $12 million distributed to Mamadie Touré (the fourth wife of late Guinean President Lansana Conté) and ministers or senior officials of Guinea's government whose authority might help secure the mining rights.

The complaint alleges that, during monitored and recorded phone calls and face-to-face meetings, Cilins attempted to induce a cooperating witness in the investigation with payments of as much as $5 million to destroy original copies of relevant contracts that had been requested by the FBI and needed to be produced to the federal grand jury. The cooperating witness has been identified in various press sources as Mamadie Touré herself. The complaint also alleges that Cilins sought to induce Touré to sign an affidavit containing numerous false statements regarding matters under investigation by the grand jury.

The contracts that Cilins allegedly sought to obtain and destroy related to a scheme by which BSGR and its affiliate entities offered Touré millions of dollars. The complaint details five separate contracts that involved payments of $7 million and transfers of stock of BSGR subsidiary companies and blocks 1 and 2 of the Simandou Mountains area of Guinea to a company held by Touré. One contract in particular provided that the BSGR subsidiary would transfer 17.65% of its capital to a holding company in which Touré would have a 33.3% interest. In filings dated June 28, 2013, Cilins stated that the contracts at issue are fake and that they were "created [by Touré] to extort monies from BSGR, Mr. Cilins, and others."

BSGR has repeatedly denied Guinean government allegations that it paid bribes to Conté, the country's former and now deceased ruler, to obtain access to the Simandou deposits, instead arguing that the allegations "are entirely baseless and motivated by an ongoing campaign to seize the assets of BSGR." Following Cilins's arrest, however, BSGR issued a "response to press speculation" in which it stated that it had transferred a 17.65% stake in its subsidiary BSGR Guinea Ltd BVI to an entity named Pentler Holdings, which had been established by Cilins and two other individuals, Michael Noy and Avraham Lev Ran.

In April 2014, at the recommendation of a Guinean investigative committee set up to review Guinea's mining deals, BSGR was stripped of its rights to the Simandou mine. The investigative committee determined that there was sufficient evidence to conclude that BSGR had obtained its mining rights through corrupt acts. The rights to Simandou were subsequently awarded to Rio Tinto, Chinalco, and the International Finance Corporation. The FBI's investigations into BSGR's efforts to secure the Simandou mining rights remain ongoing.

Towards the end of 2014, Guinea's government requested the assistance of the United Kingdom in investigating the circumstances surrounding BSGR's acquisition of the aforementioned mining rights, as both countries are signatories to the United Nations Convention Against Corruption. The United Kingdom's Secretary of State for the Home Department ("Home Department") then referred the matter to the Serious Frauds Office ("SFO"), which then, in turn, sent notices to various entities requesting

documents relating to the investigation. On November 26, 2014, BSGR filed a claim against the Director of the SFO and the Secretary of State for the Home Department in an attempt to challenge their decision to assist the government of Guinea. Review was refused on February 23, 2015, after which the case was appealed to the High Court of Justice, seeking judicial review of the Home Department/SFO decision.

BSGR made several arguments in seeking to have the Home Department/SFO decision subjected to judicial review. Among them was that the government should not assist Guinea because its investigation was politically motivated and because the U.K. was, under Article 6 of the Human Rights Act (as interpreted by the European Court of Human Rights, the House of Lords, and the U.K's Supreme Court) prohibited from assisting in a criminal process that might deny individuals within BSGR the right to a fair trial. BSGR presented witness statements to the effect that the Government of Guinea had stripped BSGR's mining rights without cause in order to reward another company that had supported the new president's rise to power. BSGR also claimed that the statute of limitations should bar any investigation, and that the SFO's requests for documents were too numerous and expensive.

On May 7, 2015, the High Court denied judicial review of the Home Department/SFO decision, thereby upholding the U.K. government's cooperation with the request from Guinea for mutual legal assistance in its corruption investigation. The High Court first stated that the U.K. was bound to provide swift assistance to a fellow government that requested such assistance in investigating corruption unless the request was obviously unlawful or there was a compelling reason not to provide that assistance. The High Court ruled that, while BSGR had provided some evidence that the country of Guinea had, in some ways, acted arbitrarily in its pursuit of its claims against BSGR, the Court was not in possession of enough facts to substantiate BSGR's claim that Guinea's request for assistance was "tainted by bad faith and/or political motivation." Furthermore, the High Court ruled that BSGR's claims under the Human Rights Act were not sufficient to justify the prevention of the transfer of the requested documents because there was not yet any risk that individuals would be prevented from receiving a fair trial in Guinea, as such a risk could not exist prior to Guinea's opening of criminal proceedings against an individual. The High Court also rejected BSGR's procedural objections to the transfer of documents to the SFO (and in turn to Guinea) because (i) the Court had insufficient knowledge of the facts to conclude that a statute of limitations defense existed to bar the investigation; (ii) BSGR was in a position to produce the documents despite the associated cost; and (iii) the document requests were sufficiently clear and specific.

4. Diebold

Diebold Inc. ("Diebold") is an Ohio-based manufacturer of automated teller machines ("ATMs") and bank security systems that has operations or subsidiaries in 90 countries. On October 22, 2013, Diebold entered agreements to settle charges filed by the DOJ and SEC on the same day. The DOJ filed an Information charging Diebold with (i) conspiracy to violate the anti-bribery and accounting provisions of the FCPA in connection with its operations in China, and (ii) violating the books and records provisions in connection with its operations in Russia. The SEC filed a complaint alleging that Diebold had violated the anti-bribery, books and records, and internal controls provisions of the FCPA in connection with its conduct in China, Indonesia, and Russia.

Diebold entered into a three-year DPA with the DOJ, agreeing to pay a $25.2 million penalty, implement rigorous internal controls, and retain a compliance monitor for at least 18 months. Diebold's agreement with the SEC also required the company to appoint an independent compliance monitor, as well as to pay an additional $22.9 million in disgorgement and pre-judgment interest, bringing the total

financial cost to settle the charges to over $48 million. Diebold also consented to a final judgment and agreed (once again) to be permanently enjoined from violating the FCPA.

Underlying conduct

Between 2005 and 2010, Diebold's Chinese and Indonesian subsidiaries, Diebold Financial Equipment Company (China), Ltd ("Diebold China") and P.T. Diebold Indonesia ("Diebold Indonesia"), made payments of cash, travel, and other gifts totaling approximately $1.6 million to employees of majority state-owned banks in China and Indonesia. The SEC Complaint details various improper travel expenses that the company paid to provide "leisure trip[s]" to various Chinese and Indonesian banking officials, including:

- A number of trips to the United States, including: (i) fifteen-day "leisure trip" in 2005 for two banking officials to Los Angeles (including Universal Studios and Disneyland), Las Vegas, the Grand Canyon, Washington DC, New York City, San Francisco, and Hawaii, (ii) a "two-week leisure trip to the U.S. for three officials" in 2008, and (iii) a two-week trip for twenty-four officials to Chicago, Las Vegas, Los Angeles, San Diego, and San Francisco and Napa Valley in 2009;

- Multiple trips to Europe, including: (i) a 12-day "leisure and sightseeing trip" in 2006 for eight banking officials to Rome, Italy, and Stockholm, (ii) a two-week leisure trip in 2007 for thirteen banking officials to France, (iii) a two-week tour through France, Belgium, the Netherlands, Germany, Austria, and Italy in 2008 for eight banking officials, and (iv) an additional trip to Europe in 2009; and

- Trips to locations in the Asia Pacific region, including "two-week leisure trip[s]" to Australia and New Zealand for five banking officials in 2006, and to Hong Kong, Singapore, Malaysia, and Indonesia in 2008.

In addition to the trips, Diebold also conspired to provide cash gifts to senior banking officials with the ability to influence purchasing decisions by the banks. The DOJ quotes several emails from 2005 and 2006 in which Diebold employees discuss the distribution of "China Spring Festival" gifts to senior officials and provide detailed spreadsheets showing previous and proposed expenditures for such gifts.

Separately, Diebold's Russian subsidiary Diebold Self-Service Ltd ("Diebold Russia") entered into fraudulent contracts with a third-party distributor in Russia. The distributor did not perform any of the services fictitiously described in those contracts, but instead used the compensation that it received from Diebold to pay bribes to the employees of privately-owned banks in order to obtain or retain contracts from those entities. The SEC Complaint alleges that Diebold Russia paid at least $1.2 million in bribes to its customers in Russia through its distributor.

a. Key Takeaways

The Diebold settlements are instructive in demonstrating that companies are expected to investigate red flags thoroughly when they are uncovered, either by a due diligence review or in light of the existence of corruption-related investigations in other jurisdictions. The SEC, for example, criticized Diebold for not fully investigating red flags that were the subject of a governmental investigation in China:

> Other executives at Diebold were on notice of potential corruption issues at Diebold China. In 2007, a regional governmental agency in China, the

> Chengdu Administration of Industry & Commerce ("CDAIC"), opened an investigation involving, among other issues, leisure trips and gifts Diebold China had provided to bank officials. Company executives in China and the U.S. learned of the investigation after a Diebold field office in Chengdu was raided by the authorities. . . . Diebold was able to settle the matter with no corruption charges filed . . . . Despite being on notice of potential corruption issues at Diebold China, Diebold failed to effectively investigate and remediate these problems.

Similarly, the SEC criticized Diebold for continuing to engage third-party distributors in the Ukraine and Russia after learning that those distributors had made illicit payments in the past on behalf of other clients:

> During due diligence, executives at Diebold . . . learned that Distributor B had previously made illicit payments to employees of its bank customers. Diebold was unable to determine whether these illicit payments involved sales of Diebold products. While Diebold did not move forward with the acquisition, without taking any further steps to investigate and remediate these corruption issues, Diebold continued to do business with Distributor B until 2010.

Additionally, the settlements demonstrate the importance that enforcement agencies place on remediation as a tool to foster an appropriate corporate environment and ensure the effectiveness of a compliance program. Notably, although Diebold voluntarily disclosed the alleged misconduct to the DOJ and SEC, both enforcement agencies required Diebold to retain an independent compliance monitor as a condition of settlement. In discussing this requirement, the DOJ explained that:

> in light of the specific facts and circumstances of this case and the Company's recent history, including a previous accounting fraud enforcement action by the [SEC], the [DOJ] believes that [Diebold's] remediation is not sufficient to address and reduce the risk of recurrence of the Company's misconduct and warrants the retention of an independent corporate monitor.

The court documents do not provide details regarding Diebold's remediation efforts, including whether Diebold took any disciplinary measures against its relevant employees. The filings do note, however, that although Diebold self-disclosed its violations to the DOJ and SEC in 2010, the two Diebold executives principally involved with the conduct in question were promoted in early 2010 and retained their positions until they both resigned in December 2011. Additionally, publicly available documents state that the individual identified as "Executive A" in the court filings received over $1.3 million in compensation from Diebold in 2010.

Various emails discussed in the court filings also suggest that Diebold executives and employees devised various ways to conceal the improper activity or provide fictitious justifications specifically in anticipation of future investigations. For example, in one email, a Diebold employee suggested ways to make an overseas trip for banking officials appear "more training related . . . [so that] we can have some argue [sic] points if any investigation comes."

In another email, a Diebold China executive wrote to a supervisor in Diebold's French offices about an independent auditor's request for evidence regarding the "overseas training" provided to bank officers. The executive requested that the supervisor appoint a local contact in France who could tell the auditors, if requested, "that Diebold France did assist Diebold China on the invitation preparation, program arrangement, and needed logistic assistance."

5. Keyuan Petrochemicals

On February 28, 2013, the SEC entered into a settlement with Keyuan Petrochemicals ("Keyuan") and its former CFO, Aichun Li, for violations of the FCPA books and records and internal controls provisions and other violations of U.S. Securities laws. Keyuan agreed to pay a $1 million civil penalty, while Aichun consented to a final judgment and agreed to pay a $25,000 civil penalty without admitting or denying the allegations in the SEC Complaint.

Keyuan is headquartered in Ningbo, China, and was formed in 2010 when Ningbo Keyuan Plastics Ltd. ("Ningbo") completed a reverse merger with a Nevada shell company that traded in the United States. Keyuan is still traded on the OTCQB, but was delisted from NASDAQ in October 2011 after amending its SEC filings to disclose potential violations of the FCPA along with other U.S. and Chinese laws. The Keyuan settlement appears to be the first FCPA settlement with a China-based company.

According to the SEC Complaint, Keyuan operated an off-balance cash account that the company used to provide gifts for Chinese government officials from the environmental, port, police, and fire departments, particularly during the Chinese New Year season. The SEC alleged that gifts included household goods such as bedding and linens, but also "red envelope" gifts that were filled with cash. In total, Keyuan dispersed approximately $1 million from the off-balance cash account, including in connection with other payments that were not adequately recorded in Keyuan's books and records, such as bonus payments to senior officers, fees for technical experts, and travel, entertainment, and apartment rental expenses for the Keyuan CEO.

The off-balance cash account was allegedly funded in part through proceeds from the sales of promissory notes and certain products like scrap metal, as well as through fictitious reimbursement claims used to withdraw cash from the company's official accounts. According to the complaint, Ningbo's vice president of accounting, who is based in China, actively maintained and hid the off-balance cash account from the company's auditors.

The SEC alleged that Aichun, a Chinese national and resident of North Carolina, was hired by Keyuan to serve as CFO primarily to oversee its SEC reporting responsibilities. The SEC alleged that Aichun received "red flags that should have indicated to her that the company was not properly identifying or disclosing related party transactions" but that she nonetheless filed statements and reports that did not accurately disclose such transactions. The SEC alleged that Aichun was also verbally informed by an audit manager of the related party transactions, and of the company's obligations to track and disclose them in its public filings, but "failed to take reasonable steps" to comply with those obligations, and subsequently knowingly submitted inaccurate public filings on the company's behalf.

The SEC did not allege that Keyuan or Aichun violated the anti-bribery provisions of the FCPA, including with respect to the gifts and payments that the company made from its off-balance cash

account. Instead, the SEC charged the company and former CFO with two counts each of recordkeeping and internal controls violations, alleging that “Keyuan’s books and records failed to accurately reflect the use and disbursement of cash through the off-balance sheet cash account” and that its “internal controls surrounding the disbursement, usage, and recording of cash and cash transactions were also inadequate.”

6. Koninklijke Philips Electronics

On April 9, 2013, the SEC instituted cease-and-desist proceedings against Dutch electronics company Koninklijke Philips Electronics N.V. (“Philips”) in connection with charges that Philips had violated the books and records and internal controls provisions of the FCPA with respect to conduct by its Polish medical equipment subsidiary (“Philips Poland”) between 1999 and 2007. In anticipation of the cease-and-desist order, the SEC agreed to accept Philips’ offer of $3.1 million in disgorgement and $1.39 million in prejudgment interest to settle the charges.

According to the SEC, Philips first learned of potential control problems in Poland in August 2007, when Polish authorities raided three Philips Poland offices and arrested two Philips Poland employees. Philips subsequently conducted an internal audit, terminated and disciplined several Philips Poland employees, and made changes to the company’s management and internal controls. The settlement agreement, however, states that Philips failed to uncover the FCPA-related conduct that formed the basis of the April 2013 order and settlement.

The SEC further alleged that Philips Poland made payments to health care officials of 3% to 8% of the value of contracts for the sale of medical equipment, supported by falsified documentation and often with the assistance of an unidentified third-party agent. The SEC stated Polish healthcare officials allegedly accepted the improper payments in exchange for assisting the company in obtaining contract awards by incorporating the specifications of Philips’ equipment into relevant public tenders. The SEC also stated that some of the officials who received the alleged payments were also responsible for selecting the winners of the bids.

In December 2009, Polish prosecutors indicted three former Philips Poland employees along with four other private individuals and sixteen Polish healthcare officials. The indictments provided information on at least thirty improper payments that Philips Poland allegedly made between 1999 and 2007 in violation of public tendering laws.

In response to the 2009 indictments, Philips conducted another internal investigation with the help of three law firms and two accounting firms, the results of which supported the findings that Philips Poland employees had made improper payments to Polish healthcare officials and had inaccurately recorded those payments in their books and records. In 2010, Philips self-reported its ongoing internal investigation to the SEC and DOJ, and continued to update the enforcement agencies on the results of its internal audit as it progressed.

Although the activity in question was undertaken by a Polish subsidiary of a Dutch company, Philips agreed that the SEC had subject-matter jurisdiction because (i) Philips Poland’s financial statements are consolidated into Philips’ books and records, and (ii) in addition to having common shares listed on the Euronext Amsterdam Exchange, Philip’s New York Registry Shares are listed on the NYSE. As noted earlier in this Alert, the DOJ and SEC’s recently published Resource Guide makes clear that

issuer parents might be held responsible for ensuring that their wholly-owned subsidiaries comply with the accounting provisions of the FCPA to an even greater level than with the anti-bribery provisions of that law. The SEC did not charge Philips with any violations of the anti-bribery provisions of the FCPA, and in late 2011, the DOJ informed Philips that it declined to take enforcement action.

The SEC alleged that Philips had failed to "implement an FCPA compliance and training program commensurate with the extent of its international operations," but noted that since launching its internal investigation and self-reporting the conduct, Philips had (i) established new internal controls related to third parties, (ii) substantially revised its Global Business Principles policies, (iii) established an anti-corruption training and certification program, (iv) "formalized and centralized its contract administration system and enhanced its contract review process," and (v) "established a broad-based verification process related to contract payments." Philips also terminated or disciplined several employees and installed new management of Philips Poland. In light of these remediation efforts, as well as Philips' cooperation with the investigation, the SEC did not impose any civil penalty beyond the disgorgement and pre-judgment interest.

7. Subramanian Krishnan

On July 2, 2013, Subramanian Krishnan, former CFO of Minnesota-based Digi International, Inc. ("Digi"), settled civil charges with the SEC relating to allegations that he caused Digi to file inaccurate reports and certifications, resulting in violations of the books and records and internal controls provisions of the FCPA. Without admitting or denying the allegations, Krishnan consented to the payment of a $60,000 civil penalty, a permanent injunction against future violations of securities laws, and a five-year bar from serving as an officer or a director of a public company and from appearing or practicing as an accountant before the Commission.

According to the SEC Complaint, Krishnan circumvented Digi's corporate policy to approve travel and entertainment expenses that lacked legitimate business purposes. Digi's internal procedures required Krishnan to submit his expenses to the CEO for approval. The Complaint alleged, however, that Krishnan circumvented those controls between March 2005 and May 2010 by seeking reimbursement instead through Digi's Hong Kong office, where he could approve the expenses himself. The SEC also alleged that Krishnan authorized reimbursement of personal expenses for other Digi employees, falsely recording them as work and travel expenses, and that he authorized and approved cash payments that were not properly supported or explained. The SEC did not specify how Krishnan or other employees used the funds from the improper reimbursements, but stated only that Krishnan's actions reflected a "lack of management integrity" and a material weakness in Digi's internal controls.

The SEC also alleged that Krishnan made numerous material misrepresentations and omissions, including: (i) stating in Digi's public filings and financial statements that he had assessed the company's internal control over financial reporting and concluded that it was effective; (ii) representing to the company's external auditor that he had no knowledge of any fraud; and (iii) signing approximately 20 management letters, in which he falsely attested that he had no knowledge of any fraud. In addition, Krishnan allegedly falsified books, records, accounts, and certifications, including Forms 10-K and 10-Q signed on behalf of Digi during the period of misconduct.

The charges filed against Krishnan originated from an internal investigation conducted by Digi following whistleblower allegations against Krishnan and three other employees in 2010. Reportedly, Digi

voluntarily disclosed the allegations to the SEC and the DOJ, and used outside counsel to investigate potential FCPA violations in Asia Pacific and other selected regions. The company also adopted remedial measures that included terminating the individuals involved and strengthening its internal controls over branches located abroad. Even though the SEC found that Digi had failed to make and keep accurate books and records and to maintain a system of internal accounting controls, both the SEC and DOJ reportedly confirmed in July 2010 that they would not pursue any enforcement actions against the company in connection with Krishnan's conduct.

8. Direct Access Partners Executives Ernesto Lujan, Tomas Clarke, Jose Hurtado, Benito Chinea, and Joseph DeMeneses, and former BANDES Vice President Maria Gonzalez

Between May 2013 and April 2013, five executives of New York-based broker-dealer Direct Access Partners LLP ("Direct Access") and one Venezuelan government official were arrested for paying or conspiring to pay bribes to officials of two state-owned economic development banks in Venezuela in violation of the FCPA and the Travel Act. Initially, this included Tomas Clarke Bethancourt ("Clarke"), Jose Alejandro Hurtado, and Ernesto Lujan but later expanded to include Chief Executive Officer Benito Chinea, and a managing director, Joseph DeMeneses.

United States officials also arrested a Venezuelan government official in connection with her alleged involvement in the bribery scheme. On May 3, 2013, Maria de los Angeles Gonzalez de Hernandez ("Gonzalez") was arrested in Miami. Gonzalez served as the Vice President of Finance and Executive Manager of Finance and Funds Administration for Venezuela's state-owned banking entity, Banco de Desarrollo Económico y Social de Venezuela ("BANDES"). As a foreign government official, Gonzalez would not be liable for receiving improper payments under the FCPA; she was charged instead with violating and conspiring to violate the Travel Act for traveling (and using the mail and facilities) in interstate and foreign commerce with the intent to violate the FCPA as well as New York state laws that prohibit the receipt of commercial bribes.

a. Allegations

Lujan, Clarke, Chinea, and DeMeneses were executives of Direct Access's Global Markets Group, a business unit that executed fixed income trades of foreign sovereign debt for its clients. Under its business model, the group would buy government bonds on the open market to fill customer orders, and it would retain as profit the markup difference between the market price and the price that it charged its customers. Similarly, the broker-dealer sold bonds on customer request and retained the markdown difference between the market transaction price and price paid to its customers.

Primarily through its Miami office, Direct Access executed such trades with BANDES, a new client that it developed through its connections with Hurtado. In connection with such trades, the broker-dealer executives improperly paid to BANDES officials portions of the profit that they received from executing bond transactions on BANDES's behalf. Specifically, according to the court filings, these individuals paid kickbacks to Gonzalez and another BANDES official, whom the individuals referred to respectively as "the ant and the passion fruit."

Between January 2009 and June 2010, Direct Access generated revenue of over $66 million in connection with its bond trades with BANDES. The broker-dealer obtained most of this revenue through

markups or markdowns of bond transactions on the open market. For example, Direct Access fulfilled a BANDES order by purchasing Petroleos de Venezuela, S.A. ("PDVSA") bonds on the market for approximately $8.7 million and subsequently selling those bonds to BANDES for approximately $9.4 million. Lujan and Clarke had apparently arranged to pay $50,625 to Gonzalez as a kickback for implementing the BANDES orders.

Additionally, Direct Access executed two same-day roundtrip trades with BANDES that generated over $10.5 million in revenue. Specifically, on January 28, 2010, Direct Access purchased a large number of bonds from BANDES for approximately $90.7 million, and immediately resold them back to BANDES for approximately $96 million. Direct Access executed similar trades on the following day, purchasing bonds from BANDES for approximately $90 million and reselling them back for approximately $95.2 million. The broker-dealer executives allegedly arranged to pay $5.26 million (equivalent to half of the markup on the trades) to Gonzalez.

The broker-dealer executives developed a number of different methods to conceal their improper payments. At first, Direct Access routed the improper payments through Hurtado's wife, whom Direct Access improperly paid as a non-registered "foreign finder" even though she lived in Miami (and thus was not domiciled abroad as required) and had not introduced Direct Access Global to BANDES.

After the "foreign finder" arrangement was questioned by one of the company's clearing brokers, Hurtado was hired as a "back office" non-registered employee, paying him an annual salary of $1.2 million plus bonuses to make up the difference for the required payouts. Under this arrangement, Hurtado received approximately $6.1 million between August 2009 and June 2010 in connection with trades that had been executed prior to August 2009. Furthermore, in connection with trades executed in August 2009 and after, Direct Access allegedly paid Gonzalez by funneling payments through ETC Investment, S.A. ("ETC"), a Panama corporation controlled by Clarke and his wife, or by directing payments to Clarke's wife, who had been hired as a foreign associate of Direct Access Global. Finally, the authorities also maintain that DeMeneses and Clarke paid Gonzalez approximately $1.5 million from their personal funds, and were later reimbursed by Direct Access. The reimbursements were allegedly concealed by Chinea and DeMeneses in the company's books as sham loans to companies associated with DeMeneses and Clarke.

Gonzalez allegedly received most of these improper payments through Cartegena International, Inc. ("Cartegena"), a Panamanian corporation that Gonzalez owned with Jorge Hernandez Gonzalez, an apparent relative. The documents allege, for example, that Clarke and Hurtado laundered kickbacks to Gonzalez in part by transferring funds from the Swiss-bank accounts of ETC and H.A.S. Investment Group (a company that Hurtado controlled) to Cartegena's various Swiss bank accounts. Similarly, a second BANDES official also received kickbacks that were transferred to the Swiss bank accounts of Hyseven S.A., a company that he controlled.

Lujan, Clarke, Hurtado, and DeMeneses were also accused of conspiring to violate the FCPA in connection with payments to another Venezuelan government official. The executives had entered into a similar agreement to bribe the vice president of another state-owned economic development bank, Banfoandes, and its successor Banco Bicentenario.

b. Investigation and Resolution

The anti-corruption investigation and subsequent charges developed from a periodic examination that the SEC commenced in November 2010. The Information states that Lujan, Clarke, Hurtado, and DeMeneses conspired to conceal evidence from the SEC examination staff and that each deleted emails relating to the above conduct. Additionally, Clarke was accused of lying to the SEC examination staff when responding to questions about the associated payments.

In parallel to the criminal prosecution, the SEC filed civil complaints against Lujan, Clarke, Hurtado, Chinea, and DeMeneses, as well as the wives of Clarke and Hurtado, seeking civil monetary penalties and disgorgement with interest of all ill-gotten gains. Additionally, the DOJ filed a forfeiture complaint to seize the assets of the various third-party companies that the broker-dealer executives and BANDES officials allegedly used to transfer the illicit funds.

After Direct Access's parent, Direct Access Group, filed for bankruptcy in July 2013, each of the defendants plead guilty to some of the charges: First, in August 2013, Lujan, Clarke, and Hurtado pleaded guilty to (i) four counts of conspiring commit FCPA, Travel Act, and money laundering violations, (ii) three counts of substantive violations of the FCPA, the Travel Act, and money laundering laws, and (iii) one count of conspiracy to obstruct justice. Second, on November 18, 2013, Gonzalez pleaded guilty to charges of violating and conspiring to violate the Travel Act for traveling (and using the mail and facilities) in interstate and foreign commerce with the intent to violate the FCPA as well as New York state laws that prohibit the receipt of commercial bribes. Third, on December 17, 2014, Chinea and DeMeneses both pleaded guilty to one count of conspiracy to violate the FCPA and the Travel Act. They also admitted the forfeiture allegation with respect to that count, with Chinea agreeing to forfeit $3.6 million and DeMeneses agreeing to forfeit $2.6 million.

On March 27, 2015, U.S. Southern District of New York Judge Denise L. Cote proceeded to sentence Chinea and DeMeneses. Judge Cote called the extent of the misconduct "extraordinary" and sentenced both men to four years in prison, the longest yet imposed by the Second Circuit for such a violation. In addition to the above-mentioned $3.6 million and $2.6 million in forfeiture, Judge Cote fined each man $40,000 for the "very serious crime." Assistant Attorney General Caldwell, who called the conduct a "massive bribery scheme", stated that the convictions and prison sentences of Chinea and DeMeneses "demonstrate that the Department of Justice will hold individuals accountable for violations of the FCPA and will pursue executives no matter where they are on the corporate ladder."

During the March 27, 2015 hearing, Judge Cote also denied Direct Access's application to be considered a victim of the scheme, to whom restitution or other damages should be awarded. Judge Cote found that Direct Access should most properly be viewed as an uncharged co-conspirator, stating in part, "I don't need … to figure out where the law draws the line when it comes to corporate misbehavior between being a victim and being a co-conspirator. Wherever that line must be, I know which side we're on." Judge Cote noted that Direct Access was, in essence, a closely-held corporation "dominated by" Chinea, and that Direct Access's employees were acting for the benefit of Direct Access, its employees, and the co-conspirators in the action.

Most of the remaining defendants were sentenced in December 2015: Lujan and Clarke each received a two year prison term while Hurtado was sentenced to three years in prison. Lujan, Clarke and Hurtado were also ordered to forfeit profits derived from the scheme, amounting to $18.5 million, $5.8

million and $11.9 million, respectively. In January 2016, Judge Cote imposed the last and most lenient sentence on Gonzales: in recognition of the "degree of remorse" Gonzales had shown in a statement read in court, Judge Cote did not impose a prison sentence on Gonzales (beyond the time already served after pleading guilty). Gonzales was ordered to forfeit approximately $5 million in profits she received from the scheme.

Following the sentences imposed by the U.S. District Court, the SEC decided, on April 11, 2016, to sign no-penalty deals with DeMeneses, Chinea, Hurtado, Lujan, and Clarke. The parties were ordered not to break U.S. securities laws and to disgorge profits. The disgorgement was considered satisfied in each case by equivalent judgments in the criminal case.

9. Parker Drilling Company

On April 16, 2013, Parker Drilling Company ("Parker Drilling"), a Houston-based provider of drilling services, entered into a DPA with the DOJ, and separately settled charges with the SEC to resolve investigations into its operations in Nigeria in 2003 and 2004. Parker Drilling will pay over $15.85 million in fines, disgorgement, and interest, and must also implement and maintain an enhanced corporate compliance program.

Under the terms of the DPA, Parker Drilling agreed to pay a penalty of $11.76 million, approximately 20% less than the minimum fine suggested by the Sentencing Guidelines. This reduced penalty may be due, in part, to Parker Drilling's cooperation, extensive remediation efforts (including "ending its business relationships with officers, employees, or agents primarily responsible for the corrupt payments"), and responsive development of an enhanced compliance program. Separately, in the parallel civil proceedings, Parker Drilling agreed to settle civil charges brought by the SEC. Parker Drilling consented to pay disgorgement of $3,050,000, the amount that Parker Drilling's fine was reduced, plus interest of $1,040,818.

Parker Drilling's settlement is related to the prior Panalpina-related sweep. Since December 2010, when seven other companies (and, in some cases, their subsidiaries) paid more than $236 million in combined penalties to resolve DOJ and SEC investigations, the DOJ and SEC had declined to pursue prosecutions of at least four other companies originally under investigation, including most recently Nabors Industries Ltd in 2013 and Schlumberger N.V. in 2012.

Parker Drilling retained Panalpina World Transport (Nigeria) Limited ("Panalpina") to assist it in obtaining temporary import permit ("TIP") extensions for several rigs that Parker Drilling owned and operated in Nigeria. According to the charging documents, Panalpina obtained these extensions by submitting false paperwork to the Nigerian authorities that claimed that the rigs had been exported from and re-imported into Nigerian waters, even though they in fact had not. This "paper process" violated Nigerian law, and an investigative panel of the Nigerian government summoned Parker Drilling in December 2002 to discuss its TIPs and extensions.

The DOJ and SEC were not principally concerned with the manner in which Parker Drilling and Panalpina obtained the TIP extensions, but rather with the subsequent efforts that Parker Drilling undertook to resolve the investigation. By December 2003, Parker Drilling wanted to settle the TIP matter so that it could sell its rigs and exit Nigeria. To assist with that goal, an unnamed lawyer ("Lawyer") at a U.S. law firm ("Law Firm") introduced Parker Driller to one of the Lawyer's clients, who recommended that

the company engage a Nigerian and British citizen ("Agent") who resided in the United Kingdom. Parker Drilling retained the Agent indirectly through the Law Firm by engaging him to "act as a consultant to [Law Firm] to provide professional assistance resolving these issues in Nigeria." The DOJ and SEC charging documents note in particular that the Agent's resume did not indicate any relevant experience with customs issues, and that Parker Drilling did not conduct any due diligence on the Agent other than interviewing him in London.

Between January and June 2004, Parker Driller paid over $1.25 million to the Agent, almost entirely through indirect payments routed through the Law Firm. Contemporary emails between Parker Driller and the Law Firm show that many of these payments were used for entertainment expenses, including in connection with the Nigerian presidential delegation, the Ministry of Finance, and the State Security Service, Nigeria's intelligence and law enforcement agency. In mid-April 2004, for example, the Agent emailed the Lawyer and an executive of Parker Drilling to explain that:

> There is nothing more serious than landing in Nigeria without money to resolve the problems. . . . I have [a] meeting tomorrow in Abuja to discuss the drilling contracts. This is my reason for making sure that I can entertain my hosts because of their promises. Therefore, please make sure that you transfer the funds today so that my Bank Officer can send it to Nigeria tomorrow.

By early May 2004, the Lawyer explained to his contact at Parker Drilling that the Agent was spending nearly $4,000 "a day per person because of the entourage entertainment."

At the same time, Parker Drilling's treasurer was concerned about an ongoing Sarbanes-Oxley audit and requested an invoice for the growing expenses. The Agent then provided two invoices to the Lawyer for "professional fees" for 2004 totaling $500,000, which the Lawyer reproduced on Law Firm letterhead and arbitrarily divided between "expenses" and "fees," even though there was no apparent reason for doing so.

On May 12, 2004, the Nigerian governmental panel investigating the TIP issues levied a fine of $3.8 million against Parker Drilling. Two weeks later, however, the panel reduced the fine to $750,000 without stating a reason for doing so. Following that decision, the Agent requested additional compensation, and Parker Drilling paid him another $650,000 in June 2004.

Parker Drilling's three-year DPA with the DOJ requires that the company (i) implement an enhanced compliance program with a high-level commitment from its directors and senior managers; (ii) develop and maintain risk-based policies, procedures, and internal controls capable of preventing and detecting FCPA violations, including internal mechanisms for discipline and confidential reporting of violations; (iii) provide training and guidance to directors, officers, and relevant employees, as well as agents and business partners "where necessary and appropriate;" and (iv) conduct appropriate risk-based due diligence on agents, business partners, and potential acquisitions.

10. Ralph Lauren

On April 22, 2013, Ralph Lauren Corporation ("Ralph Lauren") entered into an NPA with the DOJ ("DOJ NPA") and agreed to pay a penalty of $882,000 to resolve allegations that it violated the FCPA by

paying bribes to customs officials in Argentina in return for preferential treatment. The same day, the SEC announced that it had also reached an NPA ("SEC NPA") with Ralph Lauren based on the same conduct. As part of the SEC NPA, Ralph Lauren agreed to pay $593,000 in disgorgement and $141,859.79 in prejudgment interest, bringing Ralph Lauren's total to more than $1.6 million to resolve the allegations with both enforcement authorities.

Ralph Lauren, a New York-based company listed on the New York Stock Exchange, is a designer, marketer and distributor of apparel, accessories and other products. According to the charging documents, from 2005 through 2009, Ralph Lauren's indirect, wholly-owned Argentine subsidiary, P.R.L.-S.R.L. ("Ralph Lauren Argentina"), paid over $550,000 to a customs agent for the purpose of paying bribes to Argentine customs officials.

The DOJ NPA alleges that the general manager of Ralph Lauren Argentina orchestrated a scheme with the customs agent to make unlawful payments to officials in the Argentine customs department in order to secure various improper advantages, including clearance of certain merchandise without proper paperwork, clearance of items that were otherwise prohibited, and avoidance of inspection of Ralph Lauren Argentina merchandise. In order to disguise the purpose of payments, the customs agent submitted invoices to Ralph Lauren Argentina with line items such as "Loading and Delivery Expenses" and "Stamp Tax/Label Tax," for which no back-up documentation was provided and which were allegedly for amounts used as bribes.

In addition to paying bribes to customs officials through the customs agent, the DOJ NPA alleges that the general manager of Ralph Lauren Argentina directly provided or authorized gifts provided to three different customs officials to secure the importation of Ralph Lauren products into Argentina. The gifts allegedly included perfume, dresses and handbags at values ranging between $400 and $14,000.

The settlement is primarily instructive regarding the DOJ's willingness to hold parent companies responsible for the conduct of their foreign subsidiaries. As discussed above, the FCPA Resource Guide specifies that the DOJ may seek to hold parent corporations liable for their foreign subsidiaries' violations of the anti-bribery provisions of the FCPA under an agency theory and the principles of *respondeat superior*. In the Resource Guide, the enforcement agencies stated that agency-based liability would be determined on the basis of control, including a number of factors such as parent company knowledge and direction, reporting structures, the existence of shared management, and the involvement of the parent's legal department or corporate management in approving any relevant engagements or payments. In the context of the NPA, however, Ralph Lauren and the DOJ appear to have acknowledged that the parent company's hiring of the general manager of Ralph Lauren Argentina established that Ralph Lauren exercised sufficient control over its Argentinean subsidiary.

The NPAs also allege that Ralph Lauren lacked appropriate internal accounting controls. According to the DOJ NPA, during the five-year period in which the improper payments were made, Ralph Lauren did not have an anti-corruption program and did not provide training to employees or otherwise exercise any oversight to prevent misconduct.

In the beginning of 2010, Ralph Lauren implemented a new FCPA policy. After reviewing the new policy, certain employees of Ralph Lauren Argentina raised concerns about the use of the customs agent. In response to these concerns, Ralph Lauren conducted an investigation and discovered the improper payments. Within two weeks, Ralph Lauren self-reported the conduct to the DOJ.

Both the SEC and the DOJ lauded Ralph Lauren's extraordinary cooperation and remedial efforts. Among the cooperative efforts taken by Ralph Lauren were: (i) voluntary and complete disclosure of documents, including accurate translations of documents; (ii) summarizing witness interviews conducted by the company during its internal investigation; and (iii) making witnesses available and bringing them to the United States for interviews by U.S. authorities. In addition, Ralph Lauren took important remedial measures, including terminating its relationship with the customs agent, conducting a worldwide risk assessment, implementing whistleblower procedures, winding down operations in Argentina, enhancing due diligence procedures, improving policies related to commissions and gifts and hospitalities, providing targeted in-person anti-corruption training, and retaining a full-time designated compliance officer.

The Ralph Lauren settlement marks the first time that the SEC has entered into an NPA to resolve FCPA violations. The SEC cited Ralph Lauren's remedial efforts and cooperation as the main reason it chose to enter into its first agreement of this nature.

11. Stryker

On October 24, 2013, the SEC instituted cease-and-desist proceedings against Stryker Corporation ("Stryker"), a Michigan-based medical device manufacturer and distributor listed on the NYSE, in connection with charges that Stryker had violated the books and records and internal controls provisions of the FCPA in connection with conduct by its foreign subsidiaries. In anticipation of the cease-and-desist order, the SEC agreed to accept Stryker's offer of $7.5 million in disgorgement, $2.28 in prejudgment interest, and a civil monetary penalty of $3.5 million to settle the charges.

The SEC alleged that Stryker's foreign subsidiaries in Argentina, Greece, Mexico, Poland, and Romania made a combined 520 improper payments between 2003 and 2008 totaling nearly $2.2 million, including payments made directly or indirectly to public health officials in Mexico, Romania, and Argentina that were disguised as "honoraria" or passed through a third-party law firm. The SEC alleged that these improper payments resulted in nearly $7.5 million in illicit profits for Stryker.

According to the SEC, Stryker's wholly-owned Polish subsidiary provided gifts, donations, travel and other payments totaling approximately $460,000 to public health professionals. In May 2004, the subsidiary paid for a government official and her husband to travel to New Jersey to attend a single-day tour of a manufacturing and research facility, but also provided the couple with accommodations in New York City for six nights (including tickets for a Broadway Show) and a five-day trip to Aruba.

The SEC further alleged that Stryker's wholly-owned subsidiary in Greece donated nearly $200,000 to fund a public university laboratory that was the "pet project" of "a foreign official who served as a prominent professor at the Greek University, and was the director of medical clinics at two public hospitals affiliated with the Greek University." The SEC explained (brackets and ellipses in original):

> The country manager wrote: "I think that anything below 30k will leave [the foreign official] disappointed. He did promise that he would direct his young assistants into using our trauma and sports medicine products. [The foreign official] is . . . difficult to get as a 'friend' and really tough to have as a disappointed customer." The regional manager asked, "What do we get for the sponsorship – or is it just a gift?" The country manager

> confirmed the quid pro quo, stating, "For the sponsorship we get the Spine business and a promise for more products in his Department. . . ."

Even though the SEC only charged Stryker with violations of the accounting provisions of the FCPA, the enforcement agency's discussion here, as with *Eli Lilly* (discussed further below), demonstrates how broadly enforcement agencies might read the "anything of value" element of the FCPA. Even though the charitable contribution in question would benefit the university laboratory itself and would not be passed along to a government official, the SEC appears to take the position that it would nevertheless constitute something of "value" to the official because it was his "pet project." The SEC—which itself refers to the laboratory payment as a "donation"—claimed that the Greek subsidiary improperly recorded the payment by booking it in an account entitled "Donations and Grants."

12. Total S.A.

On May 29, 2013, Total S.A. ("Total"), the fifth-largest publicly traded integrated international oil and gas company in the world, and the DOJ entered into a DPA to resolve charges that Total violated the books and records provisions of the FCPA and conspired to violate both the anti-bribery and the books and records provisions. The same day, the SEC entered a cease-and-desist order against Total pursuant to a settlement between Total and the SEC. The resolution resolved a long-open investigation by the DOJ and the SEC into the company's involvement in the development of oil and gas fields in Iran. The U.S. government asserted jurisdiction over Total based on Total's NYSE-listed and SEC-registered American Depositary Receipts ("ADRs").

As part of a three-year DPA with the DOJ, Total agreed (i) to pay a criminal fine of $245.2 million; (ii) to cooperate with the DOJ, non-U.S. law enforcement and multilateral development banks; (iii) to retain an independent corporate compliance monitor (designated as a French national) for a period of three years; and (iv) to continue to implement an enhanced compliance program and internal controls designed to prevent and detect violations of relevant anti-corruption laws. Total also consented to the filing of a three-count Criminal Information by the DOJ in the U.S. District Court for the Eastern District of Virginia, which charged the company with one count of conspiracy to violate the anti-bribery provisions of the FCPA, one count of violating the internal controls provision, and one count of violating the books and records provision. Jurisdiction in the Eastern District of Virginia was asserted on the basis that Total's filings with the SEC were submitted to the SEC's Management Office of Information and Technology in Alexandria, Virginia. As part of an administrative cease-and-desist order ("CDO") entered by the SEC, Total was also required to pay $153 million in disgorgement in connection with the same events underlying the DPA. The CDO further required Total to retain a compliance consultant to review the company's FCPA compliance program, which in practice will be satisfied by the imposition of the corporate monitor required pursuant to the DPA.

The following summary is based on the Statement of Facts attached to the DPA and the SEC's allegations in the CDO. From 1995 to 2004, Total made payments of approximately $60 million to gain access to the development of oil and gas fields in Iran, which yielded an estimated $150 million in profits. Total entered into negotiations with an Iranian official of a state-owned and controlled engineering company in May 1995 to secure the official's support in obtaining contracts from the National Iranian Oil Company ("NIOC") to develop the Sirri A and E oil and gas fields. In July 2005, Total entered into a consultancy agreement with an intermediary designated by the official, and subsequently, NIOC awarded the Sirri A and E development contract to Total. Over the next two-and-a-half years, at the direction of

the official, Total paid the intermediary $16 million in "business development expenses," which the United States claimed were unlawful payments to the official. In 1997, in connection with negotiations with NIOC for a contract to develop a portion of the South Pars gas field, the official directed Total to enter into another consultancy agreement with a second intermediary. Later that year, Total entered into a development contract with NIOC related to the South Pars gas field. Over the next seven years, Total paid approximately $44 million in "business development expenses" to a second intermediary at the direction of the Iranian official. According to the DPA, Total mischaracterized the payments to the intermediaries as "business development expenses" when they were actually "unlawful payments for the purpose of inducing the Iranian Official to use his influence in connection with the granting of development rights to the Sirri A and E and South Pars fields, and improperly characterized the unlawful consulting agreements as legitimate consulting agreements."

In its announcement of the U.S. settlement, Acting Assistant Attorney General Raman characterized the case as the "first coordinated action by French and U.S. law enforcement in a major foreign bribery case," and that "(o)ur two countries are working more closely today than ever to combat corporate corruption . . . ."

13. Weatherford International Limited

On November 26, 2013, Weatherford International Limited ("Weatherford"), an NYSE-traded multinational corporation that provides equipment and services to the oil and gas industry, settled charges with the DOJ and the SEC that it had violated the anti-bribery and/or accounting provisions of the FCPA. Weatherford entered into a three-year DPA with the DOJ that required the company to pay an $87 million criminal penalty and retain an independent corporate monitor for a period of 18 months.

Pursuant to its joint motion with the SEC (approved on December 19, 2013), the company agreed to pay $97.2 million in disgorgement, prejudgment interest and civil penalties (although $31.6 million of that amount would be satisfied by payments required under Weatherford's DPA with the DOJ) without admitting or denying the underlying conduct, including a $1.87 million penalty for its lack of cooperation during the SEC's initial investigation. Like the DPA, the final judgment required Weatherford to retain a monitor.

Additionally, Weatherford's Bermuda-incorporated subsidiary Weatherford Services Limited ("WSL") pleaded guilty to one count of violating the FCPA's internal controls provisions, and Weatherford agreed to pay a $420,000 criminal fine.

In total, Weatherford agreed to pay a total of approximately $152.8 million to resolve the charges.[34] The documents filed in connection with the company's settlement with the DOJ describe improper conduct in Angola, Iraq, and another undisclosed Middle Eastern country. The SEC complaint, while describing and elaborating on those activities, also alleges further improper conduct in Albania, Algeria, and the Republic of Congo (Brazzaville) ("Congo").

[34] At the same time, Weatherford and four of its subsidiaries agreed to pay $100 million to resolve criminal and administrative export controls matters before the Department of Commerce's Bureau of Industry and Security and the Treasury's Office of Foreign Asset Control. In relation to the export controls settlement, two Weatherford subsidiaries agreed to plead guilty to export controls charges, and Weatherford agreed to enter into a separate, two-year DPA with the U.S. Attorney's Office for the Southern District of Texas.

a. Angola

In 2004, WSL sought to establish a monopoly on contracts with Angola's state-owned oil and gas company Sonangol for well screens (devices used in oil wells to filter impurities in oil) by forming a joint venture with two local Angolan entities that certain Sonangol officials had recommended. Although both local entities had "nominal" partners, they were in fact controlled by Angolan government officials or their relatives—the first (which retained a 45% interest in the joint venture) was controlled by three senior Sonangol officials, and the second (which had a 10% interest) by the daughter of a high-level official in the Angolan Ministry of Petroleum who "had influence over contracts entered into by the Angolan government."

According to the admitted facts of the plea agreement, various WSL employees knew that the local entities were controlled by government officials, and that those officials could and did exercise undue influence in WSL's favor.

First, the Sonangol officials and the daughter of the ministry official (and not the nominal partners) met with WSL employees to negotiate the terms of the joint venture or discuss operational issues in Houston in October 2004, in London in July 2005, and in Paris in September 2006. Prior to the Paris meeting, one Weatherford executive noted that the company would need to meet the "named partners" for registration purposes, but that another Weatherford executive "would like to meet with the 'real' partners."

Second, the government officials exerted significant influence to direct business to WSL. In a May 2005 email, a Weatherford executive stated that the officials "did their part and cancelled the $10M Kizomba contract and moved it over to us." In January 2006, one of the Sonangol officials informed the Weatherford executive that Sonangol would consider "not giving any new contract to Weatherford" unless the local partners received some "financial benefit." Another email from the same month explained WSL's "connections in Sonangol have again help[ed] us to secure" a Sonangol contract, even though its price was 30% higher than the competition.

In November 2006, WSL asked that the Sonangol officials intervene in connection with a private oil company that had awarded a $7 million contract to a WSL competitor. In a later email to an internal Weatherford lawyer, the Weatherford executive wrote that the private company subsequently stated that it would cancel the contract with the competitor and award it to WSL instead, and that he had explained to the company that WSL would "need another 10-15% to cover our local activities." He added that "Every now and then, life gets good."

Emails from January 2007 also suggest that the Sonangol officials provided WSL with the bid prices submitted by competitors to enable them to win the contract awards.

In addition to failing to conduct any meaningful due diligence on the local entities prior to executing the joint venture, Weatherford sought preliminary advice from outside counsel but ultimately ignored the unfavorable responses. In October 2004, for example, the company's lawyer contacted one firm to ask whether the relationship raised any FCPA issues, but never responded to that firm's advice that it should learn the identity of the ultimate beneficiaries of the local joint venture partners. In July 2005, the Weatherford lawyer falsely informed a separate law firm that had inquired about FCPA issues that the joint venture had been vetted and approved by outside counsel.

The settlement documents also state that WSL participated in a separate bribery scheme in Angola that involved improper payments to a Sonangol drilling manager in order to obtain regulatory approval for the renewal of an $11.7 million contract between WSL and a private oil company for the provision of oil services in the Cabinda region of Angola.

One WSL manager reported internally that he had attended a meeting with the drilling manager in late 2005 in which the official slid an envelope across the table that that "250,000" written on it. The manager refused to pay the bribe and informed the company that he believed other Weatherford and WSL managers were making such payments.

The manager was transferred out of Angola in 2006, and WSL executives subsequently agreed to pay the bribe to the drilling manager by entering into a sham consultancy agreement with a Swiss-based freight forwarder. At the agent's request, Weatherford removed the FCPA compliance clause from the agreement as "in view of the nature of the business [the freight forwarder] cannot accept the original wording." The SEC added that Weatherford had also provided certain travel benefits to the drilling manager, such as a weeklong European trip that included only one day of bona fide business activities.

b. Undisclosed Middle Eastern Country

Weatherford Oil Tool Middle East Limited ("WOTME"), a wholly-owned, Dubai-headquartered subsidiary of Weatherford International, awarded improper "volume discounts" to a third-party distributor who supplied Weatherford products to the national oil company of an undisclosed country in the Middle East. Officials of the national oil company had directed WOTME to work with the distributor in question. WOTME subsequently provided the distributor with a 5-10% volume discount on each sale, which totaled approximately $15 million between 2005 and 2011. WOTME believed that the excess funds would be used to create a slush fund to bribe government officials.

The DOJ noted that neither WOTME nor Weatherford had conducted any due diligence on the distributor despite the existence of several red flags, including (i) the above-mentioned recommendation by government officials, (ii) the distributor's role in selling goods to a government instrumentality, and the fact (known by WOTME executives) that a member of the royal family had an ownership interest.

c. Iraq

WOTME also paid kickbacks to the Iraqi government in relation to the United Nations Oil for Food Program ("OFFP"). As discussed in other OFFP cases, the Iraqi government began demanding 10% kickbacks from the suppliers in connection with the humanitarian program in violation of OFFP regulations and U.N. sanctions. Between February and July 2002, WOTME paid approximately $1.4 million to the Iraqi government in the form of kickbacks on contracts for oil drilling and refining equipment, and WOTME falsified its books and records to conceal the payments.

d. Congo

The SEC alleged that WSL made over $500,000 in bribe payments to employees of a commercial customer through the same Swiss freight forwarding agent mentioned above in order to obtain and retain business in Congo. Because this arrangement did not involve the bribery of government officials, the SEC did not allege violations of the FCPA's anti-bribery provisions, but instead alleged that WSL falsified its books and records to conceal the payments, in violation of the accounting provisions.

e. Algeria

According to the SEC Complaint, Weatherford provided improper travel and entertainment expenses to officials of Sonatrach, the Algerian state-owned oil and gas company. These alleged expenses included trips for two Sonatrach officials to the World Cup Soccer tournament in Germany, a honeymoon trip for the daughter of a Sonatrach official, and a religious trip by a Sonatrach employee and his family to Jeddah in Saudi Arabia. The SEC stated that none of these trips had a legitimate business purpose, and that Weatherford also gave cash to Sonatrach officials on at least two occasions in connection with their visits to the Weatherford offices in Houston.

f. Albania

The SEC alleged that management of Weatherford Mediterranean S.p.A. ("WEMESPA"), a wholly-owned Italian subsidiary of Weatherford, used company funds to bribe Albanian tax officials. The SEC stated that two WEMESPA managers misreported cash advances, diverted payments on paid invoices, and falsified reimbursement expenses to misappropriate over $200,000 of funds for personal benefit, but later paid a portion of those funds to Albanian tax auditors who questioned the company's accounts. The SEC added that the general manager responsible for the misappropriation also terminated an employee who had threatened to expose the misconduct.

g. Additional SEC fine for early lack of cooperation

As noted above, the final judgment with respect to the complaint filed by the SEC included a $1.8 million penalty assessed against Weatherford for its lack of cooperation early in the investigation. According to the SEC complaint, Weatherford and its employees "compromised" the SEC's initial investigation in a number of ways, including by (i) telling the enforcement agency that its Iraq Country Manager was missing or dead, even though he remained employed by the company, (ii) failing to secure important materials, and (iii) allowing potentially complicit employees to collect documents that had been subpoenaed by the SEC. The agency added that emails had been deleted by employees prior to computer imaging in at least two instances.

The SEC also noted, however, that Weatherford subsequently "greatly improved its cooperation and engaged in remediation efforts." The DOJ also noted both in its complaint and plea agreement that the company had been largely cooperative.

E. 2012

1. Allianz SE

On December 17, 2012, the SEC issued a cease-and-desist order against Allianz SE, a German insurance and asset management company and Europe's largest insurer. The order alleged that Allianz had violated the FCPA's books and records and internal accounting controls provisions of the FCPA related to improper payments made between 2001 and 2008 to Indonesian government officials, in exchange for lucrative insurance contracts. Because Allianz's alleged misconduct occurred at a time when its American Depositary Receipts ("ADRs") and bonds were listed on the New York Stock Exchange ("NYSE") and were required to be registered with the SEC under Section 12 of the Exchange Act, Allianz was considered an issuer subject to the FCPA's anti-bribery and accounting provisions during the relevant time period. Allianz did not admit or deny the SEC's findings, and the SEC imposed

disgorgement of $5,315,649, prejudgment interest of $1,765,125, and a civil monetary penalty of $5,315,649—$12,396,423 in total. There was no parallel DOJ settlement; DOJ issued a declination letter to Allianz in 2011.

The SEC noted several remedial measures taken by Allianz in issuing the administrative order. Allianz took employment action against several persons who were involved in or failed to stop the conduct. Allianz issued new or enhanced policies, procedures, and internal accounting controls, including the mandating of strict scrutiny of payments to third parties. Allianz also revised its standard third-party contracts to specifically refer to the FCPA in the contracts' anti-corruption clause.

Particularly noteworthy about his case is that Allianz, over the course of five years, received three whistleblower complaints alleging potential FCPA violations to the company, its auditors, and the SEC. The following summary is based on the allegations in the SEC's administrative cease-and-desist order.

2005 Whistleblower

In 2005, Allianz initiated an internal audit within days after receiving a whistleblower complaint made to both the Allianz whistleblower hotline and the hotline of PT Asuransi Allianz Utama ("Utama")'s minority owner, PT Asuransi Jasa Indonesia ("Jasindo"). Utama is a majority-owned subsidiary of Allianz, while Jasindo is an Indonesian state-owned entity. Evidence of the alleged bribes was identified during the internal audit. The audit identified two internal accounts for an Indonesian agent and was told that one of the accounts was for the agent's normal commissions and the other was for "various" purposes. The auditors also identified a "special purpose" external account that was primarily used by Utama's marketing manager "to pay project development [expenses] and overriding commissions to the special projects and clients for securing business with Utama." Until 2009, however, no further inquiries were made about the nature and purpose of the accounts or the payments flowing between them. The audit's findings were reported to Allianz's board of directors and instructions to close the "special purpose" account and to cease all future payments followed. Yet the account was not closed and further payments were made to government officials, and others, through this account. For this reason, among others, the SEC found, as discussed below, that Allianz's system of internal controls was ineffective to prevent future illegal payments. The staff specifically cited the fact that no steps were taken by the company to confirm that the special purpose account had been closed and that further improper payments were not made.

2009 Whistleblower

In March 2009, the company's external auditors received a whistleblower complaint alleging that an Allianz executive had created a slush fund during his employment with Utama's majority owner, Allianz of Asia-Pacific and Africa GmbH. In response, Allianz engaged external counsel to conduct an internal investigation of the company's payment practices in Indonesia. The investigation confirmed, among other things, that illegal payments continued to be made from the "special account," or slush fund, to government officials. This further misconduct was not initially reported to the SEC.

2010 Whistleblower

In 2010, the SEC received a whistleblower complaint alleging potential FCPA violations at Allianz. Prior to this complaint, the SEC had not been informed by Allianz, or otherwise, of the alleged misconduct investigated by the company in 2005 and 2009. The SEC opened an investigation and ultimately

determined that 295 government insurance contracts had been obtained through improper payments between 2001 and 2008. Many of improper payments were described in the company's records as "overriding commissions" or "reimbursements for overpayment" and were paid pursuant to falsified invoices.

In this case, the availability of an anonymous reporting hotline, alone, was ineffective at combatting misconduct and corruption. The company was timely in its initial internal response to the 2005 and 2009 complaints and pinpointed the source of the misconduct, but remedial steps were not promptly taken.

2. Biomet

On March 26, 2012, Biomet Inc., a medical device maker based in Indiana, settled FCPA charges with the DOJ and SEC for conduct occurring between 2000 and 2008. For most of the period of the misconduct, Biomet was listed on NASDAQ and was required to file periodic reports with the SEC, making it an "issuer" under the FCPA with respect to that time period. Biomet was targeted as part of the government's ongoing investigation into medical device companies for bribes paid to health care providers and administrators employed by government institutions.

The SEC Complaint alleged violations of the FCPA anti-bribery, books and records, and internal control provisions, while the DOJ charged Biomet with one count of conspiracy to violate the FCPA's anti-bribery and books and records provisions and four counts of violations of the anti-bribery provisions. According to DOJ and SEC charging documents, between 2000 and 2008, Biomet and four subsidiaries located in Argentina, China, Sweden, and Delaware, paid more than $1.5 million in bribes to health care providers in China, Argentina, and Brazil in order to secure business with hospitals. These payments were disguised in the company's books and records as "commissions," "royalties," "consulting fees," and "scientific incentives." According to the government, bribes involved employees and managers at all levels of Biomet, its subsidiaries, and its distributors. The payments were not stopped by Biomet's compliance and internal audit functions even after they became known.

In China, Biomet sold medical device products through two subsidiaries, Biomet China (a Chinese company and wholly owned subsidiary of Biomet) and Scandimed (a wholly owned Swedish subsidiary that sells in China and elsewhere). The DOJ and SEC alleged that Biomet China and Scandimed funneled bribes through a distributor who offered money and travel to publicly employed doctors in exchange for Biomet purchases. One e-mail from the Chinese distributor, sent on May 21, 2001, indicated that:

> [Doctor] is the department head of [public hospital]. . . . Many key surgeons in Shanghai are buddies of his. A kind word on Biomet from him goes a long way for us. Dinner has been set aside for the evening of the 24th. It will be nice. But dinner aside, I've got to send him to Switzerland to visit his daughter.

A separate April 21, 2002 email from the Chinese distributor stated:

> When we say "Surgeon Rebate included," it means the invoice price includes a predetermined percentage for the surgeon. For example, a

> vendor invoices the hospital for a set of plate & screws at RMB 3,000.00. The vendor will have to deliver RMB 750.00 (25% in this case) in cash to the surgeon upon completion of surgery.

Employees at Biomet China and Scandimed were allegedly made aware of the bribes from at least 2001, due to e-mail exchanges with the distributer that explicitly described the bribes. Biomet's President of International Operations in Indiana and employees in the United Kingdom were also allegedly made aware of the bribes in 2001. For example, one e-mail sent from the Chinese distributor copying the Associate Regional Manager stated "[Doctor] will become the most loyal customer of Biomet if we send him to Switzerland." And, in 2005, the Director of Internal Audit instructed an auditor to code as "entertainment" the payments being made to doctors in connection with clinical trials.

In 2006, Biomet ended its relationship with the Chinese distributor and hired staff to sell devices directly, a change that did not serve to end the misconduct. In October 2007, Biomet China sponsored 20 surgeons to travel to Barcelona and Valencia for training; the trips included substantial sightseeing and entertainment at Biomet's expense. Additionally, in October 2007, Biomet China's product manager sent an email to the Associate Regional Manager in which he discussed ways to bypass anti-corruption efforts by the Chinese government.

In Brazil, Biomet's U.S. subsidiary, working through a distributor, allegedly paid an estimated $1.1 million in the form of 10% to 20% "commissions" to doctors at publicly owned and operated hospitals in order to sell Biomet products. The government alleged that Biomet employees were aware of these payments as early as 2001. Payments were openly discussed in documents between Biomet's executives and internal auditors in the United States, Biomet International, and its distributor. For example, in August 2001 the Brazilian distributor sent an email to Biomet's Senior Vice President in Indiana, copying the Director of Internal Audit, stating it was paying commissions to doctors. Yet the SEC concluded that, "no efforts were made to stop the bribery." In April 2008, following its acquisition by the private equity groups, Biomet decided to purchase the Brazilian distributor and sent accountants and counsel to conduct due diligence. Accountants identified certain payments to doctors, raising red flags of bribery. In May 2008, Biomet terminated its relationship with its distributor and withdrew from the Brazilian market.

The government alleged that, with respect to Argentina, employees of Biomet paid doctors at publicly owned and operated hospitals directly, with kickbacks as high as 15% to 20% of sales. In total, Biomet allegedly paid approximately $436,000 to doctors in Argentina. In order to conceal payments, employees of Biomet Argentina, a wholly owned Biomet subsidiary incorporated in Argentina, used false invoices from doctors stating that the payments were for professional services or consulting. Prior to 2000, the payments were falsely recorded as "consulting fees" or "commissions." In 2000, the Argentine tax authorities forbade tax-free payments to surgeons, and Biomet Argentina employees began recording the payments as "royalties" or "other sales and marketing."

Auditors and executives at Biomet's headquarters in Indiana were aware of these payments as early as 2000. For example, in 2003, during the company's audit of Biomet Argentina, the audit report stated that "[R]oyalties are paid to surgeons if requested. These are disclosed in the accounting records as commissions." The internal audit did not make any effort to determine why royalties were being paid to doctors, amounting to some 15% to 20% of sales. Later in 2008, Biomet distributed new compliance guidelines related to the FCPA, and the Managing Director of Biomet Argentina informed Biomet's

attorneys of the company's payments to doctors. Biomet reacted by suspending the payments and sending outside counsel to investigate.

Biomet entered into a deferred prosecution agreement with the DOJ, which requires that Biomet implement a rigorous system of internal controls and retain a compliance monitor for 18 months. Biomet also agreed to pay a criminal fine of $17.28 million to the DOJ and $5.5 million in disgorgement of profits and prejudgment interest to the SEC. The deferred prosecution agreement recognized Biomet's cooperation during the DOJ's investigation, as well as the company's self-investigation and remedial efforts. Biomet also received a penalty reduction in exchange for its cooperation with ongoing investigations in the industry.

3. BizJet

On March 14, 2012, BizJet International Sales and Support, Inc. ("BizJet") entered into a three-year DPA with the DOJ in connection with allegations that it made improper payments to government officials in Mexico and Panama in violation of the FCPA. As part of the DPA, BizJet agreed to pay $11.8 million in criminal fines, to cooperate with the department in ongoing investigations, and to periodically update the DOJ on the company's compliance efforts.

BizJet, founded and headquartered in Tulsa, Oklahoma, is a subsidiary of Lufthansa Technik AG ("Lufthansa Technik") and provides aircraft maintenance, repair and overhaul services to customers in the United States and abroad. According to court documents, between 2004 and 2010, executives and managers from BizJet authorized wire and cash payments to key employees of potential government clients, including the Mexican Federal Police, the Mexican President's aircraft fleet, the Governor of the Mexican State of Sinaloa's aircraft fleet, the Panama Aviation Authority, and the aircraft fleet for the government of the Brazilian State of Roraima, as well as to customers in the United States. The purpose of the payments was to directly obtain and retain services contracts with these potential clients.

The payments were referred to within BizJet as "commissions," "incentives," or "referral fees" and were either paid directly to the foreign officials or disguised through use of a shell company owned by former BizJet sales manager Jald Jensen. Through the latter method, payments were made from BizJet to the shell company and then passed on to government officials, often delivered by hand in cash. Although the BizJet information contained just one count of conspiracy, the deferred prosecution agreement lists at least 12 recorded bribe payments (ranging from $2,000 to $210,000) made by BizJet and recorded as "commission payments" or "referral fees."

The information alleges that the highest levels of the company were aware of the improper conduct, which was carried out or authorized by at least three senior executives and one sales manager. According to the information, the BizJet Board of Directors was informed in November 2005 that decisions as to where to send aircrafts for maintenance were often made by the potential customer's "director of maintenance" or "chief pilot." The Board was also informed that these individuals had requested commissions from BizJet ranging from $30,000 to $40,000 and that BizJet would "pay referral fees . . . to gain market share."

The $11.8 million fine paid by Bizjet falls well below the minimum range suggested under the Federal Sentencing Guidelines. The reduction may be due in part to what the DOJ perceived to be "extraordinary" cooperation by BizJet and Lufthansa Technik in the investigation. The DOJ expressly

commended BizJet and Lufthansa Technik for this cooperation, which included an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing and organizing voluminous evidence and information for the agency.

Lufthansa Technik, wholly owned by European airline Deutsche Lufthansa, entered into a three-year NPA with the DOJ in December 2011 in connection with BizJet's unlawful payments. Lufthansa Technik agreed to provide ongoing cooperation and implementation of rigorous internal controls. It is not clear from the charging documents what the basis for Lufthansa Technik's liability was, as Lufthansa was not mentioned in the Bizjet DPA and the Lufthansa Technik NPA contains no factual basis other than the following statement:

> It is understood that Lufthansa Technik admits, accepts, and acknowledges responsibility for the conduct of its subsidiary set forth in the Statement of Facts contained in the Deferred Prosecution Agreement between the Department and BizJet (the "BizJet DPA"), and agrees not to make any public statement contradicting that Statement of Facts.

Both companies agreed to engage in extensive remediation, including terminating employees responsible for the corrupt payments, enhancing due-diligence protocol for third-party agents and consultants, and heightening review of proposals and other transactional documents for BizJet's contracts. Neither company was required to retain a compliance monitor.

On April 5, 2013, a federal court in Oklahoma unsealed plea agreements with Peter DuBois and Neal Uhl, two former BizJet executives that had been charged in December 2011 with counts of violating or conspiring to violate the FCPA. After the court accepted their guilty pleas, DuBois and Uhl were both sentenced to eight months of home detention and a five-year probation term. Additionally, DuBois agreed to criminal and administrative forfeiture judgments totaling $159,950, and the court imposed a $10,000 criminal fine on Uhl.

The unsealed documents note that both DuBois and Uhl had cooperated with the DOJ. In particular, the Motion to Seal revealed that DuBois had worked in an "undercover capacity" in connection with the BizJet investigation, recording conversations with former BizJet executives and other subjects of the government's investigation. In recommending a lesser sentence for DuBois, the DOJ also explained that the assistance that DuBois provided also led to the investigation of another maintenance, repair, and overhaul company that had been engaged in a similar scheme to pay bribes to government officials overseas. Although the DOJ did not provide further details about the other investigation, the DOJ entered an NPA with Nordam Group Inc., another Tulsa-based maintenance, repair, and overhaul services company, in July 2012 (*see* Nordam p.186).

The District Court also unsealed indictments of Bernd Kowalewski (former BizJet President and CEO) and Jald Jensen (former BizJet Sales Manager), which had been entered on January 5, 2012, the same day that the DOJ filed DuBois and Uhl's plea agreements. Kowalewski was arrested in Amsterdam on March 13, 2014 and waived extradited to the United States.

Among other things, the indictment against Kowalewski alleged that he attempted to destroy evidence relating to the payments by running software that erased content from his computer after he received notice that the parent company's internal auditors would be auditing BizJet's incentive

payments. On July 24, 2014, he pleaded guilty in federal court in Tulsa, Oklahoma to conspiracy to violate the FCPA and one substantive FCPA violation in connection with the bribery scheme. He was sentenced to time served and a criminal fine of $15,000 and a special monetary assessment of $200 on November 18, 2014.

Jensen still faces six counts of substantive FCPA violations, three counts of money laundering, and two charges of conspiracy to violate the FCPA and money laundering laws, as well as criminal and administrative forfeiture allegations.

4. Data Systems & Solutions

On June 18, 2012, Data Systems & Solutions, LLC ("Data Systems"), a Virginia-headquartered corporation that provides design, installation, and maintenance services at nuclear power plants, entered into a two-year deferred prosecution agreement with the DOJ and agreed to pay an $8.82 million criminal penalty to resolve the DOJ's investigation of violations of the FCPA's anti-bribery provisions and conspiracy charges. Data Systems is a wholly owned subsidiary of the U.K.-based Rolls Royce plc. Although the parent corporation was not named in the enforcement action, Rolls Royce is currently under investigation by the SFO, as discussed further *below*, following whistleblower allegations into the company's separate activities in Indonesia and China.

According to the two-count criminal information, officers and employees from Data Systems made a series of improper payments between 1999 and 2004 directly and through subcontractors to officials employed by the Ignalina nuclear power plant, a state-owned nuclear power plant in Lithuania. The filings do not explicitly state the total value of the bribes paid by Data Systems to the power plant officials, but the information details thirty-two relevant payments totaling over $629,000 and suggests that there were others.

The purpose of the bribes was to obtain and retain multi-million dollar instrumentation and control contracts from the Ignalina nuclear power plant. In exchange for the payments and other things of value, the five officials allegedly provided Data Systems with detailed information about upcoming projects and the bids of its competitors, which allowed Data Systems to tailor its bids in order to win the contracts. The power plant officials also allegedly designed project specifications to favor Data Systems and influenced the award of contracts in the company's favor by providing input regarding bidder selection. During the relevant time period, the Ignalina power plant awarded Data Systems five contracts valued together at over $32 million.

The court filings also state that Data Systems made the improper payments through three separate subcontractors, including two that separately provided legitimate, bona fide services to Data Systems in connection with the projects. In some instances, Data Systems made payments to one of its subcontractors pursuant to fictitious "scope of work" subcontract modifications, even though no additional work was actually performed and no additional payments were required. The subcontractor would then provide the payments to the power plant officials or route them through one of two other subcontractors for on-payment. In other instances, Data Systems significantly overpaid a subcontractor for the services that it provided so that the excess could be passed along to the government officials.

In addition to the payments, Data Systems provided thousands of dollars in gifts, entertainment, and travel for Ignalina power plant officials, including a trip to Florida, a vacation to Hawaii, and a Cartier watch.

Pursuant to the DPA, Data Systems also agreed to implement and maintain an enhanced corporate compliance program and to report to the DOJ regularly regarding its remediation efforts. The DPA noted that the reduced fine of $8.82 million was based in part on Data System's extraordinary cooperation following the issuance of the subpoena, as well as extensive remediation efforts. The company not only terminated the officers and employees responsible for the corrupt payments, but instituted new risk-based policies that required CEO review and approval of the engagement of any subcontractor, as well as periodic FCPA training for all agents and subcontractors.

5. Eli Lilly and Company

On December 20, 2012, Eli Lilly and Company ("Lilly") became the latest pharmaceutical company to settle FCPA-related charges, continuing what appears to be an ongoing sweep of the industry (*see also Pfizer, Akzo Nobel, Novo Nordisk and Johnson & Johnson*). The SEC alleged Lilly violated the FCPA's anti-bribery and accounting provisions. The Indianapolis-based company resolved the SEC's investigation of payments that various Lilly subsidiaries had made in Russia, Poland, China, and Brazil. Although Lilly neither admitted nor denied the allegations, the company agreed to pay a total of $29.4 million to settle the charges, including approximately $14 million in disgorgement, $6.7 million in prejudgment interest, and a civil penalty of $8.7 million. In addition to paying the civil penalty, Lilly also agreed to retain an independent consultant to review and make recommendations about its foreign corruption policies and procedures. At the time of the settlement, the DOJ had not announced any related enforcement actions against Lilly. In February 2013, the company stated that it believed that a DOJ investigation of the company was ongoing.

According to the SEC Complaint, Lilly's subsidiary in Russia ("Lilly-Vostok") paid millions of dollars over the course of a decade to forty-two separate third-party distributors through purported "marketing agreements." The SEC noted that the government officials with whom Lilly-Vostok negotiated drug supply contracts often directly proposed the third-party entities that Lilly would engage. Lilly allegedly engaged those third parties without conducting due diligence sufficient to identify the beneficial owners, ensure that the company could perform legitimate services, or determine if there were any improper links to the Russian government officials.

Noting a lack of evidence that any services had ever been provided—as well as emails from commercial managers that explained that "if real services are provided [then] the marketing agreement is not the appropriate form"—the SEC argued that Lilly made the payments improperly to secure business. The SEC provided specific examples, alleging that Lilly had paid approximately $11 million to four of these third-party entities located in Cyprus and the British Virgin Islands, two of which were owned by the director general of a Russian governmental distributor or a member of the upper house of Russian parliament.

The SEC stated that a number of internal control failures enabled such conduct to occur. Specifically, although Lilly's internal reviews raised concerns regarding such "marketing agreements" as early as 1997, the company did not employ meaningful efforts to stop using such agreements until 2004.

Even then, the SEC stated that the subsidiary continued to make payments under existing marketing agreements until 2005.

The SEC also noted that Lilly-Vostok made several proposals to support charities and various educational events associated with government-owned or affiliated institutions between 2005 and 2008. Although these charities were related to public health issues and many of the proposals were reviewed by counsel, the SEC criticized Lilly because it did not specifically have internal controls in place to determine "whether Lilly-Vostok was offering something of value to a government official for a purpose of influencing or inducing him or her to assist Lilly-Vostok in obtaining or retaining business."

The SEC also focused on charitable donations that Lilly's subsidiary in Poland ("Lilly-Poland") allegedly made between 2000 and 2003. According to the complaint, while Lilly-Poland was negotiating the possible financing of a cancer drug with the director of one of the regional government health authorities that reimbursed hospitals and health care providers for approved medicines, the health authority director requested that Lilly-Poland make a small contribution to the Chudow Castle Foundation, a charitable institution that he founded and administered for the restoration of a local castle.

According to the SEC, Lilly-Poland made a total of eight payments totaling $39,000 over two and a half years, and it mischaracterized them in its books and records by describing their purpose as being for the purchase of computers, to support of development activities, or to use the castle grounds for conferences that never actually occurred. The SEC criticized Lilly-Poland's payment approval process and internal procedures for not (i) seeking to better understand the ownership of the foundation; (ii) questioning the timing of the foundation payment requests; (iii) highlighting inconsistencies among the various justifications offered for the donations over the years; or (iv) asking why the company was seeking to make donations to the Chudow Castle Foundation (but no other archaeological charities) in Poland.

Interestingly, the SEC had previously criticized pharmaceutical maker Schering-Plough for donations to the Chudow Castle Foundation in a separate 2004 civil enforcement action.

In China, between 2006 and 2009, sales representatives of Lilly's subsidiary ("Lilly-China") allegedly provided improper gifts and entertainment to government-employed physicians to induce them to prescribe Lilly drugs. According to the SEC, various Lilly-China sales representatives falsified expense reports for travel expenses and used the reimbursements to buy the gifts, which included meals, cigarettes, jewelry, and visits to bath houses and karaoke bars. The SEC specifically noted that "[a]lthough the dollar amount of each gift was generally small, the improper payments were widespread throughout the subsidiary."

Finally, in Brazil, between 2007 and 2009, Lilly's subsidiary ("Lilly-Brazil") allegedly paid approximately $70,000 in bribes to government officials through a third-party distributor to secure approximately $1.2 million in sales of drugs. The SEC Complaint stated that Lilly-Brazil provided a certain distributor with an unusually high discount (between 17% and 19%), allowing the distributor to use part of the difference to bribe public officials who authorized the purchases. The SEC specifically criticized Lilly-Brazil because it "relied on the representations of the sales and marketing manager without adequate verification and analysis of the surrounding circumstances of the transaction," including the unusually high discount offered.

In connection with all of these allegations, the SEC argued that Lilly and its subsidiaries had failed to (i) implement an adequate system of internal accounting; (ii) perform adequate due diligence; (iii) implement adequate compliance controls and safeguards regarding third-party payments; and (iv) implement risk-based procedures that took into account the vulnerability of emerging markets to FCPA violations. However, the SEC also noted that Eli Lilly's internal controls and procedures had been improved since the alleged misconduct, which included enhancing third-party due diligence and financial controls, creating specific anti-corruption auditing and monitoring, and expanding anti-corruption training.

6. Marubeni

On January 17, 2012, Marubeni Corporation ("Marubeni"), a Japanese trading company headquartered in Tokyo, Japan, entered into a DPA with the DOJ to resolve FCPA-related charges in connection with its participation in a conspiracy to bribe Nigerian officials. Under the two-year DPA, Marubeni agreed to pay a $54.6 million criminal penalty, to cooperate with the DOJ's ongoing investigations, to review and improve its compliance and ethics program, and to engage an independent compliance consultant for two years. The $54.6 million penalty represented the lowest limit of the DOJ's calculated fine range, which spanned up to $109.2 million.

According to the criminal information, Marubeni was involved in the corruption scheme implemented by the TSKJ joint venture between 1995 and 2004 to unlawfully obtain contracts to build liquefied natural gas facilities in Bonny Island, Nigeria (*see, e.g., KBR/Halliburton, Tesler and Chodan*). As part of the scheme, TSKJ (operating through a corporate entity based in Madeira, Portugal) hired U.K. attorney Jeffrey Tesler and Marubeni as agents to arrange and pay bribes to high-level and working-level government officials, respectively. In that context, Marubeni met Albert Stanley (the former head of KBR) and other TSKJ officers in Houston and exchanged correspondence with them to discuss its contracts and fees. Throughout the course of the scheme, Marubeni received $51 million from TSKJ, of which $17 million was transferred by KBR from the Netherlands, in part for use in corrupting Nigerian officials. On two occasions preceding the award of engineering, procurement and construction ("EPC") contracts to TSKJ, a Marubeni employee met with officials of the executive branch of the Government of Nigeria to identify a representative to negotiate bribes with TSKJ.

The DOJ ultimately charged Marubeni with one count of conspiracy to violate the FCPA and one count of aiding and abetting KBR in violating the FCPA. It should be noted that, given that Marubeni negotiated its contract with TSKJ through correspondence directed to the United States and an in-person meeting in Houston, there were seemingly grounds to prosecute Marubeni for a direct violation of the statute, as it arguably took acts in furtherance of the scheme while in the territory of the United States

7. Nordam Group

In July 2012, the privately held aircraft maintenance and component manufacturing company Nordam Group Inc. ("Nordam"), headquartered in Tulsa, Oklahoma, entered into a three-year NPA with the DOJ to resolve FCPA violations arising from improper payments to government officials in China. Under the terms of the non-prosecution agreement, Nordam was required to pay a criminal penalty of $2 million, strengthen its compliance, bookkeeping, and internal controls standards and procedures, and periodically report to the DOJ on the implementation of those policies and procedures.

According to the Statement of Facts attached to the non-prosecution agreement, Nordam and its Singapore subsidiary, Nordam Singapore Pte Ltd. ("Nordam Singapore"), and a wholly owned Singapore affiliate, World Aviation Associates Pte Ltd. ("World Aviation"), paid bribes to employees of state-owned or -controlled airlines in China between 1999 and 2008 in order to secure maintenance contracts with those airlines. In total, Nordam and its affiliates paid $1.5 million in bribes to those employees and obtained contracts that resulted in profits of roughly $2.48 million.

Initially, Nordam paid these bribes either by making wire transfers directly into the bank accounts of airline employees or by depositing money into the personal bank accounts of World Aviation employees who withdrew the funds to pay the airline employees in cash. Nordam internally referred to the direct payments to government officials as "commissions" or "facilitator fees," and referred to the state employees who received the bribes as "internal ghosts" or "our friends inside."

Around 2002, Nordam began routing the improper payments through fictitious entities that World Aviation employees themselves had created. Nordam and Nordam Singapore entered into sales representation agreements with these fictitious entities and paid them commissions that were then used to secure contracts. Nordam, Nordam Singapore, and World Aviation would sometimes inflate the value of the invoices that they submitted to clients to offset the bribes, thereby obtaining reimbursement from their clients for the improper payments that they made to those clients' employees.

The non-prosecution agreement notes that the $2 million penalty is "substantially below the standard range under the United States Sentencing Guidelines." The DOJ explained, however, that it had agreed to this reduced fine in part because of Nordam's "timely, voluntary and complete disclosure" and its "real time cooperation" with the department. Additionally, the Nordam settlement shows that verified demonstrations of hardship could result in reduced fines—the DOJ noted in particular that Nordam had demonstrated that a greater fine would "substantially jeopardize the Company's continued viability."

Nordam also agreed to (i) cooperate with the department for the three-year term of the non-prosecution agreement, (ii) update the department about the company's compliance efforts, and (iii) continue to implement internal controls and an enhanced compliance program to detect and prevent future FCPA violations. Among Nordam's requirements with respect to its enhanced corporate compliance program, the non-prosecution agreement requires that the company provide periodic training to, and obtain annual certifications from, not only its directors, officers, and employees, but also its agents and business partners "where necessary and appropriate."

Nordam is not the first Oklahoma-based aircraft maintenance company to settle FCPA violations with the DOJ. In March 2012, only several months before the Nordam settlement, the DOJ also entered into a deferred prosecution agreement with BizJet International Sales and Support, Inc. ("Bizjet") (discussed further *below*) in connection with the payment of bribes to foreign officials to obtain maintenance contracts. Bizjet agreed to pay an $11.8 million criminal penalty.

8. Oracle

On August 16, 2012, the SEC filed a complaint in the U.S. District Court for the Northern District of California against Oracle Corporation ("Oracle"), a Delaware-incorporated and California-headquartered software company whose shares are listed on NASDAQ. On August 27, 2012, the district

court entered a final judgment against Oracle that adopted the terms of the consent agreement between Oracle and the SEC: the court ordered that (i) Oracle was permanently enjoined from violating the books and records and internal control provisions of the FCPA and (ii) the company would pay a civil penalty of $2 million. Oracle neither admitted nor denied the conduct alleged by the SEC.

According to the SEC's complaint and press release, employees of Oracle's wholly owned Indian subsidiary, Oracle India Private Limited ("Oracle India"), used a distributor to establish "secret cash cushions" that created the potential for bribery or embezzlement. Under Oracle India's typical business model, the company sold Oracle software licenses and services in India through local distributors. Although distributors typically retain the margin from their sales as compensation for their distribution services, the SEC alleged that Oracle India often negotiated particularly excessive margins and that its local distributors would only retain a portion of that amount. The complaint states that the select employees of Oracle India would request that the local distributors then retain the remaining portion of their margin to make payments to third parties later, as directed by those Oracle India employees.

The complaint gave further context to this alleged practice by providing an example of what the SEC described as "the largest government contract that involved parked funds used for unauthorized third-party payments." The SEC stated that Oracle India had executed a contract valued at $3.9 million with India's Ministry of Information Technology and Communications in May 2006, but that Oracle India only received and booked as revenue approximately $2.1 million of that amount. The local distributor received approximately $151,000 of the margin as compensation, but Oracle India employees allegedly directed the distributor to retain the remaining $1.7 million for future "marketing development purposes."

Several months later, Oracle India employees allegedly provided the local distributor with eight invoices for payments to "storefront" third-party vendors, who provided no legitimate services and which were not on Oracle's approved vendor list. The SEC further alleged that "[t]hese invoices were later found to be fake" and that they ranged in value from $110,000 to $396,000.

The SEC complaint alleged that Oracle India used local distributors to "park" nearly $2.2 million between 2005 and 2007 in connection with eight separate government contracts.

Oracle discovered the conduct following an internal investigation that was conducted in response to a local tax inquiry. Following the investigation, the company fired four Oracle India employees whom Oracle determined knew of the alleged scheme, and it voluntarily disclosed the matter to U.S. authorities. The SEC's press release stated that the enforcement agency took these remedial steps into account in determining the appropriate penalty, as well as the subsequent enhancements that the company made to its FCPA compliance program.

9. Orthofix International

On July 10, 2012, Orthofix International N.V. ("Orthofix") entered into settlement agreements with the DOJ and the SEC relating to allegations that its wholly owned Mexican subsidiary, Promeca S.A. de C.V. ("Promeca"), had violated the books and record keeping and internal control provisions of the FCPA. Orthofix is a NASDAQ-listed multinational corporation that is headquartered in the island of Curaçao and maintains corporate offices in Lewisville, Texas. The company specializes in the design, development, manufacture, marketing and distribution of medical devices, and it became the third such company (after

Biomet and Smith & Nephew, discussed *below*) to settle charges in 2012 as part of the government's ongoing investigation of the medical device industry.

According to the DPA and the SEC Complaint, a number of Orthofix and Promeca executives conspired between 2003 and 2010 to make illicit payments to Mexican officials at the state-owned Instituto Mexicano del Seguro Social ("IMSS"), a health care and social services institution, as well as at two hospitals that IMSS owned.

Around 2003, IMSS awarded Promeca the right to sell medical products to two IMSS-owned hospitals. Promeca obtained this award by agreeing to pay various hospital officials between 5% and 10% of the collected revenue generated from sales to the hospitals. Between 2003 and 2007, Promeca executives obtained the money to make these commission payments—which they referred to internally as "chocolates"—by submitting requests for cash advancements against fictitious expenses, including meals, new car tires, and promotional and training expenses. The Promeca executives cashed these checks and provided cash payments to the hospital officials.

In 2008, IMSS implemented a national tendering system that placed the decision to award medical product contracts with a special committee rather than the individual hospitals. Subsequently, Promeca officials again agreed to pay IMSS officials a percentage of the collected sales revenue, but this time through payments to fictitious companies owned by those officials. According to the SEC and DOJ, these front companies submitted false invoices to Promeca for medical equipment, training, or other promotional expenses, which Promeca paid. The commissions were then passed on to government officials.

The filings also note that Promeca spent an additional $80,050 "on gifts and travel packages, some of which were intended to corruptly influence IMSS employees in order to retain their business." In particular, the SEC Complaint notes that Promeca paid for vacation packages, televisions, laptops, appliances, and the lease of a Volkswagen Jetta, while falsely accounting for such payments in its books and records as promotional and training expenses.

In total, Promeca's improper payments totaled approximately $317,000 and resulted in approximately $4.9 million of illicit net profits.

The DOJ and SEC both stressed that Orthofix did not have an effective anti-corruption compliance program or internal controls prior to the discovery of the unlawful payments. In particular, both enforcement agencies criticized Orthofix for not providing relevant materials to Promeca employees in the local language. The SEC, for example, stated in its Complaint:

> Although Orthofix disseminated some code of ethics and anti-bribery training to Promeca, the materials were only in English, and it was unlikely that Promeca employees understood them as most Promeca employees spoke minimal English.

The DOJ and SEC also faulted Orthofix for having failed to investigate red flags fully. The DPA explained, for example, that:

> Promeca's monthly reports showed that Promeca's expenditures regularly far exceeded the budgeted amounts in several categories, including promotional expenses, travel expenses, and meetings for doctors. Those categories were all high risk, received no extra scrutiny, and were in fact budgeted funds from which Promeca made bribe payments over a multi-year period. . . . Orthofix N.V. failed to identify Promeca's persistent cost overruns or to endeavor to determine the reason for those overruns, and Promeca continued its bribery scheme for approximately seven years after being acquired by Orthofix N.V.

Similarly, the SEC alleged that "even though Orthofix knew that Promeca's training and promotional expenses were often over budget, it did nothing to act on the red flag." The SEC Press Release noted that Orthofix did "launch an inquiry" into the over-budget expenses, but added that it "did very little to investigate or diminish the excessive spending."

Orthofix voluntarily disclosed the violations to the SEC and DOJ and conducted an internal investigation after learning of them from a Promeca executive. The enforcement agencies also noted favorably that, after discovering the bribery scheme, Orthofix terminated the relevant Promeca executives, "wound up Promeca's operations," and enhanced its anti-corruption compliance program. These enhancements included "mandatory annual FCPA training for all employees and third-party agents," as well as expanded internal audit functions and other internal control measures.

Pursuant to its settlement agreements, Orthofix agreed to pay a total of $7.4 million, including a $2.2 million penalty to the DOJ and $5.2 million in disgorgement and prejudgment interest to the SEC. Although the enforcement agencies did not impose a monitor on Orthofix, the company agreed to report to the SEC at six-month intervals for two years regarding the status of its remediation and the implementation of its enhanced anti-corruption compliance measures, and to report to the DOJ on an annual basis during the term of the three-year DPA.

10. Garth Peterson

On August 16, 2012, former Morgan Stanley executive Garth Peterson was sentenced to nine months in prison and three years' supervised release. Peterson, who had served as the managing director in Morgan Stanley's real estate investment and fund advisory business as well as the head of the Shanghai office's real estate business, had pleaded guilty previously to "conspiring to evade internal accounting controls that Morgan Stanley was required to maintain under the FCPA." Peterson was released from prison on July 3, 2013.

Peterson had also previously settled charges with the SEC, which had asserted that he had violated the anti-bribery and internal controls provisions of the FCPA and aided and abetted violations of the anti-fraud provisions of the Investment Advisers Act of 1940. As part of the settlement agreement, Peterson agreed to never again work in the securities industry, pay $241,589 in disgorgement, and relinquish the interest he secretly acquired in Shanghai real estate (which was valued at approximately $3.4 million).

According to the court documents, Peterson had a personal friendship and secret business relationship with the former Chairman (the "Chairman") of Yongye Enterprise (Group) Co. Ltd. ("Yongye"),

a large real estate development arm of Shanghai's Luwan District and the entity through which Shanghai's Luwan District managed its own property and facilitated outside investment in the district. During the relevant period, Morgan Stanley partnered with Yongye in a number of significant Chinese real estate investments and recognized Yongye as one of Morgan Stanley's most significant partners in China.

According to the DOJ's charging documents, the corruption scheme began when Peterson encouraged Morgan Stanley to sell an interest in a Shanghai real estate deal relating to one tower ("Tower Two") of a building ("Project Cavity") to a shell company controlled by him, the Chairman, and a Canadian attorney. Peterson and his co-conspirators falsely represented to Morgan Stanley that Yongye owned the shell company, and Morgan Stanley sold the real estate interest in 2006 to the shell company at a discount equal to the interest's actual 2004 market value. As a result, Peterson and his co-conspirators realized an immediate paper profit. Even after the sale, Peterson and his co-conspirators continued to claim falsely that Yongye owned the shell company, which in reality they owned. Not only did the real estate appreciate in value, but Peterson and his co-conspirators periodically received equity distributions relating to the real estate.

The DOJ charging documents further alleged that, "[w]ithout the knowledge or consent of his superiors at Morgan Stanley," Peterson sought to compensate the Chairman for his assistance to Morgan Stanley and Peterson in Project Cavity. In particular, in 2006, Peterson arranged for the Chairman personally to purchase a nearly six-percent stake in Tower Two at the lower 2004 basis rather than the current 2006 basis. Peterson concealed the Chairman's personal investment from Morgan Stanley and, as a result, others within Morgan Stanley falsely believed that, consistent with Morgan Stanley's internal controls and the desire to foster co-investment with Yongye, Yongye itself was investing in Tower Two. The SEC Complaint also asserted that, in negotiating both sides of the transaction, Peterson was engaging in secret self-dealing and thereby breached the fiduciary duties Peterson and Morgan Stanley owed to their fund client.

The SEC also alleged that Peterson never disclosed his own stake in the transaction, in annual disclosures of personal business interests Morgan Stanley required him to make as part of his employment or otherwise, until around the time of his termination in late 2008.

The SEC Complaint additionally alleged that Peterson and the Canadian Attorney secretly acquired from Morgan Stanley an interest in another Luwan District real estate deal called Project 138 by buying 1% of the Project as part of an investment group. Peterson failed to disclose his stake in Project 138 in annual disclosures of personal business interests Morgan Stanley required him to make as part of his employment. As in Project Cavity, Peterson negotiated both sides of this Project 138 sale to himself. The SEC Complaint alleged that this secret self-dealing breached the fiduciary duties Peterson and Morgan Stanley owned to their fund client.

Finally, the SEC Complaint alleged that Peterson devised a system to incentivize the Chairman to help Morgan Stanley win business on projects involving Yongye and to reward the Chairman for all he had done for Morgan Stanley and Peterson personally. Under this incentive deal, known as the 3-2-1 deal, Morgan Stanley would sell the Chairman a 3% interest in each deal he brought to Morgan Stanley for the cost of 2%, providing the Chairman a 1% discount that Peterson called a "finder's fee." Peterson also promised to pay the Chairman an added return he called a "promote" on any completed purchase to incentivize him to help make any acquired investments profitable.

Peterson disclosed the proposed 3-2-1 arrangement to his supervisors in April 2006. Less than a month later, however—before the official had been paid anything—a Morgan Stanley controller warned of the bribery implications of paying the Chairman personally for help obtaining business. One of Peterson's Morgan Stanley supervisors then instructed Peterson to abandon the 3-2-1 deal with the Chairman.

Peterson ignored his supervisor's instructions and secretly shared part of a finder's fee with the Chairman. Specifically, in March 2007, approximately six months after the Chairman retired from Yongye, Peterson caused Morgan Stanley to pay a $2.2 million finder's fee to a private investor who had been involved in the various schemes (the "Shanghai Investor"). The Shanghai Investor transferred $1.6 million of this fee to Peterson, who gave nearly $700,000 to the former Chairman and kept the rest for himself. The Shanghai Investor agreed to help Peterson steal these funds in exchange for his promise to help the Shanghai Investor get future business from Morgan Stanley. Peterson kept his payment to the Chairman and his own kickback a secret from his Morgan Stanley supervisors.

The nine-month prison sentence was much shorter than the fifty-one to sixty month prison term that prosecutors had sought. At the sentencing hearing, DOJ lawyers argued that Peterson should be sentenced to a minimum of fifty-one months in prison, which represented the bottom range of the sentencing guidelines. In particular, prosecutors argued that "the past sentences of other FCPA violators do not warrant a below-Guideline sentence," and referred to the previous sentencing of individuals involved with the Terra Telecommunications and Haiti Teleco matter, such as Joel Esquenazi (15 years), Jean Rene Duperval (9 years), Juan Diaz (57 months), Robert Antoine (4 years), Antonio Perez (2 years), and Jorge Granados (46 months) (*see Terra Telecommunications/Haiti Teleco*). The sentencing judge, however, took issue with the fact that the prosecutors could not provide any background details on the age or family situations of those individuals, and he noted in particular Peterson's "harsh and unusual upbringing" as well as his level of cooperation and "significant financial penalties" that he had already suffered.

Neither the SEC nor the DOJ opted to charge Morgan Stanley. Both the SEC and DOJ complaints contained significant discussions of Morgan Stanley's internal controls that were in place at the time. Specifically:

- *Compliance personnel*: Morgan Stanley employed over 500 dedicated compliance officers, and its compliance department had direct lines to Morgan Stanley's Board of Directors and regularly reported through the Chief Legal Officer to the Chef Executive Officer and senior management committees. In addition, Morgan Stanley employed regional compliance officers who specialized in particular regions, including China, in order to evaluate region-specific risks.

- *Due diligence on its foreign business partners*: Morgan Stanley conducted due diligence on the Chairman and Yongye (the state-owned enterprise) before initially doing business with them.

- *Payment approval process*: Morgan Stanley maintained a substantial system of controls to detect and prevent improper payments and required multiple employees to be involved in the approval of payments.

- *Training*: Morgan Stanley trained Peterson on anti-corruption policies and the FCPA at least seven times between 2002 to 2008 in both live and web-based sessions. Between 2000 and 2008, Morgan Stanley held at least 54 training programs for various groups of Asia-based employees on anti-corruptions policies and the FCPA.

- *Written compliance materials*: Morgan Stanley distributed written training materials specifically addressing the FCPA, which Peterson kept in his office.

- *Audit and periodic review of compliance*: Morgan Stanley randomly audited selected personnel in high-risk areas and regularly audited and tested Morgan Stanley's business units. Morgan Stanley conducted, in conjunction with outside counsel, a formal review annually of each of its anti-corruption policies and updated the policies and procedures as necessary.

- *Hotline*: Morgan Stanley provided a toll-free compliance hotline 24/7, staffed to field calls in every major language including Chinese.

- *Frequent compliance reminders*: Peterson personally received more than 35 FCPA compliance reminders during the time he was working for Morgan Stanley in China. These included a distribution of the Morgan Stanley Code of Conduct, reminders concerning policies on gift giving and entertainment and guidance on the engagement of consultants.

- *Written certifications*: Morgan Stanley required Peterson on multiple occasions to certify, in writing, his compliance with the FCPA. These written certifications were maintained in Peterson's permanent employment record.

- *Disclosure of outside business interests*: Morgan Stanley required Peterson, along with other employees, to annually disclose his outside business interests.

- *Specific instruction*: An in-house compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state-owned entity, were government officials for purposes of the FCPA.

Morgan Stanley voluntarily disclosed this matter and cooperated throughout the DOJ and SEC investigations. According to the SEC press release: "[t]his case illustrates the SEC's commitment to holding individuals accountable for FCPA violations, particularly employees who intentionally circumvent their company's internal controls." The SEC press release further characterized Peterson as "a rogue employee who took advantage of his firm and his investment advisory clients."

11. Pfizer

On August 7, 2012, Pfizer Inc. ("Pfizer") and affiliated companies agreed to pay over $60 million in penalties, disgorgement, and pre-judgment interest to resolve criminal and civil FCPA charges relating to conduct in multiple countries. Under a DPA with the DOJ, Pfizer H.C.P. Corporation ("Pfizer HCP"), an indirect wholly owned subsidiary of Pfizer, agreed to pay a $15 million criminal penalty to resolve one count of conspiracy to violate the FCPA's anti-bribery provisions applicable to domestic concerns and one count of violating the same anti-bribery provision. This DPA was resolved expressly on the alternative,

nationality-based jurisdiction over domestic concerns that Congress granted to the DOJ in the 1998 FCPA amendments: U.S. entities like Pfizer H.C.P. are subject to the FCPA for their conduct anywhere in the world, regardless of whether those entities use U.S. mails or other means or instrumentalities of U.S. interstate commerce.

Separately, Pfizer agreed to pay $26.3 million in disgorgement and pre-judgment interest to resolve the SEC's investigation of conduct by its subsidiaries.

Wyeth LLC ("Wyeth"), which was acquired by Pfizer in 2009 and has since been sold to Nestle, agreed to pay $18.8 million to the SEC in disgorgement and pre-judgment interest to resolve civil charges of books and records and internal controls violations. To resolve the SEC's investigation, Wyeth was not required to admit or deny the SEC's allegations; however, consistent with then-recent changes in SEC policy, Pfizer Inc. expressly acknowledged Pfizer HCP's admissions in connection with the DPA, acknowledged the SEC's new policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings" filed by the SEC, and agreed to not make any statements or take an actions that would create the impression that the SEC's complaint against Pfizer was without factual basis.

The three resolutions collectively pertained to conduct in eleven countries. The DOJ's criminal charges against Pfizer HCP pertained to activities in Bulgaria, Croatia, Kazakhstan, and Russia. The SEC Complaint against Pfizer covered conduct in these four countries, as well as in China, the Czech Republic, Italy, and Serbia. The SEC Complaint against Wyeth made separate allegations regarding conduct in Indonesia, Pakistan, China, and Saudi Arabia.

In almost all of these countries, the relevant conduct involved, at least in part, the provision of various benefits to healthcare professionals that worked at government-owned healthcare facilities. As the SEC Complaints explained, echoed by similar language in the DOJ filings, "[i]n those countries with national healthcare systems, hospitals, clinics, pharmacies, doctors, and other healthcare professionals and institutions are generally government officials or instrumentalities within the meaning of the FCPA." According to the court filings, doctors and other healthcare professionals were provided cash payments, gifts, and support for domestic and international travel in exchange for promises to increase purchases or prescriptions.

The court filings also alleged that in Croatia and Kazakhstan, payments were made to government officials involved with the registration and reimbursement of pharmaceutical products. Furthermore, in Russia and Saudi Arabia, payments were allegedly made in connection with the customs-clearing process.

Pfizer discovered the misconduct through extensive global investigations into the operations of Pfizer's and Wyeth's non-U.S. subsidiaries. Pfizer began an internal investigation in May 2004 when it became aware of potentially improper payments made by Pfizer HCP's representative office in Croatia. After conducting a preliminary investigation, Pfizer made an initial voluntary disclosure to the SEC and DOJ in October 2004. Pfizer subsequently undertook a global internal investigation of its operations in nineteen countries, through which it discovered additional improper payments. Throughout the course of its investigation, Pfizer regularly reported the results to the DOJ and SEC.

Pfizer discovered the conduct relevant to Wyeth's settlement when it conducted a post-acquisition review that uncovered potential improper payments. Pfizer undertook a global investigation of Wyeth's operations and voluntarily disclosed the results to the SEC.

Pfizer's extensive cooperation and assistance earned the company a sizable downward departure from the range of fines recommended by the U.S. Sentencing Guidelines. Under the Guidelines, the recommended fine was between $22.8 and $45.6 million. In settling for a $15 million penalty, which represents a 34% reduction from the bottom of the recommended range, the DOJ took into account Pfizer's "substantial assistance in the investigation or prosecution of others."

The DPA did not impose a monitorship, but Pfizer represented that it had implemented a compliance and ethics program designed to prevent and detect violations of anti-corruption laws, that it would continue to conduct reviews of its anti-corruption policies and procedures, and that it would report to the DOJ regarding remediation and compliance measures during the two-year term of the DPA. Similarly, the SEC resolutions with Pfizer and Wyeth require the companies to periodically report the status of remediation and implementation of compliance measures over a two-year period.

12. Smith & Nephew plc

On February 6, 2012, U.K. medical device company Smith & Nephew plc ("S&N") resolved DOJ and SEC investigations into alleged FCPA violations relating to payments to doctors of state-owned hospitals in Greece. S&N is an issuer subject to the FCPA because its American Depositary Receipts ("ADRs") trade on the New York Stock Exchange. The underlying conduct also involved S&N's wholly owned U.S. subsidiary, Smith & Nephew Inc. ("S&N U.S."); although S&NU.S.is not subject to the SEC's jurisdiction, because it is not an issuer, it is subject to DOJ enforcement of the FCPA's anti-bribery provisions as a domestic concern. Accordingly, the SEC settled with S&N, while the DOJ entered into a deferred prosecution agreement with S&N U.S..

The enforcement action is noteworthy because it related to S&N U.S.'s use of a distributor. While in some circumstances distributors may pose different risk profiles than consultants or representatives, this enforcement action demonstrates that the use of distributors is not without compliance risks. Until in or around late 1997, S&N U.S. had a standard distributorship relationship with a Greek distributor, through which it sold products at a discount from its list prices to the distributor's entities, who would then resell the products at profit to Greek healthcare providers. But beginning in or around 1998, and continuing until in or around December 2007, S&N U.S. and a German subsidiary of S&N entered into various "marketing" relationships with two offshore shell companies controlled by the Greek distributor, by which a percentage of the sales made by the Greek distributor would be paid to the shell companies. Further arrangements with a third offshore shell company provided for increased discounts to generate a pool of cash that could be used for improper purposes. No "true services" were provided by any of the shell companies.

Despite several questions raised by S&N U.S.'s internal legal and audit personnel about the propriety of the payments, including discussions of the fact that surgeons in Greece were being paid to use S&N U.S.'s medical devices products, the relationships continued. Electronic mail communications were also sent between the United States and Greece in which the Greek distributor rejected a proposal to reduce the marketing payments to the shell companies, because:

> [The payments are] already not sufficient to cover my company's cash incentive requirements at the current market level, with major competitors paying 30-40% more than [the Greek distributor]. As I explained to you [during a recent trip to Memphis], I absolutely need this fund to promote my sales with surgeons, at a time when competition offers substantially higher rates . . . . In case it is not clear to you, please understand that I am paying cash incentives right after each surgery . . . .

S&N U.S. entered into relationships with a series of shell companies, and even continued to use the Greek distributor until June 2008, even though its distribution contract had expired in December 2007. S&N U.S. further admitted that in its books and records, which were incorporated into the books and records of S&N and reflected in S&N's year-end financial statements filed with the SEC, it falsely characterized the payments to the Greek distributor as "marketing services" and false characterized the discounts provided.

Additionally, in early 2007, S&N U.S. acquired a company with a competing subsidiary in Greece and was informed by the Greek distributor that the Greek subsidiary of the newly acquired company paid Greek healthcare providers at an even higher rate than did the Greek distributor on behalf of S&N U.S..

S&N and S&N U.S. agreed to pay a total of $22.2 million to resolve these investigations. In its settlement with the SEC, S&N agreed to disgorge $4,028,000, pay prejudgment interest of $1,398,799, and agreed to retain an independent compliance monitor for 18 months. Under its deferred prosecution agreement, S&N U.S. agreed to pay a $16.8 million penalty, which the DOJ calculated to be a 20% reduction off the lower-end of the range recommended by the U.S. Sentencing Guidelines. The DOJ believed that this reduction was appropriate given S&N U.S.'s internal investigation, the nature and extent of its cooperation, and what the DOJ characterized as extensive remediation (including improvements to its ethics and compliance program).

13. Tyco International

In September 2012, the DOJ and SEC resolved parallel investigations of Tyco International, Ltd. ("Tyco"), the Swiss-based global manufacturing company, for violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Separately, Tyco's Dubai-headquartered subsidiary, Tyco Valves & Controls Middle East, Inc. ("Tyco Middle East"), pleaded guilty to one count of conspiracy to violate the FCPA. In total, Tyco and its subsidiary paid nearly $29 million, including $13.68 million in criminal penalties and $13.13 million in disgorgement and prejudgment interest in connection with Tyco's settlement agreements with the DOJ and SEC, respectively, as well as an additional criminal fine of $2.1 million that Tyco Middle East must pay in connection with its plea agreement.

As described separately below (*see* Tyco International at p.360), the SEC filed an action against Tyco in April 2006 in connection with allegations that Tyco's acquired subsidiaries in Brazil and South Korea had paid bribes and provided improper entertainment to government officials to obtain contracting work on government-controlled projects. As part of the settlement for securities laws violations and FCPA violations by Tyco and its subsidiaries, Tyco agreed to pay a $50 million civil penalty. In the midst of its settlement discussions with the SEC, Tyco engaged outside counsel in 2005 to conduct a global anti-corruption compliance review. That review uncovered other FCPA violations, prompting a new round of

negotiations with the DOJ and SEC that began in February 2010 and culminated with the September 2012 resolutions and sentencing hearing.

a. Tyco Settlement Agreements

The SEC's Complaint discusses various "post-injunction illicit payment schemes occurring at Tyco subsidiaries across the globe," and the Statement of Facts attached to the DOJ's NPA discusses those as well as other violations that occurred prior to May 2006. Together, the DOJ and SEC resolution agreements describe improper payments made by numerous Tyco subsidiaries (many of which are no longer part of the company due to changes in corporate structure or subsequent closings) incorporated or headquartered in twelve different countries to government officials or third-party agents in China, the Congo, Croatia, Egypt, India, Indonesia, Iran, Laos, Libya, Madagascar, Malaysia, Mauritania, Niger, Poland, Saudi Arabia, Serbia, Syria, Thailand, Turkey, the United Arab Emirates, and Vietnam. In total, Tyco obtained a benefit of over $16.3 million in connection with these improper payments, including over $10.5 million in profits acquired as a result of improper payments that occurred after Tyco's 2006 settlement agreement with the SEC.

In settling the charges with the DOJ and SEC, Tyco agreed, in addition to the making the financial payments discussed above, to undertake further enhancements to its anti-corruption compliance program and to report to the DOJ at no less than twelve-month intervals during the course of the three-year NPA regarding its remediation efforts and the implementation of its enhanced compliance program and internal controls. Tyco also agreed to be permanently enjoined from violating the FCPA in the future.

Both the SEC and the DOJ noted the substantial remediation efforts that Tyco had undertaken prior to entering into the settlement agreements, including in particular:

> The initial FCPA review of every Tyco legal operating entity - ultimately including 454 entities in 50 separate countries; active monitoring and evaluation of all Tyco's agents and other relevant third-party relationships; quarterly ethics and compliance training by over 4,000 middle-managers; FCPA-focused on-site reviews of higher risk entities; creation of a corporate Ombudsman's office and numerous segment-specific compliance counsel positions; exit from several business operations in high-risk areas; and the termination of over 90 employees, including supervisors, because of FCPA-compliance concerns.

i. China

The DOJ and SEC discussed improper activities that were carried out by five of Tyco's subsidiaries in China: Tyco Thermal Controls (Huzhou) Co., Ltd ("Tyco Huzhou"), Tyco Flow Control Hong Kong Limited ("Tyco Hong Kong"), Beijing Valve Co. Ltd. ("Keystone"), Tyco Flow Control Trading (Shanghai) Co., Ltd. ("Tyco Flow Control Shanghai") and Tyco Healthcare International Trading (Shanghai) Co., Ltd. ("Tyco Healthcare Shanghai").

According to the filings, Tyco Huzhou authorized over 112 payments to employees of state-owned or -controlled design institutes between 2003 and 2005, and falsely described such transactions in its books and records as "technical consultation" or "marketing promotion" expenses. The DOJ and SEC

both also note that Tyco Huzhou made an improper payment of $3,700 to the "site project team" of a state-owned corporation through a sales agent in connection with a contract that it obtained from the Ministry of Public Security. Similarly, Tyco Flow Control Shanghai made approximately eleven payments to employees of design institutes and other companies that it mischaracterized within its books and records.

Additionally, between 2005 and 2006, Tyco Hong Kong and Keystone routed approximately $137,000 through agencies that were owned by Keystone employees, who used the payments to provide gifts and cash to design institute employees or other commercial customers. Keystone also paid another agent approximately $246,000 in connection with sales to Sinopec, even though "no legitimate services were actually provided." Tyco Hong Kong and Keystone improperly recorded all of these transactions.

Tyco Healthcare Shanghai spent over $600,000 on meals, entertainment, travel, gifts and sponsorships for Chinese public healthcare professionals between 2001 and 2007. Because such expenses were not permitted under Tyco's internal guidelines, the subsidiary employees submitted falsified supporting documentation and receipts to justify the expenses. In one instance, a Tyco Healthcare Shanghai employee forged a receipt from a fictitious company, obtaining and stamping a corporate seal on the receipt.

ii. Germany

The NPA's statement of facts notes that Tyco's indirect German subsidiary Tyco Waterworks Deutschland GmBH and its direct subsidiary Erhard Armaturen made payments in excess of $2.3 million to at least thirteen sales agents in China, Croatia, India, Libya, Saudi Arabia, Serbia, Syria, and the UAE "for the purpose of making payments to employees of government customers" between 2004 and 2009. The improper payments were falsely described as "commissions" in the company's books and records.

iii. France

Tyco's indirect, wholly owned subsidiary in France, Tyco Fire & Integrated Solutions France ("Tyco France"), made improper payments between 2005 and 2009 totaling over $363,000 to twelve other individuals or entities in the Democratic Republic of Congo, Madagascar, Mauritania, and Niger. The DOJ noted that Tyco France made half of these payments to employees of the subsidiary's customers, or family members thereof. Tyco France also made a number of improper payments to various individuals, including a security officer of a Mauritanian mining company, for purported "business introduction services."

iv. Indonesia

Between 2003 and 2005, Tyco's indirect, wholly owned subsidiary Tyco Eurapipe Indonesia Pt. ("Tyco Indonesia"), made payments to current and former employees of a provincial utilities company in connection with a government water project in Banjarmasin, Indonesia. (The DOJ does not provide details regarding the purpose of the payments to the former government official or why such payments were improper.) Tyco Indonesia also made payments to sales agents during the same time period for on-payment to government employees in connection with other projects. The subsidiary improperly recorded all of the payments as "commissions payable."

A separate subsidiary in Indonesia, PT Dulmison Indonesia, made a number of payments to third parties who in turn provided the payments in whole or in part to employees of Perusahaan Listrik Negara, the state-owned electricity company in Indonesia. PT Dulmison Indonesia also provided the electricity company's employees with non-business-related entertainment and hotel costs in connection with a social trip to Paris, France following the visit to a factory in Germany. These costs were recorded in the subsidiary's books and records as "cost of goods sold."

v. Malaysia

The SEC Complaint includes allegations that Tyco's indirect, wholly owned subsidiary in Malaysia, Tyco Fire, Security & Services Malaysia SDN BHD ("Tyco Malaysia"), made improper payments through subsidiaries to approximately twenty-six employees of customers, including one employee of a government-controlled entity, while it was bidding on contracts for those customers. Tyco Malaysia described the payments as "commissions."

Interestingly, the DOJ does not discuss the conduct of any Malaysian subsidiaries in connection with its agreements with Tyco, although there are indications that it may have done so in any earlier draft. Just before describing the "details of the illegal conduct," the NPA states that "[t]he conduct described below involving" Tyco Valves & Controls Malaysia ("TVC Malaysia") and a number of subsidiaries was related to Tyco's Flow Control business. No mention of TVC Malaysia, however, is made within the rest of the NPA.

vi. Poland

Noted only in the SEC's Complaint, Tyco's indirect, wholly owned subsidiary in Poland, Tyco Healthcare Polska Sp.z.o.o ("Tyco Polska"), engaged public healthcare professionals through service contracts, some of which involved falsified or inaccurate records. Tyco Polska also reimbursed related expenses for some professionals' family members.

vii. Saudi Arabia

Between 2004 and 2006, Tyco Healthcare Saudi Arabia ("Tyco Arabia"), an operational entity of Tyco's indirect, wholly owned Swiss subsidiary, Tyco Healthcare AG, maintained a general ledger "control account" that it used in part to make improper payments to Saudi hospitals, publicly employed healthcare professionals, and other doctors. Tyco Arabia described these payments as "promotional expenses" or "sales development" expenses in its books and records.

viii. Slovakia

Tyco's majority owned Slovakian joint venture, Tatra Armatúra s.r.o. ("Tatra") paid an agent, who at the time was preparing technical specifications for a tender on behalf of a government entity, to have Tatra's products included within specifications of that tender. As a result of the modified specifications, Tatra was able to earn over $225,000 in gross profits.

ix. Thailand

The NPA states that Tyco's minority-owned Thai subsidiary, Earth Tech (Thailand) Ltd, made payments of nearly $300,000 to a local consultant in connection with the New Bangkok International

Airport project and falsely recorded such expenses as project disbursements between 2004 and 2005. (The NPA, however, does not provide further details or allegations regarding the purpose of such payments.)

Separately, ADT Sensormatic Thailand Ltd. ("ADT Thailand"), also an indirect, wholly owned subsidiary of Tyco, routed approximately $78,000 through one of its subcontractors to various recipients in connection with its business in Laos. ADT Thailand also made payments against falsified invoices to consultants and other entities in connection with work that was never actually performed.

Last, the DOJ stated that another indirect, majority-owned Tyco subsidiary, Tyco Electronics Dulmison (Thailand) Co., Ltd., made improper payments to government officials in Vietnam that it mischaracterized in its books and records as "cost of goods sold."

x. The United Kingdom

Between 2004 and 2008, Tyco's indirect, wholly owned subsidiary Tyco Fire & Integrated Solutions (U.K.) Ltd. ("Tyco U.K.") engaged an Egyptian agent to wire approximately $282,022 to the personal bank account of a former Tyco U.K. employee so that the employee could entertain representatives of a majority state-owned company in Egypt. Tyco U.K. made payments to the Egyptian agent against inflated invoices to provide him with the necessary funds to pass along to the former employees. Those former employees used the money in part to fund two trips to the United Kingdom and two trips to the United States for those representatives. This conduct was only discussed in filings made by the SEC.

xi. The United States

M/A-COM Inc. ("M/A-COM") was an indirect, wholly owned subsidiary of Tyco headquartered in Massachusetts and incorporated in Florida. Between 2001 and 2006, M/A-COM engaged a New York City-based sales agent to sell radio frequency microwave receivers and related equipment to government entities in Turkey. The sales representative sold the equipment at a mark-up, and he also received a commission in connection with one of his sales, which he provided in part to a Turkish government official to obtain further orders. According to the SEC Complaint, M/A-COM employees knew that the sales agent was making improper payments to Turkish government officials, and it cites one email in which an employee stated, "Hell, everyone knows you have to bribe somebody to do business in Turkey."

Additionally, as discussed further immediately below, the DOJ stated that Tyco's Delaware-incorporated subsidiary Tyco Middle East, which is headquartered in Dubai, had made direct and indirect cash payments to clients' employees in Iran, Saudi Arabia, and the UAE between 2003 and 2006.

b. Tyco Middle East Plea Agreement

As noted above, the DOJ entered into a separate plea agreement with Tyco's subsidiary Tyco Middle East on September 24, 2012. Pursuant to the agreement, Tyco Middle East pleaded guilty to conspiring to violate the FCPA by seeking to obtain and retain business from various foreign government customers—including (i) Saudi Aramco in Saudi Arabia, (ii) Emirates National Oil Company ("ENOC") and its subsidiary Vopak Horizon Fujairah ("Vopak") in the UAE, and (iii) the National Iranian Gas Company ("NIGC") in Iran—through the payment of bribes to government officials employed by those companies.

The plea agreement does not provide any details regarding the conspiracy to make improper payments to government officials in Iran, and, with respect to the UAE, notes only that a Tyco Middle East "employee cashed a check for the purpose of paying a bribe to an ENOC employee" on November 6, 2003.

The agreement discusses the conduct in Saudi Arabia in greater detail, explaining that Tyco Middle East had engaged a local company to act as its sponsor and distributor in that country, and that the subsidiary passed improper payments to Saudi Aramco officials through the local sponsor. Tyco Middle East made payments to the local sponsor against falsified invoices for consultancy costs, fictitious commissions, or equipment costs. The local sponsor then provided those payments to Saudi Aramco employees to obtain the approval of Tyco equipment in connection with specific projects, win project contracts, and remove Tyco products and manufacturing plants from Aramco's blacklist.

As part of the plea agreement, Tyco Middle East also agreed to address any deficiencies in its internal controls and anti-corruption compliance by adopting and implementing the same corporate compliance program enhancements discussed in Tyco's NPA.

F. 2011

1. Aon

On December 20, 2011, Aon Corporation ("Aon"), a Delaware corporation and one of the largest insurance brokerage firms in the world, entered into a two-year NPA with the DOJ that required the company to pay a $1.76 million penalty to resolve violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Simultaneously, the company entered into an agreement with the SEC to pay approximately $14.5 million in disgorgement and interest to resolve books and records and internal controls charges. While the DOJ's charges were limited to conduct in Costa Rica, the SEC alleged additional misconduct in Egypt, Vietnam, Indonesia, UAE, Myanmar, and Bangladesh.

According to stipulated facts, in 1997, Aon's U.K. subsidiary, Aon Limited, acquired the British insurance brokerage firm Alexander Howden and took over management of a "training and education" fund ("the Brokerage Fund") set up by Alexander Howden in connection with its reinsurance business with Instituto Nacional De Seguros ("INS"), Costa Rica's state-owned insurance company. From 1999 through 2002, at INS' request, Aon Limited managed another training account ("the 3% Fund") that was funded by premiums paid by INS to reinsurers.

The ostensible purpose of both the Brokerage Fund and the 3% Fund was to provide education and training for INS officials. However, between 1997 and 2005, Aon Limited used a significant portion of the funds to reimburse INS officials for non-training related activity, including travel with spouses to overseas tourist destinations, travel to conferences with no apparent link to the insurance industry, or for uses that could not be determined from Aon's books and records. Many of the invoices and other records for trips taken by INS officials did not provide any business purpose for the expenditures, or showed that the expenses were clearly not related to a legitimate business purpose. A majority of the money paid from the funds was disbursed to a Costa Rican tourism company for which the director of the INS reinsurance department served on the board of directors. Aon's records included only generic descriptions of the expenses, such as "various airfares and hotel."

The SEC's complaint alleged further improper practices in Egypt, Vietnam, Indonesia, UAE, Myanmar, and Bangladesh, which the company has neither admitted nor denied. In Egypt, Aon subsidiary Aon Risk Services agreed by written contract to sponsor annual trips to various U.S. cities for Egyptian officials from the Egyptian Armament Authority ("EAA") and the Egyptian Procurement Office ("EPO"). According to the SEC complaint, the trips' non-business segments unjustifiably outweighed the legitimate business segments. Also in Egypt, Aon made several payments to third parties without performing appropriate due diligence to ensure or prevent the payments from ending up in the hands of government officials. The SEC noted that the fact that the third parties appeared to perform no legitimate services, "suggest[ed] that they were simply conduits for improper payments to government officials in order to obtain or retain business."

In Vietnam, Aon Limited allegedly paid a third-party facilitator $650,000 between 2003 and 2006 to obtain and retain an appointment as insurance broker with Vietnam Airlines, a government owned entity. The facilitator, however, did not provide legitimate services and passed portions of the Aon Limited funds on to unidentified individuals referred to as "related people."

In Indonesia, the SEC alleged that, between 2002 and 2007, Aon Limited paid $100,000 as a retainer to a consultant as part of a kickback scheme to secure accounts with Pertamina, a state-owned oil and gas company. The scheme did not come to fruition however. Aon Limited also paid $100,000 to a company recommended by officials of another state-owned oil company, BP Migas, to assist in securing Pertamina and BP Migas accounts. Another $100,000 was paid by two Aon brokers to a "third-party introducer" to assist in obtaining the BP Migas account.

In the UAE, Aon Limited allegedly acquired a broker that had, from 1983 to 1997, made payments to the general manager of a private insurance company to secure and retain the Aon account. Aon Limited then continued to make these payments, which totaled $588,000, to the general manager for 10 years after the acquisition in 1997. The payments were disguised as payments to a third-party consultant.

In Myanmar, Aon Limited's records show that, between 1999 and 2005, a portion of the $3.25 million paid to an "introducer" was transferred to an employee at Myanmar Insurance for protection of Aon's business interests at Myanmar Insurance and Myanmar Airways, two state-owned entities.

Finally, in Bangladesh, the SEC alleged that a former Aon Limited employee and another company were paid $1.07 million as consultants to secure accounts for Aon Limited with Biman Bangladesh Airways and Sudharam Bima Corporation, both of which are government-owned. A portion of the fees paid to the consultants were forwarded as "finder's fees" to the son of a former high-ranking government official with important political connections.

In 2009, the U.K. Financial Services Authority ("FSA") determined that between 2005 and 2007 Aon Limited violated Principle 3 of the FSA's Principles for Business when it failed to take reasonable care to organize and control its affairs responsibly and effectively with adequate risk management systems. Because of these gaps in controls, the FSA found that a number of "suspicious" payments were made by Aon Limited to foreign third parties in Bahrain, Bangladesh, Bulgaria, Burma, Indonesia, and Vietnam. Aon Limited entered into a settlement agreement with the FSA in 2009 and paid a penalty of £5.25 million. The DOJ stated that this settlement and the FSA's close supervision over Aon Limited contributed to its decision to grant an NPA and a reduced financial penalty.

2. Armor Holdings & Richard Bistrong

On July 13, 2011, Armor Holdings, Inc. ("Armor"), now a subsidiary of BAE Systems Inc. but at the time of the relevant conduct an issuer of securities listed on the New York Stock Exchange, entered into an NPA with the DOJ and a settlement agreement with the SEC to resolve FCPA violations relating to bribes paid to obtain contracts from the U.N. To resolve anti-bribery, books and records, and internal controls allegations, Armor agreed to pay a $10.29 million monetary penalty under the NPA and under its settlement with the SEC agreed to disgorge $1,552,306, pay prejudgment interest of $458,438, and pay a civil penalty of $3,680,000. At the time of the conduct at issue, Armor manufactured security products, vehicle armor systems, protective equipment and other products primarily for use by military, law enforcement, security and corrections personnel. Prior to its acquisition by BAE, Armor was a Delaware corporation headquartered in Jacksonville, Florida with shares listed on the NYSE. Although Armor was not required to admit or deny the SEC's allegations, it did admit to the facts underlying its NPA. Accordingly, the factual summary below is based on the facts stated in the NPA unless otherwise noted.

Armor accepted responsibility for more than $200,000 in payments made by its wholly owned subsidiary Armor Products International ("API") to a third-party intermediary. API was awarded the two contracts after it used an agent to obtain competitors' confidential bid prices and adjust its bid based on this information. Armor acknowledged that employees involved knew that a portion these funds was to be passed on to a U.N. procurement official to induce the official to award two separate U.N. contracts for body armor that were collectively worth approximately $6 million and, once awarded, produced a profit for the subsidiary of approximately $1 million.

In 2001, Richard Bistrong, the Vice President for International Sales of Armor's wholly owned division Armor Holdings Products Group (the "Products Group"), and an API managing director retained an agent to assist the company in obtaining a contract to supply body armor for U.N. peacekeeping forces.

Upon the agent's advice, Bistrong and the API managing director submitted two pricing sheets, one of which was signed but was otherwise blank. The blank pricing sheet was to be used if API's price needed adjustment after the bidding was closed. After submitting API's bid, the agent obtained the prices of competitors' non-public bids and used the information to adjust API's bid price on the blank pricing sheet. When the U.N. awarded the 2001 body armor contract to API, Bistrong and the API authorized the payment of a commission to the agent, knowing that some portion of this money would be paid to the U.N. official for providing the confidential information used by API and the agent to secure the bid. Using the same bidding procedures, API worked with the same agent to secure another U.N. contract in 2003. According to the SEC's complaint, API authorized at least 92 payments to its agent that totaled approximately $222,750.

Under the NPA, Armor also admitted that Bistrong and another employee caused it to keep off of its books and records approximately $4.4 million in payments to third-party intermediaries used to obtain business from foreign governments from 2001 to 2006. Specifically, Armor's Products Group would submit an invoice to customers that included a fee for the Products Group's payment to an agent. Simultaneously, Bistrong and other employees caused the Products Group to create a false invoice that did not include the agent's commission. According to the SEC settlement, this accounting approach is commonly referred to by the SEC as a "distributor net" transaction. Under such an approach, the false internal invoice results in a credit balance in the client's accounts receivable that amounts to the

commissions paid. The credit balance can be used to pay intermediaries through non-client accounts before finally being paid to the third-party consultants. Consequently, the commission payments are never recorded on a company's books and records.

The SEC further alleged that Armor was on notice of its improper accounting practices due to 2001 comments made by an outside auditor and a 2005 refusal by the comptroller of another Armor Holdings subsidiary to institute Armor's distributor net accounting practices in his division. The SEC alleged that, despite these warnings, Armor continued these accounting practices until 2007. Finally, under the NPA, Armor also admitted that it had failed to devise and maintain an adequate system for internal accounting controls.

Bistrong was also separately indicted for his involvement in several bribery schemes, including in regards to the U.N. contracts. On September 16, 2010, Bistrong pleaded guilty to a single conspiracy with several objects relating to the U.N. contracts described above: to violate the anti-bribery provisions (Bistrong himself was a domestic concern due to his U.S. citizenship), to falsify books and records, and to export controlled goods without authorization. This plea was pursuant to a plea agreement with the United States that Bistrong had accepted on February 17, 2009, ten months before the indictment of 22 defendants in the military enforcement products sting (discussed separately)—a sting in which Bistrong played a key role.

In addition to the allegations related to the U.N. contracts, Bistrong's plea was also based on improper payments to officials in the Netherlands and Nigeria, as well as the unlawful export of Armor materials to Iraq. Bistrong allegedly hired a Dutch agent to help Armor Holdings bid on a contract to supply pepper spray to the National Police Services Agency of the Netherlands. According to the information, Bistrong caused Armor Holdings to pay the Dutch agent $15,000 intended to be passed on to a Dutch Procurement Officer in return for the procurement officer using his influence to effect the tender for the contract to specify a type of pepper spray manufactured by Armor Holdings. Bistrong attempted to conceal these payments by arranging for the agent to issue an invoice for marketing services allegedly, but not actually, performed. In Nigeria, Bistrong allegedly instructed another employee to pay a bribe to an official of the Independent National Election Commission ("INEC") in exchange for INEC's purchase of fingerprint inkpads from Armor Holdings. In order to conceal these payments, Bistrong instructed the employee to arrange for the bribe to be paid to a company or intermediary, which would then pass the kickback along to the official. Despite making payment to a company designated by the official, Armor Holdings never received an order from INEC for the fingerprint pads.

In the plea agreement, the parties agreed that the U.S. Sentencing Guidelines recommended a sentence between seventy and eighty-seven months, which is automatically overridden by the statutory maximum of five years. In its Sentencing Memorandum, however, the DOJ moved for a downward departure of seventeen levels from the Sentencing Guidelines to a level corresponding to a prison term of zero to six months. Citing Bistrong's cooperation in his own investigation, the investigation into his co-conspirators, and his role in the wide-scale investigation into the Military and Law Enforcement Products Industries, including his role in the sting operation and resulting prosecutions, the DOJ recommended a sentence that includes a combination of probation, home confinement, and community service. Noticeably missing from this recommended sentence was any jail time.

Despite the DOJ's recommendation, on July 31, 2012, Bistrong was sentenced by Judge Richard Leon of the U.S. District Court for the District of Columbia to 18-months in jail followed by 36 months of

probation and community service. Due to financial hardship, he was not required to pay a fine. Bistrong was released from prison on January 15, 2014.

3. Ball

On March 24, 2011, the Ball Corporation ("Ball"), a publicly traded manufacturer of metal packaging for beverages, food, and household products based in Broomfield, Colorado, settled FCPA books and records and internal controls charges with the SEC. As part of the settlement, Ball agreed to pay a $300,000 civil penalty and consented to a cease-and-desist order, while neither admitting nor denying the factual allegations.

The SEC charges stemmed from the actions of the company's Argentinean subsidiary, Formametal S.A. ("Formametal"), which Ball acquired in March 2006. The SEC alleged that, beginning in July 2006 and continuing into October 2007, Formametal employees made at least ten illegal payments totaling approximately $106,749 to local Argentinean government officials. Payments were made with the authorization or acquiescence of Formametal's President and were in some instances arranged by the Vice President of Institutional Affairs (the "Vice President"), an Argentinean national who had previously been Formametal's President and owner.

Over $100,000 of the illegal payments was allegedly made to Argentinean customs officials, usually in hopes of circumventing local laws that prohibited the importation of used equipment and parts. These payments were improperly recorded as ordinary business expenses such as "fees for customs assistance," "customs advisory services," "verification charge," or simply as "fees." One of these bribes was paid by the Vice President from his own funds, after which he was reimbursed in the form of a company car. Formametal initially booked the transfer as an interest expense and, later, after two Ball accountants learned in February 2007 it was reimbursement of a bribe, changed it to a miscellaneous expense. The SEC found that neither description was sufficient as the transfer was not accurately described as a reimbursement for an illegal payment. The SEC also alleged that, in 2007, Formametal paid a bribe, authorized by its President, in hopes of obtaining an export duty waiver so as to avoid Argentina's high tariff on the export of domestic copper, generally 40% of the copper's value. The payment was funneled through Formametal's third-party customs agent in five installments, although the company ultimately did not make any exports pursuant to the illegal payment. The payments were improperly recorded as "Advice fees for temporary merchandise exported."

The SEC found that Ball had "weak" internal controls, which made it difficult for the company to detect the subsidiary's repeated violations and allowed for the violations to continue into October 2007. Among the failings highlighted by the SEC was an insufficient response to an internal report produced by an analyst in Ball's general accounting group in June 2006—shortly after the subsidiary was acquired—identifying prior questionable payments, dishonest customs declarations, and document destruction. Although by the time of the report Ball had demoted Formametal's President and replaced the Chief Financial Officer, it did not, in the SEC's view, take further action sufficient to prevent future misconduct.

The SEC noted in the settlement order that it did not impose a higher civil penalty due to Ball's cooperation in the SEC investigation and related enforcement action. The DOJ reportedly closed its investigation without taking any enforcement action.

4. Bridgestone

On September 12, 2011, Bridgestone Corporation ("Bridgestone") entered into a plea agreement with the DOJ for conspiring to violate the FCPA with respect to payments to foreign officials in Mexico and other Latin American countries, and for conspiring to violate the Sherman Act (governing anti-competitive practices) with respect to its marine hose business. In the wake of the DOJ investigation into the conspiracies, which lasted from 1999 to 2007, Bridgestone decided (i) to close the Houston office of Bridgestone Industrial Products of America ("Bridgestone USA"), (ii) to withdraw entirely from the marine hose business, (iii) to take disciplinary action against certain employees, and (iv) to terminate many of its third-party agent relationships. In addition, Bridgestone agreed to pay a $28 million criminal fine and to adopt a comprehensive anti-corruption compliance program.

Tokyo-based Bridgestone is the world's largest manufacturer of tires and rubber products. The company was also, during the time of the events alleged by the DOJ, in the business of making and selling marine hose, a flexible rubber hose used to transfer oil between tankers and storage facilities. The marine hose was made and sold by Bridgestone's International Engineered Products Department ("IEPD"), which was also responsible for the export and sales of other industrial products, such as marine fenders, conveyor belts, and rubber dams.

In many countries, including throughout Latin America, IEPD sold various products through local third-party sales agents, after coordinating such activities with the help of Bridgestone's various subsidiaries. For countries in Latin America—including Brazil, Ecuador, Mexico, and Venezuela—IEPD coordinated its sales via third-party agents with coordinating assistance from Bridgestone USA.

In certain Latin American countries, Bridgestone (through the IEPD division, assisted by Bridgestone USA) developed relationships with employees of Bridgestone customers that were state owned entities. The United States classifies the employees of these state owned entities as "foreign officials" under the FCPA. For example, in Mexico, Bridgestone cultivated a relationship with an employee of the state owned oil company, Petroleos Mexicanos ("Pemex"). Bridgestone arranged to improperly pay these foreign officials bribes calculated on the total volume of sales by overpaying the third-party sales agent commissions, with the understanding that the agent would keep a portion of the commission while conveying the remainder to the foreign official. Bridgestone took steps to conceal these payments by communicating orally and via telephone to avoid creating written records, and by avoiding e-mail, instead using faxes that contained information about the bribes and handwritten instructions to "**READ AND DESTROY**."

The DOJ Criminal Information details the acts surrounding one improper transaction involving a Pemex employee. It describes a 2004 e-mail from a Bridgestone employee in Japan to one in Houston explaining that a "source" at Pemex could help Bridgestone win a contract for marine hose, and a subsequent e-mail from a Japan employee instructing the Houston employee to cease communicating on the subject by email in favor of voice and fax communication. In 2005, a Houston employee suggested sending a Pemex employee on a trip to Japan to "have him at our side," and in 2006, a Houston employee faxed a "**READ AND DESTROY**" document to Japan which discussed reserving 24% of a Pemex contract for commissions, with 5% for "top level" commissions, and another 5% for commissions to other Pemex employees. Two weeks later, a Houston employee emailed an employee in Japan first with confidential information received from Pemex sources, and then with a description of steps being taken by certain Pemex employees to help Bridgestone win the contract. In January 2007, Bridgestone

won the contract and invoiced Pemex for $324,200, an amount from which Pemex employees would receive kickbacks.

The DOJ also charged Bridgestone with conspiring to suppress and eliminate competition by rigging bids, fixing prices, and allocating market shares for sales of marine hose in the United States and elsewhere, all in violation of the Sherman Act (15 U.S.C. §1). The DOJ alleged that Bridgestone, in combination with other unnamed co-conspirators, used a third-party individual to act as a central point of coordination for price fixing and bid rigging activities. The Criminal Information alleged that Bridgestone, with other companies, discussed how to allocate shares of the marine hose market, set prices for marine hose, and refrained from competing for other conspirators' customers by either not bidding or submitting purposefully inflated bids to specific customers. All of these activities were apparently coordinated through a third-party individual who arranged the price fixing and bid rigging activities.

Bridgestone did not enter into a DPA or NPA, but instead pleaded guilty to criminal charges. The application of the U.S. Sentencing Guidelines produced a fine range of $6.72 to $13.44 million for the antitrust charge, and a range of $39.9 to $79.8 million for the FCPA charges.

Departing from the guidelines, the DOJ agreed to a combined fine of $28 million, with no term of organizational probation. The DOJ stated that it agreed to the greatly discounted fine in response to Bridgestone's level of cooperation, which included "conducting an extensive worldwide internal investigation, voluntarily making Japanese and other employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information…" as well as "extensive remediation, including restructuring the relevant part of its business" which included dismantling its IEPD and closing its Houston office (Bridgestone USA). The DOJ also stated that Bridgestone's remedial actions included "terminating many of its third-party agents and taking remedial actions with respect to employees responsible for many of the corrupt payments." Bridgestone additionally "committed to continuing to enhance its compliance program and internal controls…."

In 2011, Japanese companies including Bridgestone, JGC, and Marubeni paid significant FCPA fines to the U.S. government. Although Japan is a signatory of the OECD Convention and therefore has its own anti-corruption law, the Japanese law does not include criminal liability for corporations, and civil enforcement is generally perceived as being less aggressive than in the United States.

5. Comverse

On April 6, 2011, the New York-based Comverse Technology Inc. ("CTI") entered non-prosecution and settlement agreements with the DOJ and SEC, respectively, in connection with improper payments made by CTI's Israel-based, second-level subsidiary, Comverse Ltd. ("Comverse") between 2003 and 2006. CTI agreed to pay a combined $2.8 million to the enforcement agencies, including a $1.2 million criminal fine to the DOJ for violating the FCPA's books and records provisions and an additional $1.6 million in disgorgement and prejudgment interest to the SEC for violating those provisions as well as the FCPA's internal controls provisions.

According to both the settlement and the NPA, Comverse engaged an Israeli agent to help the company pay bribes to its customers, including Hellenic Telecommunications Organisation S.A. ("OTE"), an Athens-based telecommunications provider partially owned by the Greek government, as well as other purely private customers.

In February 2003, several Comverse employees conspired with the unnamed agent to incorporate Fintron Enterprises Ltd. ("Fintron"), a Cyprus-based entity established "purely [as] a money laundering operation," according to one witness quoted by the DOJ. The agent also opened a Cyprus bank account in Fintron's name. Comverse employees used the new company and its bank account in a scheme to funnel bribes to OTE and other customers. Under the scheme, Comverse executed consultancy services contracts with Fintron, agreeing to pay "commissions" in connection with the purchase orders that the shell company purportedly helped to procure. Upon receipt of a purchase order, Comverse employees notified the agent of the value for a fraudulent "commission" invoice. The agent then issued an invoice to Comverse under Fintron's name for the pre-agreed "commission" amount. Comverse submitted the invoices for payment and subsequently transferred the requested funds to Fintron's bank account in Cyprus, falsely recording the transactions in the company's books and records as legitimate commission payments. The agent—or in some cases Comverse employees themselves—travelled to Cyprus to withdraw the money from Fintron's account. The agent would hand deliver the funds—minus his own 15% commission—to one of three Comverse employees, who provided the cash to various Comverse customers in Israel, Italy, and Greece.

The scheme first came to light after the agent had been questioned at an airport in December 2005 about a same-day, round-trip flight he had taken between Rome and Tel Aviv. Because Comverse had purchased the agent's ticket, an airline representative reported the matter to Comverse's Director of Security, who undertook further investigation. The investigation revealed that the agent had taken sixteen same-day, round-trip flights between Israel and either Rome or Cyprus—as well as numerous other flights to Greece—over a period of eight months. Comverse had booked and paid for all the flights directly.

In a memorandum dated January 1, 2006, the Director of Security advised the President of the Europe, Middle East, and Africa ("EMEA") division and the Head of Human Resources of his findings. Specifically, he explained that Comverse had arranged for the agent's frequent same-day, round-trip flights so that he could transport large amounts of cash to Comverse employees, and that such actions could violate money laundering laws.

Rather than suggesting that the agent's relationship be terminated with immediate effect, however, the memorandum recommended certain steps to minimize the risk that the agent's actions could be traced back to the company. Thus, for example, the memorandum recommended that: (i) a separate travel agent make the agent's bookings, (ii) the agent stay at hotels where he would not be recognized as a Comverse employee, and (iii) the agent return to Tel Aviv on a different flight than he had taken to leave Israel. Although the Director of Security argued that the agent should eventually be terminated (because "he knows too much"), he advised that "as long as the current system exists, [the agent] will need an appropriate cover story, that is grounded and backed-up with documents that Comverse has no part in."

The incidents described in the memorandum were not reported to anyone else at Comverse, such as senior Comverse or CTI executives, nor did the company have a policy at the time that directed the employees to do so. Partly as a result, Comverse continued to make improper payments through the end of 2006. In total, Comverse made payments of $536,000 to individuals connected to OTE (obtaining over $1.2 million in profit through improperly obtained purchase orders), as well as unspecified amounts to other Comverse customers. Comverse voluntarily disclosed the matter to the SEC and DOJ on March 16, 2009.

Neither the DOJ nor the SEC directly argued that the employees of OTE were “foreign officials” under the FCPA, although the DOJ did characterize OTE as controlled by the Greek government, which owns slightly more than one-third of the issued share capital. OTE is listed currently on the Athens Stock Exchange and the London Stock Exchange, and it was listed on the NYSE until September 2010. While this may explain why the enforcement agencies did not allege that Comverse had violated the FCPA’s anti-bribery provisions, the charging documents’ vague characterization leaves open the possibility that the agencies did (or would, if pushed) consider OTE a state instrumentality, even at its one-third ownership level. In any event, the lack of such a direct argument—combined with references to other bribes that Comverse paid to indisputably private entities—suggests that the DOJ and SEC remain willing to prosecute “private bribery,” by focusing on books and recordkeeping violations.

Interestingly, this marks OTE’s second appearance in three years in an FCPA settlement. In 2008, the DOJ referenced the company (then characterized as a state-owned entity) in the *Siemens* case, stating that a Siemens employee “had received substantial funds to make ‘bonus payments’ to managers at the Greek national telephone company, OTE.”

In its Form 20-F filed on June 17, 2011, OTE stated that it had “launched an internal audit within the Group in order to fully investigate the [Comverse] issue and safeguard the Group’s interests. The internal audit is ongoing.” OTE subsequently filed a Form 15F to terminate its reporting requirements with the SEC, however, and the results of the audit, if any, has not been made publicly available.

6. Diageo

On July 27, 2011, the SEC charged London-based beverage company Diageo plc (“Diageo”), the world’s largest producer of spirits, with widespread FCPA books and records and internal controls violations stemming from more than six years of improper payments to government officials in India, Thailand, and South Korea. The SEC alleged that Diageo’s subsidiaries paid more than $2.7 million to obtain lucrative sales and tax benefits relating to its Johnnie Walker and Windsor Scotch whiskeys, among other brands. Diageo, which is listed on the New York Stock Exchange as well as the London Stock Exchange, agreed to cease and desist from further violations and pay over $16 million in disgorgement, prejudgment interest, and financial penalties without admitting or denying the SEC’s findings.

Diageo’s anti-corruption issues stemmed in part from a series of worldwide mergers and acquisitions. In 1997, Guinness plc and Gran Metropolitan plc merged to create Diageo. Following the merger, Diageo acquired Diageo India Pvt. Ltd. and an indirect majority interest in and operational control of Diageo Moët Hennessy Thailand, a Thai joint venture. In 2001, Diageo acquired the spirits and wine business of the Seagram Company Ltd., which included Diageo Korea Co. Ltd. After acquisitions Diageo identified—but did little to strengthen—the weak compliance programs of the acquired subsidiaries until mid-2008 in response to the discovery of the illicit payments made in India, Thailand, and South Korea.

According to the SEC, Diageo and its subsidiaries made more than $1.7 million in illicit payments to Indian government officials between 2003 and 2009. The officials were responsible for purchasing or authorizing the sale of Diageo’s beverages in India; these payments yielded more than $11 million in profit for the company. Specifically, Diageo’s Indian subsidiary used distributors to make over $790,000 in payments to an estimated 900 employees of government liquor stores to obtain orders and more prominent product placement in stores. The distributors themselves received “cash service fees” totaling

23% of the illicit payments from Diageo for their efforts. Diageo also reimbursed sales promoters for improper cash payments made to the Indian military's Canteen Stores Departments ("CSD"). In exchange, Diageo received better product promotion within the stores, annual label registrations, price revision approvals, favorable inspection reports, the release of seized products, and favorable promotion of Diageo holiday gifts to CSD employees. Diageo also made improper payments, through third parties, to officials responsible for label registrations and import permits. These payments were improperly recorded in Diageo's books and records with vague descriptions such as "incentive," "promotions," miscellaneous," "traveling expense," or "special rebates."

In Thailand, Diageo, through a joint venture, paid approximately $12,000 per month from 2004 to 2008 to retain the consulting services of a Thai government and political party official. This official lobbied senior commerce, finance and customs officials extensively on Diageo's behalf in connection with pending multi-million dollar tax and customs disputes, contributing to Diageo's receipt of certain favorable decisions by the Thai government. Payments for the consulting services were provided in monthly disbursements of $11,989 and described as advisory fees and out-of-pocket expenditures in various accounts labeled "Outside Services," "Corporate Social Responsibility," "Corporate Communications," "External Affairs Project," and "Stakeholder Engagement." According to the SEC, the joint venture's senior management was aware of the consultant's governmental and political positions as he was the brother of one of the joint venture's senior officers.

The SEC also alleged that Diageo paid more than $86,000 to a customs official in South Korea as a reward for the key role that he played in the government's decision to grant Diageo approximately $50 million in tax rebates. The rebates were supposedly justified by millions of dollars Diageo had overpaid due to use of a less advantageous transfer pricing formula of Windsor Scotch whiskey imported to South Korea. Sixty percent of the custom official's reward was paid by Diageo by way of on an inflated invoice from a customs brokerage firm that was charged to a professional services and consulting fees account. The remainder was paid from the personal funds of a Diageo subsidiary manager, which was not recorded in its books and records.

In addition, a South Korean Diageo subsidiary improperly paid travel and entertainment expenses for customs and other government officials involved in the tax negotiations. In one instance, several officials travelled to Scotland to inspect production facilities. While this trip was "apparently legitimate," on its face, senior employees of the Diageo joint venture also took the officials on purely recreational side trips to Prague and Budapest. The cost of these trips was improperly recorded in Diageo's "Entertainment-Customer" account.

Further, Diageo's South Korean subsidiary routinely made hundreds of gift payments to South Korean military officials in order to obtain and retain liquor business in the form of gifts known either as "rice cakes" or "Mokjuksaupbi." The so-called "rice cake" payments were customary gifts made at various times during the year for holidays and vacations (in the form of cash or gift certificates) to officials responsible for purchasing liquor and ranged in value between $100 and $300. At times, the company used fake invoices to generate the cash for the "rice cake" payments. Diageo also paid military officials an estimated $165,287 in "Mokjuksaupbi" payments, or "relationships with customer" payments. These payments were recorded in sales, promotion, and customer entertainment accounts. Diageo and its subsidiaries failed to properly account for these payments in their books and records. Instead, they concealed the payments to government officials by recording them as legitimate expenses for third-party

vendors or private customers, or categorizing them in false or overly vague terms or, in some instances, failing to record them at all.

Diageo cooperated with the SEC's investigation and implemented remedial measures, including the termination of employees involved in the misconduct and significant enhancements to its FCPA compliance program.

7. IBM

On March 18, 2011, International Business Machines Corporation ("IBM") agreed to settle FCPA books and records and internal controls charges with the SEC stemming from alleged improper cash payments, gifts, travel, and entertainment provided to government officials in South Korea and China. According to the SEC, IBM subsidiaries and an IBM joint venture provided South Korean government officials with approximately $207,000 in cash bribes, gifts, and payments of travel and entertainment expenses and engaged in a widespread practice of providing overseas trips, entertainment, and gifts to Chinese government officials. Without admitting or denying the SEC's allegations, IBM agreed to pay $8 million in disgorgement and prejudgment interest and a $2 million civil penalty. IBM also consented to the entry of a final judgment that permanently enjoined it from violating the accounting provisions of the FCPA. The settlement agreement was approved in court on July 28, 2013.

a. South Korea

According to the SEC, from 1998 to 2003, employees of an IBM subsidiary, IBM Korea, Inc. ("IBM Korea") and the IBM majority-owned joint venture LG-IBM PC Co., Ltd. ("LG-IBM") provided approximately $207,000 in cash bribes, gifts, travel, and entertainment to employees of South Korean government entities. Members of IBM Korea's management personally delivered IBM Korea company envelopes and shopping bags filled with cash to these officials in exchange for their assistance to designate IBM Korea as the preferred supplier of mainframe computers to the South Korean government, to secure contracts for IBM Korea business partners, and to ensure that the South Korean government would purchase IBM computers at higher-than-normal prices.

A manager at LG-IBM also directed an LG-IBM business partner to "express his gratitude"—in the form of a cash payment—to a South Korean official who had facilitated the award of a contract to IBM despite performance problems identified in a benchmarking test of LG-IBM computers. The business partner was in turn "adequately compensated by generous installation fees" from LG-IBM in exchange for acting as an intermediary. Employees of the government entity were also given free LG-IBM laptop computers to entice them to purchase IBM products.

Separately, an employee of LG-IBM made a cash payment of over $9,000 to a manager of a state-owned entity in order to secure a contract for personal computers. LG-IBM submitted a low bid to win the contract. After the contract was won, the employee and the manager went into the manager's office and replaced the tendered bid sheet with a new bid sheet showing a higher price that was closer to the state-owned entity's internal target price. After securing the contract, the LG-IBM employee directed an LG-IBM business partner to overbill LG-IBM for installation costs in order to conceal a cash payment to the agency manager.

Overbilled installation costs were also used on at least one other occasion to fund payments (in the form of cash and entertainment) to a South Korean government official in exchange for confidential information and to secure government contracts.

The complaint further alleged that LG-IBM paid the business partner for non-existent software services, funds from which the business partner then kicked back to an LG-IBM Direct Sales Manager who used the money to pay for gifts, entertainment (including entertainment provided by a "hostess in a drink shop"), and travel expenses for officials at South Korean government entities. The LG-IBM Direct Sales Manager also funded entertainment expenses by billing the South Korean government for laptop computers that it did not provide. Key decision-makers were also given free computers and computer equipment to encourage them to purchase IBM products or assist LG-IBM in securing government contracts.

b. China

The SEC also alleged that, from at least 2004 to 2009, more than 100 employees of IBM (China) Investment Company Limited and IBM Global Services (China) Co., Ltd. (collectively, "IBM China"), including "two key IBM China managers," created slush funds to finance travel expenses, cash payments, and gifts provided to officials of government-owned or controlled customers in China. IBM China provided improper travel and travel reimbursement in spite of an IBM policy requiring IBM China managers to approve all expenses and require customers (in this case, government officials) to personally fund any non-training-related travel and side trips. According to the SEC, IBM's internal controls failed to detect at least 114 instances where IBM China submitted false travel invoices, invoices for trips not connected to customer training, invoices for unapproved sightseeing for Chinese government employees, invoices for trips with little or no business content, and invoices for trips where per diem payments and gifts were provided to Chinese government officials. Employees at IBM China also funded unauthorized travel by designating travel agents as "authorized training providers," who then submitted fraudulent purchase requests for "training services" that could be billed to IBM China.

8. JGC

In April 2011, JGC Corporation ("JGC"), a Japanese engineering and construction company headquartered in Yokohama, Japan, entered into a two-year DPA with the DOJ, agreeing to pay a criminal penalty of $218.8 million to resolve charges of participating in a conspiracy to bribe Nigerian officials in violation of the FCPA.

JGC was the last of the four companies in the TSKJ joint venture to settle with the DOJ in the series of enforcement actions regarding the corruption scheme carried out between 1995 and 2004 to unlawfully obtain contracts to build liquefied natural gas facilities in Bonny Island, Nigeria (*see KBR/Halliburton, Tesler and Chodan, Marubeni*). According to the DOJ, JGC authorized TSKJ (operating through a corporate entity based in Madeira, Portugal) to hire U.K. attorney Jeffrey Tesler and the Japanese company Marubeni Corporation as agents to arrange and pay bribes to high-level and working-level government officials, respectively. Over the course of the scheme, the joint venture caused wire transfers of over $180 million for use in part to corrupt Nigerian officials. On several occasions preceding the award of engineering, procurement and construction ("EPC") contracts to TSKJ, JCG's co-conspirators met with officials of the executive branch of the Government of Nigeria to identify a representative to negotiate bribes with TSKJ or to determine their amount.

JGC was ultimately charged with, and plead guilty to, one count of conspiracy to violate the FCPA and one count of aiding and abetting violations to the FCPA. Under the DPA, in addition to paying the criminal penalty, JGC agreed to cooperate with the DOJ's ongoing investigations, to review and improve its compliance and ethics program, and to engage an independent compliance consultant for two years.

9. Johnson & Johnson

On April 8, 2011, Johnson & Johnson ("J&J"), a multinational pharmaceutical and medical device company headquartered in New Jersey, along with its subsidiaries, entered into a "global" settlement with the DOJ, SEC, and SFO to conclude enforcement actions regarding corrupt practices under the U.N. Oil for Food Program, as well as in Greece, Poland, and Romania. Under the DPA, J&J admitted and accepted responsibility for the acts of its officers, employees, agents, and wholly owned subsidiaries, including DePuy, Inc. ("DePuy"), an Indiana-based subsidiary against whom the DOJ filed a two-count complaint, and DePuy's U.K. subsidiary, DePuy International Limited ("DPI"). In total, J&J and its subsidiaries agreed to pay over $76.9 million to resolve the charges, which included a $21.4 million criminal penalty under J&J's DPA with the DOJ, disgorgements of $38.2 million in profits and $10.4 million in prejudgment of interest by J&J to the SEC, and a £4.8 million civil recovery order (plus prosecution costs) as imposed on DPI by the SFO. In parallel, Greek authorities froze the assets of J&J subsidiary DePuy Hellas worth €5.7 million.

The criminal information filed against DePuy alleged one count of conspiracy to violate the FCPA and one count of violating the FCPA's anti-bribery provisions. Similarly, the SEC charged J&J with violating the FCPA's anti-bribery, books and records, and internal control provisions. The U.K. authorities only exercised jurisdiction over the conduct carried out in Greece. Working with the U.S. agencies, as to avoid double jeopardy, the SFO limited its enforcement action to a civil recovery order under the Proceeds of Crime Act 2002. Recalling that "[t]he DOJ Deferred Prosecution Agreement has the legal character of a formally concluded prosecution and punishes the same conduct in Greece that had formed the basis of the Serious Fraud Office investigation," the Director of the SFO considered that a "a [criminal] prosecution was therefore prevented in this jurisdiction by the principles of double jeopardy," for "[t]he underlying purpose of the rule against double jeopardy is to stop a defendant from being prosecuted twice for the same offence in different jurisdictions." He concluded, "[c]ombined criminal and civil sanctions have therefore been imposed in the United States in respect of DePuy International Limited's parent and assets have been frozen in the ongoing Greek investigation, all relating to the same conduct in Greece. Consequently the Serious Fraud Office is satisfied that the most appropriate sanction is a Civil Recovery Order."

When reaching the settlement figures, apart from the existence of multiple enforcement actions, the authorities considered that J&J voluntarily and timely disclosed the misconduct, cooperated fully with the DOJ's investigations, conducted thorough internal investigations, and implemented extensive remedial measures.

a. Greece

According to the facts as stipulated in the DPA, from 1998 through 2006, DePuy and its subsidiaries authorized improper payments of approximately $16.4 million to two agents while knowing that a significant portion would be passed on to publicly employed Greek healthcare providers. DePuy and its subsidiaries sold products to Company X (an agent and distributor for DePuy and its subsidiaries

in Greece that was later acquired by DePuy in 2001 and ultimately named DePuy Hellas) at a 35% discount, then paid 35% of sales by Company X to an offshore account of Company Y (a consultant for DePuy International, based in the Isle of Man) as a way of providing off-the-books funds to Agent A (a Greek national and beneficial owner of Companies X and Y) for the payment of bribes to Greek healthcare officials, in exchange for the purchase of DePuy products.

In 2000, three senior DPI officials recommended terminating Company X because Agent A was making cash payments to Greek surgeons to induce them to purchase DePuy products. However, after the meeting DPI instead began efforts to purchase Company X in a fashion that would allow Agent A to continue his payments so as not to lose sales. Correspondence during this period between senior DPI employees repeatedly demonstrated their awareness of Agent A's activities, and at one point the DPI VP Finance wrote that he was "very disappointed to read in [a] proposal that it contains reference to [Agent A's] activities which cannot be mentioned in written correspondence with [DPI]." The acquisition was concluded shortly thereafter and Agent A signed a consulting agreement with DePuy Hellas where he received an advance commission of 27%, which was deemed "sufficient to cover [DPI] and J&J cash incentives." Agent A ultimately received nearly €8 million under this and subsequent agreements before being replaced by Agent B, who received both a 15% commission from DPI and a 16% commission from DePuy Hellas. When concerns were raised about Agent B's activities, DPI's VP Marketing responded by email that if DePuy ceased making improper payments it would lose 95% of its business. The issue eventually reached a senior DePuy executive in the U.S. who conducted discussions about continuing the Greek business without intermediaries but conducted no investigation of past conduct. Agent B received over €7 million, "a significant portion of which" was used to induce Greek healthcare professionals to purchase DePuy products.

Finally, between 2002 and 2006, £500,000 was withdrawn by employees and directors of Company X/DePuy Hellas to cover payments owed to Greek healthcare officials and not yet paid. According to the SEC Complaint, the issues in Greece had been raised to an internal audit team in 2003 via an anonymous letter, but the auditors focused their investigation on conflict of interest issues rather than bribery. The issue was raised again in 2006 by a whistleblower complaint to a separate internal audit group.

b. Poland

From 2000 to 2007, wholly owned subsidiary J&J Poland authorized the improper payment of approximately $775,000 in Poland to publicly employed healthcare professionals. According to the DOJ, J&J Poland bribed publicly employed Polish healthcare professionals, in particular members of tender committees, by making payments in the form of phantom civil contracts (professional service contracts for which payment was made, but no proof of actual performance was ever required) or sponsoring travel and attendance to conferences, in order to unduly influence the officials to select or favor J&J Poland in tender processes. J&J Poland entered into approximately 4,400 of the civil contracts totaling approximately $3.65 million.

J&J Poland also made approximately 15,000 payments totaling $7.6 million to sponsor travel for Polish HCPs to attend conferences, "a portion of which were improper." Certain of these were directly targeted at officials who previously had or could positively influence J&J Poland business. The DOJ stated that many of these trips, "included spouses and family members to what amounted to vacations." Faked travel expenses were also used to generate cash to funnel to doctors as bribes.

c. Romania

From 2005 to 2008, wholly owned J&J Romania authorized the improper payment of approximately $140,000 in Romania. According to the criminal information, J&J Romania employees arranged for its distributors to make cash payments and provide gifts to publicly employed Romanian healthcare professionals, in exchange for prescribing pharmaceutical products manufactured by J&J and its subsidiaries. Payments were made in the form of envelopes of cash, electronics, laptops, and other gifts and were funded through discounts of 10 to 12% given to the distributors. On some occasions, though the payments were funded through the distributors, J&J Romania employees themselves delivered the payments.

When J&J's internal auditors uncovered the improper payments in Romania, J&J Romania employees shifted their schemes to provide improper travel benefits to doctors rather than cash, including by having travel agents overcharge J&J Romania so as to generate surplus cash for "pocket money."

d. Iraq

In addition, J&J also admitted that its wholly owned subsidiaries Janssen Pharmaceutica, NV (headquartered in Belgium) and Cilag AG International (headquartered in Switzerland) had secured 18 contracts with the Iraqi Ministry of Health State Company for Marketing Drugs and Medical Appliances ("Kimadia") through the payment of approximately $857,387 in kickbacks between 2000 and 2003, under the United Nations Oil for Food Program. The total contract value amounted to circa $9.9 million, with approximately $6.1 million in profits. The payments were made through an agent whose commission was inflated from 12% to 22% to accommodate the kickbacks to Kimadia.

e. Robert John Dougall and Other Employees

In a related enforcement action in the United Kingdom, on December 1, 2009, Robert John Dougall, the former Vice President of Market Development of DPI, appeared before the City of Westminster Magistrates' Court in response to an SFO summons alleging conspiracy to corrupt contrary to the Criminal Law Act 1977. U.K. authorities alleged that Dougall conspired to provide inducements to medical professionals working in the Greek public healthcare system in relation to the supply of orthopedic products between February 2002 and December 2005. In April 2010, Dougall pleaded guilty and was sentenced to one year in prison, despite a request from the SFO for a lighter sentence in consideration of his service as a valuable witness in the case. In May 2010, the U.K. Court of Appeal reversed the ruling of the trial court and affirmed the suspended sentence requested by the SFO. However, the Court also reprimanded the SFO and their U.S.-style plea agreement approach, saying that "agreements between the prosecution and the defense about the sentences to be imposed in fraud and corruption cases were constitutionally forbidden," and that sentencing should be left entirely to judges.

Separately, various news articles reported in February 2013 that Greek prosecutors had brought criminal corruption and money laundering charges against five DePuy employees and eight state hospital doctors in connection with the conduct discussed above. The names of the DePuy officials were not released, and further details have not been available.

10. Magyar Telekom and Deutsche Telekom

On December 29, 2011, Magyar Telekom Plc. ("Magyar") and its majority owner, German telecommunications giant Deutsche Telekom AG ("Deutsche Telekom"), announced that they would pay approximately $95 million to resolve criminal and civil charges brought by the DOJ and SEC for FCPA violations. The DOJ's investigation followed a February 2006 internal investigation initiated by Magyar after its auditors identified two suspicious contracts during an audit of the company's financial statements.

In 2005, the Macedonian parliament enacted a new Electronic Communications Law that authorized telecommunications regulatory bodies in Macedonia to hold a public tender for a license that would allow a third mobile phone company to enter the Macedonian telecommunications market. This new mobile phone company would have competed directly with a Magyar subsidiary, Makedonski Telekommunikacii AD Skopje ("MakTel"). According to charging documents, Magyar and its executives entered into secret agreements—referred to internally at Magyar as "protocols of cooperation"—with high-ranking Macedonian officials to delay or preclude the issuance of this new license in order to help MakTel retain a dominant share of the Macedonian telecommunications market. The Macedonian officials also exempted MakTel from having to pay increased licensing fees required by the Electronic Communications Law. To effect the scheme, Magyar paid over $6 million to a Greek intermediary under sham consulting contracts with the knowledge or belief that the funds would be passed on to Macedonian officials. These payments were recorded as legitimate expenses on MakTel's books and records (including by the use of backdating and fabricated documentation), which Magyar consolidated into its own financial records and which were eventually incorporated into Deutsche Telekom's financial statements.

The DOJ and the SEC also alleged that Magyar made approximately $9 million in improper payments to acquire state-owned telecommunications company Telekom Crne Gore A.D. ("TCG") in Montenegro. In exchange for these payments, Magyar acquired an approximately 51% interest in TCG from the Montenegrin government. Magyar was also able to acquire an additional 22% interest in TCG—giving Magyar supermajority control over the telecommunications company—after the Montenegrin officials committed the Government of Montenegro to supplement Magyar's offer to minority shareholders by €0.30 per share. Magyar attempted to conceal these payments through sham contracts with third-party consultants, including one based in Mauritius and another based in the Seychelles, neither of which had ever provided services to Magyar or Deutsche Telekom, and one of which was not even legally incorporated at the time. A third sham contract with a counterparty in New York was designed to funnel money to the sister of a Montenegrin official, while a fourth, to a London-based shell company, was purportedly to provide strategic reports. The reports received were not original work and were valued by Magyar's auditors at €20,000, far less than the €2.3 million paid for them. The ultimate beneficiary was not identified. Magyar's payments were each recorded as consulting expenses in Magyar's books and records.

Magyar agreed to pay a $59.6 million criminal penalty to the DOJ as part of a two-year DPA to resolve charges of one count of violating the FCPA's anti-bribery provisions and two counts of violating the FCPA's books and records provisions. Magyar also agreed to implement an enhanced compliance program and submit annual reports regarding its efforts in implementing those enhanced compliance measures and remediating past problems. Additionally, Magyar agreed to pay $31.2 million in disgorgement and prejudgment interest to the SEC. Deutsche Telekom will pay an additional $4.36

million in criminal penalties as part of a NPA for one count of violating the FCPA's books and records provisions.

a. SEC Action Against Former Magyar Executives

The SEC also brought civil charges against three former Magyar executives: former Chairman and CEO Elek Straub; former Director of Central Strategic Organization Andras Balogh; and former Director of Business Development and Acquisitions Tamas Morvai. The SEC alleges that the executives personally authorized Magyar's payments to the Macedonian officials. The SEC further alleged that, from 2005 through 2006, Straub, Balogh, and Morvai authorized at least six other sham contracts through the Greek intermediary. According to the SEC, these sham contracts were all designed to channel funds to government officials—a process referred to by the former executives as "logistics"—in a manner that circumvented Magyar's internal controls. The executives also proposed, though ultimately did not follow through on, a plan to secure political support by having Magyar construct a telecommunications infrastructure in a neighboring country that could be run for the benefit of a minor Macedonian political party. Finally, the SEC alleged that the former executives authorized and implemented the sham consultancy contracts Magyar used to facilitate its acquisition Telekom Crne Gore A.D.

The SEC accused Straub, Balogh, and Morvai of authorizing or causing all of the payments described above with "knowledge, the firm belief, or under circumstances that made it substantially certain" that all or a portion of the payments would be channeled to government officials. The SEC also alleged that the former executives caused these payments to be falsely recorded in Magyar's books and records and mislead auditors in charge of preparing Magyar's financial statements. Consequently, the SEC charged Straub, Balogh, and Morvai with violating or adding and abetting violations of the FCPA's anti-bribery, books and records, and internal controls provisions; knowingly circumventing internal controls and falsifying books and records; and making false statements to auditors.

The case remains ongoing. In February 2013, the defendants lost a joint motion to dismiss the case. The SEC subsequently amended the complaint, dropping the Montenegrin bribery charges in 2014. Fact discovery was completed in March 2015. On August 24, 2016, the District Court heard oral arguments concerning opposing motions for summary judgment.

b. Investigation by German Authorities

German authorities also investigated Magyar. In late August 2010, German prosecutors raided Deutsche Telekom's offices, as well as the homes of several employees, as part of an investigation into the activities of Deutsche Telekom subsidiaries in Hungary and Macedonia. Although commentators have suggested that the raids stemmed from the SEC's request for assistance in the U.S. enforcement actions described above, German prosecutors insisted that the raids were not requested by the SEC and were ordered after a German investigation raised suspicions that a violation of German anti-corruption law may have occurred. The focus of these investigations was Deutsche Telekom's CEO, Renee Obermann, whose home was one of the residences searched as part of the raids. Deutsche Telekom strongly denied that Obermann was involved in any wrongdoing, however, and in January 2011, citing a lack of evidence, German prosecutors dropped all charges against Obermann.

11. Maxwell Technologies

On January 31, 2011, Maxwell Technologies, Inc. ("Maxwell") entered into a DPA with the DOJ and settled with the SEC for FCPA-related violations stemming from improper payments to officials of various Chinese state-owned entities. Maxwell manufactures energy storage and power supply products in the United States, Switzerland, and China, and is an issuer under the FCPA because its shares, listed on NASDAQ, are registered with the SEC. The SEC and DOJ had charged Maxwell with violations of the FCPA's anti-bribery and books and records provisions, while the SEC also alleged violations of the FCPA's internal controls provisions as well as Section 13(a) of the Exchange Act and Rules 13a-1, 13a-13, and 12b-20. Maxwell agreed to pay an $8 million criminal penalty to the DOJ and $6.35 million in disgorgement and prejudgment interest to the SEC to resolve the U.S. authorities' investigations. According to the DPA, which has a term of three years and seven days, the criminal penalty was 25% below the bottom end of the range recommended by the U.S. Sentencing Guidelines due to, among other things, Maxwell's voluntary disclosure, full cooperation with the U.S. authorities' investigations, and agreement to cooperate with the government's ongoing investigation. In addition, Maxwell agreed to report to the DOJ, at no less than 12-month intervals for three years, on the remediation and implementation of its compliance program and internal controls.

On October 15, 2013, Swiss citizen Alain Riedo, former Senior Vice President and General Manager of Maxwell S.A., was indicted on nine counts of violating the FCPA in connection with the conduct described in the 2011 Maxwell DPA. He remains a fugitive.

Underlying Conduct

The DPA states that from July 2002 through May 2009, Maxwell made approximately $2,789,131 in improper payments to Chinese officials through Maxwell Technologies S.A. ("Maxwell S.A."), the company's wholly owned Swiss subsidiary. Maxwell made these payments through a Chinese agent by, at the agent's instruction, over-invoicing state-owned customers by approximately 20%and passing the surplus on to the agent, who then used the amount to bribe officials at the same state-owned customers. The 2013 Riedo indictment added some detail to the facts contained in the 2011 Maxwell DPA, including that the Chinese agent's secret 20% mark-up was invoiced to Maxwell separately and characterized as an "extra amount," "special arrangement," or a "consulting" fee. The Riedo indictment listed and described a variety of communications that allegedly show that Riedo and other executives were well aware of, and complicit in continuing, the bribery scheme in China.

Maxwell admitted that members of its U.S. management "discovered, tacitly approved, concealed, and caused to be concealed" this bribery scheme in 2002. Its management discussed—over e-mail—that the scheme "would appear" to be "a kick-back, pay-off, bribe . . . given that we cannot obtain an invoice or other document that identifies what the payment is for." In response, one senior executive advised that the issue was well known and instructed the others, "No more e-mails please."

After the 2002 discovery, annual payments to the Chinese agent increased from $165,000 to $1.1 million by 2008. Maxwell then improperly recorded such payments as sales commissions in its books and records. According to the SEC, the improper payments generated approximately $15.4 million in revenue and profits of more than $5.6 million.

According to the SEC's separate allegations, which Maxwell neither admitted nor denied in its settlement with the SEC, the bribery scheme again came to light during a 2008 internal review of Maxwell S.A.'s commission expenses after Maxwell's management team learned of the unusually high commissions paid to the Chinese agent. During the review, Maxwell's management team requested information about the high payments to the agent. In response, Riedo provided the Chinese Agent an "FCPA Letter," asking him to sign it so as not to "disturb our business in China." The agent signed the letter certifying that he was familiar with the FCPA and local laws on corruption, and conveyed the signed letter back to Riedo who forwarded it to Maxwell's finance department; obtained a signed certification from the agent stating that he was familiar with the FCPA and local laws on corruption. Satisfied with the declaration, Maxwell took no further action in 2008. In 2009, however, Maxwell S.A.'s sales director was notified by the Chinese agent—in person while on a business trip to China—that cash transfers listed on the agent's invoices to Maxwell as "extra amounts" were being transferred back to "customers" at state-owned entities.

The agent subsequently told the company that Alain Riedo, the Senior Vice President and General Manager of Maxwell S.A., "had known [of] and approved of the . . . arrangement . . . ." Maxwell's CEO informed the audit committee and outside counsel of the agent's disclosures and, following the agent's statements concerning Riedo, Maxwell publicly disclosed the information to investors in its May 5, 2009 quarterly report for the period ended March 31, 2009.

Riedo left the company in July 2009. On October 15, 2013, a Grand Jury in the Southern District of California issued an indictment for Riedo on nine counts of violating the FCPA. The government identified specific emails that Riedo had sent to the United States that it argued established jurisdiction for certain counts, and listed specific financial records that Riedo allegedly caused to be falsified and that established jurisdiction for other counts. In addition, the indictment alleges that Riedo and another individual "hamper[ed] efforts by other Maxwell executives to learn the truth" regarding the company's operations in Switzerland with respect to Chinese sales, and that after Maxwell terminated the Chinese agent, Riedo attempted to secretly re-hire the agent under the name of a different intermediary company, against the instructions of the Maxwell's CEO. In the wake of the indictment, a warrant for Riedo's arrest has been issued, but he remains a fugitive.

Settlement Disclosures

Maxwell provided relatively detailed disclosures in its March 31, 2010 10-Q quarterly report regarding the progress of its settlement talks with U.S. authorities and generated some media controversy as a result. Anticipating a monetary penalty in connection with a resolution of the DOJ and SEC investigations, Maxwell reported that the company recorded an accrual of $9.3 million in the fourth quarter of 2009 and explained that this amount:

> [W]as based on the Company's estimation of loss as required under GAAP and discussions with both government agencies. These discussions have resulted in an estimate of a potential settlement range of $9.3 million to $20.0 million. The top end of the range of $20.0 million represents the combined first offer of settlement put forth by the relevant governmental agencies.

On July 28, 2010, during the Q2 2010 earnings call, Maxwell's CFO informed investors that Maxwell had negotiated "an agreement in principle" to pay the SEC approximately $6.35 million over two installments. The CFO further disclosed that the DOJ had indicated that it would accept a penalty of $8 million to resolve the investigation, but that the company was still negotiating with DOJ and had offered $6.35 million. During the call, the CFO stated that because the settlement offers were ongoing there could be no assurance that the settlement with the SEC would be approved or that the company could settle with the DOJ for $6.35 million. Maxwell released a press release regarding this call on July 29, 2010. One day later, on July 30, 2010, Maxwell issued another press release with the statement as shown below:

> The Department of Justice has not indicated a specific settlement amount or other terms that would be acceptable to settle the ongoing investigation of alleged FCPA violations. As with all potential settlements with the DOJ, there are numerous other aspects of the settlement, in addition to the monetary penalties, that also need to be resolved.

Media reports speculated that the immediate clarification was the result of DOJ displeasure with the detailed public disclosure concerning the DOJ's negotiating position. However, although Maxwell did later increase its accrual to $8 million, the final penalty amount was no different than the DOJ's position that Maxwell disclosed during the June 28, 2010 earnings call.

12. Rockwell Automation

Rockwell Automation Inc. ("Rockwell"), whose shares trade on the NYSE, is a Wisconsin-based company that provides industrial automation power, intelligent motor control products, and information solutions for a range of sectors. On May 3, 2011, Rockwell settled an SEC administrative proceeding to resolve an investigation of alleged violations of the books and records and internal control provisions of the FCPA. The SEC's allegations involved a former Rockwell subsidiary, Rockwell Automation Power Systems (Shanghai) Ltd. ("RAPS-China"). Rockwell, without admitting or denying the SEC's allegations, agreed to disgorge $1,771,000, pay $590,091 in prejudgment interest, and pay $400,000 penalty. The DOJ declined to bring a parallel enforcement action for the same conduct, which Rockwell had disclosed to both the SEC and DOJ in 2006.

The SEC alleged that, between 2003 and 2006, employees of RAPS-China paid $615,000 to state-owned design institutes that provided design engineering and technical integration services. These institutes, which have been at the center of other FCPA-related enforcement activity (*see*, *e.g.* Watts Water at p.224), have the ability to influence contract awards by end-user state-owned customers. The SEC alleged that the payments were made through third-parties at the direction of RAPS-China's Marketing and Sales Director in order that design institute employees would pass on the payments to employees at state owned entities to influence purchasing decisions. The SEC further alleged that Rockwell failed to properly record the payments in the company's books and records and failed to implement an adequate system of internal accounting controls sufficient to prevent and detect the improper payments.

During the relevant period, RAPS-China also paid $450,000 to fund "sightseeing and other non-business trips" for design institute employees and for employees of other state-owned entities. Trip destinations included the United States, Germany, and Australia. According to the SEC, some of these

trips did not appear to have any direct business component "other than the development of customer good will." Trips were nevertheless recorded as business expenses in Rockwell's books and records without any indication that they were not directly connected to the company's business.

Rockwell was able to take in $1.7 million of net profit from sales contracts with Chinese state-owned entities that were related to RAPS-China's payments to the Design Institutes and other entities. Rockwell's improper payments to design institutes were discovered in 2006 during a normal financial review as part of the company's global compliance and internal controls program. Rockwell responded to this discovery by hiring counsel to investigate the payments, voluntarily self-reported the payments to the SEC and DOJ, and took several remedial measures (including employee termination and discipline). According to the SEC, the civil fine was not greater than $400,000 due to the extent of Rockwell's cooperation with the Commission's investigation.

13. Tenaris S.A.

On May 17, 2011, the DOJ and SEC announced resolutions of their respective FCPA-related investigations of Tenaris S.A. ("Tenaris"), a Luxembourg-based manufacturer and supplier of steel pipe products and related services to oil and gas companies relating to payments to Uzbekistani officials to obtain confidential information about competitors' bids. Tenaris is subject to the FCPA as an issuer because its American Depositary Receipts ("ADRs") trade on the New York Stock Exchange

In total, Tenaris agreed to pay $8.9 million to resolve the investigations. The SEC entered into its first-ever DPA to resolve its investigation of Tenaris, under which Tenaris agreed to disgorge $4,786,438, pay prejudgment interest of $641,900, and commit to several compliance-related undertakings. The latter included providing the SEC with a written certification of compliance with the DPA between 45 and 60 days before its expiration, to annually review and update, as appropriate, its Code of Conduct, to require all directors, officers, and managers to certify annually their compliance with the Code of Conduct, and to conduct effective training for certain groups of employees. Tenaris was not required to admit or deny the SEC's allegations and did not contest the SEC's statement of facts included in the DPA. Robert Khuzami, Director of the SEC's Division of Enforcement, explained that Tenaris was "an appropriate candidate for the Enforcement Division's first Deferred Prosecution Agreement" following the SEC's January 2010 authorization of its Enforcement Division to enter into DPAs, because of "[t]he company's immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training."

The DOJ entered into an NPA with Tenaris. Tenaris agreed to pay a $3.5 million monetary penalty and admitted to truth and correctness of the statement of facts included in the NPA. The DOJ considered an NPA to be appropriate based on Tenaris's timely, voluntary, and complete disclosure of the conduct, its extensive, thorough, and real-time cooperation with the DOJ and SEC, its voluntary investigation of its business operations throughout the world, specifically including the thorough and effective manner in which the investigation was carried out and information was disclosed to the Department and SEC, and its remedial efforts already undertaken and to be undertaken, including voluntary enhancements to its compliance program and others to which it committed under the NPA.

Tenaris ran its business operations in Uzbekistan through its offices in Azerbaijan and Kazakhstan. Its operations in the Caspian Sea region, including Uzbekistan, amounted to 5% of its global oilfield services sales and only 1% of its total global sales and services from 2003 to 2008. It secured

such business in part by bidding on contracts tendered by state-owned enterprises or government agencies, often with the assistance of third-party agents.

The conduct at issue related to potential Tenaris business with OJSC O'ztashquineftgas ("OAO"), a wholly owned subsidiary of Uzbekneftegaz, the state holding company of Uzbekistan's oil and gas industry. Both Uzbekneftegaz and OAO were wholly owned by the Uzbekistani government during the relevant time periods. In or around December 2006, Tenaris was introduced to a third-party agent (the "OAO Agent") to help Tenaris bid on OAO contracts. The OAO Agent offered Tenaris access to competitors' confidential bidding information obtained from officials in OAO's tender department. These officials would then permit Tenaris to submit a revised bid. Tenaris employees described the OAO Agent's services in e-mails, noting that such a "dirty game" was "very risky" for the complicit OAO employees, "because if people caught while doing this they will go automatically to jail. So as [OAO Agent] said, that's why this dirty service is expensive." With the assistance of OAO Agent, whom Tenaris agreed to pay a 3% commission, Tenaris won four contracts.

After competitors complained that the bidding process on three of these contracts had been corrupted, Tenaris employees authorized payments to the Uzbekistani authority conducting an investigation. According to the NPA, no evidence was uncovered that the payments were actually made, however. Ultimately, OAO cancelled one of the contracts on which payments had not been made and cancelled the outstanding portions of the other three contracts. Before these cancellations, OAO had paid Tenaris approximately more than $8.9 million, of which approximately more than $4.7 million was profit.

14. Tyson Foods

On February 10, 2011, Tyson Foods, Inc. ("Tyson") entered into a DPA with the DOJ and settled with the SEC for FCPA violations in connection with improper payments by Tyson's wholly owned Mexican subsidiary, Tyson de México ("TM"). Tyson is one of the world's largest processors of chicken and other food items. TM comprises approximately 1% of Tyson's total net sales.

According to the DPA's statement of facts, which Tyson stipulated was true and accurate, meat-processing facilities in Mexico must undergo an inspection program administered by the Mexican Department of Agriculture ("SAGARPA") called *Tipo Inspección Federal* ("TIF"), before the facilities may export products. As part of this certification process, on-site government veterinarians supervise the inspection program at the facility and ensure that all products are in conformity with Mexican health and safety laws. As described in the DPA, Mexican law has two categories of government TIF veterinarians: "approved" and "official." Mexican law permits "approved" veterinarians to charge the facility they supervise a fee for their services in addition to their government salary. However, once a veterinarian becomes "official," they receive all of their salary from the Mexican government and are not permitted to receive any payment from the facility.

The DPA indicates that from the time of Tyson's acquisition of TM in 1994 to May 2004, TM made $260,000 in improper payments to two TIF veterinarians, who for a majority of that time period were of "approved" status. These payments took the form of "salaries" to the veterinarians' wives, even though the wives did not perform any service for the company, and, later, took the form of invoices submitted by one of the veterinarians. Between June 2003 and May 2004, the status of two TIF veterinarians was changed from "approved" to "official." Despite the change in status, TM continued to make payments to

the veterinarians totaling at least $90,000 from fiscal year 2004 through 2006 to influence the veterinarians' decision-making in the TIF process.

According to the DOJ, in June 2004, a TM plant manager discovered that the veterinarians' wives were on TM's payroll despite providing no services to the company and alerted a Tyson accountant of the situation. After a series of internal meetings between several Tyson and TM senior management officials in July 2004, it was agreed that the veterinarians' wives would no longer receive payments but several of the officials were tasked with exploring how to shift the payments directly to the veterinarians. On July 29, 2004, a senior executive at Tyson approved a plan to replace the payroll payments made to the veterinarians' wives with invoice payments made directly to the veterinarians. When an auditor at Tyson responsible for TM raised concerns in August 2004 about incomplete payroll accounting records from TM while noting "I am beginning to think they are being intentionally evasive," a Vice President in Tyson's Internal Audit department responded "Let's drop the payroll stuff for now." By the end of August 2004, TM began paying the veterinarians an amount equivalent to the wives' salaries through invoices submitted by one of the veterinarians.

In September 2005, a TM plant manager expressed discomfort with authorizing the invoice payments. In response, the general manager of TM emailed the plant manager that he had talked to a Tyson senior executive and "he agreed that we are OK to continue making these payments against invoices (not through payroll) until we are able to get TIF/SAGARPA to change." These payments were recorded as legitimate expenses in TM's book and records, and were consolidated with Tyson's reported financial results for fiscal years 2004, 2005 and 2006. During those years, Tyson recognized net profits of more than $880,000 from TM.

Tyson discovered these improper payments in November 2006 during an internal investigation and, in 2007, the company voluntarily disclosed the misconduct to the DOJ and the SEC. Pursuant to the DPA, Tyson agreed to self-report to the DOJ periodically, at no less than six-month intervals, regarding its remediation and implementation of compliance activities for the duration of the two-year DPA.

In total, Tyson agreed to pay approximately $5.2 million, of which $4 million was a monetary penalty to the DOJ, which filed a two-count criminal information including one charge for conspiracy to violate the books and records, internal controls and anti-bribery provisions of the FCPA and a second combined charge of violations of the anti-bribery and books and records provisions of the FCPA and aiding and abetting such violations. The monetary penalty was approximately 20% below the minimum amount suggested by the guidelines as described in the DPA. A significant factor behind this lower monetary penalty was that "the organization, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, reported the offense, fully cooperated, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct."

The SEC had charged Tyson with violating the anti-bribery, books and records, and internal controls provisions of the FCPA. Without admitting or denying the SEC's allegations, Tyson consented to the entry of a final judgment ordering disgorgement plus pre-judgment interest of more than $1.2 million and permanently enjoining it from violating the anti-bribery, books and records, and internal controls provisions of the FCPA.

15. Watts Water

On October 13, 2011, the SEC imposed a cease-and-desist order and civil penalties totaling more than $3.8 million against Watts Water Technologies, Inc. ("Watts") and Leesen Chang for violating the books and records and internal controls provisions of the FCPA. The SEC alleged that Watts, a Delaware corporation headquartered in Massachusetts, established a wholly owned Chinese subsidiary, Watts Valve Changsha C., Ltd., ("CWV"), for the purpose of purchasing Changsha Valve Works ("Changsha Valve") in 2005. Prior to purchasing Changsha Valve, Watts was not heavily involved in business with state owned entities.

The SEC charged that employees of CWV made improper payments between 2006 and 2009 to influence state owned design institutes to recommend CWV products to state owned entities and to draft specifications that favored CWV products.

Several compliance failings led to the payments being made. First, the SEC noted that, while Watts introduced an FCPA policy following its acquisition of Changsha Valve in 2006, it failed to conduct adequate FCPA training for its employees until Spring of 2009 and otherwise failed to implement adequate internal controls considering the risks involved in sales to state owned entities. More dramatically, the sales were "facilitated by a sales incentive policy" in place at Changsha Valve that incentivized and directly provided for the improper payments. This policy, which was never translated into English or submitted to Watts' U.S. management following the purchase of Changsha Valve, provided that all travel, meals, entertainment and "consulting fees" would be borne by the sales employees out of their own commissions. Further, the policy specifically provided that sales personnel could utilize commissions to make payments of up to 3% of the total contract amount (nearly half of the regular commissions) to the design institutes. The improper payments were recorded in CWV's books and records as sales commissions.

Chang, the former interim General Manager of CWV and Vice President of Sales for Watts' management subsidiary in China, approved many of the improper payments to the design institutes. Watts' senior management in the United States had no knowledge that these improper payments were being made. Chang knew and relied on their unawareness. In fact, the SEC found that Chang actively resisted efforts to have the Sales Policy translated and submitted to Watts' senior management for approval. Nevertheless, in March 2009, Watts General Counsel learned of an SEC enforcement action against another company, ITT, that involved unlawful payments to employees of Chinese design institutes. Considering the similarities between ITT and Watts' business model in the same region, Watts' senior management implemented anti-corruption and FCPA training for its Chinese subsidiaries. In July 2009, following FCPA training in China and through conversations with CWV sales personnel who participated in the training, Watts' in-house corporate counsel became aware of the potential FCPA violations in China. On July 21, 2009, Watts retained outside counsel to conduct an internal investigation of CWV's sales practices. On August, 6, 2009, Watts self-reported its internal investigation to the SEC.

When the conduct was discovered, Watts took several immediate remedial steps including conducting a worldwide anti-corruption audit that included additional FCPA and anti-corruption training at its Chinese and European locations, a risk assessment and anti-corruption compliance review of their international operations in Europe, China, and any U.S. location with international sales, and conducted anti-corruption testing at seven international Watts sites, including each of the manufacturing and sales locations in China.

G. 2010

1. ABB Ltd., Fernando Basurto & John O'Shea

On September 29, 2010, ABB Ltd. ("ABB") resolved U.S. authorities' investigation into FCPA violations related to the company's activities in Mexico and the United Nations' Oil-for- Food Programme. According to U.S. authorities, ABB and its subsidiaries made at least $2.7 million in improper payments in exchange for business that generated more than $100 million in revenues. ABB is a Swiss engineering company that is an issuer under the FCPA because its American Depositary Receipts are publicly traded on the New York Stock Exchange. Previously, in July 2004, ABB and two subsidiaries had resolved unrelated DOJ and SEC FCPA investigations by paying a $10.5 million criminal penalty, disgorging $5.9 million in ill-gotten gains and prejudgment interest, and engaging an independent consultant to review ABB's internal controls. (Vetco International Ltd. subsequently acquired one of the subsidiaries, and this same subsidiary and three other Vetco International subsidiaries would later plead guilty to additional FCPA violations and pay more than $30 million in combined criminal fines.)

ABB's U.S. subsidiary, ABB Inc.—a domestic concern under the FCPA—pleaded guilty to violating, and conspiring to violate, the FCPA's anti-bribery provisions. ABB Inc. received a criminal fine of $17.1 million. ABB itself entered into a three-year DPA with the DOJ, paid a monetary penalty of $1.9 million, and consented to the filing of a criminal information against its Jordanian subsidiary, ABB Ltd. – Jordan, for conspiring with an unnamed employee and unknown others to violate the FCPA's books and records provision by failing to accurately record kickbacks relating to the Oil-for-Food Programme. In the DPA, ABB also agreed to "enhanced" compliance obligations, including: (i) the use of chief, regional, and country compliance officers; (ii) the retention of legal counsel for compliance; (iii) the ongoing performance of "risk-based, targeted, in-depth anti-bribery audits of business units" according to an agreed-upon work plan; (iv) the use of "full and thorough" pre-acquisition anti-corruption due diligence; (v) changes to its business model to eliminate the use of agents wherever possible; (vi) thorough anti-corruption due diligence of all third-party representatives; (vi) country-specific approval processes for gifts, travel, and entertainment; and (viii) biannual reporting to the DOJ, SEC, and U.S. Probation Office.

Under the DPA, the parties had agreed to steeper fines; however, at sentencing, Judge Lynn Hughes of the United States District Court for the Southern District of Texas, noting that "the guidelines are just guidelines," reduced the culpability score by two points, leading to a reduction in ABB Inc.'s fine from the $28.5 million contemplated in ABB's DPA and ABB Inc.'s plea agreement to $17.1 million. Judge Hughes appeared to take issue with the DOJ's contention that ABB should be punished more harshly as a recidivist because different individuals were involved in the charged misconduct than were involved in the misconduct leading to ABB's 2004 guilty plea. The DOJ's contention that this was irrelevant given that ABB's compliance procedures had failed (or simply did not exist) in both instances fell on deaf ears: "[The DOJ is] arguing that somehow ABB is more culpable and it should be punished more severely because it didn't have procedures," Judge Hughes stated at the hearing. "My point is procedures don't work."

Without admitting or denying the SEC's allegations, ABB agreed to disgorge $22,804,262 in ill-gotten gains and pre-judgment interest to the SEC, pay a $16,510,000 civil penalty, and report periodically to the SEC on the status of its remediation and compliance efforts. The combined monetary penalties against ABB Ltd. and its subsidiaries exceeded $58 million.

As is common in negotiated FCPA dispositions, the parent company—here, ABB—was able to avoid a criminal conviction through the DPA and pleas by its subsidiaries. ABB Inc., although a wholly owned subsidiary of ABB Ltd., was treated as a stand-alone domestic concern under the anti-bribery provisions, and ABB Ltd. – Jordan (through its own subsidiary ABB Near East Trading Ltd.) was guilty of an FCPA books and records conspiracy because its books were rolled into ABB Ltd.'s books at the end of the fiscal year. In support of its agreement to the DPA with ABB, the DOJ stated that it considered, among other things, the fact that ABB Ltd.'s "cooperation during this investigation has been extraordinary," ABB Ltd. "conducted and continues to conduct" an "extensive, global review of its operations and has reported on areas of concern to the Fraud Section [of the DOJ] and the SEC," and "following the discovery of the bribery, ABB Ltd. and ABB Inc. voluntarily and timely disclosed to the Fraud Section and the [SEC] the misconduct."

ABB had announced that it voluntarily disclosed to the DOJ and SEC suspected FCPA violations involving employees of ABB subsidiaries in Asia, South America, and Europe in 2007. In December 2008, ABB announced the accrual of an $850 million total charge for the expected resolutions of a European anti-competition investigation and the DOJ and SEC FCPA investigations.

a. Mexican Bribery Scheme

ABB Network Management ("ABB NM"), a Texas-based business unit of ABB, Inc., allegedly bribed officials of two electric utilities owned by the government of Mexico, Comisión Federal de Electricidad ("CFE") and Luz y Fuerza del Centro ("LyFZ"), between 1997 and 2004. ABB NM, through an agent, Grupo Internacional de Asesores S.A. ("Grupo") and two other Mexican companies serving as intermediaries, allegedly provided checks, wire transfers, cash, and a Mediterranean cruise vacation to officials and their spouses. ABB failed to conduct due diligence on the transactions, which were improperly recorded on ABB's books as commissions and payments for services in Mexico. As part of its guilty plea, ABB, Inc., admitted that ABB NM paid approximately $1.9 million in bribes to CFE officials alone between 1997 and 2004. Such improper payments resulted in contracts from CFE and LyFZ that generated $13 million in profits on $90 million in revenues for ABB.

ABB NM's primary business involved providing electrical products and services to electrical utilities around the world, many of which are described as state-owned. ABB NM worked with Grupo on a commission basis to obtain contracts from Mexican governmental utilities, including CFE. John Joseph O'Shea, the General Manager of ABB NM, and Fernando Maya Basurto, a principal of Grupo, allegedly conspired with a number of individuals and intermediary companies to make illegal payments to various officials at CFE. In return, ABB

NM secured two contracts with CFE that generated revenues of over $80 million. A number of different schemes were used to make and conceal the corrupt payments.

In or around December 1997, ABB NM obtained the SITRACEN Contract from CFE to provide significant improvements to Mexico's electrical network system. The SITRACEN contract generated over $44 million in revenue for ABB NM. During the bidding process, certain CFE officials informed Basurto and O'Shea that in order to receive the contract, they would have to make corrupt payments. O'Shea arranged for these payments to be made in two ways. First, he authorized ABB NM to make payments for the benefit of various CFE officials to an intermediary company that was incorporated in Panama and headquartered in Mexico. Second, O'Shea authorized Basurto and an individual identified as Co-

Conspirator X, who was also a principal of Grupo, to make payments to a particular CFE official by issuing checks to family members of this official.

In or around October 2003, O'Shea and Basurto conspired with Co-Conspirator X and CFE officials to ensure that ABB NM received the Evergreen Contract, an extension of the earlier SITRACEN Contract, and that the contract contained certain terms that were favorable to ABB NM. In return, Basurto and O'Shea agreed that the officials would receive 10% of the revenue generated by the Evergreen Contract. The Evergreen Contract generated over $37 million in revenue for ABB NM.

Over the course of the Evergreen Contract, ABB NM allegedly utilized Basurto and Grupo to funnel approximately $1 million in bribes to various CFE officials. The co-conspirators referred to these payments as "payments to the Good Guys." In order to make these payments, O'Shea caused the wire transfer of funds from ABB NM, often in a series of small transactions, to Basurto and his family members. Basurto then received instructions from a CFE official as to how and where the funds should be transferred. Basurto wired some of the funds to a Merrill Lynch brokerage account, a portion of which the CFE official then transferred to his brother, and a separate portion of which he transferred to the son-in-law of another official. The official also provided instructions to Basurto regarding the funds that were not sent to the Merrill Lynch account; these funds were used, among other things, for a $20,000 cash payment to the official. The charging documents further allege that $29,500 was wired to the U.S. bank account of a military academy to pay for the tuition expenses of the son of a CFE official.

The conspirators attempted to conceal the corrupt nature of the payments by creating false invoices from two companies headquartered in Mexico. It is alleged that O'Shea, fully aware of the false nature and corrupt purposes of these invoices, approved their payment and had funds from ABB NM wire-transferred to accounts in Germany and Mexico and held by intermediary companies in order to make the payments. The conspirators referred to these payments as a "Third World Tax."

Basurto and an unnamed Co-Conspirator X received approximately 9% of the value of the SITRACEN and Evergreen Contracts for all of the services that they performed for ABB NM, both legitimate and illegal in nature. A portion of those commissions was also apparently used to make kickback payments to O'Shea. In order to keep the true nature of the kickback payments hidden, Basurto and Co-Conspirator X made them from a number of different bank accounts and to a number of different payees. These payees included O'Shea himself, his friends and family members, and his American Express credit card bill.

Upon discovering evidence of corrupt payments made by ABB NM, ABB Ltd. conducted an internal investigation and voluntarily disclosed the potential violations to the DOJ, SEC, and Mexican authorities. In August 2004, ABB Ltd. terminated O'Shea's employment.

After O'Shea's termination, Basurto, O'Shea, and other conspirators attempted to conceal their actions and thereby obstruct the DOJ's investigation in a number of ways. Basurto and O'Shea worked with certain CFE Officials to create false, backdated correspondence that was designed to show a legitimate history of business relationships between ABB NM and the two Mexican intermediary companies. This correspondence also purported to justify the false invoices submitted by the Mexican intermediary companies as part of the "Third World Tax" scheme. The indictment cites to an e-mail apparently sent by O'Shea that instructs Basurto to "never deliver or e-mail electronic copies of any of

these documents" for fear that the electronic versions' metadata would have revealed their true date of composition.

Basurto and certain CFE officials also created false work product and documentation relating to the work for which the false invoices purported to claim payment. They plagiarized a study that had been previously commissioned by CFE from legitimate outside consultants and represented the plagiarized study as being authored by one of the Mexican intermediary companies. These CFE officials also created documentation that indicated that the funds that had been transferred to the Merrill Lynch bank account as part of the "Good Guys" scheme were part of a legitimate real estate investment. Finally, O'Shea avoided meeting Basurto in particular locations and avoided using his personal telephone or work e-mail address to communicate with Basurto in an attempt to conceal the alleged conduct.

b. Oil-for-Food Kickbacks

From 2000 to 2004, ABB also participated in the U.N.'s Oil-for-Food Programme for Iraq ("OFFP"). Six ABB subsidiaries participated in the program and allegedly paid more than $300,000 in kickbacks to the Iraqi government in exchange for at least 11 purchase orders from entities connected to the Iraqi Electrical Commission under the OFFP. The kickbacks were allegedly paid through ABB's subsidiary in Jordan, ABB Near East Trading Ltd. ABB improperly recorded the kickbacks, some of which were in cash, on its books as legal payments for after-sales services, consulting, and commissions. According to the SEC, ABB secured Oil-for-Food contracts that generated $3.8 million in profits on $13.5 million in revenues.

c. Prosecutions of Individuals

The DOJ has charged several individuals in connection with the Mexican bribery scheme described above. On November 18, 2009, U.S. authorities arrested O'Shea, charging him with criminal conspiracy, twelve counts of violating the FCPA's anti-bribery provisions, four counts of money laundering, and falsification of records in a federal investigation. The DOJ is also seeking the forfeiture of more than $2.9 million in criminal proceeds from the offenses and any money or property illegally laundered.

On September 30, 2010, Judge Hughes ordered the government to proceed to trial on the FCPA charges alone, after which the court would schedule a trial on the remaining charges if necessary; in so ordering, the court considered the non-FCPA charges to be "derivative" of the "substantive" FCPA counts and expressed concern that a trial on all of the charges might result in the defendant being "pilloried by other stuff that's not part of the substantive counts."

In March 2011, O'Shea filed a motion to dismiss, challenging the DOJ's assertion that CFE employees are "foreign officials" under the FCPA. In opposition, the DOJ argued that O'Shea's challenge was premature at pre-trial because it was premised on a question of fact. The DOJ further argued that its definition of "foreign official" was supported by the plain language and legislative history of the FCPA as well as relevant case law. On January 3, 2012, Judge Hughes denied O'Shea's motion to dismiss in a single sentence, without explanation, as part of a management order addressing several other issues. In the same management order, the Court took judicial notice of three facts relating to the governmental nature of the CFE, including that the CFE holds a monopoly over the public service of electricity, that the President of Mexico appoints the General Director of the CFE, and that the governing board of the CFE

includes Secretaries of the Mexican Ministry of Energy, Mines, and State-Owned Industry. Along with (i) Nguyen & Nexus Technologies, (ii) Haiti Teleco, (iii) Lindsey Manufacturing, and (iv) Carson, the O'Shea case marked the fifth challenge to the definition of "foreign official" under the FCPA. All five challenges have failed.

Although he lost on his motion to dismiss based on the definition of "foreign official," O'Shea soon won his case. After one week of trial in January 2012, the Court granted O'Shea's motion to dismiss the twelve FCPA counts and one conspiracy count against him. Pinpointing the weakness in the government's case, Judge Hughes explained that, "The problem here is that the principal witness against O'Shea is Basurto, Jr., who knows almost nothing . . . His answers were abstract and vague, generally relating gossip. And as I indicated, even hearsay testimony must be something other than a conclusion." On February 9, 2012, the remaining counts against O'Shea for conspiracy, money laundering, and obstruction were dismissed.

Basurto—the star witness who knew "almost nothing"—was O'Shea's and ABB's sales agent in Mexico. A January 2009 criminal complaint alleged that Basurto, a Mexican citizen, illegally structured transactions to avoid triggering financial institutions' reporting requirements. In June 2009, Basurto was indicted for that offense. In November 2009, however, he agreed to cooperate fully with the United States and pleaded guilty to one count of conspiring with O'Shea and others to violate the FCPA's anti-bribery provisions, launder money, and obstruct justice. While he faced up to five years of incarceration, Basurto was released on bail in July 2011 after spending 22 months in prison. In April 2012, after all charges against O'Shea had been dropped, Basurto was sentenced to time served and released. According to the terms of his plea agreement, Basurto will forfeit roughly $2 million in illegal profits.

The directors of Grupo, Enrique and Angela Aguilar, were separately indicted for their role in another alleged FCPA offense involving Grupo on September 15, 2010. Enrique Aguilar was charged with anti-bribery violations, conspiracy to violate the FCPA, money laundering, and conspiracy to commit money laundering. Angela Aguilar was charged only with the money laundering-related offenses. Their cases are discussed separately below in connection with the Lindsey Manufacturing disposition.

2. Alcatel-Lucent

Alcatel-Lucent S.A. is a French telecommunications company that provides products and services to voice, data, and video communication service providers. Alcatel-Lucent, and Alcatel S.A. before the November 30, 2006, merger that created Alcatel-Lucent (collectively, "Alcatel"), registered American Depositary Shares with the SEC that were traded on the New York Stock Exchange as American Depositary Receipts ("ADRs"). Accordingly, Alcatel was an issuer covered by the FCPA. An FCPA investigation into Alcatel S.A.'s merger partner, Lucent Technologies, Inc., was resolved in 2007 and is described later in this Alert.

On December 27, 2010, Alcatel-Lucent formally resolved investigations into FCPA violations in Costa Rica, Honduras, Malaysia, Taiwan, Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda, and Mali. This resolution had been previously disclosed on February 11, 2010, when Alcatel-Lucent stated that in December 2009 it reached agreements in principle with the SEC and DOJ to resolve their ongoing investigations. Alcatel-Lucent entered into a DPA with the DOJ and three Alcatel-Lucent subsidiaries—Alcatel-Lucent France, S.A. (formerly Alcatel CIT, S.A.), Alcatel-Lucent Trade International A.G. (into which Alcatel Standard A.G. was merged in 2007), and Alcatel

Centroamerica S.A. (formerly Alcatel de Costa Rica S.A.)—have pleaded guilty to criminal informations charging them with a conspiracy to violate the FCPA's anti-bribery and accounting provisions. These three subsidiaries were persons other than issuers or domestic concerns who were subject to the FCPA for acts in the United States in furtherance of the FCPA violations.

Pursuant to its DPA, Alcatel-Lucent paid a monetary penalty of $92 million, agreed to retain an independent compliance monitor for three years, and agreed to enhance its compliance program. As is the case with Technip, Alcatel-Lucent's DPA states that the monitor is to be a "French national" and contains language designed to ensure that the monitorship is compliant with French law, including French data protection and labor laws, such as the French Blocking Statute. The DOJ stated that the monetary penalty was higher due to "limited and inadequate cooperation" by Alcatel S.A. "for a substantial period of time" until, after the 2006 merger with Lucent Technologies, Inc., Alcatel-Lucent "substantially improved its cooperation." The DOJ further stated that it gave Alcatel-Lucent credit for, "on its own initiative and at a substantial financial cost, making an unprecedented pledge to stop using third-party sales and marketing agents in conducting its worldwide business."

To resolve the SEC's investigation, Alcatel-Lucent, without admitting or denying the SEC's allegations, consented to an injunction against further FCPA violations, agreed to improve its compliance program, and paid $45,372,000 in disgorgement and prejudgment interest. The SEC alleged that corrupt payments made by Alcatel or its subsidiaries were either undocumented or recorded improperly as consulting fees and that "leaders of several Alcatel subsidiaries and geographical regions, including some who reported directly to Alcatel's executive committee, either knew or were severely reckless in not knowing about the misconduct."

The combined monetary penalty of more than $137 million is one of the largest-ever FCPA settlements. The DOJ also acknowledged the "significant contributions" to its investigation by numerous U.S., Costa Rican, and French authorities.

The following summary of the underlying facts is from Alcatel-Lucent's admissions in its DPA and from public information regarding U.S. or foreign enforcement investigations or actions. Many of the admissions provide concrete examples of facts and circumstances that, at least in the eyes of U.S. authorities, constitute "red flags" that require additional anti-corruption due diligence of potential business partners or establish a sufficient basis for FCPA liability due to an awareness of merely a high probability that payments to third parties will be passed on to foreign officials to assist in obtaining or retaining business.

a. Business Practices and Internal Controls

A significant portion of the facts admitted by Alcatel-Lucent concerned the failure of Alcatel's business practices and internal controls to detect and prevent corruption. The inadequate practices and controls singled out in Alcatel's DPA included:

- Pursuing business through the use of third-party agents and consultants even though this was a business model "shown to be prone to corruption" because such third parties "were repeatedly used as conduits for bribe payments";

- Allowing decentralized initial vetting of third parties by local employees "more interested in obtaining business than ensuring that business was won ethically and legally"; and

- Allowing review of such initial vetting by the CEO at another subsidiary, Alcatel Standard (the "Alcatel Standard Executive"), who "performed no due diligence of substance and remained, at best, deliberately ignorant of the true purpose behind the retention and payment to many of the third-party consultants."

Specifically, the Alcatel Standard Executive's due diligence included "no effort, or virtually no effort, to verify" information gathered under Alcatel's approval procedures, beyond using Dun & Bradstreet reports to confirm the consultant's existence and physical address. Where the Dun & Bradstreet reports showed problems, inconsistencies, or red flags, "typically nothing was done."

Alcatel also admitted that "[o]ften senior executives… knew bribes were being paid, or were aware of the high probability that many of these third-party consultants were paying bribes, to foreign officials to obtain or retain business." As evidence of the executives' knowledge, Alcatel admitted that many consultants' contracts were not executed until after Alcatel had already obtained the customer's business, that consultants' commissions were excessive, that multiple consultant companies owned by the same person were sometimes hired for the purpose of obscuring excessive commission payments, and that lump sum payments that did not correspond to a contract were made to consultants. Alcatel, certain subsidiaries, and certain employees also knew, or purposefully ignored, that internal due diligence forms were not accurate, that many of the invoices submitted by third parties falsely claimed that legitimate work had been completed, and that payments were being passed to foreign officials.

b. Costa Rica

Alcatel-Lucent admitted that corrupt payments to Costa Rican officials earned Alcatel CIT a profit of more than $23.6 million on more than $300 million in contracts.

Christian Sapsizian, a French citizen and Alcatel CIT's Director for Latin America, and Edgar Valverde Acosta, a Costa Rican citizen and president of Alcatel de Costa Rica ("ACR") negotiated consultancy agreements with two third-party consultants on behalf of Alcatel CIT for the purpose of making improper payments to Costa Rican officials to assist in obtaining business in Costa Rica. Alcatel Standard (on behalf of Alcatel CIT) signed at least five consulting contracts with Servicios Notariales, which was headed by Valverde's brother-in-law, a fact Valverde omitted from the company profile he prepared. The contracts contained commissions as high as 9.75%, which was "a much higher commission rate" than Alcatel "normally awarded to a legitimate consultant," in exchange for "vaguely-described marketing and advisory services." Servicios Notariales created 11 false invoices between 2001 and 2003, totaling approximately $14.5 million. The other consultant, Intelmar, received at least four consulting agreements for "vaguely-described advisory services," under which Intelmar submitted inflated invoices for $3 million between 2001 and 2004. These payments were made through a bank in New York.

These payments and other moneys were corruptly given to foreign officials to secure three contracts for Alcatel CIT with Costa Rica's government-owned telecommunications company, the Instituto Costarricense de Electricidad ("ICE"). Sapsizian and Valverde obtained the first two contracts in 2001, together worth approximately $193.5 million, after promising an ICE official between 1.5% and 2.0% of

the value of the second contract. The ICE official assisted with ensuring that the second contract would be based on a technology offered by Alcatel, rather than a technology offered by a competitor that Alcatel did not offer, and later agreed to share part of his payment with a senior Costa Rican official. In 2002, Alcatel secured the third contract, worth approximately $109.5 million, through payments to Costa Rican officials of $7 million passed through Servicios Notariales and $930,000 passed through Intelmar. Sapsizian and Valverde also enriched themselves through kickbacks of $300,000 and $4.7 million, respectively, from the payments made to Servicios Notariales.

Sapsizian, on behalf of Alcatel CIT, also rewarded ICE officials for selecting Alcatel for the third contract with $25,000 in travel, hotel, and other expenses incurred "during a primarily pleasure trip to Paris" in October 2003. Alcatel admitted that these reimbursements were not bona fide promotional expenses under the FCPA.

Alcatel's internal controls failed to detect or prevent these improper payments. The regional president supervising Sapsizian approved the payments to Servicios Notariales, despite telling Sapsizian "on several occasions" that the regional president "knew he was 'risking jail time' as a result of his approval of these payments," which the regional president "understood would, at least in part, ultimately wind up in the hands of public officials." The Alcatel Standard executive, mentioned above, also improved the retention and payment of these consultants "despite… obvious indications" that they were performing "little or no work yet receiving millions of dollars… reflecting a significant percentage of the payments in question." Neither Alcatel nor its subsidiaries "took sufficient steps" to ensure the consultants' compliance with the FCPA or "other relevant anti-corruption laws."

Sapsizian and Valverde were charged with criminal offenses relating to their conduct. On June 7, 2007, Sapsizian pleaded guilty to violating the FCPA's anti-bribery provisions and conspiring to do so. On September 30, 2008, he was sentenced to 30 months in prison, three years of supervised release, and ordered to forfeit $261,500 in criminal proceeds. Valverde was charged as Sapsizian's co-defendant, but remains a fugitive.

French and Costa Rican authorities are also investigating the above conduct. French authorities are investigating Alcatel CIT's use of consultants in Costa Rica. Costa Rican authorities and ICE instituted criminal, civil, and administrative proceedings relating to the improper payments. In January 2010, Alcatel-Lucent France, as the successor to Alcatel CIT, settled for $10 million civil charges brought by the Costa Rican Attorney General for the loss of prestige to the nation of Costa Rica (characterized as "social damage"). Criminal proceedings are ongoing against several Costa Rican individuals. Alcatel continues to face a variety of civil and administrative actions in Costa Rica as well, and in 2008 ICE's board terminated the operations and maintenance portion of the third contract described above.

i. Instituto Costarricense de Electricidad

In May 2011, ICE, became the first party to seek victim status under U.S. law in an FCPA enforcement action. In June 2011, the Southern District of Florida denied ICE's petition, and the Eleventh Circuit denied ICE's subsequent petition for a writ of mandamus requesting that the appellate court direct the district court to grant victim status to ICE.

On May 3, 2011, ICE objected to the DPA and the plea agreements by Alcatel-Lucent's subsidiaries. ICE claimed that it was a victim of Alcatel-Lucent's bribery scheme and that the agreements

violated the victims' rights to which it was entitled by statute, including mandatory restitution. Thus, ICE petitioned the court for "the protection of its rights as a victim of [Alcatel-Lucent] and for appropriate sanctions resulting from the [DOJ's] failure to protect those rights." In addition, ICE objected to the DPA plea agreements on the grounds they failed the satisfy the legal standards required for court approval, including those related to victim restitution under 18 U.S.C. § 3771.

In order to establish its right to restitution as a victim, ICE faced the preliminary hurdle of establishing that is was actually a victim. Prior to ICE's petition, both the SEC and DOJ had rejected ICE's claim that it was a victim. The SEC had denied without explanation ICE's request to create a "Fair Fund" for the benefit of victims. Similarly, the DOJ rejected ICE's claim of victim status apparently, in part, because it considered ICE to be a participant in Alcatel-Lucent's bribery scheme through the ICE employees that accepted bribes. In its memorandum of law in support of its petition and objections, ICE argued that it was a victim because it "suffered massive harm as a result" of Alcatel-Lucent's criminal conduct. Specifically, ICE alleged that it incurred losses due to contractual "obligations [Alcatel-Lucent] never satisfied, services it never rendered, and hardware that was inferior to what was promised or never delivered." Furthermore, ICE challenged the suggestion by DOJ that is was a participant, stating, "[t]he notion that acceptance of bribes by five of ICE's more than 16,500 employees, managers, and directors necessarily renders ICE an active participant in Alcatel's admitted bribery scheme is nonsense."

As a victim, ICE argued, it was entitled to certain statutory rights under the Crime Victims' Rights Act and the Mandatory Victim Restitution Act. The Crime Victims' Rights Act provides certain rights to crime victims, including restitution as provided by law. Further, the Act imposes an obligation on DOJ employees to make their best efforts to notify victims of and accord victims these statutory rights. The Mandatory Victim Restitution Act requires courts to order restitution to victims of Title 18 crimes, including conspiracy.

Specifically regarding the plea agreements, ICE argued in its memorandum that they were flawed, in part, because they failed to account for victim losses or restitution and waived a pre-sentence investigation and report upon which the court could order restitution. More generally, ICE argued that the court should reject the DPA and plea agreements because they "fail[ed] to satisfy the best interests of justice [and] the public" and failed to provide assurances that the punishment was commensurate with the defendants' history and conduct. Thus, ICE concluded it was entitled to restitution under the Mandatory Victim Restitution Act.

In its petition, ICE also noted that the SEC settlement called for the "illegal proceeds obtained from *victims* [to] be distributed to the federal government."

On May 23, 2011, the United States and Alcatel-Lucent filed oppositions to ICE's petition and objections. In response to ICE's request for victim status, both the government and Alcatel-Lucent argued that ICE could not be considered a victim because it was a participant in the underlying conduct, and consequently, it was not entitled to restitution. The government alternatively argued that, regardless of whether ICE was a victim, the government had afforded ICE the rights provided to victims under the Crime Victims' Rights Act. On the same day, the government filed a separate sentencing memorandum in support of the plea agreements and DPA. The government argued that, even if ICE were a victim, the Crime Victims' Rights Act did not "give [ICE] veto power over prosecutorial decisions, strategies, or tactics." The government also questioned in a footnote whether ICE had standing to challenge the DPA.

On May 27, 2011, ICE filed replies. In its reply to the United States, in relevant part, ICE argued that the government's contention that ICE was a co-participant should fail because "(1) as a matter of law, ICE cannot be imputed with the conduct of its few personnel who accepted Defendants' bribes; and (2) ICE did nothing to warrant the label of 'co-participant.'" Furthermore, on May 31, 2011, ICE submitted a sworn statement by Edgar Valverde Acosta, Alcatel's former president in Costa Rica, who was incarcerated for his conviction in the Costa Rican criminal court of corruption allegations related to Alcatel-Lucent's sales to ICE. Acosta stated that "no one at ICE, other than the individuals who were receiving the payments had knowledge of these matters, nor, do I believe, they could have known of these matters. . . ."

At a hearing on June 1, 2011, Judge Marcia G. Cooke found that ICE was not a victim to Alcatel-Lucent's bribery, and thus, was not entitled to restitution. Judge Cooke explained that corruption was rampant at ICE, and the issues regarding whether ICE was a victim or an offender were too intertwined.

On June 15, 2011, the ICE filed a petition for mandamus asking the Eleventh Circuit to effectively overturn Judge Cooke's ruling. ICE argued that the district court's determination that ICE was not a victim was incorrect because the court wrongly found that ICE was a co-conspirator. On June 17, 2011, the U.S. Court of Appeals for the Eleventh Circuit denied ICE's petition for mandamus. The Court of Appeals held that the district court did not clearly err in finding that ICE functioned as a co-conspirator, explaining that the "district court identified the pervasive, constant, and consistent illegal conduct conducted by the 'principals' (*i.e.* members of the Board of Directors and management) of ICE." The court also held that ICE failed to show it was directly and proximately harmed by Alcatel-Lucent's criminal conduct.

c. Honduras

Alcatel CIT, ACR, and Sapsizian also pursued business opportunities in Honduras with the assistance of Alcatel Mexico. Until late 2002, the state-owned telecommunications company Empresa Hondureña de Telecomunicaciones ("Hondutel") was responsible for evaluating and awarding telecommunications contracts on behalf of the Honduran government. The Comisión Nacional de Telecomunicaciones ("Conatel") was the Honduran government agency that oversaw Hondutel's activities and regulated the telecommunications industry in Honduras. From 2002 to 2003, Alcatel was awarded approximately $48 million of Honduran government contracts and was able to retain its business despite "significant performance problems." Alcatel earned profits of approximately $870,000 on these contracts.

To assist with its efforts to obtain or retain business in Honduras, Alcatel hired a local third-party consultant to provide vaguely described services that included "maintaining liaisons with appropriate government officials." Alcatel admitted that Alcatel Standard knowingly failed to conduct appropriate due diligence on the consultant by failing to follow-up on "numerous, obvious red flags," including:

- The consultant had no experience in the telecommunications industry; instead, a company profile of the consultant, which was submitted as part of Alcatel's due diligence process and signed by the consultant and Alcatel's local area president, listed the consultant's main business as the distribution of "fine fragrances and cosmetics in the Honduran market," while the Dun & Bradstreet report on the consultant described him as a door-to-door cosmetics salesman;

- The consultant was selected by the brother of a senior Honduran government official. The official's brother regularly communicated with Alcatel using an e-mail address from a domain name associated with the senior official; and

- The senior official's brother once contacted the local area president in an attempt to collect commissions owed to the consultant, and the senior official personally followed-up on this request.

Alcatel also admitted that Alcatel CIT executives approved unspecified payments to the consultant while knowing that a significant portion of the payments would be passed on to the family of the senior Honduran official, with the high probability that some or all of the payments would be passed on to the senior government official. In addition to these commissions, Alcatel reimbursed numerous "primarily pleasure" trips to Europe for an official who provided Alcatel with confidential information about competitors' bids for Hondutel contracts, a trip to Europe for another official and his spouse, an educational trip for that official's daughter, and a trip to Paris for a Hondutel in-house attorney who worked on one of the contracts awarded to Alcatel.

d. Malaysia

The largest client of Alcatel Network Systems Malaysia Sdn. Bhd. ("Alcatel Malaysia"), a majority-owned Alcatel subsidiary, was Telekom Malaysia Bhd. Telekom Malaysia was the largest telecommunications company in Malaysia and was controlled by the Malaysian government, which held a 43% ownership interest. Celcom was the Telekom Malaysia subsidiary that handled mobile communications services. In connection with an $85 million contract tender, which Alcatel won, and other unspecified business opportunities, Alcatel Malaysia and Alcatel Standard knowingly circumvented Alcatel's internal controls and caused Alcatel's books and records to contain inaccurate and false information.

Efforts to circumvent Alcatel's internal controls took a variety of forms. From 2004 to 2006, Alcatel Malaysia's management approved 17 improper payments to Telekom Malaysia employees for nonpublic information about Celcom public tenders. Eight of the payments related to the public tender of the $85 million contract. Many of these payments were made against false invoices for "document fees," although one invoice was for the "purchase of tender documents." In 2005 and 2006, despite being aware of "significant risk" that two Malaysian consultants were merely conduits for passing improper payments on to Malaysian government officials, Alcatel Standard retained the consultants at $500,000 each to generate reports that were never prepared. One the consultants also worked for Alcatel Malaysia under a series of "gentlemen's agreements" before any formal contract was executed. Finally, Alcatel Malaysia's complete lack of policies and controls concerning gifts, travel, and entertainment for customers allowed Alcatel Malaysia to give unspecific "lavish gifts" to Telekom Malaysia officials.

On February 28, 2013, former Alcatel Malaysia account executive Radziah Ani was convicted under Malaysia's Anti-Corruption Act 1997 of offering bribes to Telekom Malaysia officials to obtain confidential tender information. According to the press release of Malaysia's Anti-Corruption Commission, the court rejected Ani's "claim that she was a victim of circumstances as well as her claim that the corrupt practices were a common practice in the company." Ani was sentenced to a term of two years imprisonment and fined RM125,000 (approximately $40,000).

e. Taiwan

Taiwan's Ministry of Justice investigated an Alcatel-Lucent subsidiary, Alcatel-Lucent Deutschland A.G. (formerly known as Alcatel SEL, A.G.), and an Alcatel-Lucent joint venture (and Siemens A.G. distributor), Taiwan International Standard Electronics, Ltd. ("Taisel"), regarding allegations of bid-rigging and improper payments to officials surrounding the state-owned Taiwan Railway Administration's ("TRA") awarding of an axle-counter supply contract to Taisel in 2003. Following an internal investigation by Alcatel, it terminated Taisel's president and accepted the resignation of an Alcatel-Lucent Deutschland director of international sales. In criminal proceedings from 2005 through 2009, Taiwanese courts acquitted, and subsequently affirmed the acquittal of, criminal charges brought against Taisel relating to the alleged scheme. Taisel's former president and other individuals were, however, convicted for violating the Taiwanese Government Procurement Act.

In resolving the U.S. authorities' investigations, Alcatel admitted that Alcatel Standard retained two consultants on behalf of Alcatel SEL to assist with the axle-counting, that these consultants claimed to have close relationships with Taiwanese legislators who were believed to have influence over the awarding of the axel-counter contract, that Alcatel paid these consultants more than $950,000 even though they had no telecommunications experience and provided no legitimate services, and that Alcatel used the consultants to make indirect, corrupt payments to Taiwanese legislators who could influence the award of the axel-counting contract.

As was the case with the consultants in Costa Rica and Honduras, Alcatel Standard retained these consultants without conducting adequate due diligence. Regarding one consultant, the Dun & Bradstreet report indicated that the contact information provided did not relate to the consultant, and a company profile (that was not signed by the required internal personnel until after-the-fact) indicated that the consultant had no relevant market experience or knowledge. Alcatel SEL wired a purported commission of more than $900,000 to this consultant after Alcatel had won the TRA contract, which the consultant then passed on to two legislators, one of whom had argued to TRA that Alcatel SEL met the technical requirements of the contract. The consultant also promised $180,000 in campaign contributions to one of the legislators and paid for travel and gifts to staff of the other legislator and a government minister, including a $3,000 set of crystal given to the minister's secretary.

A second Taiwanese consultant retained by Alcatel was the brother of a third legislator who had influence over TRA matters. At a meeting between an Alcatel SEL executive, the consultant, and the legislator, the legislator demanded a 2% success fee, paid through his brother, in exchange for the axle-counting contract. Alcatel SEL subsequently made payments to the brother through a bogus consulting contract for $383,895 between Taisel and the consultant, under which the consultant was never expected to provide any legitimate services to Taisel.

Ultimately, Alcatel SEL was awarded a $19.2 million axel-counting contract from TRA, on which Alcatel earned approximately $4.34 million in profits.

f. Kenya

Alcatel's improper payments in Kenya concerned competition for an $87 million frame supply contract to a telecommunications joint venture. The joint venture was between an unnamed French "telecommunications and entertainment company" and a Kenyan company. Although the particular

ownership structure of this joint venture is not disclosed, the joint venture had to have been at least 60%-owned by the Kenyan partner for the joint venture to have won the underlying telecommunications license. The frame supply contract included construction of a switching center, operations and maintenance center, and mobile network base stations. Alcatel CIT bid on the contract and was short-listed to make a final bid against one competitor.

Although bids were to be made formally to the joint venture, personnel from the French telecommunications and entertainment company handled the bidding process itself. The French company informed Alcatel CIT that it would win the bid if an Alcatel entity paid $20 million to an intermediary. Alcatel agreed to this condition.

The improper payment was not made until after Alcatel was formally awarded the contract in February 2000. At the French company's direction, Alcatel hired the intermediary and rolled the intermediary's fees into the contract price. The French company was then able to restructure Alcatel's contract with the joint venture to increase the price to cover the intermediary's fees. The French company explained to Alcatel that the purpose of this arrangement was to pass money directly to its Kenyan joint venture partner. Alcatel Standard approved of this arrangement and was the entity that formally hired the intermediary. Alcatel reflected this arrangement on its books by increasing the price of its contract with the joint venture, which was not an accurate and fair reflection of the transaction. Alcatel also entered into a side agreement that had the effect of entitling it to reimbursement of its payments to the intermediary if Alcatel's contract with the joint venture were canceled.

Alcatel admitted that, because Alcatel Standard knew that it would be difficult to justify a $20 million payment to one consultant, the payment was structured into several smaller transactions through three different banks to two different consulting companies, both of which were affiliated with the intermediary and one of which Alcatel Standard knew to be an offshore holding of the Kenyan joint venture partner. Payment to one of the companies was also made under a separate contract relating to a second telecommunications license. Although the intermediary provided monthly reports and economic intelligence on the telecommunications market in Africa, the intermediary failed to provide any information related to a second license or the Kenyan telecommunications market.

Ultimately, Alcatel admitted that there was "a high probability" that all or part of the payments to the intermediary would be ultimately passed on to Kenyan officials who had played a role in awarding the contract to the unnamed French company because of the following facts known to Alcatel: (i) the payments to the intermediary were "huge"; (ii) the intermediary performed "little legitimate work" in connection with the second license purportedly underlying one of the consulting contracts; and (iii) the intermediary's second company was an offshore holding of the Kenyan joint venture partner.

Alcatel has also disclosed that it understands that French authorities are "conducting an investigation to ascertain whether inappropriate payments were received by foreign public officials" in connection with payments by Alcatel CIT to a consultant "arising out of a supply contract between CIT and a privately-owned company in Kenya," which was the same supply contract that Alcatel had disclosed to the DOJ and SEC. Alcatel is cooperating with the French authorities and has submitted to them the findings of an internal investigation regarding those payments, which Alcatel had also submitted to the DOJ and SEC.

g. Nigeria

Alcatel admitted that its books and records failed to fairly and accurately describe numerous payments by Alcatel subsidiaries to Nigerian officials for several purposes, including to reduce tax or other liabilities, to obtain security services from Nigerian police, to recover a debt legally owed to Alcatel subsidiary ITT Nigeria of $36.5 million, and to benefit a political party official. Alcatel also failed to properly record a payment of $75,000 to a former Nigerian Ambassador to the United Nations to arrange meetings between Alcatel and a high-ranking Nigerian executive branch official.

Alcatel also paid more than €9.9 million to three consultants for the benefit of a senior executive at a private Nigerian telecommunications company. Some of the payments were made through a consultant known to have "significant connections" to a senior Nigerian government official, after which an affiliate of the Nigerian telecommunications company won the bid for a telecommunications license but then lost the license for failure to pay the required fee. The other payments were made through three different banks to consultants owned, at least partially, by a relative of the senior executive. Alcatel admitted that these payments were for the purpose of securing contracts between Alcatel subsidiaries and the private Nigerian telecommunications company and that this purpose was not reflected on Alcatel's books.

Following a voluntary disclosure to French and U.S. authorities, Alcatel disclosed that French authorities have "requested . . . further documents related to payments made by its subsidiaries to certain consultants in Nigeria" and that Alcatel responded to the request as part of its continued cooperation with French and U.S. authorities.

h. Bangladesh

Alcatel admitted to paying a consultant $626,492 in commissions after Bangladesh's state-controlled telecommunications services provider abandoned a prior project being performed by a competitor for a project by Alcatel that was allegedly inferior on a cost/benefit basis. Alcatel paid the same consultant more than $2.5 million from 1997 to 2006 in connection with upgrades to an older telecommunications project. Alcatel admitted, without providing a detailed basis, that Alcatel Standard "was aware of a significant risk" at the time the payments were made, that the consultant "would pass all or part of these payments to foreign officials."

i. Ecuador & Nicaragua

Alcatel paid a consultant, a wealthy local businessman with a "longstanding relationship" with the Alcatel Standard Executive who approved third-party consulting contracts, 10% to 14% commissions for assistance with obtaining or retaining business from three state-owned telecommunications companies in Ecuador. Because 10% to 14% was a "much higher" rate than Alcatel typically paid consultants, the Alcatel Standard Executive structured the commission payments to be paid through several different entities controlled by the consultant, each of which received a commission of between 3% and 5%.

From 1999 to 2004, Alcatel and its subsidiaries executed at least 58 separate consulting agreements with such entities and paid a total of more than $8.8 million in commissions. Although Alcatel's agreements with the consulting entities stated that the payments were for market evaluations, client and competition analysis, and assisting with contract negotiations, Alcatel admitted that "it was

anticipated" that the consultant would pass a portion of the payments on to officials at the state-owned telecommunications companies in order to secure business and improper benefits for Alcatel. Alcatel also paid for trips taken by telecommunications officials that were principally for leisure.

The Ecuadorian consultant also assisted Alcatel CIT, through Alcatel's Costa Rican subsidiary ACR, in obtaining business from the Nicaraguan state-owned telecommunications company Empresa Nicaraguense de Telecomunicaciones S.A. ("Enitel"). Although the Ecuadorian consultant appeared to provide no legitimate work in support of two contracts between Alcatel CIT and Enitel worth nearly $2 million, Alcatel CIT paid the consultant $229,382 while admitting that the consultant "likely used a portion of these payments to bribe certain key Enitel officials" whom the consultant later identified to Sapsizian as his "amigos." Alcatel CIT also paid for two Enitel officials to travel, largely for pleasure, to Madrid and Paris in late 2001.

j. Other Consultancy Agreements Not Subject to Proper Due Diligence

Alcatel further admitted to failing to conduct adequate due diligence on, and to fairly and accurately record in its books, $3.5 million in payments to Angolan consultants, $3 million in payments under 65 contracts to an Ivory Coast consultant, $382,355 in payments to a Ugandan consultant, and less than $50,000 in payments to a Malian consultant. These payments were made, in most instances, despite the fact that Alcatel was aware, should have been aware, or was aware of a significant risk that such consultants would pass on all or part of these payments to foreign officials.

3. BAE Systems

In August 2007, BAE Systems plc ("BAES"), Europe's largest defense contractor by sales and the fifth largest in the United States, confirmed that the DOJ had opened a formal investigation in June 2007 of potential violations of U.S. anti-corruption laws. On March 1, 2010, BAES pleaded guilty in U.S. district court to a criminal conspiracy to make false statements to the U.S. government regarding three subjects: (i) BAES's commitment to create and implement policies and procedures to ensure compliance with provisions of the FCPA and relevant provisions of the OECD Convention; (ii) BAES's failure to inform the U.S. government of material failures to comply with these undertakings; and (iii) BAES's disclosures and statements required by U.S. arms export regulations.

The DOJ did not charge BAES with violating the FCPA or conspiring to do so. But, rather than entering into a DPA with BAES, the DOJ required BAES to plead guilty to a criminal offense. BAES and the DOJ entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which requires the sentencing court to accept the parties' recommended sentence if it accepts the defendant's plea of guilty. On March 2, 2010, a U.S. district court accepted BAES's plea of guilty and, accordingly, sentenced BAES's to the parties' recommended three years of corporate probation and a fine of $400 million. As conditions of corporate probation, BAES is required to engage an independent corporate monitor for three years and to implement and maintain an effective compliance program subject to U.S. approval.

BAES was not charged with bribery or corruption in either the United States or the United Kingdom, a disposition that could have prevented BAES from bidding on U.S. and European defense contracts. The U.S. plea agreement also specifically excluded any activities of BAES's wholly owned U.S. subsidiary, BAE Systems, Inc., which is subject to a Special Security Agreement ("SSA") with the U.

S. government restricting the amount of control BAES is able to exercise over BAE Systems, Inc. On Friday February 5, 2010, the same day it announced its plea agreement with the DOJ, BAES announced that it had reached a settlement with the U.K.'s Serious Fraud Office ("SFO") that would require BAES to pay £30 million in connection with the long-running bribery probe of BAES's worldwide activities, to be split between a criminal fine in the United Kingdom and a charitable donation to benefit the people of Tanzania, whose officials had received payments from BAES. In March 2012, the SFO announced that BAES, the SFO, and Tanzania had reached an agreement that the money would be spent on textbooks, teacher's guides, syllabi, and syllabus guides; the SFO also stated that the procurement process would be monitored to ensure that the funds are "used solely for the benefit of the Tanzanian people." As part of its settlement with BAES, the SFO agreed not to pursue further action against BAES for prior conduct, with a few exceptions. The dropped investigations included the SFO's investigation and prosecution of Count Alfons MenOSDrff-Pouilly from Austria, a BAES agent who had been charged with conspiracy to corrupt in connection with BAES's sales to European countries.

On May 16, 2011, the U.S. State Department entered a civil settlement with BAES for alleged violations of the Arms Export Control and the International Traffic in Arms Regulations, under which BAES would pay a civil penalty of $79 million. The State Department charges related in part to front companies set up in the British Virgin Islands through which BAES funneled corrupt payments.

a. Specific Allegations

The following summary of the specific U.S. allegations against BAES comes from the Statement of Offense included in BAES's plea agreement with the DOJ, unless otherwise noted. BAES stipulated to the truth and correctness of the Statement of Offense as part of its plea agreement and plea of guilty. Information regarding the SFO's settlement is from the SFO's February 5, 2010 press release, unless otherwise noted.

In 2000, BAES expanded its business in the United States through the acquisition of several U.S. defense companies. In response to U.S. national security concerns, BAES's CEO John Weston wrote a letter to the U.S. Secretary of Defense stating that BAES and its non-U.S. affiliates were "committed to conducting business in compliance with the anti-bribery standards in the OECD Anti-Bribery Convention," that BAES's U.S. affiliates would comply with the FCPA, and that BAES's non-U.S. affiliates would adopt compliance programs to ensure OECD compliance. Weston further stated that such compliance programs would include training, procedures, and internal controls "concerning payments to government officials and the use of agents." At the time of this letter, BAES allegedly did not have and was not committed to the practices and standards represented to the Secretary of Defense.

On May 28, 2002, BAES reiterated these commitments in another letter to the U.S. Secretary of Defense. At the time of this letter, however, BAES had not created and was not intending to create sufficient mechanisms to ensure its non-U.S. affiliates were complying with applicable provisions of the FCPA and the OECD Convention. Additionally, BAES's failure to disclose its actual and intended policies and procedure prevented the DOJ and the Department of Defense from investigating BAES's practices and imposing remedial actions.

Despite its commitments to the Secretary of Defense, BAES regularly retained "marketing advisors" to assist in securing sales. BAES attempted to conceal some of these relationships and misrepresented the amount of oversight and scrutiny the company gave to substantial payments under

these agreements. BAES established various offshore shell companies through which it paid these marketing advisors and encouraged some of the advisors to establish their own shell companies to receive the payments in an effort to conceal the relationships. Through one entity in the British Virgin Islands, BAES made payments of over £135 million and $14 million to marketing advisors and agents without subjecting the payments to the level of internal scrutiny and review that BAES represented to the Secretary of Defense it would apply. These shell companies were formed to hide the name of the agent and how much the agent was compensated, to create obstacles for investigative authorities, to circumvent laws of countries that do not allow agents, or to assist the agents in avoiding tax liability. BAES further failed to take adequate steps to ensure that its advisors and agents were compliant with the standards of the FCPA. For example, in many instances BAES had no adequate evidence that its advisors performed legitimate activities, and in others the due diligence material purportedly produced was designed to give the appearance that legitimate services were being provided but the material was not, in fact, useful to BAES.

Finally, beginning in 1993, BAES knowingly and willfully failed to identify commissions paid to third parties for assistance with arms sales, in violation of U.S. arms control regulations. Had these commissions been disclosed, the United States might not have approved the sales of certain defense articles.

BAES gained more than $200 million from these false statements to the U.S. government.

b. Saudi Arabia

Since the mid-1980s, BAES served as the prime contractor for the sale of fighter aircraft to the U.K. government that were then re-sold to Saudi Arabia pursuant to a series of agreements between the two countries. Media reports suggest that these agreements have generated more than £43 billion in revenue for BAES.

At least one of these agreements identified “support services” that BAES was required to provide. BAES considered itself obligated by this provision to provide substantial benefits to one Saudi Arabian public official, who was in a position to exercise significant influence, and it did so through payment mechanisms in U.S. territory and elsewhere. These benefits included travel, security services, real estate, automobiles, and personal items, and one employee submitted to BAES more than $5 million in invoices for such benefits between May 2001 and early 2002. BAES also concealed payments to advisors assisting with the fighter aircraft sales; in one case, BAES agreed to transfer more than £10 million and $9 million to the Swiss bank account of a marketing advisor while knowing there was a high probability that the marketing advisor would transfer a portion of these funds to Saudi officials in order to influence the decision on these contracts. BAES failed to perform adequate due diligence on the payments, in contradiction of BAES’s commitments to the Secretary of Defense.

According to U.K. court documents and media reports, the SFO abruptly halted its investigation of BAES’s Saudi Arabia activities in December 2006 due to national security concerns after Saudi Arabia threatened to withdraw all cooperation on security and intelligence. Following the decision to halt the investigation, two anti-arms trade groups brought suit challenging the decision. In April 2008, Britain’s High Court condemned the decision to drop the investigation, but the Appellate Committee of the House of Lords sided with the U.K. government and ruled that the SFO Director was entitled to drop an investigation if, in his judgment, British lives were at risk.

c. Czech Republic & Hungary

In 1999, both the Czech Republic and Hungary sought bids by major defense contractors for the sale of fighter jets. Ultimately, the two countries separately decided to lease Griphen fighter jets, produced by BAES, from the government of Sweden. BAES made payments of more than £19 million to various entities associated with an individual identified in the Information only as "Person A." These payments were allegedly made even though BAES knew there was a high probability that part of the payments would be used to make improper payments so that the bid processes would favor BAES. Additionally, BAES did not perform proper due diligence with respect to its relationship with entities associated with Person A, contradicting what the company had reported to the U.S. government. Finally, because U.S. defense materials were used in the jets, the government of Sweden was required to apply for and obtain arms export licenses from the U.S. for each contract. BAES's failure to disclose the existence of payments to Person A caused Sweden to provide false information in its application submitted with the U.S. government.

d. Tanzania

The SFO had investigated $12.4 million in payments that BAES made to a purported Tanzanian marketing agent in connection with BAES's sale of a £28 million air traffic control radar system to Tanzania.

According to court documents, a local businessman, Shailesh Vithlani, had been recruited and retained by a Siemens entity (later acquired by BAES) as a marketing advisor to assist in negotiations. Vithlani had entered into a contract with a subsidiary of the Siemens entity, however, shortly before the radar contract was signed, two new adviser agreements with Vithlani were concluded. One agreement was made between Red Diamond Trading Company ("Red Diamond"), a British Virgin Islands entity created by BAES for the purposes of the transaction to ensure confidentiality, and a Vithlani-controlled Panama-incorporated company, Envers Trading Corporation. The fee for Vithlani's services under this contract was to be not more than 30.025% of the radar contract price. The other arrangement was for services direct to BAES by another Vithlani-controlled business, Merlin International, registered in the B.V.I. The fee under this agreement was 1% of the radar contract value. Between January 2000 and December 2005 around $12.4 million was paid to Vithlani's companies by BAES or Red Diamond.

BAES and the SFO entered a settlement agreement, under which BAES admitted to failing to keep accurate accounting records regarding the payments to the Tanzanian marketing agent "sufficient to show and explain the transactions of the company," in violation of Section 221 of the U.K.'s Companies Act of 1985. BAES also admitted that there "was a high probability that part of the $12.4m would be used in the negotiation process to favour BAE," and agreed to make a payment of up to £30 million, less any fines imposed by the court, to the Tanzanian government without admitting any liability to the Tanzanian government. Media reported that, at a December 20, 2010, plea hearing, the SFO also stressed that BAES had "gone to very considerable lengths to ensure that the conduct giving rise to the offence is never again repeated" and had "instituted appropriate standards of compliance."

In exchange, the SFO agreed to a series of express declinations of further actions against BAES that went beyond the conduct BAES had disclosed to the SFO. The SFO agreed to "terminate all its investigations into the BAE Systems Group," that—with the exception of conduct related to the Czech Republic or Hungary—"there shall be no further investigation or prosecutions of any member of the BAE

Systems Group for any conduct preceding 5 February 2010," that there would be no civil proceedings "against any member of the BAE Systems Group" relating to matters the SFO investigated, and that "[n]o member of the BAE Systems Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party."

At the plea hearing, Justice David Michael Bean of the Crown Court at Southwark challenged the propriety of the plea agreement. Justice Bean harshly criticized the plea agreement's failure to include a corruption-related offense, stating, according to media reports, that the "obvious inference" from the accounting plea was that part of the secret payment was, in fact, a bribe to a Tanzanian official to win the contract. "I do not read that the money paid was just payments reflecting the fact Mr. Vithlani was a busy man. I read that part of the 12.4m was used to make corrupt payments. Is that what it means?" inquired Justice Bean. Media reports stated that Mr. Justice Bean further criticized BAES for taking a "hear no evil, speak no evil" posture by arranging the payment so that it would not know how much was paid to foreign officials. Justice Bean continued the hearing over to December 21 because he would not approve the settlement until he knew the intended use of the $12.4 paid to the marketing agent. In subsequent formal remarks, Justice Bean further commented that he was "surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise."

On December 21, 2010 however, Justice Bean approved the settlement despite his misgivings. Although noting that U.K. law did not require him to accept the purported basis of the plea—which included suggestions by the SFO, seriously doubted by Justice Bean, that the payments to the agent were for his lobbying efforts and that "public relations and marketing services" would have been an appropriate description for the payments under Section 221—Justice Bean concluded that he had no power to modify the settlement agreement or sentence BAES for an offense to which it did not admit. Justice Bean also considered the fact that BAES had already paid U.S. authorities $400 million for unrelated conduct and observed that the settlement agreement's offset of any criminal fines against the £30 million payment to Tanzania placed "moral pressure on the Court to keep the fine to a minimum so that the reparation is kept at a maximum." Accordingly, Justice Bean sentenced BAES to a fine of £500,000 and a payment of £225,000 towards the SFO's costs.

4. Daimler

On April 1, 2010, Daimler AG ("Daimler"), a German automotive company and foreign issuer traded on the New York Stock Exchange, paid $185 million dollars to resolve DOJ and SEC FCPA investigations. According to Daimler's 2004 Annual Report, the SEC first notified Daimler of its investigation in August 2004 after a former employee in DaimlerChrysler Corporation's Corporate Audit Department filed a whistleblower complaint with the U.S. Department of Labor and, subsequently, in a U.S. district court. According to court records, the whistleblower alleged that Daimler wrongfully terminated him for questioning Daimler's use of secret bank accounts to make improper payments to foreign officials in violation of the FCPA. Daimler's July 28, 2005 quarterly report disclosed that it was also cooperating with a DOJ investigation into the same conduct.

Ultimately, Daimler and three of its subsidiaries resolved DOJ criminal prosecutions. A U.S. district court accepted pleas of guilty to criminal violations of, and conspiracies to violate, the FCPA's anti-bribery provisions by two Daimler subsidiaries, DaimlerChrysler Automotive Russia SAO ("DCAR," now known as Mercedes-Benz Russia SAO) and Daimler Export and Trade Finance GmbH ("ETF"). The court approved DPAs between the DOJ and Daimler and a Daimler subsidiary, DaimlerChrysler China Ltd.

(“DCCL”) (now known as Daimler North East Asia Ltd.). Prior to the court’s approval of the DPAs, the DOJ had charged DCCL with a criminal violation of, and a conspiracy to violate, the FCPA’s anti-bribery provisions, and the DOJ had charged Daimler with a criminal violation of, and a conspiracy to violate, the FCPA’s books and records provisions.

As part of its DPA, Daimler admitted to making tens of millions of dollars in improper payments to foreign officials in at least 22 countries between 1998 and January 2008 and that the corrupt transactions with a territorial connection to the United States earned Daimler more than $50 million in pre-tax profits.

Collectively, Daimler and its subsidiaries paid a criminal penalty of $93.6 million. The United States asserted that the criminal fine was approximately 20% below the low end of the U.S. Sentencing Guidelines’ recommended fine range, but the nature and extent of Daimler’s cooperation warranted the reduced criminal fine. The DOJ specifically commended Daimler’s extensive internal investigation and its remediation efforts, the latter of which included terminating 45 employees and sanctioning another 60. In addition, the DOJ noted Daimler’s efforts to reform its anti-bribery compliance program before its resolution with the DOJ. Daimler agreed to adopt internal accounting controls, adopt a compliance code with the minimum elements specified in Daimler’s DPA (including direct reporting by one or more senior corporate officials with compliance responsibility to Daimler’s Board of Management and Supervisory Board), and engage former FBI Director Louis J. Freeh as a corporate compliance monitor for a term of three years from the date of DCAR’s and ETF’s guilty pleas.

To resolve the SEC’s investigation, Daimler agreed to disgorge more than $91 million in ill-gotten gains and consented to a final judgment in a civil enforcement action, without admitting or denying the SEC’s allegations that Daimler violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.

a. General Allegations

As part of its DPA with the DOJ, Daimler stipulated to the truth and accuracy of a sixty-five page Statement of Facts that describes “many of the details” of Daimler’s “practice of making improper payments in violation of the anti-bribery and books and records provisions of the FCPA,” although the DOJ only formally charged Daimler with books and records violations. Daimler also expressly admitted responsibility for the acts of its subsidiaries, employees, and agents described in the Statement of Facts. Daimler admitted to the following general allegations about its improper practices.

Daimler paid bribes to foreign officials through the use of corporate ledger accounts known internally as “third-party accounts” or “TPAs,” corporate “cash desks,” offshore bank accounts, deceptive pricing arrangements, and third-party intermediaries. Daimler then recorded the bribes as “commissions,” “special discounts,” or “nützliche Aufwendungen” (“N.A.,” which translates to “useful” or “necessary” payments). Daimler’s FCPA violations resulted from an inadequate compliance structure, the lack of centralized oversight of its operations, a culture that encouraged or tolerated bribery of foreign officials, and the involvement of several key executives in the improper conduct.

In 1999, Germany’s legislation implementing the 1998 amendments to the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions came into force. The same year, at the request of Daimler’s head of internal audit, Daimler’s Board of Management discussed the need for an integrity code that would include anti-bribery provisions. Some participants at

this meeting expressed concern at the impact of such a code on Daimler's business in certain countries. Daimler nonetheless adopted a written integrity code, but in practice the company did not make sufficient efforts to enforce the code, train employees regarding compliance with the FCPA or other applicable anti-bribery statutes, audit the use of TPAs, or otherwise ensure that Daimler was not continuing to make improper payments. Daimler's internal audit department continued to raise concerns about the propriety of the TPAs and the controls relating to TPAs, eventually recommending in 2001 that all TPAs be shut down. However, not until 2005, after the SEC and DOJ investigations had begun, did Daimler eliminate the use of TPAs and adopt the internal accounting controls necessary to prevent, detect, and deter improper payments to foreign officials.

Below are summaries of selected stipulated violations.

b. Russia

Daimler, through DCAR, sold vehicles and spare parts in Russia to various government customers including the Russian Ministry of Internal Affairs, the Russian military, and several city governments. Between 2000 and 2005, Daimler made approximately €65 million in sales to Russian government customers. In connection with these sales, Daimler and DCAR made over €3 million in improper payments to Russian government officials, either directly or indirectly.

Daimler and DCAR allegedly used various methods to make the improper payments to Russian government officials. Sometimes these payments were made by over-invoicing the government customer and paying the excess back to the foreign official, directly or indirectly. Payments were often wired to U.S. or Latvian bank accounts owned by shell companies—including shell companies registered in the United States—to disguise the true beneficiary of the payment. In addition, cash payments were occasionally made directly to government officials or to third parties with the knowledge that the payment would be passed on in whole or in part to government officials.

According to media reports, on November 12, 2010, the Investigative Committee of the Prosecutor General's Office of the Russian Federation announced that it had initiated criminal proceedings against Daimler. Reportedly, the Committee specifically announced, "Due to results of a preliminary audit . . . a criminal case has been initiated . . . into fraud committed through deception and breach of confidence in concluding contracts for the delivery of Mercedes-Benz automobiles to state bodies." Russia's President, Dmitry Medvedev, and Russia's Interior Minister, Rashid Nurgaliev, are reported to have ordered the investigation after Daimler admitted the above conduct to resolve U.S. authorities' investigation.

c. China

Daimler, with the assistance of DCCL, sold vehicles to government customers in China. Daimler's government customers included the Bureau of Geophysical Prospecting, a division of the China National Petroleum Corporation, and Sinopec Corp., a state-owned energy company. Between 2000 and 2005, Daimler made improper payments of over €4 million in the form of commissions, travel, and gifts to Chinese government officials in connection with more than €112 million in sales to government customers. Daimler allegedly inflated the sales price on vehicles sold to Chinese government or government-owned customers and maintained the overpayments in a "special commissions" account, from which improper payments were made. Some payments were made by DCCL's head of sales and

marketing, who had authority to wire funds from another account in Germany to Chinese officials or third parties. Often the payments were made into U.S. bank accounts of third parties—several of which were U.S.-registered corporations—that performed no services for Daimler and on which no due diligence was done. Daimler made these payments with no system in place to check their legitimacy.

d. Vietnam

Daimler sold vehicles in Vietnam through its joint venture with a government entity. Daimler owned 70% of the joint venture, Mercedes Benz Vietnam ("MBV"), through a Singapore subsidiary. Between 2000 and 2005, Daimler employees working for MBV made improper payments to foreign officials to obtain or retain business. The highest levels of MBV management knew of, and openly encouraged, such payments. MBV made, or promised to make, more than $600,000 and €239,000 in improper payments to foreign officials, and incurred $22.3 million in debt investing in a government-owned high tech park that was then transferred to a U.S. company for only $223,000, to obtain business that generated more than €4 million in profits and more than an additional €890,000 in revenue.

Daimler and MBV used sham consulting agreements with third parties, including U.S. companies, to disguise the payments. MBV's CFO questioned the legitimacy of one such consulting agreement with Viet Thong Limited Company, which did not exist until after the date of its consulting agreement with MBV. Other MBV employees provided the CFO with Viet Thong's purported 2004 analysis of Mercedes-Benz vehicle emissions in Vietnam; however, the employees plagiarized this analysis from a public 1998 report of Ford Escort emissions and pasted the Viet Thong letterhead on the plagiarized report.

e. Turkmenistan

In 2000, Daimler gave a high-level Turkmen government official an armored Mercedes-Benz S Class passenger vehicle, worth more than €300,000, as a birthday gift. Daimler employees believed that Daimler would receive large government contracts in exchange for this gift. In 2002, Daimler provided the same official with golden boxes with an inscription of his personal manifesto translated into German, worth approximately $250,000, in exchange for the official's long-term commitment to Turkmenistan's purchase of Daimler vehicles. The golden boxes were recorded on Daimler's books as "expenses to develop Commonwealth of Independent States' successor market —Turkmenistan." From 1999 to 2003, the stipulated payments also include "N.A." payments of $45,000 and more than DM2.5 million in cash, and €195,000 in cash and a vehicle, in connection with contracts valued at more than €3 million and DM21.8 million.

f. Nigeria

Daimler operated in Nigeria through a joint venture with the Nigerian government. Daimler only owned 40% of the joint venture, Anambra Motor Manufacturing Company ("Anammco"), but it controlled the joint venture through its power to appoint the managing director, who had unfettered discretion to run the joint venture's business. Daimler also appointed three of the seven directors on Anammco's board.

The stipulated payments included improper payments to Nigerian officials from TPAs, either in cash or to the officials' Swiss bank accounts. For example, from 1998 to 2000, Daimler made more than DM1.5 million and €1.4 million in improper payments to officials at the Nigerian president's official office and residence in exchange for sales of more than $350,000 and DM15.8 million. Daimler also made

improper payments of more than €550,000 to officials of a sugar company majority-owned by the Nigerian government in exchange for a $4.6 million contract. Other improper payments related to the sale of a heavy vehicle to the Nigerian Police Force, buses to the Nigerian government for a world youth soccer tournament, vehicles for the 8th All-Africa Games in 2003 (including the transfer of an improper payment to a bank account in the United States), and buses to a local Nigerian government.

g. West Africa

Daimler operated in West Africa through a majority-owned subsidiary, Star Auto S.A. ("Star Auto"). Daimler made improper payments to foreign officials in the Ivory Coast and Ghana, including a $170,000 commission to an agent who negotiated a sale to the Army of Ghana, through a TPA. In 1999, Daimler was awarded a contract worth $14.5 million to supply trucks to a logging operation in Liberia. Daimler's local dealer gave a senior Liberian government official an armored Mercedes-Benz passenger car, worth approximately €267,000, in connection with the contract.

h. Latvia

Between 2000 and 2006, EvoBus GmbH ("EvoBus"), a wholly owned Daimler subsidiary, made approximately €1.8 million in "commission payments" to third parties, with the understanding that such payments would be passed on to members of the Riga City Council, to win contracts to supply buses to two public transportation entities valued at approximately €30 million. Two of the third parties were U.S.-based entities that entered into sham consulting contracts with EvoBus.

On June 13, 2013, the Latvian Prosecutor General's Office alleged that Daimler had made as much as €5 million in bribes, including almost €1 million meant for an individual official. In 2013, Latvian authorities charged three government officials in connection with the improper conduct: former mayor of Riga Gundars Bojars, his advisor Armands Zeihmanis, and Riga City Council deputy chairman Leonards Tenis. According to local press reports, three other individuals have been officially charged, including "the director of a company registered in Sweden, Raimonds Krastins, businessman Sergejs Zambers, [and] a certain Agris Korosevskis."

i. Austria and Hungary

In 2005, EvoBus Hungarian Kft. ("EvoBus Hungary") acquired 17 buses from EvoBus Austria GmbH ("EvoBus Austria") and resold them to Volanbusz, a state-owned public transport company in Budapest. EvoBus Austria agreed to pay a "commission" of €333,370 to a U.S. company, USCON Ltd., knowing that all or part of the payment would be passed on to Hungarian government officials. During the SEC and DOJ investigation, the CEO of EvoBus Austria attempted to conceal the true nature of the payments by creating and backdating a phony consulting agreement; however, USCON had been dissolved two years before the commission payment was made.

j. Turkey

In the fall of 2006, during the internal investigation, Daimler's Corporate Audit department discovered a safe in the offices of Daimler's majority-owned distributor in Turkey, MB Turk. The safe contained binders labeled "N.A." that recorded more than €6 million in third-party payments in connection with sales to non-Turkish government customers in North Korea, Latvia, Bulgaria, Romania, Russia, Saudi Arabia, Yemen, and other countries. These sales generated approximately €95 million in revenue.

Of the more than €6 million in third-party payments, at least €3.88 million were improper payments and gifts to non-Turkish foreign officials.

k. Indonesia

Between 1998 and 2006, Daimler's largest government customer in Indonesia was Perum Damri, a state-owned bus company. During this time period, Daimler's local affiliates in Indonesia provided unspecified gifts, travel, and entertainment to foreign officials associated with Perum Damri. Daimler earned approximately $8.36 million in revenue from Perum Damri during this period. Daimler affiliates also made large cash payments (totaling as much as $120,000 in the case of one affiliate) to Indonesian tax officials in order to reduce tax obligations. The affiliates attempted to roll the amounts of the improper payments into their internal record of their tax payments, but the tax payments were paid only by wire and the improper payments were made only in cash.

l. Croatia

ETF provided financing for Daimler exports to countries without a local Daimler Financing Company, such as Croatia. In connection with a public tender for the sale of fire trucks to the government of Croatia, valued at €85 million, the Croatian government required ETF to partner with a former weapons manufacturer that the Croatian government controlled and partially owned. Between 2002 and 2008, ETF made more than €3 million in improper payments to this entity, with the understanding that all or part of these payments would be paid to Croatian officials in connection with the fire truck contract. ETF also made more than €1.6 million in improper payments to shell companies in the United States with the same understanding.

m. Oil-for-Food

In connection with the sale of vehicles and spare parts to the Iraqi government under the United Nations' Oil-for-Food Programme, Daimler inflated the book value of the contracts to hide 10% commissions to the government of Iraq. In total, Daimler paid approximately $5 million in commissions to the Iraqi government.

5. Dimon and Universal

On April 28, 2010, the SEC filed a settled civil enforcement action against four former employees of the tobacco merchant Dimon, Inc. ("Dimon"), now Alliance One International, Inc. ("Alliance One"), for violating the FCPA's anti-bribery provisions and aiding and abetting violations of the internal controls and books and records provisions. From 1996 to 2004, the time of the alleged conduct, Dimon was a U.S. issuer. Alliance One is a U.S. issuer that was formed in May 2005 by the merger of Dimon and Standard Commercial Corporation. The SEC and DOJ enforcement actions stemmed from payments allegedly made to foreign officials at a Kyrgyzstan regulatory entity established to regulate the sale and export of Kyrgyz tobacco, and at the state-owned Thailand Tobacco Monopoly ("TTM").

Without admitting or denying the SEC's allegations, Bobby J. Elkin, Jr. (a former country manager for Kyrgyzstan), Baxter J. Myers (a former regional financial director), Thomas G. Reynolds (a former international controller), and Tommy L. Williams (a former senior vice president for sales) consented to the entry of final judgments permanently enjoining each of them from further such violations. Myers and Reynolds also each agreed to pay a $40,000 civil penalty.

On August 3, 2010, Elkin pleaded guilty to a criminal conspiracy to violate the FCPA and was sentenced on October 21, 2010, to three years' probation and a $5,000 fine. Although the government had requested that Elkin receive 38 months' imprisonment, the sentencing court imposed only probation. The court determined probation was appropriate because Elkin had substantially assisted the U.S. government in its investigation, that Elkin had faced a choice of either making the corrupt payments or losing his job, and it likened Elkin's payments to the CIA's payments to the Afghan government, which the judge noted were not violations of federal law but were relevant to "the morality of the situation."

In August 2010, U.S. authorities also announced the resolution of several related investigations. On August 6, 2010, the DOJ and the SEC settled FCPA complaints against both Alliance One and Universal Corporation, Inc. ("Universal Corporation"), another large tobacco company that issued securities in the United States. Collectively, the monetary penalties imposed on Alliance One and Universal Corporation in these April and August 2010 dispositions exceeded $28.5 million.

As part of the DOJ's NPA with Alliance One, it and two subsidiaries pleaded guilty to criminal conspiracies to violate, and substantive violations of, the FCPA's anti-bribery and accounting provisions. Collectively, the Alliance One subsidiaries paid a criminal fine of $9.45 million and the parent company agreed to cooperate with the DOJ's investigation and retain an independent compliance monitor for a minimum of three years. This independent monitor would oversee Alliance One's implementation of an anti-bribery and anti-corruption compliance program while periodically reporting to the DOJ. To settle the related SEC investigation, Alliance One also agreed to disgorge $10 million in ill-gotten gains.

Universal Corporation, one of Alliance One's competitors, similarly pleaded guilty to conspiring to violate the FCPA and to violating the anti-bribery provisions relating to the corrupt payments to officials at TTM as part of its NPA with the DOJ. Universal Corporation simultaneously settled FCPA anti-bribery, books and records, and internal controls charges with the SEC, which in addition to the improper payments in Thailand, had alleged FCPA violations relating to Universal's conduct in Mozambique and Malawi. (The DOJ's charges were limited to Universal's conduct in Thailand.) Universal Corporation agreed to disgorge more than $4.5 million in ill-gotten gains with the SEC settlement and its Brazilian subsidiary, Universal Leaf Tabacos Ltda. ("Universal Brazil"), agreed to pay a $4.4 million criminal fine in connection with the DOJ NPA. Like Alliance One, Universal Corporation also agreed to cooperate with the DOJ investigation and retain an independent compliance monitor for a minimum of three years.

The following factual summary is based on the stipulations in the criminal investigations resolved in August 2010 against the former Alliance One employees and the corporate defendants, except where otherwise noted.

a. Kyrgyzstan

From 1996 through 2004, Dimon's wholly owned Kyrgyz subsidiary, Dimon International Kyrgyzstan, Inc. ("DIK"), paid over $3 million in bribes to Kyrgyzstan officials, including officials of a Kyrgyz government entity, JSC GAK Kyrgyztamekisi ("Tamekisi"), which regulates the sale and export of Kyrgyz tobacco, and local officials, known as Akims, who controlled various tobacco regions. Tamekisi, which owns and operates all the tobacco fermentation plants in Kyrgyzstan, signed an agreement with Dimon International Inc., a wholly owned subsidiary of DIK, which included a five cent-per-kilogram charge for "financial assistance." Elkin allegedly paid this charge by delivering bags of U.S. currency to a high-ranking Tamekisi official upon request. These cash payments had no legitimate business purpose

and a total of approximately $2.6 million was paid to this Kyrgyz official under the arrangement. Elkin also paid approximately $260,000 in bribes to the Akims for allowing DIK to purchase tobacco from the regions under their control.

Additionally, Kyrgyz tax officials repeatedly conducted extortive tax audits of DIK but, according to U.S. authorities, the extortive nature of these audits did not excuse the resulting corrupt payments. On one occasion, according to the SEC's complaints, the tax officials determined that DIK failed to submit two reports, imposed a fine of approximately $171,741, and threatened to satisfy the fine through the seizure of DIK's local bank accounts and inventory if DIK did not make a cash payment to tax authorities. In total, DIK made payments of approximately $82,850 to the Kyrgyz tax authorities from 1996 through 2004.

Elkin made the payments to Kyrgyz officials through a bank account, held in his name, known as the "Special Account." Dimon's regional finance director was not only aware of the Special Account, but also of authorized transfers to the Special Account from Dimon subsidiaries. The regional finance director had traveled to Kyrgyzstan to discuss the records associated with the Special Account and was aware of the transaction activity in the Special Account. The SEC further alleged that Dimon's international controller was aware of the Special Account, knew that the Special Account was used to make cash payments, revised the manner in which payments from the Special Account were recorded, and received but failed to act upon a 2002 internal audit report that concluded that DIK management was challenged by a "cash environment," that DIK had potential internal accounting control issues relating to cash, and that corruption in Kyrgyzstan exposed Dimon to financial risk.

b. Thailand

From 2000 to 2003, Dimon colluded with Standard Commercial and another competitor to pay bribes of more than $1.2 million to government officials of TTM while realizing approximately $7 million in profits. The bribes were part of the parties' contracts with TTM that included "special expenses" or "special commissions" calculated on a per-kilogram basis. As part of this scheme, Dimon paid nearly $700,000 in bribes to TTM officials and secured more than $9.85 million in contracts from TTM. In addition to the payments, Dimon arranged for trips by the TTM officials to Brazil on the pretext of looking at tobacco blends and samples, which included unrelated activities such as piranha fishing, trekking in the Amazon jungle, and trips to Argentina, Milan, and Rome. The kickbacks were paid through Dimon's local agent and recorded as sale commissions to the agent. The payments were authorized by Dimon personnel, including a senior vice president of sales who allegedly knew that the payments were going to TTM officials. This Dimon senior vice president instructed one such payment to be transmitted as eight smaller payments to several different bank accounts over several days and in an email discussion with an unidentified employee about the "special commission," he stated "[i]t would be better if I did not have to answer too many questions" in the United States. According to the SEC's complaint, after the senior vice president stopped authorizing the payments in 2004 (because the TTM officials' demands had grown too large), TTM stopped purchasing tobacco from Dimon.

Similar to Dimon, Universal Corporation made "special expenses" payments on a per kilogram basis to the TTM from 2000 to 2003. In this time period, its Brazilian subsidiary, Universal Brazil, paid $697,800 in "special expenses." In return, Universal Brazil realized net profits of approximately $2.3 million from its sales to TTM. The bribes took the form of direct payments by Universal Brazil employees to bank accounts in Hong Kong provided by the local agent. Universal also partially paid for of a

"purported inspection" trip to Malawi in 2000 by TTM officials, including a portion of the airfare, more than $3,000 in "pocket money" to certain officials, and more than $135,000 in "special expenses" to a TTM agent. In addition to the kickbacks, the SEC complaint also alleges that Universal Brazil colluded with two unidentified competitors to apportion tobacco sales to TTM and coordinate sales prices. In the DOJ Plea Agreement, it was noted that Universal Corporation maintained insufficient oversight or review over its subsidiaries' financial records, including that Universal Corporation never audited their records from 2000 to 2004.

c. Malawi and Mozambique

According to the SEC complaint, between October 2002 and November 2003, a Universal subsidiary, Universal Leaf Africa (Pty) Ltd. ("Universal Leaf Africa"), made payments totaling $850,000 to two high-ranking Malawian officials and a Malawian political opposition leader. The SEC alleged that such payments were routed through Universal's Belgian subsidiary, and were improperly recorded as service fees, commissions, expenses related to local law purchasing requirements, and donations to the government. According to the SEC, Universal had no effective internal controls in place to ensure that these payments were proper.

Regarding Mozambique, the SEC alleged that between 2004 and 2007 Universal Leaf Africa made payments of more than $165,000 through Universal subsidiaries in Belgium and Africa to five Mozambican officials and their family members. These Mozambique payments were alleged to have been made at the direction, or with the authorization, of the Universal Leaf Africa's regional director. The bribes took the form of cash payments, debt forgiveness, and gifts, including supplies for a bathroom renovation and personal travel on a company jet. These bribes were meant to assist Universal Corporation secure a land concession that gave its subsidiary the exclusive right to purchase tobacco from regional growers, avoid export taxes, and procure beneficial legislation.

The SEC alleged that Universal failed to have and maintain adequate internal controls to ensure that such payments were not made in order to obtain or retain business. Specifically, that Universal did not require supporting documentation for the payments, which were improperly recorded as, among other things, commissions, consulting fees, and travel advances.

6. General Electric

On July 27, 2010, General Electric Company ("GE"), agreed to settle FCPA books and records and internal controls charges with the SEC for its involvement in a $3.6 million kickback scheme as part of the now infamous Iraqi Oil-for-Food Programme. GE agreed to pay $23.4 million in fines, disgorgement, and interest to settle the charges against it as well as two wholly owned subsidiaries for which GE had assumed liability through acquisition—Ionics, Inc. and Amersham plc ("Amersham"). In addition, GE, Ionics, Inc. (now GE Ionics, Inc.) and Amersham (now GE Healthcare Ltd.) consented to the entry of a court order enjoining them from future violations of the FCPA books and records and internal control provisions.

The allegations in the SEC's complaint involve separate schemes by two subsidiaries of GE (Marquette-Hellige and OEC-Medical Systems (Europa) AG ("OEC Medical")) and two subsidiaries of companies that would later be acquired by GE (Ionics, Inc. and Amersham).

According to the complaint, Marquette-Hellige and OEC-Medical made approximately $2.04 million in kickbacks through a third-party agent to the Iraqi government under the Oil-for-Food Programme. Marquette-Hellige allegedly agreed to pay illegal in-kind kickbacks valued at approximately $1.45 million in the form of computer equipment, medical supplies, and services on three contracts that generated profits of approximately $8.8 million. OEC-Medical, using the same agent, made similar in-kind kickback payments worth approximately $870,000 to secure a bid on a contract that generated a profit of $2.1 million. Similar to other OFFP schemes, OEC-Medical and the third-party agent created fictitious services in the contract in order to justify increased commissions for the agent to conceal the illegal payment from U.N. inspectors.

Separately, Norway-based company Nycomed Imaging AS, a subsidiary of Amersham, made approximately $750,000 in improper payments between 2000 and 2002 on nine contracts that earned the company approximately $5 million in profits. The contracts were negotiated by a Jordanian agent and authorized directly by Nycomed's salesman in Cyprus, who increased the agent's commission to 27.5% to cover the kickbacks. When a U.N. official inquired about the basis of the 27.5% commission, a Nycomed manager sent a letter to the U.N. falsely describing work the agent had performed to justify the commission.

In addition, Italian company Ionics Italba, a subsidiary of Ionics, Inc., earned $2.3 million in profits through illegal kickbacks of nearly $800,000 on five separate contracts to sell water treatment equipment to the Iraqi Oil Ministry. Side letters documenting the kickbacks for four of the contracts were concealed from U.N. inspectors.

GE acquired Amersham in 2004 and Ionics, Inc. in 2005 and assumed liability for the conduct of each entity and its subsidiaries. According to a statement from Cheryl Scarboro, Chief of the SEC's FCPA Enforcement Unit, "GE failed to maintain adequate internal controls to detect and prevent these illicit payments by its two subsidiaries (Marquette-Hellige and OEC Medical) to win Oil-for-Food contracts, and it failed to properly record the true nature of the payments in its accounting records. Furthermore, corporate acquisitions do not provide GE immunity from FCPA enforcement of the other two subsidiaries involved."

7. James H. Giffen and Mercator

On August 6, 2010, The Mercator Corporation ("Mercator"), a merchant bank with offices in New York, pleaded guilty in federal court to one count of making an unlawful payment to a senior government official of the Republic of Kazakhstan in violation of the FCPA. Mercator was sentenced to a $32,000 fine and a $400 assessment and agreed to withdraw and relinquish any and all right, title, or interest in a series of Swiss bank accounts, including $84 million frozen by the Swiss government and subject to a civil forfeiture action.

More than seven years earlier, Mercator's CEO and principal shareholder, now 69-year-old James H. Giffen, had been indicted on 62 counts linked to activities in Kazakhstan. The indictment charged Giffen with a criminal conspiracy to violate the FCPA's anti-bribery provisions and to commit mail and wire fraud, violations of the FCPA's anti-bribery provisions, mail and wire fraud, money laundering, conspiracy to commit money laundering, and filing false personal income tax returns. In announcing the April 2003 indictment, the DOJ alleged that Giffen had made "more than $78 million in unlawful payments to two senior officials of the Republic of Kazakhstan in connection with six separate oil transactions, in

which the American oil companies Mobil Oil, Amoco, Texaco and Phillips Petroleum acquired valuable oil and gas rights in Kazakhstan."

However, by 2010, those multiple serious charges had been reduced to one relatively minor charge, willful failure to supply information regarding foreign bank accounts in violation of 26 U.S.C. § 7203, to which Giffen pled guilty in a Manhattan federal district court. Specifically, Giffen admitted that he had failed to disclose his control of an $84 million Swiss bank account on his March 1997 income tax return.

For his guilty plea on the one remaining charge, Giffen still faced a statutory maximum imprisonment of up to a $25,000 fine, up to one year in federal prison, or both. However, on November 2010, the sentencing judge essentially repudiated the government's charges by sentencing Giffen—who had been released on a personal recognizance bond after his 2003 arrest—to "time served" and to pay a total lump-sum assessment of only $25. How a high-profile bribery indictment involving tens of millions of dollars ended with a fine less than most parking tickets is a story with as many twists as the spy novels to which it has been compared.

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 of Kazakhstan, and he and Mercator provided Kazakh officials with advice on strategic planning, investment priorities, and attracting foreign investment to the Kazakh government. Between 1995 and 2000, Mercator was awarded $69 million in success fees for helping to broker large oil and gas deals between U.S. oil companies and the Kazakh government.

The DOJ alleged that, between 1995 and 2000, Giffen caused at least four U.S. oil companies—Mobil Oil, Texaco, Amoco, and Phillips Petroleum—to make payments totaling approximately $70 million into escrow accounts in connection with some of Kazakhstan's most lucrative oil and gas projects, in particular the Tengiz field, one of the world's largest oil fields, and the Karachaganak field, one of the world's largest gas condensate fields. 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 Kazak 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.

According to the criminal information filed and to which Mercator pleaded guilty in 2010, Giffen used parts of the $67 million in success fees and the $70 million diverted to the Swiss bank to make unlawful payments to three senior, unnamed Kazakh government officials (KO-1, KO-2, and KO-3). The funds were also used to purchase luxury goods—notably two snowmobiles—for KO-1, KO-2, and KO-3. In 2004, prosecutors identified one of the recipients of Giffen's bribes as Kazakh President Nursultan Nazarbayev, the oligarchic ruler of that country since its independence in 1991.

Few predicted that Giffen would emerge from this case after seven years with a guilty plea merely to a relatively paltry tax-related misdemeanor, a charge that has been described as "a face-saver for the government." But Giffen's defense strategy was both bold and novel: Giffen sought discovery in support

of a possible public authority defense, claiming that the U.S. government had effectively authorized his conduct through its secret intelligence agencies.

The discovery requests, sustained over government objection, triggered the Classified Information Procedures Act ("CIPA") procedures that govern the handling of classified information in federal trials. As a result, there followed a complicated series 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. As the Second Circuit recognized, "regulating Giffen's access to classified information has presented the district court with a significant challenge."

During Giffen's November 19, 2010 sentencing, media reports indicate that U.S. District Judge William Pauley took the dramatic and unusual step of praising Giffen from the bench for approximately 20 minutes, describing Giffen as a patriot and voluntary instrument of U.S. foreign policy during and after the Cold War. The judge admonished the government for prosecuting a case for seven years that, the judge said, should never have been brought, and he commended "the prosecutors for having the courage to take another look at this case." The judge further reportedly noted that since his initial arrest, Giffen's fortune had shrunk, not only from the $10 million bail he had posted until prosecutors dropped the serious charges in 2010, but also from enormous legal bills that forced him to cut staff from his company, Mercator, even while the Government of Kazakhstan continued to consult with him. Expressing deep sympathy with Giffen's long and expensive legal battle at the twilight of his career, the judge asked rhetorically, "In the end, at the age of 69, how does Mr. Giffen reclaim his good name and reputation?" The judge then reportedly stated, "This court begins that process by acknowledging his service."

According to the judge, with access "to the highest levels of the Soviet Union," Giffen acted as "a conduit for secret communications to the Soviet Union and its leadership during the Cold War" and, later, as a "trusted adviser to Kazakhstan's president," all while advancing American "strategic interests." The judge continued, "These [Kazakh] relationships, built up over a lifetime, were lost the day of his arrest." In these and other comments, the Judge showed that he had been thoroughly persuaded by Giffen's defense and by the many still-classified U.S. diplomatic and intelligence documents reviewed by the Judge alone, although the Judge did not divulge any specifics learned from those documents.

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

Giffen's $84 million Swiss bank account had also been the focus of a 2007 civil forfeiture action brought in U.S. District Court of Manhattan. The account was in the name of Condor Capital Management, a corporation controlled by Giffen and incorporated in the British Virgin Islands. The $84 million was allegedly related to unlawful payments to senior Kazakh officials involved in oil and gas transactions arranged by Mercator Corporation in Kazakhstan. However, the forfeiture action failed because a special 2007 agreement among the governments of the United States, Switzerland, and Kazakhstan specifically designated the funds to be used by a Kazakh NGO benefiting underprivileged Kazakh children.

8. Innospec

On March 18, 2010, Innospec, Inc. and its U.K. subsidiary, Innospec Limited, (together "Innospec") settled criminal and civil charges with the DOJ, the SEC, OFAC, and the U.K. Serious Fraud Office ("SFO") regarding activities in Iraq, Indonesia, and Cuba. Most of the charges relate to Innospec's sale of tetra ethyl lead ("TEL"), a lead-based gasoline additive that had seen its market decline as leaded gasoline fell into global disuse.

The SEC, DOJ, and SFO also brought civil and criminal cases against various individuals involved in the conduct. In the United States, Naaman pleaded guilty in U.S. District Court to conspiring to violate the books and records provision of the FCPA in connection with securing OFFP contracts and to conspiring to violate and violating the anti-bribery provisions with respect to other payments to Iraqi officials. In March 2012, Naaman was sentenced to thirty months in prison and fined $250,000. The SEC also settled enforcement actions against Naaman, Turner, and Jennings. In August 2010, Turner agreed to disgorge $40,000 but avoided paying additional fines and penalties as a reward for his extensive cooperation with the SEC. After his extradition to the United States, Naaman also cooperated in the SEC's investigation. In his August 2010 SEC settlement, Naaman agreed to disgorge $810,076, an additional $67,030 in prejudgment interest, and to pay a civil penalty of $438,038, although the SEC agreed that Naaman's financial penalty (but not the disgorgement or interest) would be deemed satisfied by a criminal order requiring him to pay a criminal fine that is at least equal to the civil penalty amount. In January 2011, Jennings agreed to disgorge $116,092 plus prejudgment interest of $12,945, and to pay a civil penalty of $100,000.

In the United Kingdom, the SFO pressed corruption-related charges against (1) former Business Director David Turner; (2) former CFO and CEO Paul W. Jennings; (3) another former CEO, Dennis Kerrison; and (4) former Regional Sales Director Miltiades Papachristos. Turner and Jennings pleaded guilty. On August 4, 2014, Jennings was sentenced to two years in prison, and Turner was given a sixteen-month suspended sentence and was required to perform 300 hours of community service.

Messrs. Papachristos and Kerrison pleaded not guilty. On June 18, 2014, following an investigation conducted by the SFO, a Crown Court found both men guilty of conspiracy and bribery. Kerrison was sentenced to four years in prison (later reduced to three), while Papachristos was sentenced to eighteen months. On September 19, 2014, a U.K. appellate court upheld the convictions of Kerrison and Papachristos, stressing their participation in "prolonged, cynical and serious corruption of public officials in a foreign country" through which "bribes were used to persuade public authorities artificially to extend the life of a product that was being phased out elsewhere in the world because of its adverse impact."

9. Charles Paul Edward Jumet & John W. Warwick

Charles Paul Edward Jumet and John W. Warwick pleaded guilty on November 13, 2009, and February 10, 2010, respectively, to conspiring to violate the FCPA by bribing Panamanian officials to obtain contracts with Panama's National Maritime Ports Authority ("APN"). Jumet also pleaded guilty to making a false statement to federal agents about the purpose of an $18,000 payment to a Panamanian official, which Jumet had claimed was a campaign contribution.

On April 19, 2010, the U.S. District Court for the Eastern District of Virginia sentenced Jumet to (i) more than seven years' imprisonment, consisting of five years for the FCPA conspiracy and 27 months for making the false statement to federal agents, to be served consecutively, (ii) three years' supervised release, and (iii) a $15,000 fine. The DOJ's press release heralded Jumet's 87-month sentence as "the longest prison term imposed against an individual for violating the FCPA." On June 25, 2010, the court sentenced Warwick to 37 months' imprisonment and two years' supervised release. Warwick also agreed in his February 10, 2010 plea agreement to forfeit $331,000, representing the proceeds of the bribery conspiracy.

In late 1996, Warwick and Jumet created two companies under the laws of Panama: the Ports Engineering Consultants Corporation ("PECC") and Overman de Panama, a subsidiary of the Virginia-based engineering firm Overman Associates. Warwick and Jumet served as the President and Vice President, respectively, of PECC and both Overman entities.

With the assistance of APN's Administrator and Deputy Administrator, Warwick and Jumet submitted a proposal to privatize APN's engineering department. The submission proposed that Overman de Panama would provide APN's engineering services through PECC, and in January 1997, the APN Administrator awarded PECC a no-bid provisional contract to collect certain tariffs, maintain lighthouses and buoys, and provide other engineering services. By the end of 1997, APN had awarded PECC separate twenty-year concessions to (i) collect lighthouse and buoy tariffs and (ii) service lighthouses and buoys along waterways outside of the Panama Canal. According to the DOJ's press release, PECC received approximately $18 million in revenue from these contracts between 1997 and 2000.

Warwick and Jumet used several means to make corrupt payments to Panamanian officials in exchange for these no-bid contracts. Warwick and Jumet allowed two shell corporations to hold ownership interests in PECC, which then made "dividend" payments to its shareholders. The first entity, a British Virgin Islands entity called Warmspell Holding Corporation ("Warmspell"), owned 30% of PECC and Warmspell's corporate officers were the relatives of the APN Deputy Administrator (who later became the APN Administrator). A second entity, Soderville Corporation ("Soderville"), established in Panama and also owning 30% of PECC, was owned directly by the APN Administrator.

Jumet and Warwick admitted that Warmspell and Soderville were created for the purpose of "conceal[ing] the receipt of corrupt payments by Panamanian government officials." In December 1997, PECC issued "dividend" payments of $81,000 each to Warmspell and Soderville. Warwick and Jumet also provided a third government official, described in the DOJ's charging documents as a "very high-ranking executive official of the Republic of Panama," with an $18,000 dividend issued to the unspecified "bearer" of the dividend check. This same high-ranking official also indirectly received portions of payments of unspecified amounts made to someone called "El Portador."

Although court documents do not specify the names of the above officials, Panamanian newspapers and the former Comptroller General of Panama have identified the three individuals as former APN Administrator Hugo Torrijos, former APN Deputy Administrator Ruben Reyna, and former President of Panama Ernesto Pérez Balladares, who held office from 1994 to 1999.

In 1999, Panama's Comptroller General began investigating possible impropriety surrounding APN and PECC, and as a result, the Panamanian government made few payments to PECC from 1999

until 2003. In discussing his investigation with the media, the Comptroller General pointed to the $18,000 check deposited by former President Balladares. At the time, both Balladares and Jumet asserted that the check was intended for Balladares' reelection campaign, and Jumet later repeated this assertion to U.S. federal agents in January 2005. Due to a Panamanian court ruling that granted Balladares immunity, the Comptroller's investigation ceased and government payments to PECC resumed.

Following Jumet's and Warwick's U.S. settlements, Panamanian interest in the scandal had revived. As of January 2010, Panama's Tribunal de Cuentas, which has jurisdiction over the misuse of public funds, has reopened the case and is investigating twenty-one individuals, including APN Administrator Torrijos and APN Deputy Administrator Reyna. Further information has not been available.

Due to his immunity, President Balladares is not a subject of the investigation. But Balladares was placed under house arrest on January 15, 2010, pending the outcome of an investigation of corruption and money laundering allegations unrelated to the PECC affair. In March 2010, the house arrest was lifted, but Balladares was required to report to the Special Prosecutor for Organized Crime twice each month.

10. Lindsey Manufacturing, Enrique & Angela Aguilar

On May 21, 2011, Lindsey Manufacturing Company ("Lindsey Manufacturing"), Dr. Keith E. Lindsey (President and majority owner, Lindsey Manufacturing), and Steve K. Lee (Vice President, Lindsey Manufacturing) (collectively, "Lindsey Defendants") were convicted by a federal jury on one count each of conspiracy to violate the FCPA and five substantive counts of violating the FCPA in connection with bribes paid to officials of the Mexican state-owned electric utility company, Comisión Federal de Electricidad ("CFE"). The jury conviction of Lindsey Manufacturing was the first ever conviction of a company by jury trial under the FCPA. However, on December 1, 2011, following a post-conviction motion from the Lindsey Defendants, U.S. District Judge Howard Matz vacated the convictions of the Lindsey Defendants and dismissed the case with prejudice, citing pervasive government misconduct in the investigation and prosecution of the case. While he did not make a finding of actual innocence, Judge Matz found that the conduct of the government, taken as a whole, was egregious and that dismissal could serve as a deterrent for similar behavior on the part of the government.

Judge Matz focused in particular on his findings that the government allowed a key FBI agent to provide material false testimony to the grand jury, included material falsehoods in affidavits in support of search warrants, improperly reviewed potentially privileged information between a defendant in her lawyer, improperly withheld documents from the defense, and engaged in questionable behavior in examining witnesses and providing closing arguments. Although the DOJ initially appealed Judge Matz's dismissal of its case, on May 25, 2012, the DOJ voluntarily dismissed its appeal and thereby officially dropped its prosecution of the Lindsey Defendants.

Despite the ultimate failure of the prosecution, a review of the substantive allegations underlying the charges against the Lindsey Defendants is a valuable exercise, particularly considering the relative rarity of FCPA cases proceeding to jury trial.

On October 21, 2010, a federal grand in Los Angeles returned a superseding indictment against the Lindsey Defendants as well as Enrique Faustino Aguilar Noriega and his wife, Angela Maria Gomez Aguilar, both directors of Grupo Internacional de Asesores S.A. ("Grupo"). Grupo is a Panamanian

company serving as a commercial agent for transactions with CFE, a government owned Mexican electrical utility. The indictment alleged that the Aguilars laundered money from Lindsey Manufacturing, a privately held company that manufactures emergency restoration systems and other equipment supporting the electrical utility industry, to pay bribes to the head of CFE.

The FCPA conspiracy for which the Lindsey Defendants had been convicted began in or around February 2002 and continued until March 2009. Beginning in 2002, Lindsey Manufacturing hired Grupo as its sales representative in Mexico. Mr. and Mrs. Aguilar, as directors of Grupo, were to assist the company in obtaining business from CFE and served as the intermediaries for payments between Lindsey Manufacturing and CFE. The indictment alleged that Grupo was hired because of Mr. Aguilar's close personal relationship with certain government officials, in particular the Sub-Director of Operations and Director of Operations, and others, at CFE during the period in question.

The government had alleged that Lindsey Manufacturing agreed to pay Grupo a 30% commission on all contracts obtained from CFE, a significantly higher rate than the company had paid to its previous representatives. The government had also alleged that for each CFE contract Lindsey Manufacturing won, Lindsey Manufacturing then inflated its invoices to CFE by thirty percent so that CFE bore the full cost of the "commissions" paid to the Aguilars, which the government contended the co-conspirators knew would be passed on, in whole or in part, as bribes to CFE officials. As a result, CFE ultimately would pay the costs of the bribes paid to its own officials. Further, to hide the unusually large percentage of the Grupo's commission, the government alleged that the Aguilars created false invoices to Lindsey Manufacturing purporting to show that only 15% of the contract price as paid to Grupo as a true commission on the CFE contracts and the other 15% was paid to Grupo for additional services, which the government contended were fictitious. Specifically, the government identified 29 separate wire transfers from Lindsey to Grupo that included more than $5.9 million in allegedly improper payments for CFE officials.

The government further alleged several improper payments beyond these wire transfers. In July 2006, Mr. Aguilar began using funds from Grupo's Houston brokerage account to pay the monthly American Express credit card bill of a CFE executive, Nestor Moreno. When instructing the Houston brokerage firm to make these regular payments, Mr. Aguilar justified the payments from Grupo's accounts by falsely explaining that the head of CFE was the brother-in-law of Grupo's owner.

In August 2006, Mr. Aguilar purchased an 82-foot, $1.8 million yacht, *Dream Seeker*, which he then gave to Mr. Moreno. To complete this purchase, Mr. Aguilar used funds from Grupo as well as funds from the Swiss bank account of another company, Sorvill International S.A. ("Sorvill"), which was also controlled by the Aguilars.

In early 2007, the Aguilars purchased a 2005 Ferrari Spider for $297,500 from Ferrari of Beverly Hills, using funds from Grupo's Houston account and from Sorvill's Swiss account. According to an affidavit filed with the court, Angela Aguilar authorized Mr. Moreno to take possession of the new Ferrari. Mr. Aguilar also purchased a car insurance policy for the Ferrari in his name, but that listed Mr. Moreno as the Ferrari's driver. And in March 2007, Mr. Aguilar wired $45,000 from Sorvill's Swiss bank account to an escrow account at Banner Bank on behalf of Moreno's half-brother.

The Aguilars also allegedly funneled cash to a second CFE executive, Arturo Hernandez CFE Director of Operations until 2007 (when Moreno took that job). In November 2006, Mr. Aguilar allegedly

transferred $500,000 from Grupo's Houston brokerage account into accounts at Banco Popular controlled by Hernandez. False documentation allegedly purported to show that the first $250,000 was for a female relative of Hernandez, while the second $250,000 was for a male relative of Hernandez. Aguilar allegedly supplied documentation falsely indicating that Hernandez's relatives were Grupo employees being paid for "professional services advice." Additionally, in March 2007, Aguilar allegedly caused $100,000 in "consulting fees" to be transferred to bank accounts benefiting Mr. Hernandez, although the fees were ostensibly earned by, and paid to, Hernandez's mother and brother.

11. Military and Law Enforcement Products Sting

On January 18, 2010, twenty-two individuals from sixteen different companies in the military and law enforcement products industry were arrested for FCPA violations in a first-of-its-kind undercover sting operation conducted by the FBI and the DOJ. All of the individuals were arrested on the same day, and all except for one were arrested in Las Vegas, where they were each attending a major industry conference and exposition, the Shooting, Hunting, Outdoor Trade Show and Conference (known as the "SHOT Show"). The other individual was arrested in Miami. The DOJ's prosecution of these individuals represents the single largest prosecution against individuals in the history of FCPA enforcement.

The arrests followed an undercover operation involving approximately 150 FBI agents and focusing on allegations of bribery in the military and law enforcement products industry. The companies associated with the charged individuals provide military and law enforcement equipment such as armored vehicles, weapons, body armor, ballistic plates, and various accessories. The defendants were charged with violations of, and conspiracy to violate, the anti-bribery provisions of the FCPA, aiding and abetting violations of the FCPA, and a money laundering conspiracy. Together, these charges covered the waterfront of U.S. FCPA jurisdiction. Sixteen individuals were charged as domestic concerns because they are U.S. citizens. Four U.K. citizens and one Israeli citizen were charged as "other persons" subject to the FCPA for acts in U.S. territory. And one U.S. citizen was charged both as a domestic concern and for causing his employer, a U.S. issuer for the purposes of the FCPA, to commit an act in violation of the FCPA.

At the time, then-Assistant Attorney General Lanny Breuer hailed the operation and stated that the DOJ was prepared "to bring all the innovations of our organized crime and drug war cases to the fight against white-collar criminals."

What began as an innovative sting operation, however, ultimately collapsed. Initially, the 22 individuals were charged in sixteen separate indictments. At a February 3, 2010, arraignment in U.S. district court, U.S. prosecutors announced that the DOJ believed the defendants were involved in one large, overriding conspiracy. Prosecutors asserted that documents, audio recordings, and video recordings that support this theory. According to media reports, among these materials was a video of all 22 defendants, a cooperating witness, and the FBI undercover agent posing as a representative of Gabon's Minister of Defense toasting to the success of the operation at a well-known restaurant in Washington, D.C. Accordingly, on April 19, 2010, the DOJ filed a single superseding indictment against all 22 defendants consistent with the single-conspiracy theory. On April 28, 2010, 21 of the defendants entered pleas of not guilty. The final defendant, Daniel Alvirez, pleaded guilty to two counts of conspiracy to violate the FCPA on March 1, 2011. Prior to trial, two other defendants changed their pleas to guilty: Jonathan Spiller pleaded guilty to a single count of conspiracy to violate the FCPA on March 29, 2011, and Haim Geri pleaded guilty to one count of conspiracy to violate the FCPA on April 28, 2011.

The government divided the original 22 defendants into four groups for trial. The trial of the first four defendants started in May 2011, but ended on July 7, 2011, when the jury failed to reach a verdict after five days of deliberations and the judge declared a mistrial and set retrial for May 2012. The second trial, of six defendants, also failed to result in any guilty verdicts: one defendant who had only been charged with conspiracy was acquitted in December 2011 prior to the case went to the jury when the judge ruled the government had presented insufficient evidence of the "single conspiracy" theory to sustain a conviction; in January 2012, the jury acquitted two defendants and failed to reach a verdict on the remaining three, resulting in the judge declaring a mistrial as to the latter. The government ultimately determined in February 2012 that continuing its prosecution would be a waste of government resources, and the judge granted its motions to dismiss the still-pending charges and, later, to dismiss with prejudice the indictments against the three defendants who had pleaded guilty.

Despite the government's failure to secure convictions in this case, the defendants still suffered the reputational and financial costs of fighting the charges at trial and had their personal and professional lives severely affected. Accordingly, there are still valuable lessons to learn from the tactics the DOJ employed and allegations it made. The DOJ alleged that the defendants each met with a former executive in the industry, identified in court documents as "Individual 1," and representatives of the Minister of Defense for an unnamed African country (which media reports indicate was Gabon). In actuality, the former executive was a person facing unrelated FCPA charges who had decided to cooperate with the DOJ and FBI as an undercover informant. Undercover FBI agents posed as a representative of Gabon's Minister of Defense and as a procurement officer for Gabon's Ministry of Defense.

During these meetings, which took place in both Miami and Washington, D.C., the defendants were informed that a potential contract worth approximately $15 million to provide equipment to the unnamed African country's Presidential Guard was available. The defendants allegedly agreed to a scheme in which they would provide the agent a 20% "commission" on the contract with the understanding that half of the "commission" would be passed along directly to the Minister of Defense, with the other half split between Individual 1 and the sales agent. The defendants allegedly planned to conceal the payments by overstating the contract value and providing two price quotes: one representing the actual cost of the goods, another representing the cost of the goods plus the 20% "commission."

The DOJ alleged that the defendants agreed to proceed in two phases. In Phase 1, the defendants were to fill a small order as a test run. The second phase would involve a larger, more complete order. The DOJ alleges several overt acts in furtherance of the conspiracies, including receiving payment during Phase 1 from a bank account purportedly held by the unnamed African country, filling the order, providing the faulty price quotations for Phase 1, providing the 20% commission to the sales agent's bank account for Phase 1, signing a purchase agreement for Phase 2, and using U.S. mails or means or instrumentalities of U.S. interstate commerce in furtherance of the FCPA violations.

a. Allied Defense Group

Allied Defense Group Inc. ("Allied"), a Virginia-based ammunition company, announced in its April 7, 2010, Annual Report for 2009 that it had received a subpoena from the DOJ related to the ongoing criminal investigation of one of the individuals involved in the sting, an employee of Allied's subsidiary, Mecar USA ("Mecar"). According to the Annual Report, the individual's alleged criminal conduct was done on behalf of a Decatur, Georgia company unrelated to either Mecar or Allied. Mecar fired the

individual shortly after receiving the subpoena. Though Allied did not reveal the identity of the individual, the indictment of two individuals, John Gregory Godsey and Mark Frederick Morales, referenced their affiliation with a Decatur, Georgia company. Allied indicated that it would cooperate fully with the DOJ as well as launch its own internal investigation into the Mecar employee's conduct.

A sale to Chemring Group PLC subsequently left Allied with no significant operating assets, and on October 1, 2010, Allied announced that its stockholders had approved the dissolution of the company once the company had resolved matters with the DOJ. In a letter to shareholders on August 15, 2013, Allied stated that its external counsel had received a letter from the DOJ advising that the enforcement agency "had decided to close their inquiry of [Allied] without any charge or penalties," and that it would "now proceed with our dissolution of the Company."

b. Smith & Wesson

On July 1, 2010, Smith & Wesson Holding Corporation ("Smith & Wesson") disclosed in its Annual Report that the DOJ and SEC were investigating the company for potential violations of the FCPA and federal securities laws. Smith & Wesson disclosed that it is the U.S. issuer mentioned above, that one of the SHOT Show defendants, Amaro Goncalves, was its Vice President in charge of sales to U.S. and international law enforcement agencies, and that it was served with a grand jury subpoena for documents. Smith & Wesson further disclosed that the SEC is conducting a "fact-finding inquiry" that "appears" to have been "triggered in part" by the DOJ's FCPA investigation. Smith & Wesson stated that it is cooperating with the DOJ and SEC investigations and has undertaken a comprehensive review of its policies and procedures. Smith & Wesson has since disclosed two shareholder derivative actions brought against the company stemming from the potential FCPA violations.

12. NATCO Group

On January 11, 2010, the SEC filed a settled civil enforcement action against NATCO Group, Inc. ("NATCO"), an oil and gas equipment manufacturer headquartered in Houston, Texas. NATCO was an "issuer" for the purposes of the FCPA until its purchase by Cameron International Corporation in November 2009.

The SEC alleged that NATCO violated the FCPA's accounting provisions as a result of payments made by TEST Automation & Controls, Inc. ("TEST"), a wholly owned NATCO subsidiary, in response to extortion by Kazakh officials. Without admitting or denying the SEC's allegations, NATCO agreed to pay a $65,000 civil penalty and consented to entry of a cease-and-desist order prohibiting further violations of the accounting provisions.

In June of 2005, TEST's branch office in Kazakhstan ("TEST Kazakhstan") won a contract to provide instrumentation and electrical services in that country. TEST Kazakhstan hired both Kazakh expatriates and local Kazakh employees to work on the contract.

In February and September 2007, Kazakh immigration prosecutors conducted audits of TEST Kazakhstan's compliance with immigration laws and claimed to have found that the Kazakh expatriates did not have proper documentation. The prosecutors threatened the expatriates with fines, incarceration, or deportation unless the prosecutors received cash fees of $25,000 in February and $20,000 in September. The SEC alleged that TEST Kazakhstan employees believed in good faith that the

prosecutors' threats were genuine. According to the complaint, TEST senior management authorized the employees to make the cash payments and reimbursed the employees for the payments. TEST, however, recorded the payments as a salary advance and "visa fines," which the SEC alleged was not accurate. Additionally, the SEC alleged that TEST failed to describe accurately the payments to the banks involved and separately submitted false invoices totaling over $80,000 to banks to reimburse a consultant, who had ties to the ministry issuing the visas. The cease and desist order notes that "[i]t is not known how the consultant used these funds, or to whom they were paid."

The Cease and Desist order lists several remedial measures that NATCO took upon discovering the conduct as part of an internal audit in late 2007, including: (i) an internal investigation and self-reporting to the SEC; (ii) employee termination and disciplinary action; (iii) revisions to its agent form agreement; (iv) institution of new due diligence procedures for vetting and retaining third parties; (v) increased compliance staffing, including the creation of a Chief Compliance Officer position; (vi) participation in a non-profit organization relating to anti-bribery due diligence; (vii) increased training worldwide; (viii) additional investment in internal control software; and (ix) restructuring of its internal audit department. The SEC noted that NATCO expanded its review of TEST's operations to include those in Nigeria, Angola, and China, areas described as having "historic FCPA concerns."

Because the FCPA imposes strict civil liability on issuer parents, such as NATCO during the relevant time period, for the books and records of wholly owned foreign subsidiaries, it was no defense for NATCO that the payments were made in response to extortive threats against the Kazakh expatriates.

13. Panalpina-Related Oil Services Industry Sweep

On November 4, 2010, the DOJ and SEC announced the resolution of seven FCPA investigations within the oil services industry. Touted as the first ever FCPA-related sweep of a particular industrial sector, these investigations centered on Panalpina World Transport (Holding), Ltd. ("PWT" or, together with its subsidiaries, "Panalpina") and FCPA violations related to its international freight forwarding and logistics services. The SEC and the DOJ conducted this industry-wide sweep as a proactive tactic to combat what they described as "widespread corruption in the oil services industry."

This investigation resulted in criminal and/or civil actions against GlobalSantaFe Corporation, Noble Corporation, PWT and its U.S.-based subsidiary Panalpina Inc., Pride International, Inc. and its wholly owned subsidiary Pride Forasol S.A.S., Tidewater Inc. and its wholly owned subsidiary Tidewater Marine International, Inc., Transocean Inc. (a subsidiary of Transocean Ltd.), and two Royal Dutch Shell plc. subsidiaries, Shell Nigeria Exploration and Production Company Ltd. and Shell International Exploration and Production. These actions originated in 2007, when three wholly owned subsidiaries of Vetco International Ltd. pleaded guilty to criminal FCPA violations. A fourth Vetco affiliate, Aibel Group Ltd., entered into a DPA and agreed to cooperate with the DOJ by identifying, among other parties, the consultants, contractors, and subcontractors related to its subsidiaries' FCPA violations.

Collectively, these seven companies, their subsidiaries, and parent companies agreed to pay over $236 million to resolve U.S. authorities' investigations. In announcing the simultaneous dispositions on November 4, 2010, Chief of the SEC's recently created FCPA Unit Cheryl J. Scarboro promised that the Unit will "continue to focus on industry-wide sweeps," and warned that "no industry is immune from investigation." By varying penalty reductions with regard to the companies' respective degrees of cooperation and self-disclosure, these agreements also represent a concerted effort by the DOJ to

demonstrate its willingness to extend “meaningful credit” to business organizations that voluntarily disclose potential FCPA violations and cooperate with resultant FCPA investigations.

With the exception of Noble Corporation, each of the companies involved in the November 4, 2010, FCPA settlements employed the services of PWT and its subsidiaries (collectively, “Panalpina”). In particular, the actions of Panalpina World Transport (Nigeria) Limited (“Panalpina Nigeria”), a former, majority-owned subsidiary and agent of PWT, was the common tie between the violations by Panalpina, Pride, Transocean, Tidewater, and Shell. Between 2002 and 2007, Panalpina Nigeria paid over $30 million in bribes to Nigerian officials, $19 million of which were made on behalf of Panalpina’s U.S. customers and their foreign subsidiaries.

a. Panalpina World Transport (Holding), Ltd. and Subsidiaries

On November 4, 2010, PWT and its wholly owned, U.S.-based subsidiary, Panalpina, Inc. (“Panalpina U.S.”) resolved DOJ and SEC FCPA investigations under which PWT and Panalpina U.S. agreed to pay $70.56 million in penalties to the DOJ, while Panalpina U.S. agreed to disgorge $11.33 million in illicit profits to the SEC. (Both PWT and Panalpina U.S. agreed to separate, corresponding $70.56 million penalties. However, as part of the agreement, the Panalpina U.S. fine is deducted from the PWT fine.)

To resolve the DOJ charges, PWT and Panalpina U.S. stipulated to the DOJ’s factual allegations. According to the DOJ, from approximately 2002 to 2007, Panalpina paid approximately $49 million in bribes to foreign officials through wholly owned subsidiaries in Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan to help both itself and its U.S. and foreign customers obtain preferential customs, duties, and import treatment for international freight shipments. Some of these improper payments continued as late as 2009. Panalpina admitted to paying approximately $27 million of those bribes on behalf of customers who were U.S. issuers or domestic concerns.

In addition, Panalpina admitted to improperly recording and invoicing the bribes paid on behalf of clients to make them appear to be legitimate charges, in violation of the books and records provisions, by using approximately 160 different terms to falsely describe bribes and related payments on its invoices. Panalpina further admitted to authorizing bribes to secure foreign government contracts for itself.

PWT resolved the two criminal charges that the DOJ filed against it by entering into a three-year DPA. The DOJ charged PWT with conspiring to violate and violating the anti-bribery provisions of the FCPA. Panalpina U.S. agreed to plead guilty to a two-count criminal information alleging conspiracy to violate the FCPA’s books and records provisions and aiding and abetting violations of the those same provisions by its issuer customers. Panalpina U.S. was specifically identified as the vehicle through which PWT engaged in bribery on behalf of its U.S. issuer customers. Panalpina U.S. simultaneously resolved SEC charges, without admitting or denying the SEC’s allegations, by consenting to being permanently enjoined from violating or aiding and abetting violations of the FCPA and agreeing to disgorge $11.33 million in illicit profits. Panalpina U.S. is not itself an issuer, but was subject to DOJ jurisdiction as a domestic concern. The SEC claimed jurisdiction to bring its complaint against Panalpina U.S. because the SEC considered Panalpina U.S. to be an agent of customers who were U.S. issuers and also because Panalpina U.S. allegedly aided and abetted its issuer clients’ FCPA violations.

The DOJ considered multiple factors when agreeing to enter into a DPA with PWT, including PWT's comprehensive compliance investigations and reviews, prompt and voluntary reports of its findings from these investigations, efforts to require and encourage employee cooperation with government investigations, PWT's (eventual) cooperation with DOJ and SEC investigations, and PWT's "substantial remedial measures." These remedial efforts included the creation of a compliance department with direct reporting to the Board of Directors, implementation of a compliance program and related policies, conducting systematic risk assessment in high-risk countries, developing internal review mechanisms, retaining/promoting/firing employees and management based on their individual commitments to compliance, implementation of internal compliance and audit functions, voluntarily and independently hiring outside compliance counsel, and PWT's decision to independently and at substantial cost close down operations in Nigeria to avoid future potential improper conduct.

i. Panalpina Conduct in Nigeria

According to charging documents, Panalpina Nigeria expedited customer shipments by bribing officials in the Nigerian Customs Service ("NCS"), the government office responsible for assessing and collection duties and tariffs on goods imported into Nigeria. Panalpina used the term "special" on invoices to describe cash payments made to expedite customs paperwork. Payments made to NCS officials in order to resolve customs problems or to avoid Nigerian regulations were invoiced to customers as "intervention" or "evacuation" payments. Many of the improper payments were made as part of Panalpina's express courier service, Pancourier.

In addition, Panalpina Nigeria also bribed NCS officials to help its customers secure new Temporary Import Permits ("TIPs") and extensions to existing TIPs. Under Nigerian law, a TIP allows a foreign company to temporarily import expensive equipment or vessels into Nigerian waters without paying the standard import tax, which is typically at least 10% of an imported item's total value. Any equipment or vessels not removed before a TIP's expiration, however, are subject to a fine of up to six times that equipment or vessel's value. Panalpina Nigeria's corrupt payments to NCS officials enabled its customers to effectively receive permanent TIPs, thereby avoiding both the costly import tax and the harsh post-expiration penalties.

As well as providing such transaction-specific payments to NCS officials, Panalpina Nigeria provided hundreds of officials in the Nigerian Port Authority, Maritime Authority, police, Department of Petroleum, Immigration Authority, and the National Authority for Food and Drug Control with weekly or monthly payments to obtain preferential treatment for itself and its customers.

Panalpina also admitted to paying foreign government officials to secure contracts for itself. In 2005, Panalpina directed $50,000 to a National Petroleum Investment Management Services ("NAPIMS") official to gain preferential treatment and secure a logistics contract on an oil project jointly operated by the Nigerian National Petroleum Corporation and a major oil company.

ii. Panalpina Conduct Outside Nigeria

PWT also operated subsidiaries in Angola, Azerbaijan, Brazil, Kazakhstan, Russia, and Turkmenistan that provided similar freight forwarding services by bribing customs, tax, and health and safety officials to secure preferential treatment for PWT and its clients.

From approximately 2002 to 2008, Panalpina Transportes Mundiais, Navegação e Transitos, S.A.R.L. ("Panalpina Angola") paid approximately $4.5 million in bribes to Angolan government officials. Panalpina Angola made hundreds of "special intervention" or "SPIN" payments, which ranged from *de minimis* values to amounts of up to $25,000 per transaction, to get officials to overlook incomplete documentation, to help customers avoid paying customs duties, and to avoid fines and legal problems when Panalpina Angola or its customers failed to comply with Angolan legal requirements. Additionally, from 2006 to 2008, Panalpina Angola paid over $300,000 to two Angolan officials to secure two separate Angolan oil and gas logistics contracts. In one case, the money for the payments came from profits made on the contract, while in the other case Panalpina invoiced the government-controlled entity for salary payments to a non-existent "ghost employee" and used the funds to make cash payments to an Angolan official.

Schemes in other countries followed similar patterns. Panalpina Azerbaijan LLC ("Panalpina Azerbaijan") paid approximately $900,000 in bribes to Azerbaijani government officials to overlook incomplete or inaccurate documentation, receive reduced customs duties, and avoid fines levied against both Panalpina Azerbaijan and its customers. Panalpina Azerbaijan also made payments to Azerbaijani tax officials in order to secure preferential tax treatment. Panalpina Limitada ("Panalpina Brazil") paid over $1 million in bribes to Brazilian officials in order to expedite customs clearance and resolve customs and import-related issues on behalf of its customers. Panalpina Kazakhstan LLP ("Panalpina Kazakhstan") made over $4 million in what it described internally as "sunshine" or "black cash" payments to Kazakh government officials to cause the officials to overlook incomplete or inaccurate customs documentation, avoid levying proper customs duties, and to discourage them from fining Panalpina or its customers for failing to comply with legal requirements. Panalpina Kazakhstan also made payments to Kazakh tax officials responsible for conducting annual tax audits in order to both expedite the audits and avoid or reduce any resultant tax-related fines. Panalpina World Transport Limited (Russia) ("Panalpina Russia") paid over $7 million in bribes to Russian officials to expedite customs delays, avoid administrative fines, resolve problems with temporary import permits, and to occasionally bypass the customs process in total. Finally, Panalpina World Transport Limited (Turkmenistan) ("Panalpina Turkmenistan") paid over $500,000 to Turkmen government officials responsible for enforcing Turkmenistan's customs, immigration, tax, and health and safety laws.

b. GlobalSantaFe

The SEC filed a complaint against GlobalSantaFe Corporation ("GSF") alleging violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. GSF is now known as Transocean Worldwide, Inc., and is a subsidiary of the Swiss-based Transocean Ltd. According the SEC's complaint, GSF paid a customs broker $87,000 to obtain two TIP extensions for the oil rig *Adriatic VIII* after its initial TIP expired in 2003, including false documentation showing the *Adriatic VIII* had left Nigerian waters. While these "paper moves" allowed the *Adriatic VIII* to remain in Nigerian waters, $3,500 of the payment was invoiced as "additional charges for export." GSF management in Nigeria knew the *Adriatic VIII* had not left Nigerian waters and knew or was aware of the high probability that the "additional charges for export" on the invoice was an attempt to disguise a bribe. GSF used its customs broker to carry out several other paper moves for the oil rigs *Adriatic I* and *Baltic I*. The SEC alleged that these payments helped GSF avoid $1.5 million in costs by not moving their oil rigs out of Nigerian waters and enabled GSF to gain an additional $619,000 in revenue by avoiding related work interruptions. The SEC also identified $82,000 in additional "intervention" and "retaining" payments related to expired or expiring

oil rig TIPs that allowed GSF to earn an additional $268,000 in avoided costs and gained revenues. The SEC further alleged that, through customs brokers, GSF made approximately $300,000 of similarly improper payments to government officials in Angola, Gabon, and Equatorial Guinea, and that none of the payments in Angola, Gabon, Equatorial Guinea, or Nigeria were properly recorded in GSF's books and records.

Without admitting or denying the SEC's allegations, GSF agreed to the entry of a court order enjoining it from violating the FCPA, to disgorge approximately $2.7 million of ill-gotten gains and pay prejudgment interest of approximately $1 million, and pay a civil penalty of $2.1 million.

c. Pride International, Inc.

The DOJ and the SEC also settled investigations of Pride International, Inc. ("Pride") relating to corrupt payments to foreign officials in eight different countries. According to the SEC, from 2001 to 2006, Pride, often through its subsidiaries, allegedly paid or authorized payments of approximately $2 million to foreign officials in India, Kazakhstan, Libya, Mexico, Nigeria, the Republic of the Congo, Saudi Arabia, and Venezuela. Of these payments, the DOJ brought enforcement actions against Pride and its subsidiary Pride Forasol S.A.S. ("Pride Forasol") for $804,000 in payments made to foreign officials in Venezuela, India, and Mexico to extend drilling contracts, influence customs officials, gain favorable customs duties and tax assessments, extend the temporary importation status of drilling rigs, and influence court rulings.

The DOJ charged Pride with violating and conspiring to violate the anti-bribery and books and records provisions of the FCPA. Pride resolved these charges by entering into a three-year DPA with the DOJ, while Pride Forasol pleaded guilty to charges of conspiring to violate the anti-bribery and books and records provisions of the FCPA, violating the anti-bribery provisions of the FCPA, and aiding and abetting Pride's books and records violations. Together the companies will pay approximately $32.6 million in monetary penalties, a total fine roughly 55% below the minimum one recommended by the United States Sentencing Guidelines. This reduced penalty reflects, in part, the assistance that Pride provided in regards to the DOJ and SEC investigation into Panalpina and its subsidiaries. Pride voluntarily disclosed the results of an internal investigation into misconduct occurring in Venezuela, India, and Mexico to the DOJ, as well as the fact that Panalpina subsidiaries in Kazakhstan, Nigeria, and Saudi Arabia acted as intermediaries in making payments to Kazakh tax officials, NCS officials, and Saudi customs officials, respectively. The DOJ viewed this disclosure as one that "substantially assisted" its Panalpina-related investigations because "the extent of Panalpina's conduct was unknown by the Department at the time of the Companies' disclosure." Without admitting or denying the SEC's allegations, Pride agreed to a permanent injunction against future violations of the FCPA, to disgorge over $19.3 million in ill-gotten gains, and to pay prejudgment interest of roughly $4.2 million.

In August 2010, two former Pride International, Inc. employees, Joe Summers and Bobby Benton, entered settlements with the SEC for their involvement in the alleged misconduct, both directly as the employees of an issuer and indirectly as aiders and abettors of Pride's violations, by agreeing to injunctions and paying civil penalties. On August 5, 2010, Joe Summers, Pride's former Venezuela country manager, consented to the entry of a permanent injunction prohibiting future FCPA violations and agreed to pay a $25,000 civil penalty. On August 9, 2010, Benton, Pride's former Vice President of Western Hemisphere Operations, consented to a settlement of FCPA charges that included a permanent injunction from future FCPA violations and the payment of a $40,000 civil penalty.

i. Venezuela

Summers authorized payments totaling approximately $384,000 to third parties, believing that all or portions of the money would be passed on as bribes to an official of Petroleos de Venezuela S.A. ("PDVSA"), Venezuela's state-owned oil company, to extend three drilling contracts between 2003 and 2005. The PDVSA official had requested and been paid $60,000 for each month of additional drilling he was able to secure. In another instance, Summers authorized payments of $12,000 per rig per month for extended drilling rights. Finally, when the company faced a large backlog of outstanding accounts receivable from PDVSA, Summers authorized the payment of a $30,000 to a third party to be used as a bribe to another PDVSA employee to secure the payment of the receivables.

On February 12, 2005, Benton received a draft report from Summers' replacement that included details of the improper payments described above, which had been discovered during an audit of Pride's vendors in Venezuela. Benton deleted from the report all references to the improper payments. Four days later, on February 16, 2005, Benton emailed the new Venezuela country manager regarding Benton's "cleaned up" version of the draft and advised, "As you continue to improve the Venezuela Vender [*sic*] Review audit, use the attached version to update. All other draft versions should be deleted." Benton's follow-up email ensured that his version of the action plan was the version submitted to Pride's internal and external auditors.

ii. Mexico

In 2004, in Mexico, a customs official inspected port facilities leased to various local Pride subsidiaries and identified various customs violations related to the importation status of equipment on a supply boat. Benton allegedly authorized a $10,000 bribe solicited by the customs official in order to garner more favorable treatment regarding these customs violations. The payment was made in cash through a representative of the customs official and was recorded falsely on Pride's books as an electricity maintenance expense. In December 2004, Benton became aware that one of Pride's customs agents had made a payment of approximately $15,000 to a Mexican customs official to avoid delays during the exportation process of a Pride rig from Mexico. After the payment was made, the customs agent submitted invoices to a Pride subsidiary in Mexico for fictitious "extra work" that had been performed during the export of the rig, and a Pride manager informed Benton by email that "[n]ow we need to find out a way to justify the extra payment to customs." The invoices were paid and falsely recorded in Pride Mexico's books as payments for customs agency services. Benton did not inform Pride's management, legal department, or internal auditors of the matter and allowed false records to remain on Pride's books and records.

Despite his knowledge and authorization of bribe payments, Benton falsely signed certifications in connection with Pride's 2004 and 2005 annual reports in March 2005 and May 2006, respectively, stating that he had no knowledge of FCPA violations. Benton executed the March 2005 certification less than three weeks after he redacted all references to bribery from the internal audit action plan. "But for Benton's false statements," the SEC concluded, "Pride's management and internal and external auditors would have discovered the bribery schemes and the corresponding false books and records."

iii. India

In 2001, India's Commissioner of Customs initiated an administrative action against the Indian branch of a Pride subsidiary, Pride Foramer India, claiming that the entity had intentionally understated the value of a rig it had imported in 1999. After an unfavorable ruling, Pride Foramer India appealed to an administrative tribunal. A France-based in-house lawyer at Pride Forasol S.A.S. was advised by a customs consultant that a payment to one of the administrative judges could secure a favorable result. In 2003, the lawyer authorized three payments totaling $500,000 to Dubai bank accounts of third-party companies for the benefit of the administrative judge. Later that year, Pride received a favorable ruling overturning the Customs Commissioner's determination. A U.S.-based finance manager of Pride, believing that all or a portion of the payments would be given to a foreign official, authorized recording the payments under a newly created accounting code for "miscellaneous expenses."

iv. Kazakhstan

The SEC alleged that in 2004 Pride Forasol made three payments totaling $160,000 to Panalpina's Kazakh affiliate "while knowing facts that suggested a high probability" that all or a portion of the money would be used as bribes to Kazakh officials in relation to various customs issues. Also in 2004, in connection with a tax audit, Kazakh officials indicated to Pride Forasol Kazakhstan that it could lower its substantial tax liabilities by making a payment to the tax officials. The tax officials instructed the company to retain a particular tax consultant, whom the company ultimately paid $204,000 while knowing that all or a portion of the funds would be passed on to the tax officials.

v. Nigeria

The SEC alleged that, from 2001 to 2006, Panalpina, acting on behalf of Pride Forasol Nigeria ("Pride Nigeria"), paid NCS officials a series of bribes ranging from $15,000 to $93,000 to extend oil rig TIPS in Nigeria and in 2002 paid a NCS official a $35,000 lump-sum fee to bypass future customs inspections of imported consumable goods. The payment was invoiced and recorded as "handling of consumables." The SEC also alleged that Pride Nigeria paid at least $172,000 to tax officials or, later, to a Nigerian tax agent who passed on a portion of the money to tax officials to avoid or reduce outstanding expatriate income taxes. Pride recorded the payments as "expatriate taxes," "settlement of expatriate taxes," or "Vat Audit Report Settlement."

vi. Saudi Arabia, Libya, and The Congo

The SEC further alleged a series of illicit payments in 2005, including a $10,000 payment from a petty cash fund to secure a Saudi customs official's help in expediting customs clearance for an oil rig and a $8,000 payment to the Congo Merchant Marine to avoid an official penalty for improper oil rig certification. Lastly, the SEC accused Pride Forasol Libya of paying a Libyan Tax Agent $116,000 to resolve unpaid social security taxes, $84,000 of which Pride surrendered "without adequate assurances that the Libyan Tax Agent would not pass some or all of these fees to [Libyan social security agency] officials."

d. Tidewater

Caymans Island corporation Tidewater Inc. ("Tidewater") and its wholly owned subsidiary Tidewater Marine International, Inc. ("TMII") settled charges with both the SEC and the DOJ related to

alleged bribery of foreign government officials in Azerbaijan and Nigeria. The DOJ charged TMII with conspiring to violate both the anti-bribery and books and records provisions of the FCPA. Additionally, the DOJ charged TMII with aiding and abetting a violation of the books and records provisions of the FCPA. The SEC separately alleged that Tidewater violated the anti-bribery, books and records, and internal controls provisions of the FCPA.

In 2001, 2003, and 2005, the Azerbaijani Tax Authority initiated tax audits of TMII's business operations in Azerbaijan. According to both the DOJ and the SEC, TMII paid roughly $160,000 to a Dubai entity while knowing that some or all of the money would be paid as bribes to Azerbaijani officials to resolve the tax audits in TMII's favor. TMII received roughly $820,000 in benefits from these bribes, which it improperly recorded as "payment of taxes," "tax and legal consultancy," or agent expenses in a "Crew Travel" account. With the exception of the 2003 "consultancy" fees (which were recorded by a TMII joint venture and were not rolled-up into Tidewater's financial statements), Tidewater incorporated these records into statements it filed with the SEC.

Additionally, the SEC and the DOJ alleged that, from 2002 to 2007, Tidex Nigeria Limited, a Nigerian company 60% owned by a Tidewater subsidiary, authorized payments totaling $1.6 million to Panalpina as reimbursements for bribes (described as "intervention" or "recycling" payments) to NCS employees in exchange for their help in unlawfully extending TIPs and expediting customs clearance for Tidewater vessels. By August 2004, TMII managers and employees were aware of and condoned the payments. The total benefit in avoided costs, duties, and penalties received by TMII in exchange for these payments was approximately $5.8 million. These payments were improperly recorded as legitimate business expenses by Tidex, whose books and records were consolidated into Tidewater's SEC filings.

Tidewater and TMII resolved the DOJ's allegations by entering into a DPA requiring, among other things, that TMII pay a $7.35 million criminal penalty. Tidewater also resolved the SEC's allegations by agreeing to a court order enjoining it from violating any provision of the FCPA, disgorging roughly $7.2 million in profits, paying $881,146 in prejudgment interest, and paying a $217,000 civil penalty. On March 3, 2011, Tidewater settled related bribery charges brought by the Nigerian Economic and Financial Crimes Commission by agreeing to pay a $6.3 million monetary penalty.

e. Transocean

The DOJ charged Transocean Inc., a Caymans Island subsidiary of Switzerland's Transocean Ltd. (collectively "Transocean"), with both conspiring to violate and violating the anti-bribery and books and records provisions of the FCPA. The SEC similarly alleged violations of anti-bribery, books and records, and internal controls provisions of the FCPA. According to the DOJ, from 2002 to 2007, Transocean conspired to make and made corrupt payments to NCS officials through Panalpina's courier service to resolve and avoid violations stemming from its oil rigs' expired TIPs. These bribes, which Transocean improperly recorded as "clearance" expenses, allowed Transocean to gain approximately $2.13 million in profits during the extended TIP periods. The SEC also claimed that Transocean paid $207,170 in "intervention" charges to operate its oil rigs without proper paperwork.

Additionally, the DOJ claimed that Transocean used Panalpina's Pancourier service, which paid "local processing charges" to NCS officials to help Transocean bypass the normal customs clearance process in order to avoid paying official taxes and duties. According to the SEC, Transocean used Pancourier to bypass the normal customs process 404 times and avoid $1.48 million in customs duties.

The SEC also alleged that Transocean used Panalpina to pay $32,741 to NCS officials in order to expedite the delivery of medicines and other goods.

Transocean, Inc., Transocean Ltd., and the DOJ entered into a three-year DPA that requires, among other things, that Transocean, Inc. pay a $13.44 million penalty. This penalty is 20% below the minimum penalty suggested by the United States Sentencing Guidelines in recognition of Transocean's prompt and thorough internal investigation, establishing a team of experienced auditors to oversee FCPA compliance, cooperation with the DOJ and SEC, agreeing to self-monitor and report to the DOJ, and implementation of a revised FCPA compliance policy. Transocean also received credit because a subsidiary of Transocean Ltd., Transocean Offshore Deepwater Drilling Inc., hired a new chief compliance officer with substantial experience in corporate ethics and anti-corruption compliance policies. Transocean similarly resolved the SEC's charges, without admitting or denying the allegations, by consenting to a permanent injunction against violating the FCPA and agreeing to pay nearly $7.3 million in disgorgement and prejudgment interest.

f. Royal Dutch Shell plc

Royal Dutch Shell plc ("Shell") and its wholly owned subsidiary, the Shell Nigeria Exploration and Production Company ("SNEPCO"), entered into a three-year DPA with the DOJ, while Shell and another wholly owned subsidiary, Shell International Exploration and Production ("SIEP"), agreed to an SEC administrative order. According to the DOJ, SNEPCO and SIEP paid approximately $2 million to subcontractors (who, in turn, hired Panalpina) knowing that some or all of that money would be used by Panalpina to bribe NCS officials. These payments resulted in roughly $7 million worth of savings from avoided taxes, duties, and penalties. SNEPCO improperly recorded these payments as "local processing fees" and "administrative/transport charges." The SEC estimated that these fees and savings were actually higher and claimed that SIEP authorized the payment of approximately $3.5 million to NCS officials to obtain preferential customs treatment that resulted in roughly $14 million in additional profits, neither of which were accurately reflected in Shell's books and records.

The DOJ claimed that "red flags" existed for SNEPCO employees regarding Panalpina's Pancourier service because it rarely, if ever, provided official documentation of duties or taxes being paid. Additionally, the DOJ alleged that SNEPCO employees developed actual knowledge that Panalpina was paying money to NCS officials because, in 2003 and 2004, a subsea engineering, procurement, installation and commissioning ("EPIC") contractor explained to SNEPCO employees that Pancourier operated outside the "normal customs clearing process," reduced customs fees by 85% to 90% by replacing them with "local process fees," and made it impossible to obtain official receipts to provide evidence of paying customs duties or taxes. In 2004, a Houston-based subsea contract engineer sought advice from two of SNEPCO's Nigeria-based lawyers on the legality of the Pancourier freight-forwarding service. SNEPCO's Nigerian lawyers concluded that the "local process fees" were being made in lieu of official customs duties and that "[o]rdinarily, this sort of concession granted by SNEPCO could be extra contractual and illegal." Numerous other internal communications similarly indicated that SNEPCO and SIEP employees had knowledge that the Pancourier service involved paying bribes to NCS officials.

Despite internal concerns regarding the legality of Panalpina's freight forwarding services, SNEPCO and SIEP employees continued to authorize the use of the Pancourier service. Additionally, the SNEPCO Bonga Logistics Coordinator informed the Subsea Epic Contractor and Panalpina employees in Nigeria that SNEPCO would reimburse Pancourier invoices containing improper payments to NCS

officials if the term “local processing fee” were replaced with the term “administrative/transport charge.” SNEPCO continued to reimburse invoices that used the term “administrative/transport charge” to describe improper payments to NCS officials until around February 2005, at which point Panalpina changed its invoices to simple, non-descriptive flat fees in an effort to better conceal the payments it made on SNEPCO’s behalf. The DOJ did note that certain SNEPCO employees refused to pay some fees absent official documentation, but that these efforts were the exception rather than the rule.

Although SNEPCO was the nominal defendant in the DOJ proceeding, both Shell and SNEPCO jointly entered into the DPA with the DOJ and agreed to share responsibility for the corresponding $30 million monetary penalty. The SEC alleged a similar agent relationship between SIEP and Shell to hold Shell accountable for actions taken by Panalpina. Shell and SIEP resolved the related administrative action brought by the SEC by agreeing to cease and desist from further FCPA violations and pay approximately $18.1 million in disgorgement and prejudgment interest.

g. Noble

Unlike several of the companies discussed above, Switzerland-based Noble Corporation (“Noble”), an issuer whose stock trades on the New York Stock Exchange, was able to secure an NPA, rather than a DPA, from the DOJ relating to corrupt payments to NCS officials. Noble entered into a three-year NPA with the DOJ on behalf of the Cayman-based Noble Corporation, which became a wholly owned subsidiary of Noble through a 2009 stock transaction. Prior to the stock transaction, the Cayman corporation was also an issuer within the meaning of the FCPA. This enforcement actions stem primarily from the actions of a group of Nigeria-based, wholly owned subsidiaries of the Cayman corporation (collectively “Noble Nigeria”) that became wholly owned subsidiaries of Noble during the 2009 stock transaction.

As part of the NPA, Noble admitted that, from 2003 to 2007, it utilized a Nigerian customs agent to submit false paperwork on Noble Nigeria’s behalf to extend expired TIPs and conduct paper moves of oil rigs located in Nigerian waters. In 2004, as part of its compliance program, Noble initiated an audit of its West Africa Division, which included the operations of Noble Nigeria. This audit uncovered Noble Nigeria’s paper move process, and in July 2004, the Audit Committee was advised the paper process would be discontinued. Despite this, by February 2005, Noble personnel determined that alternatives to the paper process were too expensive and time-consuming and chose to resume the paper process. Five subsequent paper moves occurred between roughly May 2005 and March 2006. During those paper moves, certain Noble and Noble Nigeria managers authorized Noble Nigeria to funnel roughly $74,000 in “special handling charges” through a Nigerian customs agent to NCS officials to avoid complications and costs associated with expired TIPs. By extending its TIPs through paper moves, Noble avoided $2.97 million in costs, duties, and penalties. Noble improperly recorded these “special handling charges” as “facilitation payments” in its books and records.

Noble’s Audit Committee was not notified of the resumption of the paper process, and Noble’s Head of Internal Audit repeatedly excluded information regarding the process from reports and presentations to the Audit Committee and affirmatively misled the Audit Committee regarding the company’s FCPA compliance. In 2007, the Audit Committee became aware that a competitor had initiated an internal investigation of its import process in Nigeria, and Noble responded by engaging outside counsel to conduct a review of its own conduct. Noble subsequently voluntarily disclosed its conduct to the DOJ and the SEC. Under the NPA, Noble agreed to a $2.59 million monetary penalty.

The DOJ expressly recognized Noble's voluntary, timely, and complete disclosure of the misconduct, the quality of its remedial measures, and its full cooperation with the DOJ's investigation.

In its parallel enforcement action, the SEC alleged that the FCPA policy Noble had in place during the period of alleged misconduct lacked sufficient procedures, training, and internal controls to prevent payments made to NCS officials to obtain TIPs and TIP extensions. To support this conclusion, the SEC cited Noble's 2004 internal audit, which both uncovered the use of payments to obtain TIPs and TIP extensions and concluded that Noble Nigeria personnel did not understand the relevant provisions of the FCPA. In particular, the SEC claimed that Noble's personnel did not understand the concept of "facilitating payments" and that its internal controls were insufficient to prevent what the SEC considered bribes as being recorded as facilitating payments. Noble settled FCPA anti-bribery, books and records, and internal controls charges with the SEC, without admitting or denying the SEC's allegations, by consenting to a court order enjoining it from violating the FCPA, disgorging roughly $4.3 million, and paying roughly $1.3 million in prejudgment interest.

i. SEC Enforcement Action against Noble Executives

On February 24, 2012, the SEC filed charges against (i) Noble's former President, CEO and Chairman (and previously, CFO and COO), Mark A. Jackson, (ii) Noble's highest executive in Nigeria, James J. Ruehlen (Division Manager of Noble Nigeria), and (iii) former Noble Director of Internal Audit, Vice President of Internal Audit, and Corporate Controller, Thomas F. O'Rourke, in the U.S. District Court for the Southern District of Texas. The SEC complaints allege that the Noble executives violated and/or and aided and abetted violations of the FCPA's anti-bribery, books and records, and internal controls provisions among other offenses. The SEC charged Jackson and Ruehlen together and O'Rourke separately.

According to the SEC complaint, Jackson and Ruehlen were directly involved in arranging, facilitating, approving, making, or concealing payments made by Noble to NCS officials in connection with the paper process Noble Nigeria used to secure TIPs and TIP extensions. The SEC alleged that Ruehlen would obtain a price proposal from customs agents detailing the costs associated with obtaining a TIP or a TIP extension, including the "special handling" or "procurement" charges that would not have any supporting documentation. Ruehlen then allegedly sought authorization for, and Jackson authorized, payments to NCS officials. According to the SEC, Jackson and Ruehlen were aware that portions or all of the "special handling" charges were being passed along to NCS officials. Altogether, the SEC alleged that Jackson and Ruehlen participated in paying hundreds of thousands of dollars in bribes to obtain 11 permits and 29 permit extensions.

Jackson and Ruehlen allegedly concealed payments to government officials by orchestrating an elaborate trail of false invoices that disguised the payments as shipping fees, handling charges, and tax. Despite orchestrating this false paperwork, Jackson and Ruehlen signed quarterly representation letters to Noble's upper management falsely stating that Noble Nigeria had complied with Noble's code of business conduct and internal controls, not violated any laws or regulations, and not violated the FCPA. Jackson, as CFO of Noble Nigeria, also signed quarterly and annual certifications that falsely represented that he had maintained effective internal controls and was unaware of any material weakness or fraud or suspected fraud affecting Noble and signed false personal certifications that were attached to Noble's quarterly annual public filings. When Noble's internal audit contacted Ruehlen expressing concern over FCPA compliance in its West Africa Division, Ruehlen had the customs agent involved in the payment

scheme sign false, backdated FCPA compliance certifications. Even after Noble hired a new CFO to replace Jackson, Ruehlen was able to continue to receive CFO approval for payments to government officials by representing the payments as "the same as we have paid in the past for [the temporary import] process." The SEC alleged that, by making false certifications and by concealing payments to government officials as legitimate operating expenses, Jackson and Ruehlen knowingly circumvented Noble's internal controls, knowingly created false books and records, and caused Noble's financial statements to be inaccurate.

The SEC complaint alleged that Jackson and Ruehlen directly violated the FCPA's anti-bribery and internal controls and false records provisions and aided and abetted Noble's violations of the FCPA's books and records and internal controls provisions. Additionally, the SEC alleged that Jackson signed false personal certifications attached to annual and quarterly Noble public filings, violated the provision of the Exchange Act that deals with issuing false or misleading statements to investors, and that Jackson was liable as a control person for violations of the anti-bribery, books and records, and internal controls provisions by Noble, Ruehlen, and O'Rourke.

Jackson and Ruehlen have both denied the SEC's allegations. Ruehlen's lawyer also stated that he was "disappointed" in the SEC for charging Ruehlen when Ruehlen himself was the individual who had initially raised concerns about the paper process internally at Noble and had "fully cooperated throughout the [SEC's] investigation." On May 8, 2012, Jackson and Ruehlen both filed motions to dismiss that, separately, argued that the SEC had ignored the FCPA's exception for facilitation payments and argued nevertheless that the SEC's claims were time-barred.

On December 11, 2012, the defendants' motions were granted in part and denied in part. First, the court declined to dismiss the entire complaint on the basis of the defendants' facilitation payment arguments. Although U.S. District Judge Ellison agreed with the defendants that the FCPA required the SEC to allege that the activities in question were not facilitation payments as a threshold pleading requirement—which itself is an interesting aspect to the case—he found that the SEC had met that burden in its complaint. Judge Ellison reasoned that though the FCPA "specifically included 'obtaining permits' as an example of the type of action that typically qualifies as routine, the Court interprets the example to refer to obtaining permits to which one is properly entitled." Because the SEC had alleged that the defendants sought to obtain the TIPs using false paperwork in violation of Nigerian law, the SEC met its burden in pleading that the defendants had not sought to speed "the proper performance of a foreign official's duties."

Judge Ellison granted the defendants' motions as to the SEC's older claims, but granted the SEC leave to re-file. The Judge noted in particular that the fraudulent concealment and continuing violation rules might be applicable to toll the statutes.

The SEC filed an amended complaint on January 25, 2013, but following the Supreme Court's holding in *Gabelli v. SEC* on February 27, 2013 regarding the inapplicability of the discovery rule in connection with civil penalty actions, the SEC filed a second amended complaint on March 25, 2013 that dropped requests for civil penalties for violations that occurred prior to May 12, 2006.

In July 2014, Jackson and Ruehlen settled with SEC. Without admitting or denying the allegations of the amended complaint, both defendants consented to a final judgment that only prohibited them from further violations of the FCPA.

O'Rourke also settled with the SEC. The SEC complaint against O'Rourke alleged that he directly violated the FCPA's internal controls and false records provisions and aided and abetted Noble's violations of the FCPA's anti-bribery, books and records, and internal controls provisions. Specifically, the SEC alleged that O'Rourke permitted and/or failed to prevent "special handling charges" from being improperly entered into Noble Nigeria's books and records as legitimate operating expenses. The SEC also emphasized that O'Rourke's positions within Noble Nigeria (Director of Internal Audit, Controller, and Vice President of Internal Audit) indicate that he personally reviewed and approved requests from Noble Nigeria to pay "special handling charges" for false paperwork TIPs. Without admitting or denying the SEC's allegations, O'Rourke consented to the entry of a court order requiring him to pay a $35,000 penalty and permanently enjoying him from future violations of the FCPA.

14. RAE Systems

On December 10, 2010, RAE Systems, Inc. ("RAE") settled FCPA charges with the DOJ and SEC relating to improper payments made by and on behalf of two Chinese joint ventures. Under its agreement with the SEC, RAE will pay $1,147,800 in disgorgement and $109,212 in pre-judgment interest to settle FCPA anti-bribery, books and records, and internal controls charges. Under a three-year NPA with the DOJ, RAE will pay a $1.7 million penalty to settle FCPA books and records and internal controls charges. RAE, based in San Jose, California, develops and manufactures chemical and radiation detection monitors and networks. RAE's common stock is traded on the NYSE Alternext exchange.

According to the SEC and DOJ, between 2004 and 2008, RAE, through two Chinese joint ventures, paid approximately $400,000 to third-party agents and government officials to influence foreign officials in order to obtain or retain business. RAE's due diligence of the Chinese company KLH, then owned by the Beijing Academy of Sciences, revealed various red flags, including that KLH's main clients were state-owned entities and government departments, KLH sales personnel financed their sales through cash advances and reimbursements, and KLH sales personnel used cash advances to bribe government officials. RAE also discovered that KLH's accounting and control mechanisms for the cash advances were flawed; specifically, sales personnel were submitting unsupported and inaccurate tax receipts (known as "fapiao") to account for their use of the cash advances. The due diligence report, submitted to RAE's Board of Directors, detailed kickback mechanisms and concluded that "[t]o some extent, the financial statements have been distorted by these commissions." Separately, a RAE employee who had met with KLH personnel reported to high-ranking RAE executives that "KLH sales team is good at and used to selling cycle that is highly dependent on 'guanxi'—whatever it takes to spec and close deal . . . to kill the sales model that has worked for them all these years is to kill the JV deal value or hurt sales momentum."

Despite this information, RAE acquired a 64% stake in KLH (then renamed RAE-KLH) in 2004, and two years later raised their interest to approximately 96%. Upon acquiring its stake in the company, RAE orally communicated to RAE-KLH personnel that bribery practices must stop; however, RAE did not impose sufficient internal controls or make changes to the cash advance practices. The DOJ described the efforts as "half-measures."

In 2005, RAE's Vice President and CFO visited RAE-KLH and observed that the company had approximately $500,000 in cash advances for which it had no fapiao. He then emailed RAE's U.S. headquarters that "[t]here is the possibility that cash may also be used for grease payments, to

supplement sales employees' incomes and as bribes…" The company responded by implementing FCPA training and required its employees to sign anti-bribery certifications, but again, it made no changes to the problematic cash advance system. Consequently, sales personnel continued to use cash advances to bribe foreign officials. In 2006, RAE-KLH entered into a consultancy agreement with an agent, whom it paid approximately $86,195. The agent used the funds to bribe employees of state-owned enterprises to obtain business for RAE-KLH related to the Dagang Oil Field.

Later that year, RAE-KLH's recently terminated General Manager emailed the company's U.S. headquarters alleging that RAE-KLH had entered into a $48,000 money laundering contract to mask kickbacks paid to clients. The company responded to the allegations, and the money paid by RAE-KLH under the contract was returned to it. The company did not, however, perform an internal audit or other investigation into the general allegation that bribery was continuing, nor did it impose any additional internal controls or make significant changes to the cash advance system. During 2007, RAE-KLH personnel continued to use cash advances to bribe government officials, including by purchasing a notebook computer for the Deputy Director of a state-owned chemical plant. RAE-KLH also entered into another contract with the same agent, who again used the funds to pay bribes to obtain two contracts.

In December 2006, RAE acquired a 70% interest in a separate Chinese company, Fushun Anyi, which then became RAE-Fushun. Despite the experience with KLH, RAE conducted no pre-acquisition due diligence and failed to implement an effective system of internal controls. In 2007, RAE-Fushun personnel engaged in bribery of government officials, including providing gifts such as fur coats, expensive liquor, and kitchen appliances.

In addition to the financial penalties, RAE also agreed to implement various enhanced compliance and reporting measures, cooperate with the government's investigation, and provide periodic reports to the DOJ and SEC over a three-year period.

15. Technip and Snamprogetti

On July 7, 2010 and June 28, 2010, respectively, Snamprogetti Netherland B.V. ("Snamprogetti"), a Dutch subsidiary of the Italian oil and gas company ENI S.p.A. ("ENI"), and Technip S.A. ("Technip"), a French-based construction, engineering and oilfield services company, each settled FCPA charges with the SEC and DOJ. The SEC separately charged Technip and Snamprogetti with violations of the FCPA's anti-bribery, books and records, and internal controls provisions, while the DOJ entered into DPAs with the two companies and charged each with two counts of violating and conspiring to violate the FCPA's anti-bribery provisions. ENI was also charged by the SEC with violating the FCPA's books and records and internal controls provisions.

Under the terms of the agreements, Technip will pay a combined $338 million in fines, disgorgement, and prejudgment interest. Snamprogetti will pay $240 million in fines to the DOJ, and Snamprogetti and ENI will jointly pay $125 million in disgorgement and prejudgment interest to the SEC. Technip's DPA provides for an independent compliance monitor to be appointed for a term of two years. The agreement specifically provides for a "French national" to serve as the monitor and for the monitor's charge to include monitoring compliance with French anti-corruption law as well as the FCPA. The charges stem from Technip and Snamprogetti's participation in the TSKJ joint venture in Nigeria between 1994 and 2004, which is discussed in greater detail in connection with the KBR/Halliburton case.

On January 30, 2013, two former managers of Technip were sentenced by a Paris tribunal for their role in the TSKJ affair. These two individuals were the only two former executives from Technip to face prosecution. Former general manager Jean-Marie Deseilligny and former commercial manager for Africa Etienne Gory were fined €10,000 and €5,000, respectively, for their participation in the TSKJ corruption scheme. French prosecutors had sought financial penalties of €100,000 from each of the two individuals, but the fines were significantly lowered by the French tribunal.

16. Terra Telecommunications (Haiti Teleco)

Since May 2009, numerous indictments, arraignments, and guilty pleas have come down relating to a scheme by the U.S. telecommunication companies Terra Telecommunications Corp. ("Terra") and Cinergy Telecommunications Inc. ("Cinergy") to bribe foreign officials at the Republic of Haiti's state-owned telecommunications company, Telecommunications D'Haiti ("Haiti Teleco").

The DOJ's investigation has cast a wide net, with indictments filed against officers of Terra, individuals associated with intermediary companies, and the Haiti Teleco officials themselves. As U.S. Attorney Jeffrey H. Sloman stated upon announcing the guilty plea of one of the Teleco officials, "[t]oday's conviction should be a warning to corrupt government officials everywhere that neither they nor their money will find any safe haven in the United States."

Perhaps most notably, the investigation resulted in a decision by the Eleventh Circuit Court of Appeals in the case of U.S. v Esquenazi (discussed above) that provided a list of non-exclusive factors that should be considered in determining whether an entity constitutes an "instrumentality" of a foreign government for purposes of the FCPA.

The DOJ's investigation has cast a wide net, with indictments filed against officers of Terra, individuals associated with intermediary companies, and, perhaps most notably, the Haiti Teleco officials themselves. As U.S. Attorney Jeffrey H. Sloman stated upon announcing the guilty plea of one of these officials, "[t]oday's conviction should be a warning to corrupt government officials everywhere that neither they nor their money will find any safe haven in the United States."

a. Haiti Teleco Officials

Haiti Teleco is the only provider of landline telephone service to and from Haiti, and accordingly, all international telecommunications companies must contract with the state-owned company to provide their customers with non-cellular telephone access to Haiti. The DOJ's investigation arose from a scheme wherein executives at Terra, a Nevada corporation based in Miami, Florida, made improper payments to two foreign officials at Haiti Teleco through several intermediary shell companies between November 2001 and March 2005. Two of the officials implicated in the scheme—Robert Antoine and Jean Rene Duperval—both worked as Director of International Relations for Haiti Teleco (Antoine from May 2001 to April 2003; Duperval from June 2003 to April 2004). In that position, they had responsibility for negotiating contracts with international telecommunications companies on behalf of Haiti Teleco. Other officials—including former Haiti Teleco director Patrick Joseph—were also involved in the conspiracy. In return for the corrupt payments, the officials granted Terra preferred telecommunication rates, reduced the number of minutes for which payments were owed, and provided various credits to reduce the debt that the companies owed to Haiti Teleco.

The prosecutions of Antoine, Duperval, and Joseph are notable because they are among the few foreign officials have been charged in connection with an FCPA matter. Because the officials could not be charged with violations of the FCPA insofar as the statute criminalizes the provision but not the receipt of bribes, Antoine, Duperval and Joseph were instead indicted for conspiracy to commit money laundering and, in Duperval's case, substantive money laundering charges. Antoine pleaded guilty on March 12, 2010, and was later sentenced to four years in prison, ordered to pay $1,852,209 in restitution, and required to forfeit $1,580,771. After years of cooperating against other defendants, Antoine's sentence was reduced in May 2012 to 18 months on a Rule 35 motion by the government. Duperval pleaded not guilty but was convicted of two counts of conspiracy to commit money laundering and 19 counts of money laundering on March 13, 2012. From 2003 to 2006, Duperval used Florida-based Cinergy Telecommunications ("Cinergy") and Uniplex Telecom Technologies ("Uniplex") to launder $500,000 paid to him in exchange for various business advantages, including the issuance of preferred telecommunications rates, a continued telecommunications connection with Haiti and the continuation of a particularly favorable contract with Haiti Teleco. Duperval concealed these payments by having the shell companies and their executives create false documents describing the payments as "consulting services," despite the fact that no actual services were performed. When the shell companies channeled the money to Duperval and his family, Duperval continued to conceal the payments by describing them as "commissions" and "payroll." Duperval was sentenced on May 21, 2012, to 9 years' imprisonment and was ordered to forfeit $497,331.

Joseph, on the other hand, agreed to cooperate with prosecutors. After initially pleading not guilty to a superseding indictment, on February 8, 2012, Joseph agreed to plead guilty to one count of conspiracy to commit money laundering in exchange for a potentially lighter sentence. Joseph agreed to forfeit $955,000, and on July 6, 2012, he was sentenced to one year and one day in prison.

Former Haiti President Jean-Bertrand Aristide has also been implicated. Commentators suggest that Aristide is the "Official B" described in the DOJ's January 19, 2012 second superseding indictment. According to that indictment, Official B was among those who received over $2 million in payments through the shell-companies Cinergy and Uniplex (*see further discussion below*). According to the second superseding indictment, Official B received his share of the payments through "Company A," which commentators believe to be Digitek, a suspected front owned by Aristide's brother-in-law Lesly Lavelanet. To date, neither Aristide nor Digitek have been charged by the DOJ.

b. Terra Telecommunications

The DOJ has also charged several former executives at Terra. On April 27, 2009, the former controller of Terra, Antonio Perez, pleaded guilty to conspiracy to violate the FCPA and money laundering laws. On January 21, 2011, Perez was sentenced to two years in prison followed by two years of supervised release. He was also ordered to pay a $100 fine and to forfeit $36,375. As a result of his cooperation with law enforcement, Perez's sentence was reduced to a total term of ten months in December 2011.

On December 4, 2009, the DOJ indicted Joel Esquenazi and Carlos Rodriguez, the president and Vice President, respectively, of Terra, for their alleged involvement in the scheme. According to the indictment, Esquenazi and Rodriguez paid more than $800,000 in bribes to foreign officials at Haiti Teleco to obtain improper business advantages. The indictment stated that Esquenazi and Rodriguez disguised these bribes as payments for consulting services to intermediary companies, reporting such payments as

commissions and consulting fees on its books and records, though no consulting services were provided by the intermediaries. The indictment also alleges that Esquenazi provided Duperval with a Rolex watch. Each individual was charged with (i) conspiring to violate the FCPA and to commit wire fraud; (ii) seven substantive FCPA violations; (iii) conspiring to commit money laundering; and (iv) twelve substantive money laundering violations.

Both Esquenazi and Rodriguez pleaded not guilty in January 2010. Esquenazi went a step further on November 10, 2010, by filing an amended motion to dismiss the indictment on the grounds that the DOJ's interpretation of the term "foreign official" in the FCPA was unsustainable. He argued that employees (including executives) of state-owned or state-controlled commercial entities did not fall within the definition of "foreign official" because that definition only applied to "officials performing a public function." In a nod to then-current political dialogue in the United States, Esquenazi argued:

> Mere control or partial control or ownership (or partial ownership) of an entity by a foreign government no more makes that entity's employees "foreign officials" than control of General Motors by the U.S. Department of Treasury makes all GM employees U.S. officials.

In the alternative, Esquenazi argued that the court should dismiss the indictment because the FCPA's definition of "foreign official" was unconstitutionally vague.

In its response, filed on November 17, 2010, the DOJ declined to defend its interpretation, although it asserted that, if the court required, "the government [would be] more than willing to elaborate on how the FCPA's plain text, its current interpretation by courts, its legislative history, and U.S. treaty obligations… confirm that the definition of 'foreign official' includes officials of state-owned and state-controlled companies." Instead, the DOJ argued that Esquenazi's motion was a premature request for a ruling on the sufficiency of the evidence. Two days later, the Court agreed with the DOJ and issued a fairly perfunctory decision in its favor and, on August 5, 2011, Esquenazi and Rodriguez were convicted on all counts.

On August 24, 2011, Esquenazi and Rodriguez filed a motion for judgment of acquittal or a new trial based on a July 26, 2011, signed statement sent to the DOJ by Haitian Prime Minister Jean Max Bellerive on behalf of Haiti's Ministry of Justice, which asserted that Haiti Teleco "has never been and until now is not a State enterprise." Prime Minister Bellerive made this statement in connection with the Patrick Joseph case described below. In a surprising development, the day after Equenazi and Rodriguez filed their motion, Bellerive signed a declaration filed by DOJ that retracted his prior statement that asserted that his prior statement was "strictly for internal purposes" and that his prior statement had "omit[ted] the fact that, after the initial creation of Teleco and prior to its modernization, it was fully funded and controlled by [the Bank of the Republic of Haiti], which is a public entity of the Haitian state."

The district court summarily denied the defendants' motion, noting simply that it "properly instructed the jury through a non-exclusive multi-factor definition that permitted the jury to determine whether Teleco was an instrumentality of a foreign government." The jury instructions permitted the jury to consider factors including, but not limited to, whether Teleco provides services to the public, whether its "key officers and directors" are government officials or are appointed by government officials, the extent of Haiti's ownership interest in Teleco, Teleco's obligations and privileges under Haitian law, and whether Teleco is "widely perceived and understood to be performing official or governmental functions."

Esquenazi and Rodriguez appealed, among other things, the district court's holding regarding Haiti Teleco's status as a foreign instrumentality.

On October 25, 2011, the Court sentenced Esquenazi to 15 years' imprisonment, a record for an FCPA-related conviction (10 of the 15 years were consecutively imposed for Esquenazi's conviction on a related money-laundering count), and Rodriguez was sentenced to 7 years' imprisonment. Both defendants were further ordered to jointly and severally forfeit $3.09 million and pay $2.2 million in restitution. Assistant Attorney General Lanny Breuer called the record-setting sentence "a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequences," and proof that the DOJ "will continue to hold accountable individuals and companies who engage in such corruption."

Esquenazi and Rodriguez continued to make FCPA history through their appeal. On May 9, 2012, Esquenazi and Rodriguez filed the first-ever appeal to challenge the definition of a "foreign official" under the FCPA. They argued that, "[b]ecause no evidence was presented at trial that Haiti Teleco performed governmental functions, Esquenazi's conviction for violation of, and conspiracy to violate, the FCPA should be reversed." The appellants further argued that the DOJ's current interpretation of a government instrumentality—which includes employees at state-owned enterprises—is overbroad and beyond the scope intended by Congress. On May 16, 2014 the Eleventh Circuit Court of Appeals affirmed the convictions in a decision that essentially adopted the DOJ's definition of government instrumentality.

On October 14, 2014, the U.S. Supreme Court denied a write of certiori for Esquenazi and Rodriguez. According to information available online, Esquenazi is currently serving his term at a minimum security prison in New Jersey, with a scheduled release date of August 22, 2024.

c. Intermediaries

The DOJ also indicted several individuals who served as intermediaries for Terra's corrupt payments. On May 15, 2009, Juan Diaz (President of J.D. Locator Services) pleaded guilty to money laundering and one count of conspiring to violate the FCPA in connection with his role in the scheme. According to his criminal information, Diaz received over a million dollars from Terra in the account of his company, J.D. Locator, to be delivered to the two foreign officials. Diaz admitted that he kept over $73,000 as commissions for facilitating the bribes. On July 30, 2010, Diaz was sentenced to four years and nine months in prison and three years of supervised release. He was also ordered to pay $73,824 in restitution and to forfeit $1,028,851. On May 22, 2012, Diaz's sentence was reduced to a term of 20 months, with three years of supervised release.

In addition, on February 19, 2010, Jean Fourcand (former President and Director of Fourcand Enterprises, Inc.) pleaded guilty to a single count of money laundering for his role in facilitating the improper payments. According to the indictment and other documents, Fourcand received checks from J.D. Locator, which he deposited and then used to purchase real property valued at over $290,000. Fourcand sold the property and issued a check for approximately $145,000 to Haiti Teleco official Antoine. The indictment also states that Fourcand received nearly $15,000 worth of pre-paid calling cards from Esquenazi and Rodriguez, the cash proceeds from the sales of which he also gave to Antoine. Fourcand was sentenced to six months in prison for his involvement in the scheme. On April 16, 2012,

the court agreed to reduce Fourcand's sentence to two months in prison, followed by two years of supervised release.

The DOJ also indicted Marguerite Grandison (former President of Telecom Consulting Services Corp. ("Telecom Consulting")) for allegedly assisting in directing payments from Terra to J.D. Locator. Grandison, who is Duperval's sister, was initially charged in February 2010 with (i) conspiracy to violate the FCPA and commit wire fraud; (ii) seven substantive FCPA violations; (iii) conspiracy to commit money laundering; and (iv) twelve substantive money laundering violations. In a July 13, 2011 superseding indictment, Grandison was charged with two counts of conspiracy to commit money laundering and 19 counts of money laundering. Grandison pleaded not guilty to all charges in February 2012.

d. Cinergy Telecommunications

On July 12, 2011, the DOJ filed a superseding indictment that charged Cinergy Telecommunications Inc. ("Cinergy"), a privately owned telecommunications company incorporated in Florida, for its alleged role in the foreign bribery, wire fraud, and money laundering scheme related to Haiti Teleco. The July superseding indictment similarly charged Washington Vasconez Cruz (President of Cinergy and Uniplex Telecom Technologies, Inc. ("Uniplex")), Amadeus Richers (then-director of Cinergy and Uniplex), and Marguerite Grandison (former President of Telecom Consulting Services Corp.). The superseding indictment also included allegations against "Co-conspirator CZ;" on January 19, 2012, the DOJ filed a second superseding indictment that identified "co-conspirator CZ" as Cecilia Zurita (former Vice President of Uniplex and Cynergy).

The indictments alleged that, from December 2001 through January 2006, Cinergy, Uniplex, Cruz, Richers, and Zurita (among others) participated in a conspiracy to pay approximately $2.65 million in "fictional 'consulting services'" to shell companies. The DOJ alleged that these "consulting services" payments were actually payments used to bribe foreign officials at Haiti Teleco in exchange for contracts that allowed Uniplex and Cinergy customers to place calls to Haiti. Cruz and Richers allegedly authorized these payments to help Cinergy and Uniplex to secure preferred telecommunications rates and to obtain credits towards money owed to Haiti Teleco. The indictment identifies 19 separate deposits of "Telecom Consulting checks" into bank accounts owned by Duperval from March 2004 through the end of March 2005.

Cinergy, Cruz, and Richers were each charged with one count of conspiracy to violate the FCPA and to commit wire fraud, six counts of violating the FCPA's anti-bribery provisions, one count of conspiracy to commit money laundering, and 19 counts of money laundering. Zurita is charged with one count of conspiracy to violate the FCPA and to commit wire fraud, four counts violating the FCPA's anti-bribery provisions, one count of conspiracy to commit money laundering, and 19 counts of money laundering.

On February 24, 2012, the DOJ prepared and received an Order for Dismissal dismissing, with prejudice, the indictment as to Cinergy. In the Order, the DOJ claimed that it had been misled into believing that Cinergy was an active company rather than, as described by the DOJ, a "non-operational entity that effectively exists only on paper for the benefit of two fugitive defendants, Washington Vasconez Cruz and Cecilia Zurita." The trials against Cruz, Richers, and Zurita are pending their arrests.

17. Veraz Networks

On June 29, 2010, Veraz Networks, Inc. ("Veraz") consented to the entry of a proposed final judgment in a SEC civil enforcement action, without admitting or denying the allegations in the SEC's Complaint. Veraz consented to a $300,000 civil penalty for violations of the FCPA's books and records and internal controls provisions.

The California-based company describes itself as "the leading provider of application, control, and bandwidth optimization products," including Voice over Internet Protocol communications, with products and services ranging from flexible network design to industry-leading voice compression technology.

The SEC alleged that Veraz engaged a consultant in China who sought to secure business for Veraz with a telecommunications company controlled by the government of China. The SEC alleged that Veraz's books and records did not accurately reflect $4,500 in gifts from the consultant to officials at the telecommunications company, which a supervisor at Veraz approved and described in email as a "gift scheme," or the promise of a $35,000 "consultant fee" in connection with a deal worth $233,000. Veraz discovered the improper fee and canceled the sale prior to receiving payment.

The SEC further alleged that a Veraz employee used a Singapore-based reseller as an intermediary to make or offer improper payments to the CEO of a telecommunications company controlled by the government of Vietnam. The SEC alleged that Veraz approved the employee's conduct and reimbursed the employee for questionable expenses, including gifts and entertainment for employees of the telecommunications company and flowers for the CEO's wife. The SEC did not allege any specific value for the gifts or entertainment provided to this telecommunications company. Regarding both the China and Vietnam violations, the SEC alleged that Veraz had failed to devise and maintain an effective system of internal accounting controls.

H. 2009

1. AGCO

On September 30, 2009, AGCO Corporation ("AGCO") and its subsidiaries, sellers of farm equipment and machinery, agreed to pay over $20 million in criminal and civil penalties to resolve international investigations into kickbacks paid to the Iraqi government to obtain contracts under the U.N.'s Oil-for-Food Programme ("OFFP").

The SEC alleged that AGCO subsidiaries made approximately $5.9 million in kickback payments to the government of Iraq that had the effect of diverting funds from the U.N.'s escrow account established to provide humanitarian goods and services to the Iraqi people. The SEC alleged that AGCO violated the FCPA's accounting provisions by failing to keep accurate records of the kickbacks or to devise and maintain internal accounting controls to prevent and detect the kickbacks. The SEC identified AGCO Ltd. (based in England), AGCO Denmark A/S, and AGCO S.A. (based in France) as the offending subsidiaries, with AGCO Ltd. arranging the sales and kickbacks through AGCO Denmark A/S, AGCO S.A., and a third-party agent in Jordan. The SEC alleged that AGCO's profits from the OFFP contracts were nearly $14 million. Without admitting or denying the SEC's allegations, AGCO disgorged these profits and agreed to pay $2 million in prejudgment interest and a civil penalty of $2.4 million.

The DOJ filed a criminal information charging only AGCO Ltd. with a conspiracy to commit wire fraud and to violate the FCPA's books and records provisions and entered into a three-year DPA with AGCO. As part of the DPA, AGCO agreed to pay a $1.6 million penalty and, if the DOJ were to initiate the prosecution deferred, that AGCO would not contest its responsibility for the acts described in an attached Statement of Facts relating to three AGCO Ltd. contracts. AGCO was required to implement a compliance and ethics program designed to prevent violations of applicable anti-corruption laws and to submit annual brief, written reports on its compliance progress and experience.

The same day that it resolved the SEC and DOJ investigations, AGCO agreed to resolve an investigation by the Danish State Prosecutor for Serious Economic Crime regarding two OFFP contracts that AGCO Denmark A/S executed. AGCO agreed to disgorge approximately $630,000 in profits related to those contracts.

a. Specific Allegations

The following factual summary is based on the allegations in the SEC's complaint, unless otherwise noted.

From 2000 to 2003, the Iraqi Ministry of Agriculture awarded 16 OFFP contracts to the three AGCO subsidiaries identified above. For three of these contracts, each executed by AGCO Ltd. and involving the sale of tractors and spare parts, AGCO subsidiaries paid the Iraqi government a total of over $550,000 in kickbacks. The first contract totaled €2.2 million including an extra 14.05% to be used for kickbacks, the second totaled €10.9 million including an extra 21% to be used for kickbacks, and the third contract totaled €4.8 million including an extra 13.47% to be used for kickbacks.

For all of its OFFP contracts, AGCO worked through a Jordanian agent who was paid through a mixture of fixed and variable commissions as well as legitimate after-sales service fees. For the contracts requiring kickbacks, the AGCO subsidiaries secretly inflated the contract price between 13 and 21 percent per contract before submitting the contracts to the UN for approval and payment under the OFFP. When the UN approved the payment, the Jordanian agent received the extra money in a separate account in a manner that made it appear as though the payment was a second after-sales commission, rather than an improper kickback. In its books and records, AGCO Ltd. mischaracterized the second account used to effect kickbacks as "Ministry Accruals."

Yet this method of accounting did not hide the fact that the commission payments occasionally varied significantly from the percentages provided for in the agent's contract or that the invoicing statements sometimes did not match the amounts actually paid. Indeed, several e-mails made public by the DOJ show that the scheme was known within the company. For example, after the first kickback was paid, the Jordanian agent emailed an AGCO Ltd. employee with details of the contract costs, noting that the "extra commission which you know" was a "third-party expense" to be paid to the Iraqi "Ministry." Regarding the second kickback, another AGCO Ltd. employee wrote to a colleague "as these contracts were negotiated and signed by your good self in Baghdad ... you would of course have a better understanding of the commercials of these contracts, i.e. you mention [sic] up to 30% kickbacks to the ministry etc."

AGCO also failed to impose adequate internal controls over its sales and marketing staff at AGCO Ltd., who were able to enter into contracts without review from either the legal or finance

departments. AGCO Ltd. marketing staff members were even able to create accrual accounts—such as the Ministry Accrual account used to pay the kickbacks—without any oversight. Additionally, on at least two occasions, the Jordanian agent asked for and received money for "car payments" and these payments were made without any due diligence.

Both the SEC and DOJ expressly noted that they considered the prompt remedial acts taken by AGCO and AGCO's cooperation in reaching the above dispositions. These efforts included a significant internal investigation and implementation of enhanced compliance procedures.

2. Avery Dennison

On July 28, 2009, the SEC filed two settled enforcement proceedings against Avery Dennison Corporation ("Avery"), a California-based company that manufactures, markets and sells a wide range of products such as adhesive materials, office products, labels and graphics imaging media, relating to attempted and actual payments and other benefits provided to Chinese government officials, payments made to customs officials in Indonesia and Pakistan and additional unspecified payments discovered in China. In a civil action filed in the U.S. District Court for the Central District of California, the SEC charged Avery with violations of the books and records and internal control provisions of the FCPA. Avery agreed to pay a civil penalty of $200,000 in settlement. In the parallel administrative proceeding, the SEC ordered Avery to cease and desist its violations of the FCPA and to disgorge and pay pre-judgment interest totaling $318,470.

According to the SEC complaint and administrative order, Avery's fourth-tier, wholly owned subsidiary, Avery (China) Co. Ltd. ("Avery China"), sells reflective materials used in printing, on road signs and on emergency vehicles. From 2002 to 2005, Avery China's Reflectives Division paid or authorized payments of several kickbacks, sightseeing trips, and gifts to Chinese government officials, primarily officials of the Wuxi, Jiangsu Province Traffic Management Research Institute ("Wuxi Institute"). China's Ministry of Public Security sets safety standards that products used in road communications must meet. The Ministry is assisted by various institutes, including the Wuxi Institute, that help "formulate project plans, draft product and project specifications, and test[] pilot projects" and, as such, "could play an important role in awarding government contracts."

The benefits Avery provided to the Chinese officials took several forms. For example, in 2002 and 2005, Avery China managers offered sightseeing trips for a total of nine government officials collectively valued at nearly $20,000 and submitted false or multiple reimbursement requests to conceal the true nature of the expenses. In January 2004, an Avery China sales manager accompanied four Wuxi Institute officials to a meeting and purchased each a pair of shoes with a combined value of approximately $500. In May 2004, Avery China hired a former Wuxi Institute official because his wife, also a Wuxi Institute official, was in charge of two projects that Avery China was pursuing.

In August 2004, Avery China's former national manager for the Reflectives Division offered or approved two attempted kickbacks to government entities. The first attempted kickback, which would have amounted to $41,138, was in connection with two contracts awarded to Avery China, which the Reflectives China National Manager obtained by agreeing to increase the sales prices of the contracts artificially and then refund the amount back to the Wuxi Institute with the understanding that at least a portion of the amount would be for the benefit of Wuxi officials. The scheme, however, was discovered by Avery's Asia Pacific region and the payment was never made. The second payment, which would

have amounted to $2,415, was designed to secure a sales contract with Henan Luqiao, which is described only as “a state-owned enterprise,” was discovered by Avery China and was also never made.

In May and June 2005, however, a Reflectives Division sales manager agreed to pay a “commission” to a state-owned customer by having Avery China’s distributor make the payment out of the distributor’s profit margin. The sale was booked as a sale to the distributor and not to the ultimate customer and the distributor claimed to have paid $24,752 out of its profit margin to the customer. The sale generated a net profit for Avery China of $273,213, the amount the company was required to disgorge in the SEC administrative proceeding (in addition to $45,257 in prejudgment interest).

After discovering the improper conduct in relation to the Wuxi Institute in September 2004, Avery conducted an internal review of the Reflectives Division and another Avery division in China before voluntarily approaching the SEC regarding the possible improper payments in 2005. The company subsequently discovered and self-reported additional instances of “possible improper payments” to customs officials in Indonesia by two companies that it acquired. The first series of payments were made by employees of an Indonesian contractor acquired by Avery, and involved payments of approximately $100 each to three customs officials who regularly inspected the company’s goods. Employees funded the payments by collecting petty cash disbursements in $10 increments, which were recorded as travel expenses. These payments continued after Avery’s acquisition of the contractor.

The company also discovered that employees of Paxar Corporation (“Paxar”), a publicly traded company that Avery acquired in June 2007, made illegal payments to customs and tax officials in Indonesia in order to overlook bonded zone regulations or obtain bonded zone licenses. A former Paxar general manager instructed employees to fabricate invoices to conceal the illegal payments, which amounted to $5,000, and the conduct was reported to Avery by a whistleblower in September 2007. Through a series of internal reviews, including a “comprehensive FCPA review in ten high-risk countries,” Avery further discovered problematic payments in connection with the activities of Paxar Pakistan and Paxar China. The Paxar Pakistan payments, amounting to $30,000, were made to customs officials through a customs broker. The SEC’s cease and desist order does not provide details on the potentially problematic payments in China, aside from noting that they amounted to $16,000.

3. Control Components

On July 31, 2009, Control Components, Inc. (“Control Components”) pleaded guilty to FCPA and Travel Act violations in connection with a conspiracy to pay bribes to both foreign officials and officials of foreign and domestic private companies in order to secure contracts in over 30 countries. Control Components is a Delaware company based in California that manufactures and sells industrial service valves for use in nuclear, oil and gas, and power generation facilities, including to many state-owned entities worldwide. It is owned by IMI plc, a British company traded on the London Stock Exchange. Control Components was ordered to pay an $18.2 million criminal fine, implement a compliance program, and retain an independent compliance monitor for three years. It was also placed on three years’ organizational probation.

According to the company’s admissions in connection with its plea of guilty, the conspiracy began in approximately 1998 and lasted through 2007. From 2003 to 2007 alone, Control Components made 236 corrupt payments totaling approximately $6.85 million to foreign officials at state-owned entities in more than 36 countries including, but not limited to, China (Jiangsu Nuclear Power Corp., Guohua

Electric Power, China Petroleum Materials and Equipment Corp., PetroChina, Dongfang Electric Corporation, China National Offshore Oil Corporation ("CNOOC")), Korea (KHNP), United Arab Emirates (National Petroleum Construction Company), and Malaysia (Petronas). On August 15, 2009, CNOOC issued a statement that none of its employees or officials received bribes from CCI.

From 2003 to 2007, Control Components specifically paid or caused to be paid $4.9 million to foreign officials in violation of the anti-bribery provisions of the FCPA and another $1.95 million in bribes to officers and employees at both domestic and foreign private companies located in California, China, Italy, Russia, and Texas in violation of the Travel Act. The company admitted that these payments resulted in net profits of $46.5 million.

The indictments and Control Components' guilty plea are notable for the inclusion of charges that Control Components and the individuals violated the Travel Act by making corrupt payments to privately owned customers in violation of California state law against commercial bribery. Such payments would not violate the FCPA's anti-bribery provisions.

Control Components admitted to a detailed scheme for making improper payments to foreign officials. Control Components developed a sales practice of maintaining "friends-in-camp" ("FICs") at the company's customers and cultivating these relationships through "commission payments" to assist it in obtaining business. The FICs were often officers and employees of state-owned entities, and thus considered to be "foreign officials" within the meaning of the FCPA, who were in a position to direct contracts to Control Components or adjust technical specifications to favor the use of Control Components' valves. The illegal kickbacks were often referred to by employees of Control Components as "flowers," and were either: (i) wired directly to the FICs from the Control Components' Finance Department; (ii) made through company representative and sales staff; or (iii) made through third-party "consultants" who acted as pass-through entities.

In addition, the Company admitted that it: (i) arranged for and provided overseas holidays to Disneyland and Las Vegas to officers and employees of state-owned and private entities under the guise of "training and inspection trips"; (ii) purchased extravagant vacations, including first-class airfare to Hawaii, five-star hotel accommodations and other luxuries, for executives of state-owned and private customers; (iii) paid for the college tuition expenses of children of at least two executives of state-owned customers; (iv) hosted lavish sales events for current and potential state-owned and private customers; and (v) provided expensive gifts to officers and employees of state-owned and private customers.

Control Components also admitted that its employees sought to, and did, frustrate an internal audit in 2004 by its parent, IMI plc, into the company's commission payments. Among other things, the employees provided false information to the auditors, created false invoices and a spreadsheet in an attempt to mislead the auditors and instructed other employees not to use certain language in e-mail communications that would potentially alert the auditors to the existence of the scheme.

a. Individuals

On January 8, 2009, Mario Covino, the former director of worldwide factory sales for Control Components, pleaded guilty to one count of conspiracy to violate the FCPA. Covino also admitted that he caused other employees and company agents to make corrupt payments of over $1 million to employees

of state-owned entities. The illegal kickbacks directed by Covino earned Control Components an estimated $5 million.

One month later, Control Components former finance director Richard Morlok pleaded guilty to one count of conspiracy to violate the FCPA in connection with his involvement in the scheme. As finance director, Morlok was responsible for both approving the commission payments and signing off on the wire transfers to FICs. While his plea related specifically to one particular payment of almost $58,000 to Korean company KHNP, Morlok admitted to directing a total of approximately $628,000 to foreign officials at state-owned companies between 2003 and 2006 that resulted in contracts worth approximately $3.5 million.

On April 8, 2009, six additional former executives of Control Components were charged in connection with the same course of conduct.

- Stuart Carson, the former chief executive officer, was charged with two counts of violating the FCPA and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, Carson was the architect of the "Friends-in-Camp" system Control Components employed. Between 2003 and 2007, Carson allegedly directed approximately $4.3 million in corrupt payments to employees at state-owned entities and approximately $1.8 million to officers and employees of private companies.

- Hong Carson, the wife of Stuart Carson and the former director of sales for China and Taiwan, was charged with five counts of violating the FCPA, one count of conspiracy to violate the FCPA and Travel Act and one count of obstruction. According to the indictment, between 2003 and 2007, Mrs. Carson directed approximately $1 million in corrupt payments to employees at state-owned entities and approximately $43,000 to officers and employees at private companies. The obstruction charge was added because, just before her interview with attorneys hired by Control Components to conduct an internal investigation into the company's commission payments, Mrs. Carson allegedly intentionally destroyed documents by tearing them up and flushing them down the toilet in a company restroom. On March 3, 2011, however, the DOJ dismissed the obstruction charge against Mrs. Carson "in the interests of justice" without further explanation.

- Paul Cosgrove, a former executive vice president and the former director of worldwide sales, was charged with six counts of violating the FCPA, one count of violating the Travel Act and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Cosgrove directed approximately $1.9 million in corrupt payments to employees at state-owned entities and $300,000 to officers and employees at private companies.

- David Edmonds, the former vice president of worldwide customer service, was charged with three counts of violating the FCPA, two counts of violating the Travel Act, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Edmonds directed approximately $430,000 in corrupt payments to employees at state-owned entities and $220,000 to officers and employees of private companies.

Flavio Ricotti, the former Vice President and head of sales for Europe, Africa and the Middle East, was charged with one count of violating the FCPA, three counts of violating the Travel Act, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Ricotti directed approximately $750,000 in corrupt payments to employees at state-owned entities and approximately $380,000 to officers and employees of private companies. An Italian citizen, Ricotti is described as an "agent" of a "domestic concern" in the charging documents.

- Han Yong Kim, the former president of Control Component's Korean office, was charged with two counts of violating the FCPA, and one count of conspiracy to violate the FCPA and Travel Act. According to the indictment, between 2003 and 2007, Kim directed approximately $200,000 in corrupt payments to employees at state-owned entities and approximately $350,000 to officers and employees of private companies. As a citizen of Korea, Kim is described as an "agent" of a "domestic concern."

Mr. and Mrs. Carson, Cosgrove, and Edmonds filed a motion to dismiss two of the FCPA counts and one Travel Act count based on the five-year statute of limitations. The Government had asked for and received a tolling order in November 2008 on the premise that the grand jury investigation hinged on foreign discovery, specifically a request to Switzerland for assistance in obtaining certain documents. The four defendants contended, first, that the conduct underlying these three counts was unrelated to the documents produced by the Swiss discovery request and, second, that, in the case of the one of the counts, the tolling order was issued after the statute of limitations had already run. The court denied both claims. With regards to the first argument, the court held that the tolling order related to the general subject of the grand jury investigation and was not count-specific. Further, the court explained that the foreign discovery request need not yield essential documents for each count to uphold the tolling order, as so holding would place a prosecutor in the position of needing to "be clairvoyant to know whether his request would produce essential documents, and hence whether he had in fact secured an effective tolling order." With regards to the second argument, the court held that the effective date for statute of limitations purposes was not the date of the tolling order, but rather the date of the foreign discovery request.

The four defendants also asked the court to allow them to obtain discovery of Control Components' internal investigation, including the company's electronic database, through the DOJ, as opposed to through Control Components. They argued that Control Components' plea agreement gave the DOJ constructive possession of all of Control Components' records of foreign bribery, even those not actually possessed by the DOJ. The court disagreed and held that the Government only had to produce those materials of which it had physical possession.

On February 21, 2011, the four defendants filed a motion to dismiss arguing that the FCPA did not apply to their conduct, as employees of state-owned enterprises should not be considered to be "foreign officials." Their motion, reminiscent of previous unsuccessful motions filed in the *Nguyen* and *Esquenazi* cases, argued that the plain wording of the statute and the legislative history suggest that the term "instrumentality" of a foreign government—routinely interpreted by the DOJ and SEC to include state-owned entities—should be read to include only entities that are "innately governmental," such as government boards, bureaus, or commissions. They further argued that, particularly given the DOJ's continued refusal to provide specific guidance on the definition of "instrumentality," the term is unconstitutionally vague. On May 18, 2011, the court denied their motion, suggesting that the criteria for

establishing that a state-owned enterprise is an instrumentality of a foreign government are even broader than expected. According to the court:

> Several factors bear on the question of whether a business entity constitutes a government instrumentality, including:
>
> - The foreign state's characterization of the entity and its employees;
> - The foreign state's degree of control over the entity;
> - The purpose of the entity's activities;
> - The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
> - The circumstances surrounding the entity's creation; and
> - The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).
>
> Such factors are not exclusive, and no single factor is dispositive.

This holding, and other contemporaneous rejections by federal district courts of similar challenges to the meaning of "foreign official," are stark reminders of the importance of identifying which foreign customers of an organization subject to the FCPA are state-owned and imposing internal accounting controls and conducting due diligence on third parties reasonably designed to detect and prevent corrupt payments.

Flavio Ricotti was arrested in Frankfurt, Germany and was extradited to the United States in 2010. On April 29, 2011, Ricotti pled guilty to a single count of conspiracy to violate the FCPA and the Travel Act. Ricotti admitted to conspiring with other CCI employees to bribe an official of Saudi Aramco, as well as an employee of a private company in Qatar in an effort to secure contracts.

On March 5, 2012, defendants Stuart and Rose Carson, Cosgrove, and Edmonds filed another motion to dismiss. On the same day, defendants Edmonds, Cosgrove, and Rose Carson filed a motion to suppress. They cited Control Components' cooperation with DOJ during the company's 2007 internal investigation, in which Control Components compelled the defendants to "answer all questions regardless of their Fifth Amendment right against self-incrimination or be fired." The court held that Control Components' counsel were not acting as government agents in conducting their internal investigation and denied the motion.

Stuart and Rose Carson pleaded guilty on April 16, 2012 to single-count superseding criminal informations. Stuart Carson pleaded guilty to corruptly causing to be sent a single e-mail authorizing a $16,000 payment to state-owned Turow Power Plant in Poland. Rose Carson pleaded guilty to corruptly causing to be sent an e-mail authorizing a $40,000 payment to officials at Taiwan's Kuosheng Nuclear Power Plant. In November 2012, Carson was sentence to four months in prison and eight months of

home detention for his role in the foreign bribery scheme. Rose Carson was sentenced to six months home confinement. In addition, Stuart and Rose Carson were each ordered to pay a fine of $20,000.

In May 2012, Cosgrove pleaded guilty to a single anti-bribery violation relating to payments to officials in China. A month later, Edmonds also pleaded guilty to a one-count superseding indictment that charged Edmonds with making a corrupt payment to a foreign government official in Greece in violation of the FCPA. Cosgrove was sentenced to 13 months home confinement, and Edmonds was sentenced to serve four months in prison, in addition to serving four months of supervised release. Both individuals were ordered to pay a $20,000 fine.

In February 2013, DOJ recommended probation for Covino and Morlok, citing the significance of their cooperation that led to the guilty pleas of the Carsons, Cosgrove, and Edwards, along with the settlement of Control Components. On March 11, 2013, U.S. District Judge Selna sentenced Covino and Morlok to three years' probation with three months home detention, in addition to fines of $7,500 and $5,000, respectively.

Prosecutors also recommended time-served for Ricotti, who had spent eleven months in jail following his extradition from Germany in 2010. Judge Selna accepted the recommendation and waived the fine at Ricotti's sentencing hearing on March 18, 2013.

There is thus one defendant remaining in the Control Components case. Han Yong Kim remains a fugitive in South Korea despite a recent challenge from Kim's lawyers. According to court documents filed by Kim's lawyers in May 2013, South Korea will not extradite Kim to the United States because they do not consider the employees of KHNP to be public officials. Kim contends that his fugitive status prevents him from fighting the charges or engaging in talks for a plea deal.

4. Helmerich & Payne

On July 30, 2009, following a voluntary disclosure, Helmerich & Payne ("H&P")—an oil-drilling company headquartered in Tulsa, Oklahoma and listed on the New York Stock Exchange—entered into agreements with the SEC and DOJ in connection with improper payments by H&P subsidiaries to customs officials in Argentina and Venezuela in relation to the shipment of drilling equipment parts. Under a cease and desist order with the SEC and a two-year NPA with the DOJ, H&P is required to pay approximately $1.375 million in fines and profit disgorgement, implement rigorous internal controls and cooperate with the agencies.

H&P provides rigs, equipment, and personnel to national and international oil companies on a contract basis in the United States and South America. Between 2003 and 2008, two of H&P's subsidiaries, the financial results of which are components of the consolidated financial statements in H&P's filings with the SEC, Helmerich & Payne (Argentina) Drilling Company ("H&P Argentina") and Helmerich & Payne de Venezuela, C.A. ("H&P Venezuela"), made improper payments to government officials to skirt Argentine and Venezuelan customs laws. Both subsidiaries directed payments to officials through their customs brokers in order to facilitate imports and exports. H&P Argentina paid approximately $166,000 to customs officials to permit the importation and exportation of its equipment without required licenses or on an expedited basis, and, in some instances, when Argentine law forbade such imports. H&P Venezuela paid nearly $20,000 to customs officials to secure partial inspections or to

import equipment not in compliance with local customs regulations. Together, the subsidiaries avoided through such payments over $320,000 in expenses they would have otherwise incurred.

The subsidiaries falsely or misleadingly recorded the brokerage service payments in their books and records. H&P Argentina received and paid invoices from its customs broker that described the payments to customs officials as “additional assessments,” “extra costs,” or “extraordinary expenses.” Similarly, the improper payments that H&P Venezuela made were described on invoices as “urgent processing,” “urgent dispatch,” or “customs processing.”

H&P first learned of the improper payments during an FCPA training session. In early 2008, H&P designed and implemented standalone FCPA policies and procedures, which included worldwide FCPA training for its key employees. (The company’s Corporate Code of Business Ethics had historically contained anti-bribery provisions.) During one such training session, an H&P employee volunteered information about the improper payments H&P Argentina was making. In response, H&P hired outside counsel and independent forensic accountants to conduct an internal investigation of the subsidiaries’ customs practices in Latin America. Both the DOJ and SEC pointed to the company’s voluntary disclosure of the improper payments as well as its prompt remedial actions as mitigating factors.

5. ITT

On February 11, 2009, New York-based conglomerate ITT settled civil charges with the SEC for violating the books and records and internal controls provisions of the FCPA in connection with improper payments made by its wholly owned subsidiary, Nanjing Goulds Pumps Ltd. (“NGP”), to Chinese government officials. ITT agreed to pay more than $1.4 million in disgorgement and prejudgment interest as well as a $250,000 civil penalty.

According to the SEC Complaint, from 2001 to 2005, NGP, a part of ITT’s Fluid Technology division, made approximately $200,000 in illegal payments to employees of Chinese state-owned entities. Employees and agents of NGP made most of the payments, directly or indirectly, to employees of Design Institutes (some of which were state-owned entities) that assisted in planning large infrastructure projects in China.

The complaint alleges that the payments were inducements to the Design Institute employees to formulate request for proposals (“RFPs”) that contained specifications that corresponded to the pumps manufactured by NGP. The Design Institute then evaluated NGP’s response to the RFPs and made favorable recommendations to the state-owned entities responsible for the oversight and construction of the projects. In return, if NGP was granted the contract, it made kickback payments either directly or through third parties to the Design Institute employees. Direct payments to the Design Institute employees were sent via wire transfer to the employees’ personal bank accounts or through checks made out to “cash.” Alternatively, NGP paid inflated commissions to agents with the understanding that some of the commission would be passed on to the employees of the Design Institutes.

NGP improperly recorded the illegal payments, whether made directly or through an agent, as commission payments. These entries were eventually rolled into ITT’s financial statements and contained in its filings with the SEC from 2001-2005.

ITT learned of the illicit payments in December 2005 when its Corporate Compliance Ombudsman received an anonymous tip from an NGP employee. The company began investigating and determined that NGP employees had made illegal payments in connection with at least one contract for each of 32 different state-owned entities that were ITT customers from 2001-2005. Overall, the SEC asserts that illegal bribes paid by employees of NGP resulted in approximately $1 million of profit for ITT. The SEC "considered that ITT self-reported, cooperated with the Commission's investigation, and instituted subsequent remedial measures."

6. William J. Jefferson

On August 5, 2009, former congressmen William J. Jefferson, the first elected official ever charged with violating the FCPA, was convicted on 11 of 16 counts of corruption, including conspiracy to violate the FCPA (albeit with a wrinkle described below), soliciting bribes, money-laundering, honest services fraud, obstruction of justice, and racketeering. The jury found Jefferson guilty of soliciting and receiving 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. On November 13, 2009, he was sentenced to 13 years in prison, far less than the 27 to 33 years requested by prosecutors.

Jefferson participated in 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 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.

Jefferson also faced a substantive charge of violating the FCPA, but was ultimately acquitted of that charge. The FCPA charge stemmed 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 alleged 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 Lori Mody, 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.

The government's FCPA case was weakened when Mody did not testify. The judge instructed the jury that to convict Jefferson on the FCPA charge, they had to find that he had offered to bribe the Nigerian official or authorized such a bribe. Defense counsel argued that, as the $90,000 had been found in the freezer, it could not have been used to bribe the Nigerian official and that Jefferson had not intended to use it so.

Jefferson was found guilty of 11 counts, including a count of conspiracy, which included conspiracy to (i) solicit bribes, (ii) deprive citizens of honest services, and (iii) violate the FCPA. The jury's verdict form did not require it to specify which conspiracy charges were proven. The guilty verdict, however, is recorded as an FCPA conspiracy charge under Count 1 of the indictment. Jefferson was

acquitted on three counts of honest services wire fraud, one count of obstruction of justice, and the lone count of violating the FCPA.

Jefferson appealed his conviction on the grounds that the district court's jury instructions erroneously characterized the definition of an "official act" and the "*quid-pro-quo*" element of U.S. law prohibiting the bribery of public officials, that Jefferson's failure to disclose his and his family's interest in business he promoted did not constitute honest services wire fraud, and that the venue was improper on one of the wire fraud offenses. Among Jefferson's arguments was that the definition of an "official act" under the domestic bribery statute should be narrowly interpreted and limited to those acts that "concern a question resolvable through the formal legislative process or, at most ... through a governmental process." On March 27, 2012, however, a three-judge panel at 4th Circuit Court of Appeals unanimously affirmed ten of the eleven counts of Jefferson's conviction, including the count of conspiracy to commit (among other offenses) a violation of the FCPA. The appellate panel rejected Jefferson's "official act" argument by noting that the U.S. Supreme Court has long-held that official acts can include activities that have been clearly established by settled practice as part of a public official's position. The appellate panel also affirmed the district court's "*quid pro quo*" jury instruction and rejected Jefferson's argument that the government need to demonstrate that payments he received were tied to specific official acts (or omissions). The appellate panel confirmed the district court's reasoning that services performed on an "as needed" basis could still be linked to payments Jefferson received. Jefferson's singular victory was the appellate panel's dismissal of a single wire fraud count, which it found to be improperly prosecuted in Virginia because the misconduct involved a phone call between Africa and Kentucky.

7. KBR/Halliburton Company

On February 11, 2009, engineering and construction services provider Kellogg Brown & Root LLC ("KBR"), a subsidiary of KBR, Inc. ("KBR, Inc."), pleaded guilty to a five-count criminal information for violations of the FCPA in connection with an alleged bribery scheme in Nigeria. Simultaneously, KBR, Inc. and its former parent company Halliburton Company ("Halliburton") settled FCPA books and records and internal controls charges with the SEC. Combined, the companies will pay $579 million in fines and disgorgement, the largest combined settlement for U.S. companies since the FCPA's inception and the second-largest anti-corruption settlement in history. In total, as alleged, the bribery scheme involved over $180 million worth of improper payments used to assist in obtaining or retaining engineering, procurement and construction ("EPC") contracts valued at over $6 billion to build liquefied natural gas ("LNG") facilities on Bonny Island, Nigeria (the "Bonny Island project").

Under the DOJ settlement, KBR agreed to pay a $402 million fine in eight installments over the next two years. Due to a prior agreement with its former subsidiary, Halliburton will indemnify KBR, Inc. for $382 million of that amount, while KBR will pay the remaining $20 million. KBR will also retain a compliance monitor for three years. In settling with the SEC, Halliburton agreed to be jointly and severally liable with KBR, Inc. and in turn pay $177 million in disgorgement. Additionally, the SEC settlement requires Halliburton to retain an independent consultant for an initial review and a follow-up review a year later of its "anti-bribery and foreign agent internal controls and record-keeping policies."

As described below, in September 2008, former KBR CEO Albert "Jack" Stanley pleaded guilty to charges of conspiracy to violate the FCPA and conspiracy to commit mail and wire fraud in connection with the same alleged bribery scheme and other misconduct. He faces up to ten years in prison. However, prosecutors have agreed to a sentence of seven years in prison and $10.8 million in restitution.

KBR's U.K. subsidiary, M.W. Kellogg Limited ("MWKL") reached a civil settlement with the U.K. Serious Fraud Office ("SFO") on February 15, 2011, based on the same underlying facts. The SFO recognized that MWKL took no part in criminal activity, but it benefitted from the proceeds of the conduct in violation of the Proceeds of Crime Act 2002. MWKL agreed to pay £7,000,028 (approximately $11.2 million), an amount equal to the share of dividends payable from profits generated by the Bonny Island project, and to overhaul its internal audit and internal controls functions. Fifty-five percent of the total settlement costs will be reimbursed by Halliburton under the companies' indemnity agreement.

8. Latin Node and eLandia International Inc.

On April 7, 2009, Latin Node, Inc. ("Latin Node"), a formerly privately held telecommunications company headquartered in Miami, Florida, pleaded guilty to one count of violating the FCPA's anti-bribery provisions in connection with corrupt payments made to government officials in Honduras and Yemen. As part of its plea, Latin Node agreed to pay a $2 million fine over three years. According to a spokesman, the fine will be paid by Latin Node's parent company, eLandia International Inc. ("eLandia").

In 2007, eLandia, a publicly traded global provider of information technology communications and other services, acquired an 80% stake in Latin Node. On September 14, 2007, eLandia disclosed that as part of its acquisition of Latin Node, it had discovered certain past payments by Latin Node to consultants in Central America that were made in the absence of adequate records and controls for a U.S. public company. eLandia initiated an investigation into the payments and began establishing a new system of internal legal and accounting controls. In its May 2008 Form 10-Q, eLandia reported that the preliminary investigation had revealed certain pre-acquisition payments by Latin Node made in violation of the FCPA. eLandia subsequently reported the potential violations to the DOJ, SEC, and FBI and an investigation ensued. In its press release, the DOJ acknowledged that "resolution of the criminal investigation of Latin Node reflects, in large part, the actions of Latin Node's corporate parent, eLandia," including the fact that eLandia "voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latin Node management with involvement in or knowledge of the violations."

According to the Latin Node criminal information, between March 2004 and June 2007, Latin Node paid or caused to be paid nearly $1.1 million to foreign officials or third parties knowing that all or some of the payments would be used to bribe officials at the Honduran state-owned telecommunications company, Empresa Hondureña de Telecomunicaciones ("Hondutel"). The charging documents alleged that, as early as November 2003, Latin Node began seeking the assistance of a Hondutel official (identified as "Official A" in the Statement of Offense against Latin Node) who "headed the evaluation committee responsible for awarding interconnection agreements with private telecommunications companies…." Latin Node subsequently was awarded an interconnection agreement with Hondutel in December 2005 despite what it knew to be "financial weaknesses" in its proposal. Shortly thereafter, Latin Node's wholly owned subsidiary, LN Comunicaciones, entered into a sham "consulting" agreement with a company called Servicios IP, S.A. ("Servicios") nominally owned by two LN Comunicaciones employees. Servicios in turn entered into a sham "consulting" agreement with a company called AAA Telefonica ("AAA"), that was controlled by an individual believed to be Official A's brother. Latin Node and LN Comunicaciones then made payments to Servicios knowing that some or a portion of those

payments would be passed along to Hondutel officials, including Official A. In June 2007, Latin Node hired Official A and made her responsible for business development in Latin America and the Caribbean.

Additionally, Latin Node, at the direction of its founder and former CEO and Chairman Jorge Granados and former Vice President of Business Development Manual Caceres agreed to pay kickbacks to three Hondutel officials to reduce rates Latin Node was to pay on calls terminating in Honduras. Granados and Caceres allegedly orchestrated the payments with the Hondutel officials and certain unnamed co-conspirators, and caused the illicit payments to be made by a series of checks and wire transfers chiefly from a Latin Node account at Citibank in Miami.

Granados and Caceres allegedly instructed Latin Node employees to submit fraudulent billing statements to Hondutel to help disguise the discrepancy between Hondutel's normal rates and those paid by Latin Node, which had been identified by the Hondutel Collections Department. Granados also allegedly directed a Latin Node employee to delete emails relating to Hondutel from Latin Node's computer servers.

In total, according to the DOJ, approximately $1,099,899 in improper payments were made. Of this amount, $440,200 of the payments were made directly from Latin Node to the Honduran officials, while an additional $141,000 Latin Node paid to its own employees while knowing that some or all of the funds would be passed on to government officials. In addition, Latin Node paid approximately $517,689 to LN Communications, knowing that some or all of the funds would be passed on to government officials.

From June 2005 to April 2006, Latin Node also made improper payments in connection with its business activities in Yemen. Beginning as early as 2004, Latin Node explored ways to enter the Yemeni market, and learned that an individual identified as "Yemen Partner A" (who is described as a dual United States and Egyptian citizen) had, through his own company, obtained an interconnection agreement with TeleYemen, the state-owned telecommunications company, at a favorable rate. In March 2004, Latin Node entered into a revenue sharing agreement with Yemen Partner A with the understanding that some or all of the money paid to Yemen Partner A would be passed to TeleYemen officials in exchange for continued favorable rates. Email communications revealed that Latin Node executives were aware that Yemen Partner A was making payments to TeleYemen officials and that he claimed to have connections to the son of Yemen's president. The DOJ pointed out, however, that "[c]ourt documents do not allege or refer to evidence showing that the son of the Yemeni president received any payments from Latin Node. No foreign government officials are the subjects of U.S. investigations in this matter." According to court documents, Latin Node made over $1.1 million in corrupt payments either directly to Yemeni officials or through Yemen Partner A. Granados and Caceres were implicated in the Yemeni scheme in the Latin Node charging documents; however, their indictment relates only to the Hondutel scheme.

On December 14, 2010, Granados and Caceres were indicted by a federal grand jury in Miami. Shortly after, on December 17, 2010, the DOJ charged Manuel Salvoch, Latin Node's former CFO, and Juan Vasquez, a former senior commercial executive, in a sealed criminal information. Granados and Caceres were arrested on December 20, 2010, and their 19-count indictment was unsealed. Granados and Caceres were charged with one count of conspiracy to violate the FCPA, twelve counts of violating the FCPA's anti-bribery provisions, one count of money laundering conspiracy, and five counts of money laundering. Salvoch was arrested on January 11, 2011, and Juan Vasquez was arrested on January 20, 2011. The charges against these individuals relate only to the payments to government officials in Honduras. According to the court documents, Caceres' principal role was to negotiate the payment of

bribes with the Honduras officials, Granados' principal role was to authorize and direct the bribe payments; and Vasquez and Salvoch were responsible for facilitating the payment of bribes.

These four former Latin Node executives all pleaded guilty and three of these executives have been sentenced. Jorge Granados pleaded guilty on May 19, 2011 and in September 2011 was sentenced to 46 months in prison. Manual Caceres pleaded guilty on May 18, 2011 and in April 2012 was sentenced to 23 months, followed by one-year supervised release. Juan Vasquez pleaded guilty on January 21, 2011, and in April 2012, was sentenced to 3 years' probation, community service, home detention and monitoring, and ordered to pay a $7,500 criminal fine. Manuel Salvoch, who pleaded guilty on January 12, 2011, was sentenced on June 8, 2012 to a ten-month prison term, followed by three years of supervised release, six months of home detention, monitoring, and community service.

9. Nature's Sunshine Products, Douglas Faggioli, and Craig D. Huff

On July 31, 2009, the SEC filed a settled enforcement action against Nature's Sunshine Products, Inc. ("NSP"), its Chief Executive Officer Douglas Faggioli and its former Chief Financial Officer Craig D. Huff for violations of the anti-bribery, books and records and internal controls provisions of the FCPA as well as antifraud and issuer reporting provisions of the Exchange Act. NSP is a Utah corporation that manufactures, among other things, vitamins and nutritional supplements. Without admitting or denying the allegations, NSP, Faggioli and Huff consented to final judgments enjoining them from future violations of the FCPA and the Exchange Act. The judgment ordered NSP to pay a civil penalty of $600,000 and Faggioli and Huff each to pay a civil penalty of $25,000.

According to the SEC's Complaint, between 2000 and 2001, NSP's wholly owned Brazilian subsidiary, Nature's Sunshine Produtos Naturais Ltda. ("NSP Brazil"), made over $1 million in cash payments to customs brokers, some of which were later passed on to Brazilian customs officials. NSP recorded the payments as "importation advances." NSP Brazil began making the payments after the Brazilian governmental agency responsible for regulating nutritional products reclassified many NSP products as medicines, which led to a significant decline in NSP's sales in Brazil. As a consequence of the reclassification, NSP Brazil was required to register its products in order to legally import and sell them, but was unable to obtain registration for several of its products. From 2000 to 2003, NSP's sales in Brazil dropped from $22 million to $2.3 million. NSP Brazil thus paid the customs agents to facilitate the illegal importation of its products.

In December 2000, NSP Brazil's Operations Manager informed two NSP controllers, who were visiting NSP Brazil and had responsibility for maintaining NSP's books and records and preparing NSP's financial statements with respect to its foreign subsidiaries, including NSP Brazil, that he was concerned about the products NSP Brazil was importing because the company did not have the proper registrations. He told the controllers that, as a result of pressure from the Brazilian government, it was costing NSP Brazil 25% of the value of its product to find customs brokers willing to assist in the importation of the unregistered products. He also claimed to have informed NSP Brazil's General Manager about these issues but was told that NSP was aware of the problems. One of the controllers claimed to have informed a senior manager at NSP about the statements made to him by the operations manager.

In approximately November 2001, NSP Brazil hired a new controller who discovered entries reflecting approximately 80 cash payments, including payments to customs brokers in Brazil, for which no supporting documentation existed. Nevertheless, NSP accounted for the payments in its 2001 financial

statements as if they were legitimate importation expenses. In 2002, in an effort to conceal the payments, NSP Brazil purchased fictitious supporting documents.

In its 2001 Form 10-K filed with the SEC in March 2002, NSP stated that it had experienced a significant decline in sales in Brazil, but failed to disclose any material information regarding the payments to customs brokers.

The SEC complaint alleges that in 2000 and 2001, Faggioli, as COO during the relevant period, and Huff, as CFO during the relevant period, failed to adequately supervise NSP personnel (i) to make and keep books and records at NSP in reasonable detail and (ii) in devising and maintaining a system of internal controls to provide reasonable assurance that the registration of NSP products sold in Brazil was adequately monitored. The complaint does not allege any personal knowledge or participation in any of improper payments on behalf of Faggioli and Huff. This represents the SEC's first use of "control person liability" in the FCPA context of which we are aware.

The Complaint alleges that NSP violated Sections 10(b), 13(a), 13(b)(2)(A), 13(b)(2)(B) and 30A of the Exchange Act, and Rules 10b-5, 12b-20, 13a-1 and 13a-13, and that Faggioli and Huff violated Sections 13(b)(2)(A) and 13(b)(2)(B) as control persons pursuant to Section 20(a) of the Exchange Act.

In its statement, NSP indicated that it self-reported the results of its internal investigation to the SEC and the DOJ and "fully cooperated in the government investigations."

10. Novo Nordisk

On May 11, 2009, Novo Nordisk, a Danish manufacturer of insulin, medicines and other pharmaceutical supplies whose American Depository Receipts trade on the New York Stock Exchange, entered into a DPA with the DOJ and settled related charges with the SEC resulting from illegal kickbacks paid to the former Iraqi government in connection with the U.N. Oil-for-Food Programme ("OFFP"). As part of the three-year DPA, Novo agreed to pay a $9 million fine and cooperate fully with the DOJ's ongoing OFFP investigation for conspiring to violate the FCPA's books and records provision and to commit wire fraud. Under the SEC's settlement, Novo agreed to pay over $6 million in disgorgement of profits and prejudgment interest and a $3,025,066 civil penalty and is permanently enjoined from violating the FCPA's books and records and internal control provisions.

According to the criminal information, Novo paid over $1.4 million in kickbacks to Kimadia, the Iraq State Company for the Importation and Distribution of Drugs and Medical Equipment, in connection with eleven different contracts. The SEC complaint also indicates that Novo authorized, but did not pay, illicit kickbacks valued at over $1.3 million on two additional contracts.

According to the charging documents, in late 2000 or early 2001, a Kimadia import manager informed Novo's long-time Jordanian agent tasked with submitting bids on Novo's behalf that a 10% kickback would be required in order to obtain contracts under the OFFP. Novo's agent notified the general manager of Novo's Near East Office ("NEO," based in Jordan) and the business manager of Novo's Regional Office Near East ("RONE," based in Greece) of the demand. The request was raised internally to a Novo Senior Vice President and later to a Novo officer, who refused to comply. Despite this refusal, other Novo employees ultimately authorized the payments and agreed to increase the agent's commission from 10% to 20% to facilitate the illicit payments.

Novo made the payments in three ways: (i) by wiring money to the agent's bank account, who would then pass it on to Iraqi government accounts; (ii) by issuing bank guarantees to Kimadia; and (iii) by depositing money directly into Kimadia accounts. Novo improperly recorded these payments on its books and records as "commissions." The SEC also noted that Novo did not memorialize an increase in the agent's commission until nine months after the first commission payment was made.

In their releases announcing the settlement, both the DOJ and SEC acknowledged Novo's cooperation and remediation, with the DOJ noting that Novo conducted a "thorough review of the illicit payments and [implemented] enhanced compliance policies and procedures."

11. Jeffrey Tesler & Wojciech Chodan

On December 6, 2010, Wojciech Chodan pleaded guilty to one count of conspiracy to violate the FCPA, and on March 11, 2011, Jeffrey Tesler pleaded guilty to conspiring to violate and violating the FCPA. Tesler and Chodan's legal troubles stem from their central involvement in the Bonny Island, Nigeria bribery scheme described below.

In their original indictment in a Houston court in February 2009, the DOJ charged both individuals with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA, and sought forfeiture of over $132 million from them. The London Metropolitan Police arrested Tesler, a lawyer, in March 2009 at the request of United States authorities. According to the charging document, Tesler, Chodan, KBR's Albert "Jack" Stanley and other co-conspirators began discussions in 1994 among themselves and with Nigerian officials about how to structure bribe payments associated with contracts to build liquefied natural gas facilities at Bonny Island in Nigeria. In 1995, a Gibraltar corporation allegedly controlled by Tesler called Tri-Star Investments ("Tri-Star") was hired for the purpose of paying bribes to Nigerian government officials. According to the indictment, Tri-Star, which the U.S. government describes as an "agent" of the joint venture and all participating companies, was paid over $130 million between 1995 and 2004. The complaint identifies eight payments, totaling just under $19.6 million, that apparently were made from a joint venture-controlled bank account in Madeira, Portugal, through correspondent bank accounts in New York, to bank accounts in Switzerland and Monaco controlled by Tesler.

With respect to Chodan, the indictment alleged that he was a former employee and consultant of KBR's U.K. subsidiary and participated in "cultural meetings" where he and co-conspirators discussed the use of Tesler and others, including a second agent identified as "Consulting Company B," to pay bribes to Nigerian officials. Chodan was also a board member of one of the JV entities that entered into consulting agreements with Tesler and Consulting Company B. The indictment identifies several communications among Chodan, Tesler and others about the bribery scheme's details, including payment structures and recipients. After indictment, the DOJ pursued Tesler and Chodan's extraditions from the United Kingdom to face charges in the United States. Because both men are foreign citizens, and because neither was in the United States at any relevant time, the case raises interesting jurisdictional questions. The indictment asserts jurisdiction by classifying the men as "agents" of a "domestic concern" (KBR) and alleging that certain actions in furtherance of the violations touched U.S. instrumentalities of interstate commerce. In addition to the payments noted above that were routed through U.S. correspondent banks, the complaint identifies two email communications between KBR personnel in the United States and Tesler and Chodan. In one, the government alleges a KBR salesperson emailed Tesler details of the consulting agreements with Tri-Star and Consulting Company B, and details of a paid trip to the United States for a Nigerian official. The other email was apparently sent by Chodan to KBR officials in Houston and

contained a draft release to French authorities investigating the Bonny Island project that included false statements as to Tesler's role in assisting the joint venture.

Both Tesler and Chodan fought extradition to the United States. On November 23, 2009, at a hearing in a London court, Tesler's attorney argued that extradition would be unfair as he also faces prosecution in the United Kingdom by the SFO and that the charged offense was against Nigeria rather than the United States. Chodan's attorney made a similar argument on his behalf at Chodan's extradition hearing on February 22, 2010. On March 25, 2010, District Judge Caroline Tubbs, sitting at Westminster magistrates' court in London, ruled that Tesler's alleged crimes had "substantial connection" to the United States and ordered extradition. On April 20, 2010, Judge Tubbs similarly ordered extradition for Chodan.

Both Tesler and Chodan appealed to the High Court in London to block their respective extradition orders. On Appeal, Chodan's attorney argued that it would be "unjust and oppressive" to "haul" then-72-year-old Chodan "out of his domestic bliss" with his wife and extradite him to the United States where he could die in prison. Without explanation, Chodan withdrew his High Court challenge on November 8, 2010, and was extradited to the United States. Chodan appeared in a United States District Court in Houston, Texas, and on December 6, 2010, pled guilty to conspiring to violate the FCPA and agreed to forfeit $726,885. On February 22, 2012, he was sentenced to serve one year of probation and to pay a $20,000 fine. His sentence, which can be considered light given that he faced up to 5 years in prison for the conspiracy charge, took into account his assistance in the investigation and prosecution of Tesler.

At Tesler's January 2011 hearing at the High Court in London, two Lord Justices ruled that Tesler's extradition to the United States could also go forward. As quoted by the BBC, the Lord Justices stated that as a conspirator, Tesler could not escape liability for his corrupt activities by remaining physically outside the United States when "as a result of [his conduct] very substantial sums of money were planned to be made in the United States…. The effects of his actions were to be felt in the United States and were intended to be felt there. A United States entity [KBR] was intended to be one of the beneficiaries of his corrupt conduct." Tesler subsequently withdrew all appeals in the United Kingdom and was extradited to the United States. On March 11, 2011, Tesler pleaded guilty to conspiring to violate and violating the FCPA. As part of his plea agreement, Tesler agreed to forfeit approximately $149 million. On February 23, 2012, he was sentenced to serve 21 months in prison, followed by two years of supervised release, and to pay a $25,000 fine.

The Tesler and Chodan cases exemplify increasing cross-border cooperation in anti-corruption investigations and prosecutions. In its press releases regarding Tesler and Chodan, the DOJ acknowledges assistance from the DOJ Criminal Division's Office of International Affairs, the SFO's Anti-Corruption Unit and the police forces of the City of London, as well as authorities in France, Italy, and Switzerland.

12. United Industrial & Thomas Wurzel

On May 29, 2009, the SEC settled actions against United Industrial Corporation ("UIC"), an aerospace and defense systems provider, and the former president of one of its previously wholly owned, indirect subsidiaries, ACL Technologies, Inc. ("ACL"). The settlements relate to allegations that former ACL president Thomas Wurzel authorized illicit payments to a foreign agent in connection with an Egyptian Air Force project which Wurzel knew or consciously disregarded the high probability that the

agent would offer, provide, or promise at least a portion to active Egyptian Air Force officials. Under the settled administrative proceeding against UIC, the company was ordered to cease and desist from future violations of the FCPA's anti-bribery, books and records, and internal control provisions and was ordered to pay disgorgement and prejudgment interest of $337,679.42. In the settled complaint against Wurzel, he consented to entry of a judgment enjoining him from violating the FCPA's anti-bribery and books and records provisions and from aiding and abetting violations of the FCPA's books and records provision, and agreed to pay a civil penalty of $35,000.

According to the SEC, Wurzel employed a retired Egyptian Air Force general ("EAF Agent") in late 1996 to help ACL obtain contacts in connection with an Egyptian Air Force project to construct an F-16 combat aircraft depot as well as to provide, operate, and train Egyptian labor to use associated testing equipment ("Egyptian F-16 Depot Project"). ACL correspondence from the time indicated that ACL believed that the EAF Agent's status as a former general would be instrumental in influencing the "very small community of high-level military people," and Wurzel was aware that the EAF Agent had a personal relationship with at least one active official of the Egyptian Air Force.

Wurzel authorized monthly stipends to the EAF Agent of $4,000 per month by at least December 1997, which rose to $20,000 per month by March 1998. These payments were made without "any due diligence files" and, until March 1998, without a formal consulting agreement between ACL and the EAF Agent. The settlement documents indicate that ACL did not submit due diligence forms on the agent until 2002 despite company policy requiring that such forms be instituted in 1999. The SEC also noted that the forms, when submitted, "were largely completed by the EAF Agent himself."

In October 1999, the United States Air Force awarded the Egyptian F-16 Depot Project to ACL as part of the U.S. Department of Defense's foreign military sale ("FMS") program, under which foreign governments purchase weapons, defense items, services and training from the U.S. government through contracts typically fulfilled by private defense contractors. Under the FMS program, a foreign government has the potential to select a particular contractor through a "sole source" request, which the EAF did with respect to ACL. The F-16 Depot Project was originally valued at $28 million with the potential for additional "add-on" contracts for ACL.

The EAF Agent's compensation after the 1999 contract was awarded took several forms. First, the retired general continued to act as ACL's "consultant," earning a monthly stipend of $20,000 per month until his consulting agreement expired in mid-2001. Second, Wurzel separately authorized the EAF Agent to act as the local labor subcontractor in connection with ACL's work on the Egyptian F-16 Depot Project. In this position, the EAF Agent was reimbursed for "program manager" expenses (among other things) that varied between $4,300 and $11,100 per month in exchange for his service in coordinating local labor subcontractors to assist with the project. Finally, payments continued to the EAF Agent even after the consultant agreement expired in mid-2001, through what the SEC described as "requests for additional funds in circumstances that strongly indicated they would be used to make illicit payments." Wurzel had apparently promised to continue paying "the consultant fee either through the service contract or any other way."

Wurzel authorized three types of illicit payments to the EAF agent between 2001 and 2002: (i) payments for labor subcontracting work that included a cushion out of which payments could be made; (ii) a $100,000 advance for rental equipment and materials; and (iii) a payment of $50,000 for marketing services. The SEC alleged that Wurzel made the improper payments to the EAF Agent to secure two

“add-on” contracts: a Contract Engineering and Technical Services (“CETS”) contract and a surface treatment facility contract.

The CETS contract involved providing personnel for technical assistance at the air force base in Cairo where the F-16 depot was being constructed to allow EAF personnel to receive hands-on training to test and repair their aircraft. In December 2001, several months before the CETS project was officially awarded, the EAF Agent told Wurzel that ACL should expect to receive the contract soon because the agent had “succeeded to make the [Egyptian Air Force] give all the pressure on the USAF to finalize the sole source,” adding that it was “very important to start giving motivation that we discussed to give it before the year end.” Accordingly, the EAF Agent requested an advance of funds in addition to the compensation due under his local labor subcontracts. ACL wired $114,000 to the EAF Agent against invoices for labor subcontract services within a week of the agent’s request.

In January 2002, the EAF Agent emailed a request for addition funds to “secure our team loyalty… as you have started to have some doubts about ou[r] commitment with them.” Another email followed shortly thereafter thanking “God that our key persons are still on their positions till now” but noting that “[w]e should satisfy our people and really we cannot do that from our resources as we used to do before.” The EAF Agent requested approximately $171,000 for past due labor subcontract work, a separate $300,000 advance payment, and a lump sum payout of half of his agreed upon 8% fee from the contract value. ACL wired the EAF Agent the requested fees in March 2002 for his labor subcontract work, but did not forward the additional requested fees.

In April 2002, however, the EAF Agent emailed another request to Wurzel for additional money “to motivate people and secure our business specially [*sic*] the **CETS**.” (Emphasis in original.) Wurzel responded the same day that ACL would advance payments to the agent, but that it would offset such payments against pending labor subcontract invoices. ACL received the official CETS award later in April 2002.

In June 2002, the EAF Agent requested additional payments in connection with the surface treatment facility contract. Wurzel initially responded by noting that ACL paid the EAF Agent $40,000 per month for services under the CETS contract, which “will permit you to meet all of your obligations,” but also suggested that ACL could advance the EAF Agent another payment. The EAF Agent responded with a request for $200,000 in past due labor subcontract invoices and an additional $100,000 advance payment, noting that “[t]his could help us fulfil [*sic*] the commitment.”

Although there was no indication that the project required rental equipment or advance payments for other services, Wurzel told the EAF Agent to type an invoice that specified that “THIS INVOICE IS FOR ADVANCE PAYMENT OF RENTAL OF EQUIPMENT AND CONTRACTING OF MATERIAL AND SERVICES UNDER THE F-16 EAF DEPOT INTEGRATION CONTRACT.” (Capitalization in original.) The EAF Agent provided an invoice with the specified language, and a $100,000 advance payment was approved by Wurzel, which a corporate UIC employee inaccurately recorded by ACL as a bona fide “material” expense for the Egyptian F-16 Depot Project.

The SEC further noted that Wurzel and the EAF Agent concocted a scheme by which the latter would “repay” the $100,000 advance. Under the plan, the EAF Agent submitted false monthly labor subcontract invoices, which included a $10,000 “credit” to ACL. To offset any real repayment of the advance, the EAF Agent’s expenses were inflated by at least the amount of the $10,000 credit.

Over the next several months, the EAF Agent continued to make requests for additional payments that were necessary to “keep the momentum.” By the end of 2002, ACL had paid the EAF Agent $50,000 against an invoice for marketing services despite the parties never having entered into a marketing agreement.

As a result of the above conduct, the SEC found that the parent company UIC lacked internal controls sufficient to detect or prevent these improper payments. The SEC noted that from 1997 through 2002, “ACL paid the EAF Agent in total approximately $564,000 for consulting or marketing services without meaningful records detailing the services being provided.” The SEC also sharply criticized UIC’s legal department, noting that the EAF Agent was subject to insufficient due diligence and approved by the legal department despite the fact that the agent’s agreement with the company “did not contain FCPA provisions required by corporate policy” and “despite learning that ACL had already been using the EAF Agent without prior approval and that the EAF Agent’s existing agency agreement did not conform to UIC’s existing policies prohibiting contingent arrangements on government contracts.” The SEC noted that it considered UIC’s promptly undertaken remedial acts and cooperation in determining whether to accept the settlement offer.

13. UTStarcom

On December 31, 2009, UTStarcom Inc. (“UTStarcom”), a global telecommunications company based in Alameda, California, and whose stock trades on NASDAQ, resolved DOJ and SEC investigations into potential FCPA violations by its wholly owned subsidiaries in China, Thailand, and Mongolia.

UTStarcom entered into an NPA with the DOJ and agreed to pay a monetary penalty of $1.5 million. The DOJ stated that it agreed to an NPA because, in part, of UTStarcom’s timely, voluntary, and complete disclosure of the violations, its thorough, “real-time” cooperation with the DOJ and the SEC, and the “extensive remedial efforts” it had already taken and will be taking. UTStarcom agreed to cooperate fully with any DOJ or SEC investigations arising out of the conduct underlying the agreement, to strengthen its compliance, bookkeeping, and internal accounting controls standard and procedures, and to provide periodic reports to the DOJ regarding its compliance with the NPA. The SEC also noted that in 2006, after learning of some of the improper payments described below, UTStarcom’s audit committee conducted an internal investigation that eventually expanded to cover all of UTStarcom’s operations worldwide. UTStarcom adopted new FCPA-related policies and procedures, hired additional finance and internal compliance personnel, improved its internal accounting controls, implemented FCPA training in its major offices worldwide, and terminated a former executive officer who allegedly knew of or authorized much of the improper conduct.

Without admitting or denying the SEC’s allegations that it violated the anti-bribery and accounting provisions, UTStarcom consented to the entry of a final judgment requiring it to pay a $1.5 million civil penalty and to file four annual reports and certifications with the SEC regarding its FCPA compliance. UTStarcom agreed that such annual reports would identify any reported or suspected anti-bribery violations, any material violations of the accounting provisions, all material changes to its FCPA-related policies and controls, all gifts, travel, and entertainment provided to foreign officials, and all payments to consultants or agents in connection with contracts or bids for contracts with majority foreign government-owned enterprises.

According to the civil complaint filed by the SEC and the facts set forth in the NPA's Statement of Facts—the latter of which UTStarcom admitted, accepted, and acknowledged—UTStarcom subsidiaries engaged in several improper practices in Asia, including providing gifts, travel, and employment to employees of state-owned telecommunications companies as well as providing money to an agent knowing that part of the money would be passed on to government officials.

a. Travel

At least since 2002, according to the NPA's Statement of Facts, UTStarcom China Co. Ltd. ("UTS-China") included a provision in initial sales contracts with government-controlled municipal and provincial telecommunications companies whereby UTStarcom would pay for these entities' employees to travel to the United States for purported training. Instead, the employees visited popular tourist destinations where UTStarcom had no facilities. Between 2002 and 2007, UTStarcom spent nearly $7 million on approximately 225 such trips. Specifically regarding ten such initial contracts, UTStarcom paid for and improperly accounted for approximately $670,000 in expenses. The SEC further alleged that most of these trips lasted up to two weeks and cost $5,000 per employee.

The SEC also alleged that UTStarcom paid for employees of Chinese government customers to attend executive training programs at U.S. universities. The programs were not specifically related to UTStarcom's products or business and instead covered general management topics. The SEC alleged that UTStarcom paid for all expenses related to the programs, including field trips to tourist destinations and cash allowances of up to $3,000 per person, which totaled more than $4 million between 2002 and 2004. UTStarcom allegedly recorded these expenses as marketing expenses. In 2002, UTStarcom's CEO and UTStarcom's Executive Vice President, the latter of whom also served as the CEO of UTS-China, approved a 2003 budget increase for these programs to provide a specific program for UTStarcom's biggest customer, a Chinese state-owned telecommunications company.

b. Employment

According to the SEC, UTStarcom provided or offered full time employment in the United States to employees of government customers (or their families) in Thailand and China on at least 10 occasions. In at least three of these instances, UTStarcom allegedly provided benefits to individuals even though they never performed any work. To conceal their lack of work, fake performance reviews were prepared and kept in a personnel file and the payments were recorded as employee compensation. UTStarcom allegedly also sponsored U.S. permanent residency applications that falsely stated these three individuals would be full-time employees of UTStarcom in New Jersey, resulting in each of them receiving green cards.

c. Gifts and Entertainment

The SEC alleged that, in 2004, in an attempt to expand UTStarcom business in Thailand, UTStarcom's general manager in Thailand allegedly spent nearly $10,000 on French wine (including several rare bottles) as gifts to agents of the government customer with which UTStarcom had a contract under consideration. The manager also allegedly spent an additional $13,000 in entertainment expenses in order to secure the same contract. These expenditures were approved by UTStarcom's Executive Vice President and CEO of UTS-China and reimbursed and recorded as marketing expenses by UTStarcom.

d. Improper Consultant Payments

In 2005, in an effort to break into the telecommunications business in Mongolia, UTStarcom's Executive Vice President and CEO of UTS-China authorized a $1.5 million payment to a Mongolian company pursuant to a consultancy agreement. The payment was recorded as a license fee; however, the license actually cost only $50,000, and the company knew that at least a portion of additional money would be used to pay a Mongolian government official to help UTStarcom obtain a favorable ruling on a dispute over its Mongolian license. In 2007, the same UTStarcom executive authorized a $200,000 payment to a Chinese company as part of a consulting agreement. The SEC alleged that this was, in fact, a sham consulting company and that the payment was simply part of an effort to obtain a contract from a government customer.

I. 2008

1. AB Volvo

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

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

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

According to the SEC, as early as 1999, VCE's corporate predecessor, Volvo Construction Equipment International, AB ("VCEI"), made improper payments to Iraqi ministries in connection with OFFP contracts. VCEI made the payments through a Jordanian agent on two contracts with SOMO and one contract with the Ministry of Housing and Construction. VCEI, also through the agent, purchased a car for the Ministry of Housing and Construction. Collectively, the payments and cost of the car totaled over $100,000.

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

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

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

2. AGA Medical

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

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

The payments apparently started after the distributor informed AGA that the hospitals were requesting a 10% "discount" on AGA's products and the physicians were requesting a corresponding 10% "commission." Email records indicated that AGA officials approved the payments and were kept apprised of the scheme's progress and status. The criminal information does not provide a total dollar amount of payments to Chinese doctors, but states that as of 2001 over $460,000 in such "commission" payments had been made. Although the criminal information indicates that AGA generated sales of approximately

$13.5 million during the relevant period, it does not specify what portion of these sales were linked to the improper conduct.

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

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

3. Aibel Group Ltd.

On November 21, 2008, Aibel Group Ltd. ("Aibel Group"), a U.K. corporation, pleaded guilty to conspiring to violating the anti-bribery provisions of the FCPA in connection with allegedly corrupt payments in Nigeria. The company further admitted that it was not in compliance with a DPA it had entered into with the DOJ in February 2007 regarding the same underlying conduct.

Aibel is owned by Herkules Private Equity Fund and Ferd Capital, both of Norway. They acquired the company in June 2007 from a private equity group led by Candover, 3i and JPMorgan Partners, which bought Vetco Gray U.K. Ltd. and its affiliate Aibel in July 2004 from ABB Oil & Gas. When its current Norwegian owners acquired Aibel, it was already subject to the DPA. The new owners were required by the DOJ to ensure the company's compliance with the terms of the DPA after the acquisition.

Aibel Group agreed to pay a $4.2 million criminal fine and to cooperate with the DOJ and other law enforcement agencies, including providing the DOJ with access to all Aibel Group directors, officers, employees, agents and consultants for interviews and testimony regarding the improper payments; providing copies of relevant documents and records relating to the improper payments; submitting written reports twelve and twenty-four months after the settlement date by its Norwegian counsel describing the company's efforts to put in place controls and systems to comply with Norwegian and other applicable anti-bribery laws; and, if it determines that there is a reasonable basis to believe any of its subsidiaries, affiliates, officers, directors or employees have violated Norwegian criminal law, reporting such violations to the appropriate Norwegian authorities.

Beginning in February 2001, Aibel Group's predecessor company Vetco Limited and several affiliated companies began providing engineering and procurement services and equipment for Nigeria's first deepwater oil drilling operation, known as the Bonga Project. Aibel Group admitted to conspiring with others, most prominently, an unidentified international freight forwarding service (believed to be Panalpina), to make at least 378 corrupt payments between September 2002 and April 2005 totaling approximately $2.1 million to Nigerian Customs officials in order to provide preferential customs clearance treatment for the Aibel Group's shipments. The freight forwarding company's relationship with Aibel Group was coordinated through an affiliated company's Houston offices.

Three other entities affiliated with Aibel Group have pleaded guilty to violating the FCPA. As described further below, in 2004, Vetco Gray U.K. Ltd. and an affiliated company pleaded guilty to violating the FCPA by paying bribes to officials of Nigeria's National Petroleum Investment Management Services. In February 2007, three wholly owned subsidiaries of Vetco International Ltd., pleaded guilty to violating the anti-bribery provisions of the FCPA, resulting in a $26 million criminal fine.

4. Ramendra Basu

On April 22, 2008, former World Bank employee Ramendra Basu was sentenced to 15 months in prison, two years of supervised release and 50 hours of community service for conspiring to steer World Bank contracts to consultants in exchange for kickbacks and assisting a contractor in bribing a foreign official in violation of the FCPA. Basu is a national of India and a permanent legal resident alien of the United States. He was released from prison on August 7, 2009.

Basu pleaded guilty on December 17, 2002, and subsequently cooperated with U.S. and Swedish authorities. In September 1997, Basu left the World Bank to join a Swedish consulting firm. Three months later, in December 1997, Basu returned to the World Bank, where he continued to receive commissions from the consultant. Soon thereafter, the consultant was awarded three contracts by Basu's co-conspirator, Gautam Sengupta, a World Bank Task Manager. In February 2002, Sengupta pleaded guilty to the same charges as Basu. In February 2006, he was sentenced to two months in prison and fined $6,000.

Basu admitted that between 1997 and 2000, he conspired with the Swedish consultant and Sengupta to steer World Bank contracts for business in Ethiopia and Kenya to certain Swedish companies in exchange for $127,000 in kickbacks. Basu also assisted the Swedish consultants in bribing a Kenyan government official by arranging for $50,000 to be wire transferred to the official's account. Basu pleaded guilty in 2002, but unsuccessfully attempted to withdraw his plea in 2006.

5. Con-Way

On August 27, 2008, Con-Way, Inc. ("Con-Way"), a publicly traded international freight transportation and logistics services company based in San Mateo, California, settled civil charges with the SEC for violating the FCPA's books and records and internal control provisions in connection with hundreds of small payments totaling over $417,000 made by one of Con-Way's former subsidiaries to Philippine customs officials and to officials of several majority foreign state-owned airlines. Con-Way agreed to pay a $300,000 fine to resolve the matter. In a related administrative proceeding, the SEC issued a settled cease-and-desist order against Con-Way in connection with the same payments.

Prior to 2004, Menlo Worldwide Forwarding, Inc. ("Menlo Forwarding"), a wholly owned, United States subsidiary of Con-Way, held a 55% voting interest in Emery Transnational, a Philippines-based entity that was engaged in shipping and freight operations in the Philippines. During the relevant period, Con-Way was named CNF, Inc., and Menlo Forwarding was named Emery Air Freight Corporation. In 2004, Con-Way sold Menlo Forwarding and Emery Transnational to United Parcel Service of America, Inc.

According to the SEC, between 2000 and 2003, Emery Transnational made over $244,000 in payments to officials at the Philippine Bureau of Customs and Philippine Economic Zone Area to

influence various customs decisions. The payments were primarily used either to (i) induce the officials to violate customs regulations and allow Emery Transnational to store shipments longer than otherwise permitted, or (ii) settle disputes with customs officials or induce them to reduce or not impose otherwise legitimate fines. Emery Transnational employees made these payments from monies obtained by submitting cash advance requests that were not supported by receipts.

In addition, Emery Transnational made payments totaling at least $173,000 to officials at fourteen state-owned airlines that did business in the Philippines either to (i) induce the airline officials to reserve space improperly for Emery Transnational on airplanes ("weight shipped" payments); or (ii) induce airline officials to under-weigh or consolidate shipments, thus lowering Emery Transnational's shipping costs ("gain share" payments). Checks reflecting the amount of the improper payments were issued to Emery Transnational managers, who then distributed cash payments to the airline officials. According the SEC, Emery Transnational did not identify the true nature of the payments to the customs and state-owned airline officials in its books and records.

The SEC determined that Con-Way and Menlo Forwarding exercised "little supervision or oversight over Emery Transnational." The companies required only that Emery Transnational periodically report its net profits to Menlo Forwarding, from which Emery Transnational paid Menlo Forwarding an annual dividend of 55%. The companies (i) did not ask for or receive any additional financial information from Emery Transnational, or (ii) maintain or review the books of the Philippine company, which "should have reflected the illicit payments made to foreign officials." In determining to accept Con-Way's settlement offer, the SEC "considered the remedial acts undertaken by Con-Way and cooperation afforded the Commission staff."

6. Faro Technologies

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

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

In 2004, however, Meza began authorizing the country manager to make corrupt payments to employees of state-owned or controlled entities in China to secure business for Faro. These payments were known as "referral fees" and ranged up to 20% to 30% of the contract price. To conceal the payments, Meza instructed Faro China employees to alter account entries to remove any indication that

the payments were going to Faro's "customers." In doing so, Meza stated that he "did not want to end up in jail" as a result of "this bribery."

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

Faro's Chinese subsidiary made over twenty improper payments totaling $444,492 from which it generated a net profit of over $1.4 million. The SEC complaint asserts that Faro lacked a system of internal controls appropriate to detect the improper payments and provided "no training or education to any of its employees, agents, or subsidiaries regarding the requirements of the FCPA" during the relevant time. Faro also improperly recorded the payments in its books and records, inaccurately describing them as legitimate "selling expenses." Faro voluntarily disclosed the payments to the government.

Meza, a United States citizen who resides in Canada, agreed to pay a $30,000 civil penalty and $26,707 in disgorgement and prejudgment interest to settle an SEC enforcement action based on the same facts on August 28, 2009.

7. Fiat

On December 22, 2008, Italian vehicle and equipment manufacturer Fiat S.p.A. ("Fiat"), which had American Depository Receipts ("ADRs") listed on the NYSE until November 2007, agreed to pay $17.8 million in penalties and disgorgement to the DOJ and SEC to settle charges relating to approximately $4.4 million in illegal kickbacks paid by three of Fiat's direct and indirect subsidiaries between 2000 and 2002 in connection with the U.N. OFFP. The DOJ charged Fiat's Italian subsidiaries Iveco S.p.A. ("Iveco") and CNH Italia S.p.A. ("CNH Italia") with conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA, and charged a third Fiat subsidiary, CNH France S.A. ("CNH France"), with conspiracy to commit wire fraud. Although the DOJ did not bring charges against Fiat itself, the company agreed to pay a $7 million criminal penalty to the DOJ for the conduct of its subsidiaries and entered into a DPA, which requires Fiat and its subsidiaries to cooperate with the DOJ and other law enforcement agencies in their investigations of the companies and their operations and to adopt or modify their anti-corruption controls, policies and procedures to include, among other things, (i) the assignment of one or more senior corporate officials to implement and oversee compliance measures; (ii) effective periodic anti-corruption training and required annual certifications for all directors and officers and, where appropriate, agents and business partners; and (iii) appropriate due diligence requirements governing the retention and oversight of agents and business partners.

In contrast to the DOJ, the SEC charged Fiat as well as another of its subsidiaries, CNH Global, a majority-owned Dutch company that owned CNH Italia and CNH France and which also had ADRs listed on the NYSE during the relevant period, with failure to maintain adequate internal controls in relation to the same payments. In settlement of these charges, Fiat agreed to pay $3.6 million in civil penalties and $7.2 million in disgorgement and interest.

According to the DOJ, from 2000 to 2001, Iveco and a Lebanese company that acted as its agent and distributor paid approximately $3.17 million in kickbacks to the Iraqi Government to obtain sixteen

contracts worth approximately €31.9 million to supply various trucks and parts under the OFFP. First, on four contracts, Iveco with the Lebanese company acting as its agent inflated the price of the contracts by approximately 10% to 15%, characterizing the increase as ASSFs to cover the costs of the kickbacks before submitting them to the U.N. for approval. Then, on twelve additional contracts and in an alleged effort to conceal the kickback payments, the Lebanese company acting as Iveco's distributor engaged in the same practices. Similarly, in 2000-02, CNH Italia first directly and then indirectly through its Jordanian agent and distributor paid approximately $1 million to obtain four contracts to supply agricultural equipment worth approximately €12 million, inflating the price of the contracts by 10% before obtaining U.N. approval. Iveco and CNH Italia improperly characterized the transactions in their books and records as "service and commission payments" or "service fees," respectively; and at the end of Fiat's fiscal year 2002, the books and records of the two subsidiaries, including the false characterizations of the kickbacks, were incorporated into the book and records of Fiat for the purposes of preparing Fiat's year-end financial statements.

In 2001, CNH France caused its Lebanese distributor to pay approximately $188,000 in kickbacks to obtain three contracts worth approximately €2.2 million with the Iraqi Ministry of Oil to supply construction vehicles and spare parts, also inflating the price of the contracts by 10% prior to approval. Apparently, CNH France's books and records were not incorporated into Fiat's and thus the DOJ only charged the subsidiary with conspiracy to commit wire fraud.

The SEC asserted that Fiat and CNH Global knew or were reckless in not knowing that kickbacks were paid in connection with these transactions, emphasizing that the Fiat subsidiaries altered their relationships with their agents/distributors "to conceal their involvement in the sales of its products to Iraq in which ASSF payments were made" and the "extent and duration of the improper ASSF payments." As a result, the SEC charged that Fiat and CNH Global failed to maintain adequate internal controls or properly maintain their books and records.

8. Flowserve

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

Flowserve participated in the OFFP through Flowserve Pompes and Flowserve B.V. According to the SEC's complaint, from 2001 to 2003, these subsidiaries entered into twenty sales contracts with Iraqi government entities that involved illegal surcharge payments. Flowserve Pompes and Flowserve B.V., with the assistance of Jordanian agents, made $646,488 in improper surcharge payments and authorized an additional $173,758 in such payments.

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

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

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

9. Gerald and Patricia Green

On September 11, 2009, a jury convicted Gerald and Patricia Green, co-owners of Film Festival Management, Inc. ("FFM"), of conspiracy, violating the FCPA and money laundering for masterminding a sophisticated bribery scheme that led the couple to obtain several Thai government contracts, including contracts for Thailand's annual film festival. The jury also found Patricia Green guilty of falsely subscribing U.S. income tax returns in connection with this scheme. The DOJ had sought significant prison sentences and had argued that the appropriate Sentencing Guidelines range (if not necessarily the sentence imposed) for Mr. Green should have been calculated at life in prison. The Greens' attorneys pled for clemency based on a number of factors, including Mr. Green's age and health issues.

On August 12, 2010, the Greens were both sentenced to only six months in prison and three years of supervised release (six months of which must be served in a home detention program). Although the court did not impose criminal fines because it determined that the Greens did not have the ability to pay, the Greens were ordered to pay restitution, jointly and severally, in the amount of $250,000. On August 13, 2010, the court further ordered the forfeiture of the Greens' property derived from their criminal conduct, or substitute property if such derived property cannot be found or is comingled with other property, up to $1,049,456 plus each defendant's share in their company's benefit plan. In October 2010, the DOJ appealed the sentences imposed, which were far lower than the sentences the DOJ sought, and the Greens cross-appealed the order to pay restitution.

Neither appeal was successful. First, on August 23, 2011, the Justice Department filed a Motion for Voluntary Dismissal of the previously filed protective notice of appeal with the Ninth Circuit Court of Appeals, effectively ending its efforts to overturn the District Court's sentencing decision. Prosecutors had requested a 90-day extension to file an appellate brief—during the extension period, it was reported that the Solicitor General was determining whether to authorize the appeal. The Department's dismissal included this statement: "After consideration of this matter within the United States Attorney's Office, the Criminal Division of the Department of Justice, and the Office of the Solicitor General, the government now moves to dismiss its appeal of the district court's determination of sentence." The Government provided no further explanation for the decision and reportedly declined to provide comments to media outlets. The Greens have served their six-month sentences and have been released from custody.

Second, on July 11, 2013, the Ninth Circuit affirmed the District Court's restitution order, rejecting the Greens argument that the order violated Supreme Court precedent of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that a jury must make a finding of any facts that increase the penalty for a crime beyond the prescribed statutory maximum) or *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (applying *Apprendi* to criminal fines).

The original January 16, 2008, indictment alleged that, from 2002 to 2007, Mr. and Mrs. Green conspired to, and ultimately did, bribe a senior Thai government official in order to secure contracts to run the annual Bangkok International Film Festival ("Bangkok Film Festival"), which was funded and administered by the Tourism Authority of Thailand ("TAT"). Initially identified simply as the "Governor," the Thai official was later revealed to have been Juthamas Siriwan, the senior government officer of the TAT from 2002 to 2006. The Governor also served as the president of the Bangkok Film Festival and, in this position, had the ability to select businesses to provide goods and services for the festival. According to the indictment, in 2002 Ms. Siriwan selected Mr. Green to run the 2003 Bangkok Film Festival. In return, Mr. Green agreed to pay a percentage of the 2003 Bangkok Film Festival contract value to Ms. Siriwan. One of the Greens' business entities made a $30,000 payment to a United Kingdom bank account held by Ms. Siriwan's daughter for the benefit of Ms. Siriwan.

According to the DOJ, the Greens were also selected to run the Bangkok Film Festival for 2004, 2005, and 2006, and made payments for Ms. Siriwan's benefit in connection with these contracts. The payments typically ranged between ten and twenty percent of the total amount of the Bangkok Film Festival contracts and were disguised in the Green entities' books and records as "sales commissions." The payments were primarily made by wire transfer to bank accounts in the United Kingdom, Singapore, and the Isle of Jersey held by the daughter or a friend of Ms. Siriwan, although the Greens also made cash payments directly to Ms. Siriwan during her visits to Los Angeles.

The indictment asserted that the Greens took considerable efforts to hide their scheme, including moving money through several business entities, some with fraudulent addresses and telephone numbers. Because Ms. Siriwan was authorized to approve payments on behalf of the TAT up to a certain dollar amount, the Greens purposely sought contracts under different business names to create the appearance that the money was being paid to different entities. In reality, all the work related to the film festivals was managed by the same personnel out of the same Los Angeles-based office run by the Greens. In structuring the transactions in such a manner, the Greens were able to avoid scrutiny into the large amounts of money being paid by the TAT to the Greens' business entities.

The government alleged that, in total, the Greens' business entities received over $13.5 million from the TAT in connection with Bangkok Film Festival contracts between 2002 and 2007. As Ninth Circuit Chief Judge Kozinski explained in his July 2013 opinion:

> The Greens looked to be on their way to silver-screen success, but there was a dark secret that would get in the way: The Greens had secured their lucrative contracts thanks, at least in part, to $1.8 million in payments to the governor of Thailand's Tourism Authority.

The government twice superseded the original indictment to bring additional charges against the Greens. In October 2008, a superseding indictment was filed that included the charges that Mrs. Green filed two false tax returns when she took deductions for "commissions" that were, in fact, bribes. Later, in March 2009, the government added obstruction of justice charges against Mr. Green in a second superseding indictment. The government dismissed a substantive money laundering count prior to the case going to the jury. The jury found the Greens guilty of the charged conduct, except that it was unable to reach a verdict on the obstruction of justice count against Mr. Green.

Although the FCPA itself does not apply to the foreign officials who receive bribes, in January 2010 a federal court granted the DOJ's request to unseal January 2009 indictments of Ms. Siriwan and her daughter for money laundering and conspiracy to commit money laundering relating to the Greens' conduct. Ms. Siriwan's daughter, Jittisopa "Jib" Siriwan, was alleged to have been actively involved in the bribery scheme by traveling to Singapore, the United Kingdom, and the Isle of Jersey to open bank accounts for the purpose of facilitating the Greens' bribery of her mother. The payments originated at accounts held by the Greens in West Hollywood, California. The money laundering offenses carry statutory maximum terms of imprisonment of 20 years, but both mother and daughter remain fugitives. The DOJ is also seeking forfeiture of more than $1.7 million from four existing bank accounts, plus all commissions, fees, proceeds, and a sum of money equal to the total amount of criminally derived proceeds. In the fall of 2011, the Siriwans filed a motion to dismiss the indictments on various grounds. In January 2012, the Federal Court in the Central District of California (Western Division – Los Angeles) held hearings for oral arguments on the motion to dismiss. The case was stayed at that time pending a decision by the Thai government on the U.S. government's request to extradite the Siriwans. In an oral hearing on March 20, 2013, the court continued to stay the trial in light of information that the Thai National Anti-Corruption Commission ("NACC") intended to file a criminal case against Juthamas Siriwan and potentially against her daughter as well.

The Bangkok Post published a report on November 13, 2014 that the NACC "has agreed to indict former Tourism Authority of Thailand (TAT) governor Juthamas Siriwan in a film bribery case." As of the end of 2014, however, no formal indictment had been issued, and a status conference has been set for March 12, 2015.

10. Misao Hioki

On December 10, 2008, Misao Hioki, the former general manager of Bridgestone Corp.'s International Engineered Products ("IEP") Department, pleaded guilty to conspiracy to violate the Sherman Act and conspiracy to violate the FCPA. Hioki, a Japanese national, was charged for his role in a conspiracy to rig bids, fix prices and allocate market shares of sales of marine hoses in the United

States and elsewhere and also for his role in a conspiracy to violate the FCPA by making corrupt payments to government officials in Latin America.

The plea results from a broader investigation into a bid-rigging, price-fixing, and allocation conspiracy involving marine hose manufacturers and a consultant who acted as the coordinator of the cartel. Hioki was one of eight foreign executives arrested on May 2, 2007 in the United States following their participation in an alleged cartel meeting in Houston. He is the ninth individual to plead guilty in the hose-bid rigging investigation and first to plead guilty in the alleged FCPA conspiracy.

The DOJ charged that Hioki, along with his co-conspirators, negotiated with employees of government-owned businesses in Argentina, Brazil, Ecuador, Mexico, and Venezuela to make corrupt payments in order to secure business for his company and its U.S. subsidiary. Hioki then approved the payments through local sales agents. The payments were coordinated through the U.S. subsidiary's offices in the United States. Hioki was sentenced to serve two years in jail and to pay an $80,000 criminal fine. He was released from prison on November 23, 2010.

11. Nexus Technologies

On September 4, 2008, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging Nexus Technologies, Inc. ("Nexus") and four of its employees with one count of conspiracy to violate the FCPA and four substantive counts of violating, or aiding and abetting violations of, the FCPA. On September 5, 2008, the four individuals, Nam Nguyen ("Nam"), Joseph Lukas ("Lukas"), Kim Nguyen ("Kim") and An Nguyen ("An"), were arrested in connection with the charges.

Lukas pleaded guilty to violating and conspiring to violate the FCPA on June 29, 2009. On March 16, 2010, Nexus pleaded guilty to conspiracy, violations of the FCPA, violations of the Travel Act in connection with commercial bribes and money laundering. Also on March 16, Nam and An each pleaded guilty to conspiracy, a substantive FCPA violation, a violation of the Travel Act, and money laundering, while Kim pleaded guilty to conspiracy, a substantive FCPA violation, and money laundering.

Nexus, a Delaware company with offices in New Jersey, Pennsylvania and Vietnam, is an exporter of a variety of equipment, including underwater mapping equipment, bomb containment equipment, helicopter parts, chemical detectors, satellite communication parts and air tracking systems. The company purchases goods from United States vendors and resells them to customers in Vietnam that include the commercial arms of several government agencies, including the Vietnam Ministry of Tourism, the Ministry of Industry and the Ministry of Public Safety. The indictment describes these entities as "departments, agencies, or instrumentalities of the Government of Vietnam" making their employees "foreign officials" for purposes of the FCPA.

Nam was the founder and president of Nexus, and was primarily responsible for finding and negotiating with the company's Vietnam customers. Lukas was involved in a joint venture with Nexus until around 2005, and was responsible for overseeing the company's New Jersey office and coordinating with potential United States vendors. Kim and An were both Nexus employees and were responsible for, among other things, identifying potential United States suppliers. In addition, Kim handled certain of Nexus's finances, including money transfers, while An arranged for goods shipments from suppliers to freight forwarders and customers.

From about 1999 through May 2008, Nexus and the defendants made payments to Vietnam officials in order to obtain or retain contracts associated with a variety of products, including safety equipment, computer workstations, and air traffic equipment. The payments were typically described as "commission" payments, and were improperly recorded in Nexus's books and records as "subcontract fees" or "installment payments." After negotiating a contract and payment arrangement with a Vietnamese customer, Nam instructed Nexus employees, including the defendants, to facilitate the payment by wire transfer from Nexus's bank account in Philadelphia, Pennsylvania. The payments often were made to the Hong Kong bank account of an unaffiliated Hong Kong company in order to conceal the fact that they were intended for Vietnamese government officials. Nexus described the ultimate recipients as "supporters," and used the payments not only to generate business but also to obtain confidential information and engage in bid rigging.

For example, on one occasion, in February 2004, Nexus entered into a contract with a commercial unit of the Ministry of Transport for over $14,000 worth of computer workstations. In August 2004, Nam instructed Kim to send a commission payment through the Hong Kong company for the benefit of a foreign official connected with the contract. In an email communication, Nam referenced the fact that the commercial agency could have purchased the same equipment cheaper from a local dealer, but was purchasing from Nexus because of its willingness to "add into the contract a fat markup for [the Vietnamese agency]." In total, Nexus and the Nguyens admitted to making over $250,000 improper payments to Vietnamese officials to obtain or retain business between 1999 and 2008.

On September 15, 2010, the court sentenced Nexus and the individual defendants. Nexus was fined $11,200.00 and, as a condition of its plea agreement, Nexus ceased all operations permanently and surrendered all of its net assets to the court. Lukas was sentenced to two years' probation, community service, and a fine of $1,000.00 in light of the substantial assistance he provided the government after his indictment. Kim, who also provided substantial assistance to the government, was sentenced to two years' probation, community service, and a fine of $20,000.

The other two defendants, who had not provided substantial assistance to the United States following their indictment, were incarcerated. An, who was on probation for an unrelated offense and who tested positive for cocaine at the time of his arrest, was sentenced to nine months' imprisonment and three years' supervised release. He was released from prison on October 4, 2011. Nam, the president and founder of Nexus, was sentenced to sixteen months' imprisonment. Following his release on December 30, 2011, he was subject to two years' supervised release.

12. Shu Quan-Sheng

On November 17, 2008, Shu Quan-Sheng ("Shu"), a physicist in Newport News, Virginia, pleaded guilty to charges that he illegally exported space launch technical data and defense services to the People's Republic of China and offered bribes to Chinese government officials. Shu, a native of China and a naturalized U.S. citizen, is the President, Secretary and Treasurer of AMAC International Inc. ("AMAC"), a high-tech company based in Newport News that also maintains offices in Beijing.

Shu pleaded guilty to a three-count criminal information. The first two counts alleged that Shu violated the Arms Export Control Act ("AECA") by (i) providing the PRC with assistance in the design and development of a cryogenic fueling system for space launch vehicles from January 2003 through October

2007, and (ii) willfully exporting to the PRC controlled military technical data, in each instance without first obtaining the required export license or written approval from the State Department.

The third count alleged that Shu violated the FCPA when he offered, paid, promised, and authorized the payment of bribes to officials of China's 101st Research Institute, one of the research institutes that makes up the China Academy of Launch Vehicle Technology, to obtain for a French company that Shu represented a contract for the development of a 600 liter per hour liquid hydrogen tank system. In 2006, Shu allegedly offered "percentage points" worth a total of $189,300 to PRC officials on three separate occasions. In January 2007, the $4 million project was awarded to the French company. On April 7, 2009, Shu was sentenced to 51 months in prison. He was released from federal prison on February 15, 2013.

13. Siemens

On Monday, December 15, 2008, U.S. federal prosecutors and German regulators simultaneously ended their lengthy investigations into Siemens Aktiengesellschaft ("Siemens") and its worldwide operations by announcing settlements that included over $1.3 billion in fines and disgorgement in connection with improper payments in Argentina, Bangladesh, China, Iraq, Israel, Mexico, Nigeria, Russia, Venezuela and Vietnam. Taking into account a previous settlement with the Munich Public Prosecutor's Office, Siemens has now incurred fines of over $1.6 billion in connection with one of the most highly publicized and closely watched international bribery investigations carried out to date.

Siemens, a German corporation with its executive offices in Munich, Germany, is one of the world's largest industrial and consumer products manufacturers. Through its operating entities and subsidiaries, Siemens engages in a variety of activities including developing, constructing, selling and servicing telecommunications equipment and systems; power generation, transmission, and distribution equipment and systems; transportation equipment and systems; medical equipment and systems; and industrial and traffic equipment and systems. Siemens employs over 428,000 people and operates in approximately 190 countries worldwide.

Prior to a recent reorganization, Siemens operated in thirteen principal business groups: Communications ("Com"), Siemens Business Services ("SBS"), Automation & Drives ("A&D"), Industrial Solutions and Services ("I&S"), Siemens Building Technologies ("SBT"), Power Generation ("PG"), Power Transmission and Distribution ("PTD"), Transportation Systems ("TS"), Siemens VDO Automotive ("SV"), Medical Solutions ("Med"), Osram Middle East, Siemens Financial Services ("SFS"), and Siemens Real Estate ("SRE"). Siemens became an "issuer" for purposes of the FCPA on March 12, 2001, when its American Depository Shares began trading on the NYSE.

In connection with the U.S. settlements, Siemens and three of its subsidiaries incurred total fines of $800 million. Siemens was fined $448,500,000 by the DOJ and three of its subsidiaries—Siemens Argentina, Siemens Bangladesh and Siemens Venezuela—were each fined $500,000. Under its settlement with the SEC, Siemens was required to disgorge $350 million. The U.S. settlements also require Siemens to implement a compliance monitor for a period of four years, and the company has chosen former German Finance Minister Dr. Theo Waigel as the first ever non-U.S. national to serve in that capacity. Siemens is also required to hire an "Independent U.S. Counsel" to counsel the monitor. Although the use of monitors has increased markedly in recent years, the four-year term is the longest

such term instituted in connection with an FCPA settlement to date, and the dual monitor structure also appears to be novel.

The DOJ plea agreement charged Siemens with criminal violations of the FCPA's books and records and internal controls provisions, but did not include a claim that Siemens violated the FCPA's anti-bribery provisions. The DOJ charged two Siemens subsidiaries—Siemens Venezuela and Siemens Bangladesh—with conspiracy to violate the FCPA's anti-bribery and books and records provisions, while the third subsidiary—Siemens Argentina—was charged only with conspiracy to violate the statute's books and records provision. The SEC charged Siemens with violations of the FCPA's anti-bribery, books and records and internal controls provisions.

In its settlement with the Office of the Prosecutor General in Munich, Siemens agreed to pay a fine of €395 million (approximately $540 million), marking the end of legal proceedings against the company (but perhaps not against individuals) in Germany. In October 2007, Siemens paid a fine of €201 million (approximately $285 million) to the Office of the Prosecutor General in Munich for activities relating to the company's former Com group.

Several other countries have also investigated Siemens for bribery. Most notably, in January 2011, the Greek government indicated it would seek damages from Siemens following an 11-month parliamentary investigation into allegations Siemens paid bribes to secure various government contracts from the late 1990s up to 2009, including those related to the 2004 Athens Olympics. Greece estimated the bribery cost Greek taxpayers €2 billion. On April 5, 2012, the Greek Parliament approved a settlement agreement between Siemens and the Greek State which includes the following: Siemens waives public sector receivables in the amount of €80 million; Siemens agrees to spend a maximum of €90 million on various anti-corruption and transparency initiatives, as well as university and research programs; and Siemens agrees to provide €100 million of financial support to Siemens A.E. to ensure its continued presence in Greece. In exchange, the Greek State agrees to waive all civil claims and all administrative fines related to the corruption allegations and to utilize best efforts to resolve all pending disputes between Siemens and the Greek state-companies or its public authorities.

Nigeria's Economic and Financial Crimes Commission also reached a settlement with Siemens and a Siemens subsidiary in November 2010, which is discussed further below.

a. Historical Context

In a break from past practice, the SEC and DOJ both provided significantly more detail regarding the historical context of Siemens' conduct. As the charging documents describe, Siemens traces its origins to the mid-1800s and has long been one of Germany's most successful conglomerates. Following World War II, the company was left with many of its international facilities destroyed and found it difficult to compete for business in developed, Western nations. As a result, according to the SEC, Siemens focused its attention on developing economies where "corrupt business practices were common."

The DOJ classified what it described as "Siemens' historical failure to maintain sufficient internal anti-corruption controls" into three periods: pre-1999, 1999-2004, and 2004-2006. The SEC used approximately the same classifications. Prior to 1999, at a time when Siemens was not listed on the NYSE and bribery was not only legal but tax deductible under German law, the government describes a period where bribery was commonplace at Siemens. The DOJ indicates that Siemens operated in a

"largely unregulated environment" and conducted business in many countries where "corruption was endemic."

In 1999, the legal and regulatory environment in which Siemens operated began to change. In February 1999, the German law implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") came into force. As noted, the company became listed on the NYSE in March 2001. During this second period, Siemens took certain steps, such as the creation of a "paper program" against corruption, that the government characterized as largely ineffective at changing the company's past business practices. It established a new position for a Compliance Officer, yet the office was severely understaffed and the officer worked only part time on compliance issues. The company issued principles and recommendations, but not mandatory policies, for agreements with business consultants. In addition, Siemens considered, yet rejected, the creation of a company-wide list of agents and consultants in order to review these relationships. Among the investigations that the company faced during this period was one by the Milan, Italy public prosecutor's office into €6 million in potentially improper payments by Siemens to the Italian energy company Enel. The DOJ underscored the fact that, in connection with the Enel investigation, a U.S. law firm informed Siemens that there was "ample basis for either the [SEC] or [DOJ] to start at least an informal investigation of the company's role in such a matter." Further, the DOJ emphasized that the U.S. law firm advised Siemens that U.S. enforcement officials would expect an internal investigation to take place, and suggested that Siemens immediately review and assure proper functioning of its FCPA compliance program, including disciplining any employees involved in wrongdoing.

During the third period, 2004-2006, the government alleges that members of senior management largely failed to respond to red flags that would have disclosed improper conduct. For example, the SEC notes that in the fall of 2003, Siemens' outside auditor identified €4.12 million in cash that was brought to Nigeria by Com employees. A Siemens compliance attorney conducted a one-day investigation into the matter and no disciplinary action was taken against any of the involved employees, despite evidence that the event was not an isolated occurrence. The charging documents indicate that senior management failed to follow up on government investigations in numerous countries and failed to take appropriate disciplinary action against potentially culpable employees. Specifically, the DOJ asserted "[f]rom in or about 2006, in addition to learning of the corruption issues involving Siemens in Nigeria, Italy, Greece, Liechtenstein, and elsewhere, Siemens' senior management became aware of government investigations into corruption in Israel, Azerbaijan, Taiwan, and China. Nevertheless, Siemens ZV members and other senior management failed to adequately investigate or follow up on any of these issues." Throughout this period, the Siemens compliance apparatus lacked sufficient resources and was faced with an inherent conflict in its dual roles of defending the company against prosecution and preventing and punishing compliance breaches.

In November 2006, the Munich Public Prosecutor's Office conducted raids on multiple Siemens offices and homes of Siemens employees as part of an investigation of possible bribery of foreign public officials and falsification of corporate books and records. Shortly after the raids, Siemens disclosed to the DOJ and SEC potential violations of the FCPA and initiated a "sweeping global investigation."

The investigative efforts undertaken by outside counsel and forensic accountants resulted in over 1.5 million hours of billable time throughout 34 countries. The SEC and DOJ noted, in particular, (i) Siemens' use of an amnesty and leniency program to encourage cooperation with the internal

investigation; (ii) the company's extensive document preservation, collection, testing and analyses, which the DOJ described as "exemplary" and "a model" for other companies seeking to cooperate with law enforcement; and (iii) its "extraordinary" reorganization and remediation efforts.

Reportedly, the internal investigation and related restructurings cost the company more than $1 billion.

b. Challenged Payments, Arrangements, and Conduct

The breadth and scope of the improper payments made by Siemens is matched only by the audacity of certain of the described conduct. Siemens is alleged to have made improper payments in connection with, among others, power plant projects in Israel; metro train and signaling device contracts in China; telecommunications projects in Nigeria; telephone service contracts in Bangladesh; identity card projects in Argentina; and medical device contracts in Vietnam, China and Russia. Siemens entities are also alleged to have made improper "after service sales fee" payments in connection with the Iraqi Oil-for-Food Programme.

In total, the SEC alleges that Siemens made 4,283 improper payments worth over $1.4 billion to government officials in order to obtain or retain business. The SEC also indicates that Siemens made 1,185 payments that were not subject to proper controls and were used in connection with either commercial bribery or embezzlement. On the fourteen categories of payment schemes detailed within the SEC's complaint, Siemens is alleged to have earned over $1.1 billion in profit.

Although by no means exhaustive of the company's conduct, the schemes described below are illustrative of the type of activities attributed to the parent company that pervade government documents.

c. Oil-for-Food Programme

Although Siemens' conduct is much more pervasive than any associated with a previous Oil-for-Food Programme settlement, the DOJ requested that its settlements with Siemens and its three subsidiaries be filed as "related cases" to the DOJ's other OFFP cases. According to charging documents, from 2000 through 2002, four Siemens entities—Siemens France, Siemens Turkey, Osram Middle East and GTT, each of which was wholly owned by Siemens or one of its subsidiaries—made improper "after service sales fee" payments totaling over $1.7 million to obtain 42 contracts with Iraqi ministries that earned a gross profit of over $38 million. The Siemens France, Siemens Turkey and GTT contracts were all with the Iraqi Ministry of Electricity, and each entity used agents to facilitate the payment of ASSFs equal to approximately 10% of the contract value through Jordanian banks. After the agent made the requisite payments, it would invoice the Siemens entity using sham invoices for "commissions." In connection with the GTT contracts, GTT documents budgeted a commission of 20% for the agents the company used, understanding that half of that amount would be used to make the improper payments. In fact, after the war began in 2003, the U.N. requested that GTT decrease the value of its contracts by 10% to remove the ASSF component, but GTT nevertheless caused improper payments to be made by reimbursing its agents for kickbacks already paid. The Osram Middle East payments were to the Iraqi Ministry of Oil and operated in a largely similar manner, with payments being facilitated through an agent. In all instances, the payments were improperly characterized on the relevant subsidiary's books and records, which were incorporated into Siemens' year-end financial statements.

d. Nigeria

Siemens' former Com group (one of the company's largest) made approximately $12.7 million in "suspicious" payments in connection with Nigerian projects. According to the SEC, $4.5 million of those were paid as bribes in connection with four telecommunications projects with Nigerian government customers valued at over $130 million. A high-ranking official of a Siemens Nigerian subsidiary estimated that corrupt payments between 2000 and 2001 commonly reached 15% to 30% of the contract value. Generally, these payments were documented in fictitious consulting agreements and were often hand-delivered in cash-packed suitcases. Requests for such "commissions" were forwarded from the Siemens subsidiary's CEO to Siemens' headquarters in Germany. Approximately $2.8 million in bribes were routed through a bank in Maryland in the name of the wife of a former Nigerian Vice President. The Vice President's wife also served as the representative of a business consultant that entered into sham contracts with Siemens for "supply, installation, and commissioning" services that were never performed. In addition to the above payments, Siemens apparently purchased $172,000 in watches for Nigerian officials believed to be the then-President and Vice President.

e. Russia

The SEC describes two separate schemes involving Siemens' Russian operations. First, from 2004 to 2006, Siemens' Industrial Solutions and Services group and a regional Russian company known as OOO Siemens paid over $740,000 in bribes to government officials in connection with a $27 million traffic control system project in Moscow funded by the World Bank. Siemens paid a business consultant who simultaneously worked (at Siemens' recommendation) as a technical consultant for the quasi-governmental unit in charge of the project, the Moscow Project Implementation Unit ("MPIU"). Siemens proceeded to pay $313,000 to three entities associated with the consultant, approximately $140,000 of which the SEC claimed was in exchange for favorable treatment during the tender process. The consultant then utilized his position to (i) create tender specifications favorable to Siemens; (ii) provide tender documents to Siemens before their official publication; (iii) evaluate project bids in a way that ensured Siemens would be awarded the contract; and (iv) assist during the implementation phase of the contract. Siemens also colluded with a competitor who inflated its bid to ensure Siemens would win the contract. Siemens then hired the competitor at an inflated rate and also hired two of the competitor's consortium members as subcontractors on the project. Siemens paid approximately $2.7 million to the two subcontractors on sham contracts, and used the subcontractors to funnel at least $600,000 in payments to senior officials at the MPIU.

In a separate scheme involving Russia, Siemens' MED unit allegedly made over $55 million in improper payments to a Dubai-based consultant between 2000 and 2007 in connection with medical equipment sales in Russia. The consultant was apparently used as an intermediary for bribes to government-owned customers, such as public hospitals, in Russia. In at least one instance—which consisted of over $285,000 in payments being made in connection with a $2.5 million contract—payments were routed through both the Dubai consultant and a second consultant registered in Des Moines, Iowa. The corruption was so pervasive within this unit that senior Siemens officials estimated that up to 80% of the MED unit's business in Russia involved illicit payments.

f. China

Siemens' Power Transmission and Distribution ("PTD") group paid approximately $25 million in bribes to Chinese government officials in connection with two high-voltage transmission lines projects worth a combined $838 million. These payments were made through several intermediaries including a consulting firm controlled by a former Siemens employee and were paid to entities associated with a Chinese business consultant who held a U.S. passport and resided in the United States. Siemens PTD managers in Germany were alleged to have approved the payments with the knowledge they would be shared with government officials.

g. Israel

Siemens Power Generation ("Siemens PG") paid approximately $20 million in bribes to a former Director of the Israel Electric Company, a state-owned business, in connection with four contracts to build and service power plants. The payments were routed through a company owned by the brother-in-law of the CEO of Siemens' Israeli subsidiary. The brother-in-law's company was in fact a clothing company based in Hong Kong. Yet, it was engaged to "identify and define sales opportunities, provide market intelligence," and support contract negotiations. Certain of the funds passed through U.S. bank accounts.

In addition to the above conduct, as noted above, the DOJ also entered into plea agreements with three Siemens subsidiaries: Siemens Venezuela, Siemens Bangladesh, and Siemens Argentina. Siemens Venezuela and Siemens Bangladesh pleaded guilty to conspiracy to violate the FCPA's anti-bribery and books and records provisions. Siemens Argentina pleaded guilty to a single count of conspiracy to violate the FCPA's books and records provision. All three entities are described in charging documents as "person[s] other than an issuer or domestic concern," and thus were required to make "use of the mails or any means or instrumentality of interstate commerce or [] do any other act in furtherance of" prohibited conduct "while in the territory of the United States" to satisfy the FCPA's jurisdictional requirements. It appears that the DOJ failed to charge Siemens Argentina with an anti-bribery violation because it was not (unlike in the case of Siemens Venezuela and Siemens Bangladesh) able to establish a sufficiently "strong nexus" between its alleged improper payments and the United States. The conduct for which these entities were charged is summarized below.

h. Venezuela

Siemens Venezuela was a wholly owned subsidiary headquartered in Caracas, Venezuela that contracted for and managed regional Siemens projects. Beginning around 1997, Siemens Venezuela became involved in bidding for two mass transit projects, the MetroMara and ValMetro projects. Beginning at least as early as 2001, Siemens Venezuela began making payments (estimated to total $16.7 and $18.7 million by the SEC and DOJ, respectively) to Venezuelan government officials in relation to the construction of the two metro transit systems that generated approximately $642 million in revenue for Siemens. In its charging documents, the DOJ alleges several connections to the United States although it does not explicitly tie these connections to the improper conduct. For example, the DOJ indicates that a separate Siemens entity headquartered in Sacramento, California performed design and construction work on behalf of the contract. In addition, one of the agents used as a conduit for payments controlled four entities, three of which had offices in the United States, and a consulting firm also used as a conduit was headquartered in Georgia.

By contrast, in describing the four different schemes used in connection with the Venezuela payments, the SEC includes additional details more specifically alleging ties to the United States, at least in certain instances. The first involved off-book bank accounts in Panama and Miami controlled by two CEOs and two CFOs of Siemens' regional subsidiary, out of which payments to Venezuelan officials were made. One of the regional CFOs routinely destroyed account statements to cover up the scheme. The second scheme involved payments to U.S.-based entities controlled by a Siemens consultant known as a political "fixer" in Venezuela. The consultant, who provided no legitimate work, funneled the money to high-ranking government officials with influence over the projects. The third scheme, authorized by a former division CFO, involved using a Cyprus-based consultant as an intermediary. Siemens and the consultant entered into sham agreements purportedly related to other projects and the consultant used the money for bribes related to the ValMetro project. The final scheme involved sham agreements with a Dubai-based consultant, which purported to supply equipment. In fact, a separate company provided the equipment. When this consultant came under scrutiny during an investigation of Siemens' activities in Italy, the division CFO simply moved the contract to a separate Dubai-based consultant who continued the scam. According to the DOJ, the former President of Siemens Venezuela kept a hand written document that recorded payments through these various intermediaries.

i. Bangladesh

Siemens Bangladesh was a wholly owned subsidiary of Siemens headquartered in Dhaka, Bangladesh that was responsible for, among other things, contracting for and managing regional projects for Siemens. Beginning in 2000, Siemens Bangladesh became involved in bidding for a national cellular mobile telephone network for the Bangladeshi government known as the BTTP Project. The Bangladeshi government issued two initial tenders for the BTTP Project in 2000 and 2001. However, each of these tenders was canceled. In April 2001, Siemens Bangladesh executed letters of authority granting two "consultants," with which they had a fifteen-year history of success, the authority to carry out "business promotion activities" with respect to the BTTP Project. Siemens Bangladesh also entered into oral agreements with the consultants at this time to pay them 10% of the BTTP Project value. Beginning shortly thereafter, Siemens Bangladesh began making payments to the consultants, often through other Siemens entities or intermediaries. In December 2002, Siemens discovered that its bid for the third tender of the BTTP Project had been rejected on technical grounds. It enlisted the assistance of a third consultant, described by the DOJ as a dual U.S. and Bangladeshi citizen, to "rescue" it from this disqualification. Throughout the next several years, Siemens Bangladesh made payments, through intermediaries, to the three consultants knowing that all or part of the payments would be passed on to members of the Bangladeshi government evaluation committee or their relatives in order to obtain favorable treatment for Siemens' bid. The DOJ states that "at least one payment to be made to each of these purported consultants" came from a United States bank account. The SEC noted that "[m]ost of the money paid to the business consultants was routed through correspondent accounts in the United States." In addition, at one point, one of the consultants moved to the United States in 2004. Siemens Bangladesh continued to funnel payments through him but used a Hong Kong bank account instead, ostensibly to avoid a U.S. connection. In June 2004, Siemens was awarded a portion of the BTTP Project worth over $40 million. Between May 2001 and August 2006, Siemens Bangladesh is alleged to have made over $5.3 million in payments (the majority of which were through the three consultants) in connection with the Bangladeshi BTTP Project.

j. Argentina

Siemens Argentina was a controlled (but apparently not wholly owned) subsidiary of Siemens with its headquarters in Buenos Aires, Argentina that contracted for and managed regional projects for Siemens. Beginning in the 1990s, Siemens Argentina became involved in a national identity card project in Argentina valued at approximately $1 billion. In February 1998, Siemens Argentina and its affiliates were awarded the national identity card project. Shortly thereafter, in September 1998, the Siemens subsidiary began making and promising payments to a "consulting group" with the understanding that these payments would be passed on to high-level Argentine officials with influence over the national identity card project. Regardless, in 2001, the national identity project was canceled, resulting in disputes between Siemens Argentina, the Argentine government and the consulting group that Siemens was using to funnel improper payments. In response to claims by the Argentine consulting group for outstanding payments, the Siemens Legal Department in Munich advised Siemens Argentina that payments to the Argentine consulting group were potentially problematic. Despite this advice, in July 2002, Siemens Argentina directed over $5.2 million in payments to be made through a Uruguayan bank account based on a backdated invoice for purported consulting services in Chili and Uruguay that were never provided. These payments were made to partially offset the outstanding payments claimed by the Argentine consulting group.

In connection with the payment dispute, Siemens officials met with officials of the consulting group in the United States on at least one occasion. Despite the payments and attempts to negotiate a resolution, the consulting group brought an arbitration claim against Siemens Argentina, which settled in 2006 for $8.8 million. An explicit condition of the settlement was that no information regarding the claims could be released to the public. In total, Siemens Argentina is alleged to have paid or caused to be paid over $15.7 million directly to entities controlled by members of the Argentine government; over $35 million to the Argentine consulting group; and over $54 million to other entities. The SEC claims, although it does not provide specifics, that certain payments were routed "through U.S. bank accounts based on fictitious invoices for non-existent services." Notably, in February 2007, Siemens was awarded $217 million in a separate, International Center for Settlement of Investment Disputes ("ICSID") arbitration arising out of the national identity card project dispute with the Argentine government for its cancellation of the project. ICSID does not have jurisdiction over claims based on contracts obtained through corruption.

k. Payment Mechanisms and Schemes

The improper payments (both described above and more generally) were made using a variety of mechanisms, including the following:

- *Widespread Use of Business Consultants and Intermediaries*: According to the SEC, Siemens paid over $980 million to third parties (all but $27.5 of which occurred before November 15, 2006) in order to funnel payments to government officials. Although many of these payments were ostensibly made under "consulting" agreements, in reality the entities to which they were made provided little or no service in return for the payments, but were rather used as conduits to make improper payments to foreign officials.

- *Slush Funds*: The SEC alleges that approximately $211 million in improper payments were made through "slush fund" bank accounts held in the name of present or former Siemens employees or shell companies.

- *Cash*: According to the SEC, Siemens employees were able to obtain large amounts of cash and cash equivalents that they could then use to pay government officials or intermediaries. The DOJ describes former Siemens telecommunications employees routinely filling up suitcases of cash from various cash desks, typically from the Siemens Real Estate group.

- *Intercompany Accounts*: Siemens was also able to mask payments by making them to accounts maintained in the name of unconsolidated Siemens entities around the world. The SEC alleges that Siemens used these internal accounts to funnel over $16.2 million to third parties. A Siemens Corporate Finance Financial Analyst who raised concerns about these accounts in 2004 was promptly phased out of his job.

- *Confidential Payment System*: The DOJ indicates that at least one Siemens business unit used a confidential payment system that was outside of the normal accounts payable process and allowed for flexibility as to which project to charge for the payment. The DOJ alleges that over $33 million was paid to business consultants and agents from 2001 through 2005 using the confidential system.

I. Individual Charges

Facing pressure from Congress and the media that the DOJ was not prosecuting the individuals who participated in bribery schemes, the DOJ indicted eight former Siemens executives and agents on December 13, 2011. The indictment charges that defendants committed to paying nearly $100 million in bribes to a series of Argentine government officials beginning in 1996 and until 2009 to win a billion dollar contract to produce national identity cards (the Documentos Nacionales de Identidad or "DNI" project). After the DNI contract was suspended in 1991, the defendants allegedly paid additional bribes to old and new Argentine officials in an attempt to reinstate the contract. Despite these efforts, the DNI project was terminated in 2001. At this point, the defendants caused Siemens AG to file a fraudulent ICSID arbitration claim against Argentina in Washington, D.C. The claim alleged wrongful termination of the contract for the DNI project and demanded nearly $500 million in lost profits and expenses. The defendants continued to pay bribes to suppress evidence during the arbitration proceedings and actively hid from the tribunal the fact that the contract for the DNI project had been secured by bribery and corruption, which included tampering witness statements and pleadings that falsely denied the existence of corruption. As a result of the bribe payments it made, Siemens prevailed in the Washington arbitration and received an arbitration award in 2007 against the government of Argentina of over $217 million plus interest for the DNI contract. However, in August 2009, after settling bribery charges with the United States and Germany, Siemens waived the arbitration award.

The DOJ alleged that the defendants filtered money to the Argentine government officials in various ways, including offshore shell companies, fake consulting contracts, and large amounts of cash carried across national borders. Defendants also caused Siemens to pay $8.8 million in 2007 under the legal cover of a separate arbitration initiated in Switzerland by their co-conspirator intermediaries to enforce a sham $27 million contract that involved a company controlled by those intermediaries, which

consolidated existing bribe commitments. The defendants caused Siemens to quietly settle the arbitration, keeping all evidence of corruption out of the proceeding.

The defendants named in the DOJ's indictment were: Uriel Sharef, a former member of the central executive committee of Siemens AG; Herbert Steffen, a former chief executive officer of Siemens Argentina; Andres Truppel, a former chief financial officer of Siemens Argentina; Ulrich Bock, Stephan Signer and Eberhard Reichert, former senior executives of Siemens Business Services; and Carlos Sergi and Miguel Czysch, who served as intermediaries and agents of Siemens in the alleged bribe scheme. The defendants live in Germany, Switzerland, or Argentina. The defendants were charged with conspiracy to violate the anti-bribery, books and records, and internal control provisions of the FCPA; conspiracy to commit wire fraud; conspiracy to commit money laundering; and substantive wire fraud. They have not yet been arrested or extradited.

In 2009, following a change in management and the initiation of proceedings by the Munich prosecutor's office, Siemens began cooperating with the DOJ and SEC as well as German prosecutors. The scheme was revealed at that time and the company decided to forego the right to the arbitration award.

The DOJ's press release that accompanied the indictment praised Siemens' laudable actions in disclosing these potential FCPA violations, noting that "Siemens AG disclosed these violations after initiating an internal FCPA investigation of unprecedented scope; shared the results of that investigation; cooperated extensively and authentically with the department in its ongoing investigation; and took remedial action, including the complete restructuring of Siemens AG and the implementation of a sophisticated compliance program and organization."

Also on December 13, 2011, the SEC filed a civil action in the U.S. District Court for the Southern District of New York in connection with the Argentina DNI project, charging seven former senior executives of Siemens AG and its regional company in Argentina with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. According to the SEC complaint, Siemens paid an estimated total of over $100 million in bribes, approximately $31.3 million of which were made after March 12, 2001, when Siemens became subject to U.S. securities laws. The SEC alleges that in furtherance of the scheme, the defendants falsified documents, including invoices and sham consulting contracts, participated in meetings in the United States to negotiate the terms of bribe payments, and made use of U.S. bank accounts to pay bribes.

Six of the individuals charged in the SEC complaint were included in the DOJ's indictment: Uriel Sharef, Herbert Steffen, Andres Truppel, Ulrich Bock, Stephan Signer, and Carlos Sergi. Bernd Regendantz, CFO of Siemens Business Services from February 2002 to 2004, was not named in DOJ's indictment. However, Regendantz was the first of the Siemens' defendants to settle with the SEC, and he did so in 2011 without admitting or denying the allegations by consenting to the entry of a final judgment that permanently enjoins him from committing future violations. He agreed to pay a civil penalty of $40,000 which was deemed satisfied by the payment of a €30,000 administrative fine ordered by the Munich prosecutor.

In October 2012, Uriel Sharef agreed to pay $275,000 to settle the SEC charges that alleged he participated in a scheme to bribe government officials in Argentina. Sharef agreed to pay the fine without admitting or denying the charges against him, and a final judgment was entered against Sharef on April

15, 2013. Sharef's civil penalty was the second highest penalty ever assessed against an individual in an FCPA case.

Also in October 2012, Herbert Steffen filed a motion to dismiss the SEC's charges against him. Steffen argued that the claims against him should be dismissed because the Manhattan court lacked personal jurisdiction over him and the SEC's complaint was filed outside the statute of limitations. In February 2013, Judge Shira Scheindlin dismissed the SEC's charges against Steffen on grounds of lack of personal jurisdiction.

On September 30, 2015, Andres Truppel (former CFO, Siemens Argentina) pleaded guilty to participating in the scheme to bribe government officials in Argentina. Truppel agreed to cooperate with the DOJ, the United States Attorney for the Southern District of New York, and the FBI. Truppel admitted to knowingly preparing false invoices for consultant services that were never actually provided in order to circumvent Siemens' internal accounting controls. Truppel told Judge Denise Cote that the false invoices were necessary to circumvent the new internal account procedures adopted when Siemens AG became listed in New York. Truppel also admitted to preparing an affidavit that falsely omitted the existence of the bribery despite knowing that it would be used by Siemens AG in legal proceedings against Argentina to obtain the proceeds of the DNI project. Truppel's sentence has not been announced.

In November 2013, Truppel agreed to pay $80,000 to settle SEC charges related to his participation in the same scheme. Truppel agreed to pay the fine without admitting or denying the charges against him, and a final judgment was entered against Truppel on February 3, 2014.

As to the other defendants named in the SEC's complaint—Ulrich Bock, Stephan Singer, and Carlos Sergi—none have made court appearances, and they are presumed to be in Germany.

At least twelve individuals have been prosecuted by German authorities for their involvement in Siemens' misconduct as far back as 2007. So far, all have received probation or suspended sentences, as well as fines. Among them included Reinhard Siekazcek, who admitted to setting up slush funds while a manager at Siemens' ICN fixed-line telephone network division. Prosecutors alleged Siekazcek funneled money through various shell companies for use as bribes in order to secure various government and private contracts abroad over a period of years. Two of his assistants, Ernst Keil-von Jagemann and Wolfgang Rudolph, were later convicted of accessory to breach of trust. Keil-von Jagemann received two years of probation and a fine of €12,000, while Rudolph received 9 months of probation and was fined €20,000.

On April 20, 2010, a Munich court found two former Siemens managers guilty of breach of trust and abetting bribery for their roles in the scandal. Michael Kutschenreuter, the former financial head of Siemens' telecommunication unit, received two years' probation and a fine of €160,000. Hans-Werner Hartmann, the former head of accounting at the same unit, was given a suspended sentence of 18 months and ordered to pay €40,000 to charity. Kutschenreuter is the most senior Siemens executive to be found guilty of corruption; he admitted that he covered up slush funds and other corrupt practices by Siemens employees related to contracts in Nigeria and Russia.

14. Leo Winston Smith & Martin Self (Pacific Consolidated Industries LP)

On May 8, 2008, Martin Self, a partial owner and former president of Pacific Consolidated Industries LP ("PCI"), a private company that manufactured air separation units and nitrogen concentration trolleys for defense departments throughout the world, pleaded guilty to violating the FCPA's anti-bribery provisions in connection with payments to a relative of a U.K. Ministry of Defense ("U.K.-MOD") official in order to obtain contracts with the Royal Air Force valued at over $11 million. Previously, on June 18, 2007, Leo Winston Smith, former executive vice president and director of sales of PCI, was arrested after being indicted by a federal grand jury in Santa Ana, California on April 25, 2007 in connection with the same scheme. On September 3, 2009, Smith pleaded guilty to charges of conspiracy to violate the FCPA and corruptly obstructing and impeding the due process of the internal revenue laws.

According to the charging documents, in or about October 1999, Self and Smith caused PCI to enter into a marketing agreement with the U.K.-MOD official's relative. The marketing agreement provided for the relative to receive commission payments, from which he made payments to the U.K.-MOD official. The plea agreement with Self indicates that, beginning in late 1999, he "was aware of the high probability that the payments to the [r]elative were made for the purpose of obtaining and retaining the benefits of the U.K.-MOD contracts…." Despite such awareness, Self "failed to make a reasonable investigation of the true facts and deliberately avoided learning the true facts." Between 1999 and 2002, Self and Smith caused over $70,000 in payments to be made to the relative of the U.K.-MOD official through the bogus marketing agreement. In addition, Smith's indictment indicates that beginning around 2002, Smith caused approximately $275,000 in payments to be made on behalf of the U.K.-MOD official for the purchase of a villa in Spain. In return, the U.K.-MOD official awarded a contract to PCI valued at approximately $6 million, on which Smith received commissions of approximately $500,000. The indictment alleges that Smith did not report these commissions on his 2003 United States tax returns.

On November 17, 2008, Self was sentenced to two years' probation and fined $20,000. On December 6, 2010, Smith was sentenced to six months of imprisonment followed by six months of home confinement and three years of supervised release. He was also ordered to pay $7,700 in fines and special assessments. The DOJ had sought a significantly harsher prison sentence of 37 months; however, Smith argued that his age, ill health, and lengthy pretrial supervision justified a lighter sentence. He was released from prison on September 29, 2011.

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.

15. Jack Stanley

On September 3, 2008, Albert "Jack" Stanley, former CEO and Chairman of KBR, pleaded guilty to a two-count criminal information charging him with one count of conspiracy to violate the FCPA and one count of conspiracy to commit mail and wire fraud in connection with his participation in a bribery scheme related to the Bonny Island project in Nigeria. In a related civil proceeding, Stanley agreed, without admitting or denying the SEC's allegations, to the entry of a final judgment enjoining him from violating the FCPA's anti-bribery, books and records and internal control provisions. Further, Stanley agreed to cooperate with law enforcement authorities in the ongoing investigations.

In addition to the FCPA anti-bribery, books and records and internal control charges related to the Nigeria bribery scheme underlying the KBR/Halliburton settlements, Stanley also pleaded guilty to conspiracy to commit mail and wire fraud in connection with a separate scheme involving a former Kellogg employee, described in the DOJ's criminal information as the "LNG Consultant." From around 1977 through 1988, the LNG Consultant was employed by Kellogg and responsible for LNG and other projects in the Middle East. Beginning in 1988, he left Kellogg and became a consultant for Kellogg and other firms. Beginning around 1991 and continuing through 2004, Stanley and the LNG Consultant, using various corporate vehicles, allegedly entered into a series of lucrative contracts purportedly for consulting services in connection with LNG projects. In return for the consulting contracts, the LNG Consultant agreed to make "kickback" payments to bank accounts owned or controlled by Stanley worth millions of dollars. Over the course of the scheme, Stanley caused Kellogg and KBR to make payments of over $68 million to the LNG Consultant. For his role in the scheme, Stanley received approximately $10.8 million in kickbacks.

Under the DOJ plea agreement, Stanley faced as much as ten years in prison and a fine of twice his pecuniary gain for his actions, and his original plea agreement with the DOJ contemplated a prison term of approximately 7 years. His sentencing was delayed several times, potentially to allow him to finish cooperating with the DOJ's prosecution of other individuals and companies involved in the scheme. On February 23, 2012, he was sentenced to serve 30 months at a community correction facility in Houston, followed by three years of supervised release, and to pay restitution to KBR in the amount of $10.8 million to compensate for his kickback scheme with LNG Consultant. Stanley has already paid KBR $9.25 million as partial restitution, and, per the judgment, he will be allowed to pay the remaining $1.55 million in monthly installments of $1,000 after his release. He was released from prison on April 4, 2014.

16. Westinghouse

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

The Indian Ministry of Railroads ("MOR") controls the national railway system and is responsible for soliciting bids for various government contracts through the Indian Railway Board ("IRB"). Pioneer sells railway brake blocks to, among other customers, train car manufacturers owned or controlled by the Indian government. According to the SEC's complaint, from at least 2001 to 2005, Pioneer made more than $137,400 in improper payments to employees of India's state-run railway system to induce them to consider or grant competitive bids for government contracts to Pioneer. In 2005, the IRB awarded Pioneer contracts that allowed it to realize profits of $259,000.

In order to generate the cash required to make the payments, Pioneer directed "marketing agents" to submit invoices for services rendered. Marketing agents are companies that submit invoices and collect payments on behalf of other companies. Although the invoices indicated that payments were

due for services rendered in connection with various railway projects, they were in fact fictitious and no such services were ever rendered. Once Pioneer paid the invoice, the "marketing agent" would return the cash to Pioneer minus a service fee that the agent kept for itself. Pioneer then used the cash to make the improper payments.

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

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

17. Willbros Group

On May 14, 2008, Willbros Group Inc. ("Willbros Group") an international oil and gas pipeline company with headquarters in Tulsa, Oklahoma prior to 2000 when it moved them to Houston, Texas, and four of its former employees settled civil charges with the SEC for violating the FCPA's anti-bribery, books and records and internal controls provisions in connection with the payment of bribes to officials in Nigeria and Ecuador, and for violating the anti-fraud provisions of the Securities Act (Section 17(a)) and Exchange Act (Section 10(b) and Rule 10b-5 thereunder) in connection with a fraudulent scheme to reduce taxes in Bolivia. The SEC settlement requires Willbros Group to pay $10.3 million in disgorgement and prejudgment interest and also contained civil penalties for certain of the former employees (discussed further below).

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

a. Nigeria

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

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

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

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

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

b. Ecuador

According to the SEC and DOJ, in late 2003, the then-president of Willbros International instructed an Ecuador-based employee to pursue business opportunities in that country. The employee advised Brown, who was supervising the company’s business in Ecuador, that Willbros Servicios Obras y Sistemas S.A. (“Willbros Ecuador”) could obtain a $3 million contract (the “Santo Domingo project”) by making a $300,000 payment to officials of PetroEcuador, a government-owned oil and gas company.

Brown approved the request, which required $150,000 to be paid upfront and $150,000 to follow after the completion of the project. After making this agreement, Willbros Ecuador received a letter of intent for the Santo Domingo project, and the company made the first $150,000 payment.

While the Santo Domingo project was ongoing, however, the relevant officials at PetroEcuador were replaced. Both the original officials and the incoming officials insisted on receiving payments, and Brown and Tillery authorized the Ecuador employee to broker a deal. Brown attended the meeting with the Ecuadorian officials as well, where it was agreed that the company would pay the former officials $90,000 and the new officials $165,000. As a result of this agreement, Willbros retained the Santo Domingo project, which ultimately generated $3.4 million in revenue for the company, and was awarded a second project. When the bribes relating to the second project were discovered in 2005, Willbros Group relinquished the project.

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

c. Bolivia

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

In late 2001, the subsidiary was awarded a contract to complete a pipeline as part of a joint venture. Willbros Transandina was required to pay 13% of its receipts for the project as a value added tax ("VAT"). It was, however, allowed to offset the taxes to a certain extent by the VAT it paid to its vendors. Tillery and others thus orchestrated a scheme whereby Willbros Transandina falsely inflated the VAT it owed to vendors through a series of fictitious transactions and invoices. Similarly, Tillery directed accounting personnel to materially understate the amount of Foreign Withholding Taxes that Willbros Group owed as a foreign company doing business in Bolivia.

d. Individuals

In addition to its action against Willbros Group, the SEC settled charges against several Willbros employees.

On September 14, 2006, Jim Bob Brown, a former executive of, pleaded guilty to violations of the anti-bribery provisions of the FCPA in connection with conspiring with others to bribe Nigerian and Ecuadorian government officials. On that same day, the SEC filed a civil action related to the same conduct, alleging civil violations of the FCPA and of the Exchange Act. Without admitting or denying the allegations in the complaint, Brown consented to the entry of a judgment that permanently enjoins him from future violations of these provisions. Brown was not ordered to pay a civil penalty.

Among other things, Brown's plea agreement indicates that he "loaned" a suitcase filled with $1 million in cash to a Nigerian national with the intent that it be passed on to Nigerian officials. Brown was sentenced on January 29, 2010 to 12 months and one day in prison. The judge ordered Brown to serve two years of supervised release after his prison term and pay a fine of $1,000 per month while he is on supervised release.

On November 5, 2007, Steph pleaded guilty to conspiracy to violate the FCPA as a result of his role in the fraudulent payments made to Nigerian government officials. Steph was sentenced on January 28, 2010, to 15 months in prison. In addition to the prison sentence, the judge ordered Steph to serve two years of supervised release following his prison term and to pay a $2,000 fine. Steph was also civilly charged by the SEC of violating the FCPA's anti-bribery provisions, knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records, as well as aiding and abetting Willbros Group's FCPA violations and will pay a civil penalty in connection with the judgment that has yet to be determined.

On May 14, 2008, the SEC settled allegations with three former Willbros employees. First, without admitting or denying the SEC's allegations, Gerald Jansen agreed to pay a civil penalty of $30,000 and to be permanently enjoined from future violations of securities laws. Jansen was a former employee of Willbros International who served as an Administrator and General Manager in Nigeria. He allegedly routinely approved payments of invoices out of petty cash which he knew were false and which were used to make payments to Nigerian tax and court officials. The SEC charged Jansen with aiding and abetting Willbros Group's violations of the FCPA's anti-bribery, books and records, and internal controls provisions and knowingly circumventing internal controls or falsifying books and records. The DOJ has not taken action against Jansen.

Second, Lloyd Biggers agreed to be permanently enjoined from future violations of securities laws, without admitting or denying the SEC's allegations. Biggers was a former employee of Willbros International who allegedly knowingly procured false invoices used to make payments to Nigerian tax and court officials. The SEC charged Biggers with knowingly circumventing Willbros Group's internal controls or knowingly falsifying its books and records and with aiding and abetting Willbros Group's violations of the anti-bribery and books and records provisions. Biggers was not ordered to pay a civil penalty, and the DOJ has not taken action against him.

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

On December 19, 2008, Tillery and Paul G. Novak, a former Willbros International consultant, were charged in an indictment unsealed in U.S. District Court in Houston with conspiring to make more than $6 million in corrupt payments to Nigerian and Ecuadorian government officials as part of the schemes described above. The indictment was unsealed after Novak was arrested on arrival at George Bush Intercontinental Airport in Houston from South Africa after his U.S. passport was revoked. Tillery and Novak were specifically charged with criminal conspiracy, two FCPA anti-bribery violations, and a money-laundering conspiracy.

On November 12, 2009, Novak pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA in connection with the payments authorized in the EGGS projects in Nigeria. He was sentenced on May 3, 2013 to serve 15 months in prison, two years of supervised release after his prison term and to pay a $1 million fine. Tillery remains at large.

- Bilfinger SE

As described in detail above, in 2013, Willbros Group's consortium partner, Bilfinger SE ("Bilfinger") settled charges with the DOJ related to the EGGS Project. As part of the settlement, Bilfinger agreed to pay a criminal penalty of $32 million.

J. 2007

1. Akzo Nobel

On December 20, 2007, Akzo Nobel N.V. ("Akzo Nobel"), a Netherlands-based pharmaceutical company, settled a civil complaint with the SEC for violating the FCPA's books and records and internal controls provisions in connection with improper After Service Sales Fee payments under the Oil-for-Food Programme. In the SEC action, Akzo Nobel agreed to disgorge over $2.2 million in profits and pre-judgment interest, and pay a civil penalty of $750,000.

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

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

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

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

2. Baker Hughes

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 imposed in an FCPA case up to that time. 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.

3. Bristow Group

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. On January 31, 2011, the DOJ advised the Bristow group that it had closed its inquiry into the suspected misconduct.

4. Chevron

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

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

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

In addition, Chevron's policies required traders to obtain prior written approval for all proposed Iraqi oil purchases and charged management with reviewing each such proposed deal. Chevron's traders did not follow the policy, and Chevron's management failed to ensure compliance. Furthermore, Chevron's management relied on its traders' representations regarding third-party sellers instead of properly inquiring into and considering the identity, experience and reputation of each third-party seller. A credit check of one seller, whom Chevron used in two transactions, revealed that the seller was a "brass plate" company with no known assets, experience in the oil industry or actual operations.

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

5. Chiquita Prosecution

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

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

On April 24, 2003, Roderick Hills, then-head of Chiquita's Audit Committee and former Chairman of the SEC, approached Michael Chertoff, then Assistant Attorney General and later Secretary of Homeland Security, to self-report the payments and seek the government's advice on how to proceed. Chiquita officials claim that Chertoff and, subsequently, other DOJ officials recognized the difficult position in which the company found itself, noted larger ramifications for U.S. interests if the corporate giant pulled out of Colombia overnight and did not instruct Chiquita to halt the payments. Thus, although outside counsel advised Chiquita in writing on September 8, 2003 that "[DOJ] officials have been unwilling to give assurances or guarantees of non-prosecution; in fact, officials have repeatedly stated that they view the circumstances presented as a technical violation and cannot endorse current or future payments," Chiquita continued to pay the AUC throughout 2003 and early 2004.

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

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

6. 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."

7. Dow Chemical Company

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.

8. El Paso

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

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

However, Coastal, which in January 2001 merged with a wholly owned El Paso subsidiary, continued to purchase Iraqi crude oil indirectly through third parties. The complaint alleges that based on

its past experience, trade press and communications with those third parties, El Paso knew or was reckless in not knowing that illegal surcharges were being paid in connection with that oil and that the third parties were passing the surcharges back to El Paso in premiums. The complaint further asserts that recorded conversations of the company's oil traders demonstrated the company's knowledge of the surcharge demand. For example, in one taped call, an El Paso official reminded an El Paso trader of past conversations with SOMO officials regarding the surcharges in which "they told us—blatantly—that we would have to pay."

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

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

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

9. Immucor

On September 27, 2007, Immucor, Inc. ("Immucor") and Gioacchino De Chirico, its CEO, settled FCPA books and records and internal controls charges with the SEC. At that time, Immucor and de Chirico agreed to a cease and desist order enjoining them from committing future violations of those provisions of the FCPA. On October 2, 2007, de Chirico further consented to payment of a $30,000 fine without admitting or denying the SEC's allegations.

Immucor Italia S.p.A., a wholly owned subsidiary of Immucor, sold blood-testing units to a hospital in Milan, Italy. In 2003, De Chirico allegedly arranged for the director of that hospital to chair a medical conference in Italy. Although the amount of compensation was never established, the hospital director requested, and De Chirico agreed, that payment would be made so as to allow the director to avoid Italian income taxes. In 2004, De Chirico allegedly initiated, via Immucor Italia, a payment of 13,500 Euros to the hospital director. Immucor Italia categorized the 2004 payment as overdue compensation for the October 2003 conference, but the payment allegedly was made in exchange for preferential treatment from the hospital director, who selected companies to fulfill supplies and equipment contracts. De Chirico later approved an invoice that falsely described the payment as related to consulting services and Immucor recorded the payment as such.

As discussed above, immediately following Immucor's announcement of an SEC investigation into allegations of an improper payment under the FCPA, a shareholder class filed a complaint under §§ 10-b and 20(a) of the Exchange Act. In May 2007, Immucor agreed to settle the class action for $2.5 million.

10. Ingersoll-Rand

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

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

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

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

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

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

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

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

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

11. Lucent Technologies

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

According to the SEC and DOJ, the majority of the trips were ostensibly designed either to allow Chinese officials to inspect Lucent's factories in connection with a proposed sale ("pre-sale" trips) or to train the officials regarding the use of Lucent's products in connection with ongoing contracts ("post-sale" trips). The SEC alleged that Lucent spent more than $1 million on 55 "pre-sale" visits and more than $9 million on 260 "post-sale" visits.

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

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

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

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

12. Paradigm

On September 21, 2007, the DOJ entered into an NPA with Paradigm B.V. ("Paradigm"), a Dutch software solutions company serving the oil and gas industry, in connection with improper payments in Kazakhstan, China, Mexico, Nigeria, and Indonesia between 2002 and 2007. Paradigm was, at the time of the agreement, a private limited liability company, which had maintained its principal place of business in Israel until July 2005 when it relocated to Houston, Texas (rendering Paradigm a "domestic concern" for purposes of the FCPA). Paradigm discovered the payments while conducting due diligence in preparation for listing on a U.S. stock exchange. Paradigm agreed to pay a $1 million fine, implement new enhanced internal controls and retain outside counsel for eighteen months to review its compliance with the NPA.

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

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

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

In 2004, Paradigm acquired a Mexican entity, AGI Mexicana S.A. de C.V. ("Paradigm Mexico"), and entered into a subcontract with the Mexican Bureau of Geophysical Contracting ("BGP"). Paradigm Mexico was to perform services in connection with BGP's contract with Pemex, the Mexican national oil company. Paradigm Mexico used the services of an agent in connection with this contract without entering into a written agreement. The agent requested $206,698 in commission payments to be paid through five different entities. Paradigm Mexico failed to conduct any due diligence on the agent or the entities through which payment was requested. Paradigm Mexico paid certain of the agent's invoices. When new senior management learned of the payments, however, the payments were halted. The agent sued Paradigm Mexico in Mexican court, but Paradigm prevailed in the suit.

Further, Paradigm Mexico spent approximately $22,000 on trips and entertainment for a Pemex decision maker in connection with the BGP contract and a second subcontract with a U.S. oil services company, including a $12,000 trip to Napa Valley that coincided with the Pemex official's birthday. Around the time of the second contract, Paradigm also acquiesced to a demand to hire the Pemex official's brother as a driver (who did perform some driving duties after being retained). Finally, Paradigm Mexico leased a house from the wife of a separate tender official of a Pemex subsidiary in close proximity

to the signing of a third contract between Paradigm Mexico and the Pemex subsidiary. The house was used by Paradigm Mexico's staff, and the rental fee "appears to have been fair market value." The Pemex decision maker on the first two contracts was also the "responsible official" for this third contract.

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

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

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

The compliance measures to which Paradigm agreed to address deficiencies in its internal controls, policies and procedures in preparation of its listing on a United States exchange as a public company, included: (i) promulgation of a compliance code designed to reduce the prospect of FCPA violations that would apply to all Paradigm directors, officers, employees and, where appropriate, third parties such as agents, consultants and joint venture partners operating on Paradigm's behalf internationally; (ii) the assignment of responsibility to one or more senior corporate official(s) for implementation and oversight of compliance with these policies; (iii) periodic FCPA training for all directors, officers, employees, agents and business partners and annual certification by those parties of compliance with Paradigm's compliance policies and procedures; and (iv) appropriate due diligence pertaining the retention and oversight of agents and business partners.

13. Chandramowli Srinivasan

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

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

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

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

14. Syncor International& Monty Fu

On September 28, 2007, the SEC filed settled charges against Monty Fu, the founder and former chairman of Syncor International Corporation ("Syncor"), for failing to implement a sufficient system of internal accounting controls at Syncor and for aiding and abetting Syncor's violations of the books and records and internal controls provisions of the FCPA, arising from improper commission payments and referral fees by Syncor's wholly owned Taiwanese subsidiary, Syncor Taiwan, to doctors employed by state-owned and private hospitals in Taiwan. Without admitting or denying wrongdoing, Fu consented to an injunction from violating and aiding and abetting further such violations, and agreed to pay a civil monetary penalty of $75,000.

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

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

referral fees again were in cash and typically represented between 3% to 5% of the fees that patients paid to the imaging center.

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

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

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

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

15. Textron

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

In total, Textron will pay over $4.5 million dollars to settle the charges. Specifically, according to the terms of the SEC settlement, Textron is required to disgorge $2,284,579 in profits, plus approximately $450,461 in pre-judgment interest, and to pay a civil penalty of $800,000. Textron will also pay a $1,150,000 fine pursuant to the NPA 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," and (iii) ensuring that senior corporate officials retain responsibility for the implementation and oversight of the FCPA compliance program and report directly to the Audit Committee of the Textron Board of Directors.

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

According to the SEC complaint and DOJ NPA, starting in the middle of 2000, the Textron subsidiaries, with the assistance of Lebanese and Jordanian consulting firms, inflated three OFFP contracts with the Iraqi Ministry of Oil and ten contracts with the Iraqi Ministry of Industry and Minerals to include the cost of secret ASSF payments. In violation of Textron's compliance policies, neither consulting firm was retained through a written contract. With the knowledge and approval of management officials of the Textron subsidiaries, the consultants made the ASSF payments to Iraqi accounts outside of the U.N. Oil-for-Food Escrow Account and were then reimbursed by the Textron subsidiaries. The payments were recorded as "consultation" or "commission" fees.

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

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

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

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

16. Vetco International Ltd.

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

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

The Vetco subsidiaries agreed to pay a total of $26 million in fines, then the largest criminal fine in an FCPA prosecution to that date. This was the second time that one of the subsidiaries, Vetco Gray U.K., pleaded guilty to violating the FCPA. In 2004, Vetco Gray U.K. (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 U.K. 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. (*See* DOJ Opinion Procedure Release 04-02 at p.442). In calculating the fine against Vetco Gray U.K., which totaled $12 million of the $26 million in fines, the DOJ "took into account" Vetco Gray U.K.'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. As discussed in greater detail on p.305, Aibel Group (successor to Vetco Limited) pleaded guilty in November 2008 to violating the FCPA and admitted that it was not in compliance with the 2007 DPA.

17. York International

On October 1, 2007, York International Corporation ("York"), a global provider of heating, air conditioning and refrigeration products that is now a subsidiary of Johnson Controls, entered into a three-year DPA with the DOJ and settled civil charges with the SEC related to improper payments under the OFFP and other foreign corruption allegations. The SEC charged York with violations of the anti-bribery, books and records, and internal controls provisions of the FCPA. The DOJ charged York with conspiracy to violate, and violations of, the wire fraud statute and books and records provision of the FCPA. York agreed to pay over $22 million in fines and penalties, which includes a $10 million criminal fine, a $2 million civil penalty, and disgorgement and pre-judgment interest of over $10 million.

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

a. OFFP Payments

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

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

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

b. Other International Bribery Schemes

According to the SEC and DOJ filings, from 2001 to 2006, various York foreign subsidiaries made over eight hundred improper payments totaling over $7.5 million to secure orders on approximately 774 commercial and government projects in the Middle East, India, China, Nigeria and Europe. According to the SEC, 302 of these projects involved government end-users, and York generated net profits of nearly $9 million on contracts involving illicit payments.

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

Specifically,

- In the United Arab Emirates ("UAE"), YACR made thirteen improper payments in 2003 and 2004 totaling approximately $550,000 in bribes to UAE officials to secure contracts in connection with the construction of a luxury hotel and convention complex named the Conference Palace, built and owned by the Abu Dhabi government. The officials were members of the hotel Executive Committee. The committee was established by government decree and reported to the Ministry of Finance, and its members were appointed by the Crown Prince of Abu Dhabi. Approximately $522,500 in payments in connection with the project were made through an unspecified intermediary while knowing that the intermediary would pass most of it on to the UAE officials. The payments were approved by the same YACR Vice President who approved the kickbacks under the OFFP and YACR's Dubai-based director of finance. York generated sales revenue of approximately $3.7 million in connection with the luxury hotel project.

- York entities also made illicit payments in connection with a number of non-governmental Middle East projects. For example, in connection with an Abu Dhabi residential complex project, a YACR sales manager made a cash payment to an engineering consultant working for the end user to have the engineer submit design specifications that favored York equipment. To make the payment, the YACR sales manager arranged for a local contractor to generate a false invoice for $2,000. The contractor returned $1,900 of the resulting payment to the YACR sales manager, who passed it on to the engineering consultant. In another example, York Middle East, a business unit within York, made approximately $977,000 in payments between 2000 and 2005 to a senior executive of a publicly held UAE district cooling utility in order to secure future business with the cooling utility. The payments,

which typically amounted to 7% of York's sales on cooling utility projects, were made to entities in Europe or the West Indies designated by the senior executive. The sales revenue associated with the district cooling utility payments was $12.2 million.

- York's Indian subsidiary retained an agent to assist it in securing after-installation service contracts and to provide sales and marketing support in connection with equipment sold to the Indian Navy. An employee of the agent (who for a period of time was also employed by York India) admitted making routine payments to Indian Navy officials to secure business for York between 2000 and 2006. The payments were typically less than $1,000, but over time amounted to approximately $132,500 on 215 orders. The payments were made out of the nearly $180,000 in commission payments made to the agent. York India generated revenue of $2.4 million on contracts related to these payments.

- York's U.K. subsidiary, York United Kingdom ("York U.K."), retained a Nigerian agent to provide site supervision and accommodations in connection with 2002 and 2005 contracts the subsidiary had with the NNPC. For each contract, the agent received a commission of approximately 30% of the contract value. A September 2002 e-mail from a principal of the agent to the York U.K. manager that signed the 2002 NNPC contract indicated that the commission payment was being shared with an NNPC official. A separate York U.K. manager who signed the second NNPC contract admitted that the agent's approximately 30% commission was unusually high. York U.K. has since terminated the agency relationship and ceased bidding on future NNPC contracts.

- Finally, from 2004 through 2006, York Refrigeration Marine (China) Ltd. ("YRMC") made improper payments to agents and other individuals, including Chinese government personnel at government-owned shipyards, in connection with sales of refrigeration equipment to ship builders. The payments, which were described as commissions, sales and marketing expenses or gifts and entertainment expenses, lacked sufficient supporting documentation and were for nebulous and undocumented services. York's local Hong Kong office approved the payments and processed them through the Danish subsidiary. In addition, in one instance, YRMC provided Chinese shipyard employees with electronics and laptop computers.

K. 2006

1. ITXC

On September 6, 2006, Yaw Osei Amoako, the former regional manager of ITXC Corporation, an internet telephone provider, pleaded guilty to criminal allegations of violations of the FCPA's anti-bribery provisions in connection with his payment of approximately $266,000 in bribes to employees of a foreign state-owned telecommunications carrier. On August 1, 2007 Amoako was sentenced to 18 months in prison for conspiring to violate the FCPA and the Travel Act. He was further required to pay $7,500 in fines and serve two years of supervised release. Additionally, on July 25, 2007 Amoako was required to pay $188,453 in disgorgement and pre-judgment interest in the settlement of the SEC's civil action under the FCPA. Amoako was accused of taking kickbacks for some of the bribes he paid to foreign officials.

On July 25, 2007, former ITXC Vice President Steven J. Ott and former ITXC Managing Director Roger Michael Young pleaded guilty to conspiring to violate the FCPA and the Travel Act in connection with corrupt payments to foreign telecommunications officials in Africa. On July 21, 2008, Ott was sentenced to five years probation, including six months at a community corrections center and six months of home confinement. He was also fined $10,000. On September 2, 2008, Young was sentenced to five years probation, including three months at a community corrections center and three months of home confinement. He was also fined $7,000.

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.

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

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

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

2. Faheem Mousa Abdel Salam

On August 4, 2006, Faheem Mousa Abdel Salam, a naturalized U.S. citizen from Michigan living and working as a translator for a civilian contractor in Baghdad, pleaded guilty to one count of violating the FCPA. Salam was prosecuted for trying to bribe a senior Iraqi police official in order to induce the official to purchase a high-end map printer and 1,000 armored vests in a transaction unrelated to Salam's role as a translator. In February 2007, Salam was sentenced to three years in prison for his conduct.

According to charging documents, in mid-December 2005, a high-ranking Iraqi Ministry of Interior official introduced Salam to a senior official of the Iraqi police force and indicated that doing business with Salam could be "beneficial." During the discussion between Salam and the police official, Salam apparently offered the official a "gift" of approximately $60,000 to facilitate the sale of the printer and armored vests for over $1 million. The sale was to be made through a multinational agency—the Civilian Police Assistance Training Team ("CPATT")—that oversaw, among other things, the procurement activities of the Iraqi police force. In a subsequent January 2, 2006 telephone call, Salam lowered the price of the printer and vests to $800,000, and, as a result, lowered the proposed "gift" to the police official to $50,000. Following this telephone call, the police official contacted U.S. authorities with the Office of Special Inspector General for Iraq Reconstruction ("SIGIR"), who began an investigation into Salam's alleged conduct.

During their investigation, SIGIR officials monitored telephone calls and emails between Salam and the confidential police informant. In addition, a SIGIR agent posed as a CPATT procurement official, and met with Salam to discuss the proposed transaction. During these meetings, Salam offered the undercover "procurement officer" a bribe of between $28,000 and $35,000 for his efforts in finalizing the deal. In a February 2006 email, Salam abruptly, and without explanation, indicated that he would not be able to go forward with the transaction. He was arrested upon his return to the United States at Dulles International Airport on March 23, 2006.

3. Richard John Novak

On March 22, 2006, Richard John Novak pleaded guilty to one count of violating the FCPA and another count of conspiring to violate the FCPA and commit wire and mail fraud. On October 2, 2008, Novak was placed on three years' probation and ordered to perform 300 hours of community service.

From August 1999 until August 2005, Novak and seven others operated a "diploma mill" that sold (i) fraudulent academic products, including high school, college and graduate-level degrees; (ii) fabricated academic transcripts; and (iii) "Professorships." They also sold counterfeit diplomas and academic products purporting to be from legitimate academic institutions, including the University of Maryland and George Washington University.

Beginning in 2002, Novak attempted to gain accreditation for several of the diploma mill universities in Liberia. In doing so, Novak was solicited for a bribe by the Liberian Consul at the Liberian Embassy in Washington, D.C. Acting at the direction of the diploma mill's co-owner, Dixie Ellen Randock, Novak proceeded to pay bribes in excess of $43,000, including travel expenses to Ghana, to several Liberian government officials in order to obtain accreditation for Saint Regis University, Robertstown University, and James Monroe University, and to induce Liberian officials to issue letters and other documents to third parties falsely representing that Saint Regis University was properly accredited by Liberia. Between October 2002 and September 2004, approximately $19,200 was wired from an account controlled by Dixie Ellen Randock and her husband Steven Karl Randock, Sr., to a bank account in Maryland in the name of the Liberian Consul. Dixie Ellen Randock and Steven Karl Randock, Sr. previously were each sentenced to 36 months in prison followed by three years of court supervision on non-FCPA charges.

4. Oil States International

On April 27, 2006, Oil States International, Inc. ("Oil States") entered into a settlement with the SEC without admitting or denying any of the SEC's FCPA books and records and internal controls allegations regarding business conducted in Venezuela through one of Oil States' wholly owned subsidiaries. The SEC alleged that the subsidiary passed approximately $348,000 in bribes to Venezuelan government employees. The settlement included a cease-and-desist order from future violations of the FCPA books and records and internal controls provisions, but did not include disgorgement or monetary fines.

Oil States is a Delaware corporation, traded on the NYSE, with corporate headquarters in Houston, Texas. Although it also caters to niche markets like top-secret noise-reduction technology for U.S. Navy submarines, Oil States primarily provides full spectrum products and services for the worldwide oil and gas industry, both onshore and offshore. One of its wholly owned subsidiaries is Hydraulic Well Control, LLC ("HWC"), which operates specially designed oil rigs and provides related services. Headquartered in Louisiana, HWC does business around the world, and has an office in Venezuela ("HWC Venezuela"). HWC's Venezuelan operations provided approximately 1% of Oil States' revenues during the relevant period.

In Venezuela, HWC operated in partnership with an energy company owned by the government of Venezuela, Petróleos de Venezuela, S.A. ("PDVSA"). In 2000, HWC hired a local "consultant" to facilitate day-to-day operations between HWC and PDVSA. Oil States and HWC did not investigate the background of the consultant, nor did they provide FCPA training. In addition, although HWC did have FCPA policies in place, the written contract with the consultant failed to mention FCPA compliance.

The alleged violations occurred in two phases. In December 2003, employees of the government-owned PDVSA approached the consultant about a "kickback" scheme in which the consultant would over-bill HWC for his consulting services and "kickback" the extra money to the PDVSA employees. The plan also included HWC overcharging PDVSA for "lost rig time" on jobs. The PDVSA employees were capable of delaying or stopping HWC's work if HWC did not acquiesce to the scheme. Indeed, after learning about it, three HWC employees went along with the kickback scheme: the consultant inflated the bills, the HWC employees incorporated the falsified information into the company's books and records, and an undetermined amount of improper payments were made to the PDVSA employees. The consultant billed HWC approximately $200,000 for his services, and HWC billed PDVSA approximately $401,000 for rig time. Because lost rig time is difficult to assess even in the best of circumstances, and because of the difficulties inherent in retrospective investigation of falsified documentation, it was not possible for the SEC to determine exactly how much money flowed to the Venezuelan government employees.

The second phase of the fraud began in March 2004, when the PDVSA employees who had instigated the bribery decided to change tactics. Instead of exaggerating rig time, the PDVSA employees told the consultant to continue to over-bill HWC for "gel," an important material used to manage viscosity and to protect cores by minimizing their contact with drilling fluid. The consultant and the HWC employees agreed to over-bill HWC for gel and to pass on the proceeds to the PDVSA employees as a bribe. During this phase, the consultant charged HWC and was paid over $400,000 for his consulting services, some of which was passed on to the PDVSA employees as bribes. HWC also charged PDVSA

nearly $350,000 for gel. The true amount of gel used is unknown. As in the first phase of the fraud, it is impossible to determine the exact amount of money illicitly paid to the PDVSA employees.

The scheme was discovered in December 2004 by senior HWC managers in the United States as they were preparing the following year's budget. Noticing an "unexplained narrowing" of HWC Venezuela's profits, the managers immediately investigated and uncovered the payments. HWC managers promptly reported the illicit activity to Oil States management, which in turn immediately reported it to Oil States' Audit Committee.

Oil States conducted an internal investigation and found no evidence that any U.S. employees of Oil States or HWC had knowledge of or were complicit in the Venezuelan kickback scheme. The Venezuelan consultant was dismissed, as were two complicit employees of HWC Venezuela. Oil States corrected its books and records, repaid PDVSA for improper charges, and reported the scheme in its next public filing. Oil States also strengthened its compliance program, provided the full results of its internal investigation to the SEC and DOJ, and cooperated fully with the investigation subsequently conducted by SEC staff. In the SEC administrative proceeding, which was limited to a cease-and-desist order and did not include a fine, the SEC "considered the remedial acts promptly undertaken by [Oil States] and cooperation afforded the [SEC] staff." This case illustrates the breadth of the FCPA's books and records provisions, as Oil States was held responsible for HWC's improper recording of the payments as ordinary business expenses, even though HWC's Venezuela operations consisted of only 1% of Oil States' revenues and no U.S. employees were involved in the wrongful conduct.

5. David M. Pillor & InVision

On August 15, 2006, the SEC settled FCPA charges against David M. Pillor, former Senior Vice President for Sales and Marketing and Board member of InVision Technologies, Inc. ("InVision") based on his conduct in connection with payments made by InVision's third- party sales agents or distributors to government officials in China, Thailand, and the Philippines. The SEC alleged that Pillor, as head of the company's sales department, failed to establish and maintain sufficient internal systems and controls to prevent FCPA violations and that he indirectly caused the falsification of InVision books and records. Without admitting or denying the allegations, Pillor agreed to pay $65,000 in civil penalties.

Previously, in December 2004, InVision entered into a two-year NPA with the DOJ for violating the FCPA's books and records provision in connection with the same conduct. In the NPA, InVision agreed to accept responsibility for the misconduct, pay an $800,000 fine, adopt enhanced internal controls, and continue to cooperate with government investigators. Also in December 2004, InVision was acquired by General Electric, and now does business under the name GE InVision. On February 14, 2005, GE InVision settled SEC charges based on the same underlying facts, without admitting or denying the SEC's claims. As part of the SEC settlement, GE InVision agreed to pay $589,000 in disgorgement plus an additional $500,000 civil fine. Although the conduct alleged in charging documents occurred prior to GE's acquisition of InVision, GE was responsible for ensuring InVision's compliance with the terms of its agreement.

InVision was, and GE InVision remains, a U.S. corporation that manufactures explosive detection equipment used in airports. In his position as Senior Vice President for Sales and Marketing, Pillor oversaw the company's sales department and, according to the SEC, "had the authority to ensure that InVision's sales staff complied with the FCPA." In conducting its foreign sales, InVision relied both on

internal regional sales managers who reported directly to Pillor and local sales agents and distributors, typically foreign nationals, familiar with sales practices in various regions. According to the SEC, Pillor failed to implement sufficient internal controls to ensure that its sales staff and third parties acting on its behalf complied with the FCPA. For example, the SEC notes that "InVision primarily relied on introductions by other American companies [when selecting agents and distributors], and conducted few, if any, background checks of its own." InVision further failed to properly monitor or oversee the conduct of its staff and third-party representatives to ensure that they were not engaging in improper conduct on the company's behalf. In particular, the charging documents highlight activities in China, the Philippines, and Thailand.

In November 2002, InVision agreed to sell (through its Chinese distributor) two explosive detection devices to China's Guangzhou airport, which was owned and controlled by the Chinese government. Due to export license issues, InVision was late delivering the explosive detection equipment, and the distributor informed InVision that the Chinese government would exercise its right to impose financial penalties for late delivery. The distributor informed an InVision regional sales manager that it intended to offer free trips and other "unspecified compensation" to airport officials to avoid the late delivery penalties. The regional manager alluded to such conduct in email messages to Pillor, but he did not respond or acknowledge receipt of such messages.

When InVision finally delivered its product to the distributor, the distributor sought $200,000 in reimbursement for costs incurred in connection with the delay. Pillor discussed the request with other members of InVision's management and agreed to pay the distributor $95,000. The distributor sent InVision a one-page invoice for various additional "costs." Pillor did not inquire further into these costs or seek additional documentation to support them and submitted the invoice to InVision's finance department for payment. Payment was made despite InVision being "aware of a high probability that the distributor intended to use part of the funds to pay for airport officials' travel expenses in order to avoid the imposition of the financial penalty for InVision's law delivery." It was further recorded improper as a legitimate cost of goods sold.

With respect to the Philippines, in November 2001, InVision agreed to sell two explosive detection devices to an airport. Despite having previously retained a third-party sales agent in the Philippines, InVision made the sale through a subcontractor. Afterwards, the sales agent sought a commission under the terms of its previous agreement, and suggested to a regional sales manager that it would use such commission to provide gifts or cash to Filipino government officials to assist with future InVision sales. The SEC's complaint alleges that some of the agent's messages were sent to Pillor, but he failed to respond. Pillor ultimately agreed to pay the agent a commission of $108,000, which was less than the agreed upon percentage because the sale was made directly to the subcontractor. The payment was recorded as a legitimate sales commission despite the company's awareness of the high probability that at least part of it would be used to influence Filipino officials.

Beginning in 2002, InVision began competing for the right to sell explosive detection machines in Thailand and hired a distributor to "act as InVision's primary representative to the [Thai] airport corporation and the associated Thai government agencies." Between 2003 and 2004, the Thai distributor informed an InVision regional sales manager that it intended to make payments to Thai officials to influence their decisions. As in China and the Philippines, email messages to Pillor alluded to these intentions but were never acknowledged or responded to. In April 2004, InVision agreed to sell, through

its distributor, 26 machines for over $35.8 million. Although the transaction was later suspended, the company was aware, at the time it entered into the agreement, that its distributor intended to make improper payments out of its profits on the sale.

Above all, the InVision and Pillor settlements highlight the importance of exercising vigilance over third-party relationships, be they with sales agents, distributors or subcontractors. The SEC's February 2005 charging documents note, among other things, that although InVision's standard third-party agreements contained a clause prohibiting violations of the FCPA, "InVision provided no formal training or education to its employees . . . or its sales agents and distributors regarding the requirements of the FCPA." It also notes that it did not "have a regular practice of periodically updating background checks or other information regarding foreign agents and distributors," which could have assisted in detecting or deterring such violations.

6. John Samson, John Munro, Ian Campbell and John Whelan

On July 5, 2006, John Samson, John Munro, Ian Campbell and John Whelan all agreed to settle FCPA charges against them without admitting or denying SEC allegations that they bribed Nigerian officials to obtain oil contracts. Sampson, who allegedly profited personally, agreed to pay a $50,000 civil penalty plus $64,675 in disgorgement. Munro, Campbell and Whelan each agreed to pay $40,000 in civil penalties.

All four men were employees of various Vetco companies, all of which were subsidiaries of ABB Ltd. A Swiss corporation traded on the New York Stock Exchange, ABB provides power and automation technologies to industrial clients. It has numerous subsidiaries and conducts business in 100 countries.

Sampson (former West Africa regional sales manager for Vetco Grey Nigeria), Munro (former senior vice president of operations for Vetco Grey U.K.), Campbell (former vice president of finance for Vetco Grey U.K.), and Whelan (former vice president of sales for Vetco Grey U.S.) allegedly paid bribes to secure a $180 million contract to provide equipment for an offshore drilling project in Nigeria's Bonga Oil Field.

The Nigerian agency responsible for overseeing oil exploration ("NAPIMS") had already selected ABB as one of several finalists for the contract. Sampson, Munro, Campbell and Whelan collaborated to pay approximately $1 million to NAPIMS officials between 1999 and 2001 to obtain confidential information on competitors' bids, and to secure the deal for ABB. ABB was awarded the contract in 2001.

The men paid NAPIMS officials $800,000 funneled through a Nigerian "consultant" disguised with invoices for fake consulting work. The money passed through several U.S. bank accounts. Sampson took $50,000 of this money in kickbacks from one of the NAPIMS officials he was bribing. Munro and Campbell handled the logistics of wiring the bribe money as well as creating the counterfeit invoices for nonexistent consulting services.

Additional bribes were made in the form of gifts and cash to NAPIMS officials visiting the United States. Whelan used a corporate credit card to pay for meals, accommodations, and other perks exceeding $176,000. Because the four men conspired to create fake business records to camouflage bribes as legitimate expenditures, they violated the books and records provisions of the FCPA in addition to its anti-bribery provisions.

ABB had already faced FCPA sanctions in July 2004 totaling $5.9 million. In 2007 and 2008, it would later become the subject of additional DOJ and SEC investigations into possible FCPA violations in the Middle East, Asia, South America, Europe, and in the now-defunct UN Iraq Oil-for-Food Programme.

The Vetco companies are no longer subsidiaries of ABB; in February 2007, GE bought the Vetco entities and is now bound to the Vetco settlement agreements.

7. Schnitzer Steel Industries

On October 16, 2006, the SEC settled charges with Schnitzer Steel Industries Inc., ("SSI"), an Oregon-based steel company that sells scrap metal. The SEC charged SSI with approximately $1.8 million in corrupt payments in violation of the anti-bribery provisions of the FCPA. According to the charges, from 1999 to 2004 SSI paid cash kickbacks or made gifts to managers of government-controlled steel mills in China to induce the purchase of scrap metal from SSI. During the same period, SSI also paid bribes to managers of private steel mills in China and South Korea, and improperly concealed these illicit payments in its books and records.

SSI buys and resells metal, including selling scrap metal to steel mills in Asia. In 1995, SSI began using two recently acquired subsidiaries, SSI International Far East Ltd. ("SSI Korea") and SSI International, Inc. ("SSI International"), to facilitate its Asian scrap metal sales. From 1999-2004, SSI Korea and SSI International employees made improper cash payments to managers of scrap metal customers owned, in whole or in part, by the Chinese government to induce the purchase of scrap metal from SSI. Specifically, SSI paid over $205,000 in improper payments to managers of government-owned customers in China in connection with 30 sales transactions. According to SEC settlement documents, SSI's gross revenue for these transactions totaled approximately $96 million, and SSI earned $6.2 million in net profits on these sales.

The SEC settlement documents describe two types of kickbacks paid by SSI to the general managers of its Chinese scrap metal customers. First, SSI paid a "standard" kickback of between $3,000 and $6,000 per shipment from the revenue earned on the sale. The second type of kickback involved the Chinese general managers overpaying SSI for the steel purchase. SSI would then pay a "refund" or "rebate" directly to the general managers for the overpaid amount, usually ranging from $3,000 to $15,000. SSI made these payments possible by creating secret SSI Korea bank accounts, and at least one senior SSI official was aware of and authorized wire transfers to the secret bank accounts.

According to SEC documents, SSI Korea also acted as a commission-receiving broker for Japanese scrap metal sales in China. Japanese companies also provided SSI Korea with funds to make improper payments to managers of the government-owned Chinese steel mills. To conceal the improper payments, SSI falsely described those payments as "sales commissions," "commission(s) to the customer," "refunds," or "rebates" in SSI's books and records, resulting in further violations of the FCPA's books and records provisions.

In addition to paying bribes to government-owned steel mills, SSI also paid bribes to managers of privately owned steel mills in China and South Korea to induce them to purchase scrap metal from SSI. Again, SSI falsely described the payments as "commissions" and "refunds" in its books and records. The SEC's inclusion of these charges is significant as these payments involve private parties and not foreign officials or government-owned entities as is typical of most FCPA violations. These charges underscore

that even illicit transactions not involving foreign officials might nonetheless result in FCPA violations, especially when coupled with false entries in a company's books and records.

The illicit transactions described above also resulted in SEC charges against two SSI senior officials, the former SSI Chairman and CEO and the Executive Vice President of SSI International. As part of its settlement with the SEC, SSI undertook to retain an independent compliance consultant to review and evaluate SSI's internal controls, record-keeping, and financial reporting policies. Further, SSI agreed to pay approximately $15 million in combined fees and penalties.

a. Si Chan Wooh

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

Wooh was Executive Vice President for SSI International from February 2000 through October 2004, and President from October 2004 through September 2006. Based on the increased revenue that Schnitzer generated from sales involving improper payments, Wooh received a bonus of $14,819.38.

b. Robert W. Philip

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

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

8. Statoil

On October 11, 2006, Statoil, ASA ("Statoil"), Norway's largest oil and gas corporation, entered into a three-year DPA with the DOJ relating to an agreement to pay $15.2 million in bribes, of which $5.2 million was actually paid, to an Iranian official to secure a deal on one of the largest oil and gas fields in the world, Iran's South Pars field. Statoil admitted to violating the anti-bribery and books and records provisions of the FCPA and agreed to pay a $10.5 million penalty, to appoint an independent compliance

consultant, and to cooperate fully with the DOJ and the SEC. In a separate agreement with the SEC, Statoil also agreed to pay $10.5 million disgorgement. After their own investigation, Norwegian regulators assessed a corporate fine of approximately $3.2 million that will be subtracted from the U.S. fines.

Statoil has American Depository Shares listed on the New York Stock Exchange, making it an issuer under the FCPA. In announcing the DPA, the head of the DOJ's Criminal Division emphasized that even though Statoil is a foreign issuer, the FCPA "applies to foreign and domestic public companies alike, where the company's stock trades on American exchanges."

CEO Olav Fjell, Executive Vice President Richard Hubbard, and Board Chairman Leif Terje Loeddesoel all resigned in the wake of the charges. Hubbard was also fined another $30,000 by Norwegian regulators.

According to the Agreement, Statoil angled to position itself to develop oil and gas in Iran's South Pars Field, as well as to lay the groundwork for future deals in Iran. Statoil identified a key player as their gateway to Iranian business: an Iranian official who was not only the advisor to the Iranian Oil Minister, but also the son of a former President of Iran. Working through a London-owned third-party intermediary consulting company located in the Turks & Caicos Islands (Horton Investments, Ltd.), Statoil entered into a "consulting contract" with the Iranian official. Statoil agreed to pay an initial $5.2 million bribe recorded as a "consulting fee" followed by ten annual $1 million payments. The contract was executed, the $5.2 million bribe was paid, and Statoil was awarded the South Pars Project. The bribes were made with the knowledge of Statoil's CEO.

The DOJ chastised Statoil's senior management for their handling of the issue once it became known. When an internal Statoil investigation brought the bribes to the attention of the Chairman of the Board, "instead of taking up the matter," he asked for further investigation and told the investigators to discuss the matter with the CEO. The CEO ordered that no further payments be made, but, against the investigators' recommendations, he refused to terminate the contract or otherwise address concerns raised by the investigators.

In September 2003, the Norwegian press reported on Statoil's Iranian bribes; the Chairman, CEO, and Executive VP all resigned, and the SEC promptly announced its own investigation.

The SEC and DOJ commended Statoil for its complete cooperation. Not only did the company promptly produce all requested documents and encourage employees to cooperate by paying travel expenses and attorneys fees, it also voluntarily produced documents protected by attorney-client privilege. The Board took substantial steps to ensure future compliance, including internal investigations into other transactions, implementation of a broad remedial plan with new procedures and training, new procedures to report corruption directly to the Board's Audit Committee, and an anonymous employee tip hotline.

9. Tyco International

On April 17, 2006, Tyco International, Ltd. ("Tyco"), a diversified manufacturing and service company headquartered in Bermuda, consented to a final judgment with the SEC on multiple counts of securities violations, including approximately $1 billion in accounting fraud. Part of the SEC's complaint alleged that, on at least one occasion, Tyco employees made unlawful payments to foreign officials to

obtain business for Tyco in violation of the FCPA. Additionally, in an attempt to conceal the illicit payments, false entries were made to Tyco's books and records in violation of the FCPA's accounting provisions. Although providing few details on the specific nature of the illicit payments, the SEC complaint concluded that the payments were made possible by Tyco's failure to implement procedures sufficient to prevent and detect FCPA misconduct. As part of the settlement for securities laws violations and FCPA violations by Tyco and its subsidiaries, Tyco agreed to pay a $50 million civil penalty.

From 1996 to mid-2002, Tyco acquired over 700 companies worldwide in an effort to become a global, diversified manufacturing and service conglomerate. This aggressive acquisition campaign resulted in a widespread and decentralized corporate structure with over 1000 individual business units reporting to the Tyco corporate office. Until 2003, Tyco did not have an FCPA compliance program, FCPA employee training, or an internal control system to prevent or detect FCPA violations. The SEC complaint stressed that Tyco's failure to implement FCPA control, education, and compliance programs enabled FCPA violations by Tyco subsidiaries in both Brazil and South Korea.

a. Earth Tech Brazil

In 1998, despite its own due diligence investigation uncovering systemic bribery and corruption in the Brazilian construction industry, Tyco bought a Brazilian engineering firm and renamed it Earth Tech Brazil Ltda. ("Earth Tech"). As a newly acquired subsidiary reporting to Tyco's corporate offices, Earth Tech constructed and operated water, sewage, and irrigation systems for Brazilian government entities.

According to the SEC complaint, between 1999 and 2002 Earth Tech employees in Brazil repeatedly paid money to various Brazilian officials for the purpose of obtaining business in the construction and operation of municipal water and wastewater systems. The illegal payments were widespread, and the SEC complaint estimates that over 60% of Tyco's projects between 1999 and 2002 involved paying bribes to Brazilian officials. Specifically, Earth Tech made payments to Brazilian lobbyists with full knowledge that all or a portion of these payments would be given to Brazilian officials for the purposes of obtaining work for Earth Tech. The complaint asserts that Earth Tech executives based in California routinely participated in communications discussing bribes to Brazilian officials. In order to obtain the funds for the illicit payments and entertainment provided to Brazilian officials, various Earth Tech employees created false invoices from companies they owned. On other occasions, lobbyists submitted inflated invoices to procure the funds needed for the bribes.

b. Dong Bang

In 1999, Tyco acquired a South Korean fire protection services company called Dong Bang Industrial Co. Ltd. ("Dong Bang"). Again, Tyco's own due diligence investigation revealed a systemic culture of corruption and the prevalence of bribes to government officials in the South Korean contracting market.

The SEC complaint charged that from 1999 to 2002 Dong Bang executives paid cash bribes and provided entertainment to various South Korean government officials to help obtain contracting work on government-controlled projects. Specifically, the complaint reveals that Dong Bang's former president spent $32,000 entertaining several South Korean government officials in order to obtain business for Dong Bang. In addition, the complaint asserts that Dong Bang's former president also regularly entertained the South Korean Minister of Construction and Finance as well as a South Korean military

general for the purpose of obtaining business for Dong Bang. Another payment of $7,500 was allegedly made to an employee of a government-owned and operated nuclear power plant to obtain contracting work at the facility.

Dong Bang further violated the FCPA's accounting rules by creating fictitious payroll accounts. To finance some of the improper payments, Dong Bang disguised bribes as payments to fictitious employees, but then wired the cash directly to executives for their personal uses.

As discussed in detail at p.196, Tyco subsequently resolved parallel proceedings with the DOJ and SEC in September 2012 relating to conduct by numerous subsidiaries that had been discovered by outside counsel that Tyco had engaged in 2005 while in settlement discussions with the SEC. Tyco and its Dubai-headquartered subsidiary (which separately plead guilty to conspiring to violate the FCPA) together paid nearly $29 million in criminal penalties, disgorgement, and prejudgment interest. (*See* Tyco International at p.196)

L. 2005

1. DPC (Tianjin) Co. Ltd

On May 20, 2005, the DOJ and SEC settled charges with the Los Angeles-based Diagnostic Products Corporation ("DPC") and its Chinese subsidiary, DPC (Tianjin) Co. Ltd. ("DPC Tianjin"). In the criminal case, the subsidiary, DPC Tianjin, pleaded guilty to violating the FCPA in connection with payments made in China and agreed to adopt internal compliance measures, cooperate with the government investigations, have an independent compliance expert for three years, and pay a criminal penalty of $2 million. Simultaneously, the parent company, DPC, settled with the SEC, agreeing to disgorge $2.8 million in profits and prejudgment interest.

DPC, a California-based worldwide manufacturer and provider of medical diagnostic test systems, established DPC Tianjin (originally named DePu Biotechnological & Medical Products Inc.) as a joint venture with a local Chinese government entity in 1991. While DPC initially owned 90% of the joint venture, it acquired complete ownership in 1997. Like many of DPC's foreign subsidiaries, DPC Tianjin sold its parent's diagnostic test systems and related test kits in-country. Its customers were primarily state-owned hospitals.

From 1991 to 2002, DPC Tianjin routinely made improper "commission" payments to laboratory workers and physicians who controlled purchasing decisions in the state-owned Chinese hospitals. These "commissions" were percentages (usually 3% to 10%) of sales to the hospitals and totaled approximately $1.6 million. DPC Tianjin employees hand-delivered packets of cash or wired the money to the hospital personnel. DPC Tianjin earned approximately $2 million in profits from sales that involved the improper payments.

In addition to the FCPA anti-bribery provisions, DPC Tianjin also violated the books and records provisions by recording the illicit payments as legitimate sales expenses. DPC Tainjin's general manager prepared and forwarded the company's financial records to DPC, accounting for the bribes as "selling expenses." It was not until DPC Tianjin's auditors raised Chinese tax issues regarding the illicit payments that the subsidiary discussed the payments with DPC.

Shortly after discovering the nature of the payments, DPC instructed DPC Tianjin to stop all such payments, took remedial measures, revised its code of ethics and compliance procedures, and established an FCPA compliance program. The SEC specifically noted its consideration of DPC's remedial efforts in determining to accept the settlement offer.

The DPC settlements illustrate the broad jurisdictional reach of the FCPA, particularly with respect to the conduct of non-U.S. subsidiaries. The DOJ charging documents describe DPC Tianjin as an "agent" of DPC, and the SEC specifically notes that "[p]ublic companies are responsible for ensuring that their foreign subsidiaries comply with Sections 13(b)(2)(A) and (B), and 30A of the Exchange Act." The DPC case also reinforces the need for swift remedial measures, highlights the FCPA risks that foreign subsidiaries pose to their U.S. parent corporations, and demonstrates how broadly the DOJ and SEC construe "foreign officials." Here, as with the Micrus Corporation case (above), the employees and doctors who received payments worked for foreign state-owned hospitals.

2. David Kay and Douglas Murphy

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

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

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

The Fifth Circuit remanded the case for the district court to determine whether the government could adduce sufficient evidence to prove that the alleged bribes in question were intended to lower the company's cost of doing business in Haiti "enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations" already there "so as to come within the scope of the business nexus element."

In February 2005, a jury convicted Kay and Murphy on 12 FCPA bribery counts and a related conspiracy count, and the court sentenced Kay to 37 months imprisonment and Murphy to 63 months. Both defendants appealed their convictions and sentences. One of the critical questions on appeal was

whether the district court properly instructed the jury on the *mens rea* element of an offense under the FCPA when it failed to inform them that the FCPA has both "willfulness" and "corruptly" elements. The government asserted that the jury charge's invocation of the word "corruptly" was sufficient, while the defense argued that a distinct willfulness charge was necessary for the jury to make the required *mens rea* determination. The defendants further asserted that the Government had failed to prove that they had used the mails or instrumentalities of interstate commerce—specifically, shipping documents underreporting the amount of rice being shipped—"in furtherance" of the alleged bribes. Rather, they argued, the Government had showed only that the bribes they paid "cleared the way" for acceptance of the shipping documents, not the other way around.

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

In a January 10, 2008 decision, the Fifth Circuit denied defendants' motion for a rehearing *en banc*. On October 6, 2008, the U.S. Supreme Court denied the defendants' writ of certiorari, effectively ending the litigation in this matter.

3. 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 Azerbaijani government officials in an attempt to ensure that those officials would privatize the State Oil Company of Azerbaijan ("SOCAR") and that the defendants' investment consortium would gain a controlling interest in SOCAR. Kozeny controlled two investment companies, Oily Rock Ltd. and Minaret Ltd., which participated in a privatization program in Azerbaijan. The privatization program enabled Azerbaijani citizens to use free government-issued vouchers to bid for shares of state-owned companies that were being privatized. Foreigners were permitted to participate in the privatization program and own vouchers if they purchased a government-issued "option" for each voucher.

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 by reselling the controlling interest in the private market. Bourke, a co-founder of handbag company Dooney & Bourke, invested approximately $8 million in Oily Rock on behalf of himself and family members and friends. American International Group ("AIG") invested approximately $15 million under a co-investment agreement with Oily Rock and Minaret. Pinkerton, who was in charge of AIG's private equity group, supervised AIG's investment.

The indictment alleged that, beginning in 1997, Kozeny, acting by himself and also as an agent for Bourke and Pinkerton, paid or caused to be paid more than $11 million in bribes to Azerbaijani government officials to secure a controlling stake in SOCAR. The officials included a senior official of the Azerbaijani government, a senior official of SOCAR, and two senior officials at the Azerbaijani government organization that administered the voucher program. The alleged violations included 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 of the U.S. District Court for the Southern District of New York 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. Judge Scheindlin explained that the "majority of the conduct" charged in the Indictment occurred between March and July 1998, and that the five-year statute of limitations therefore would have run before the Indictment was returned on May 12, 2005.

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. On August 21, 2007, the DOJ filed an appeal of the dismissal of the remaining counts, but the U.S. Court of Appeals for the Second Circuit affirmed the dismissal.

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 appealed and, on January 26, 2010, the Bahamas Court of Appeals affirmed the denial of extradition. On February 3, 2011, the U.S. government informed the court in a related case that the Government of the Bahamas had appealed the case to the Judicial Committee of the Privy Council in London, the court of last resort for Bahamian law, and on December 17, 2010, the Privy Council granted discretionary review of the issue of extradition. On March 28, 2012, the Privy Council unanimously ruled that Kozeny could not be extradited from the Bahamas to the United States to face FCPA charges. The Council held that because Kozeny's alleged bribery did not break any Bahamian laws, the courts there lacked jurisdiction to order his extradition.

The United States is not the only country that would like Kozeny to leave the Bahamas. The Czech Republic is also apparently seeking the extradition of Kozeny, who was once dubbed by Fortune Magazine as the "Pirate of Prague" for his alleged conduct in connection with the privatization of the Czech Republic's formerly state-owned enterprises. According to Czech prosecutors, Kozeny embezzled $1.1 billion from mutual funds that he established in the Czech Republic in the early 1990s. The Czech Republic tried and convicted Kozeny in absentia in 2010.

On July 2, 2008, the prosecution filed a *nolle prosequi* motion, an application to discontinue the criminal charges, as to Pinkerton because "further prosecution of David Pinkerton in this case would not be in the interest of justice." Judge Scheindlin granted the government's motion.

Meanwhile, the case against Bourke continued. On October 21, 2008, Judge Scheindlin rejected a proposed jury instruction from Bourke that would have allowed a local law defense that the payments were lawful under the laws of Azerbaijan. Under Azerbaijan law, the payments ceased to be punishable once they were reported to the country's president. Judge Scheindlin determined that the fact that the payments were not punishable was insufficient to meet the local law defense provided under the FCPA, as the payments were still unlawful, even if no punishment was available. The judge held that "[i]t is inaccurate to suggest that the payment itself suddenly became 'lawful'—on the contrary, the *payment* was unlawful, though the *payer* is relieved of responsibility for it."

On July 10, 2009, a federal jury convicted Bourke of conspiring to violate the FCPA and the Travel Act, and of making false statements to the FBI. During the trial, the government presented testimony from Thomas Farrell and Hans Bodmer, individuals who had previously pleaded guilty to charges related to the underlying facts and who testified that they had discussed the illicit arrangements in detail with Bourke. The Assistant U.S. Attorney stressed in closing that Bourke "didn't ask any of his lawyers to do due diligence." On October 13, 2009, Judge Scheindlin rejected Bourke's motion for acquittal or a new trial. Among other arguments, Bourke had contended that the jury was improperly instructed as to the conscious avoidance doctrine. Bourke argued that the jury instructions suggested that Bourke could be convicted based on mere negligence in not uncovering the facts of the Kozeny's activities. But Judge Scheindlin rejected this argument, pointing out both that the jury instructions specifically instructed the jury that negligence was insufficient for a conviction and that a factual predicate existed for a finding that Bourke had actively avoided learning that the payments were illegal. In November 2009, Bourke was sentenced to one year and one day in prison and fined $1 million.

On December 14, 2011, the Second Circuit Court of Appeals upheld Bourke's conviction of conspiring to violate the FCPA and the Travel Act and of making false statements. According to the brief filed in his appeal, Bourke's trial focused on two related issues: "whether Bourke knew that Kozeny was bribing the Azerbaijanis, and whether he willfully and corruptly joined the bribery conspiracy." Given the case's focus on his state of mind, Bourke argued that the government had not established a factual basis for the trial court's instruction to the jury that he could be guilty for consciously avoiding learning the truth about Kozeny's payments to Azerbaijani officials. He argued that such instruction prejudiced the jury towards conviction on the basis of negligence despite the absence of evidence that Bourke sought to avoid learning of bribery. Similarly, Bourke argued that testimony describing the due diligence of a company that decided not to invest in Kozeny's enterprise was irrelevant, further shifting the emphasis to "what [Bourke] should have known, rather than what he actually knew."

In upholding Bourke's conviction, the Second Circuit concluded that there had been a sufficient factual basis for instructing the jury on conscious avoidance of learning of Kozeny's improper payments, including: (i) his knowledge of the pervasive corruption in Azerbaijan and Kozeny's reputation for corrupt business practices, which was the same knowledge that led other similarly sophisticated investors to refuse to finance Kozeny's operations; (ii) his decision to join the board of American advisory companies rather than Kozeny's company, thus avoiding knowledge of its undertakings; (iii) tape recordings by his attorneys of conversations between Bourke and other investors in which Bourke speculated as to Kozeny's methods but deliberately eschewed actual knowledge thereof; and (iv) conversations between Bourke and his attorneys (over which Bourke had previously waived his attorney-client privilege as part of a proffer to prosecutors) demonstrating that he failed to follow-up on concerns about possible FCPA

liability that he voiced to his attorneys. In the Court's opinion, "a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny and his cohorts may be paying bribes."

On May 7, 2013, the Second Circuit denied Bourke's request for a rehearing. Bourke served his sentence at Englewood prison in Colorado and was later released on March 22, 2014.

In a related matter, Clayton Lewis, a former employee of the hedge fund Omega Advisors, Inc. ("Omega") which invested more than $100 million with Kozeny in 1998, pleaded guilty on February 10, 2004, to violating and conspiring to violate the FCPA. Lewis, Omega's prime contact with Kozeny, admitted that he knew of Kozeny's scheme prior to investing Omega's funds. In July 2007, Omega settled with the government, entering into an NPA with the DOJ, agreeing to a civil forfeiture of $500,000 and to continue cooperating with the DOJ's investigation. Lewis's sentencing has been repeatedly postponed during the government's pursuit of Kozeny's extradition. By delaying Lewis's sentencing, the government is able to continue to hold Lewis to his agreement to cooperate against Kozeny and Lewis's sentence will account for such cooperation.

4. Micrus

On February 28, 2005, the privately held California-based Micrus Corporation and its Swiss subsidiary Micrus S.A. (together, "Micrus") entered into a two-year NPA with the DOJ to resolve potential FCPA violations. Under that agreement, the DOJ required Micrus to accept responsibility for its misconduct and that of its employees, cooperate with the DOJ's investigation, adopt an FCPA compliance policy, retain an independent FCPA monitor for three years, and pay a monetary penalty of $450,000.

Following the voluntary disclosure, the DOJ investigation revealed that the medical device manufacturer made more than $105,000 in improper payments through its officers, employees, agents and salespeople to doctors employed at public hospitals in France, Germany, Spain, and Turkey. In return for these payments, the hospitals purchased the company's embolic coils—medical devices that allow for minimally invasive treatments of brain aneurysms responsible for strokes. Micrus disguised these payments in its books and records as stock options, honorariums, and commissions. Micrus paid additional disbursements totaling $250,000 to public hospital doctors in foreign countries, but failed to obtain the administrative and legal approvals required under the laws of those countries.

This case highlights the DOJ's continuing pattern of construing the term "foreign official" broadly to include even relatively low-level employees of state agencies and state-owned institutions. As this agreement shows, the DOJ may consider doctors employed at publicly owned and operated hospitals in foreign countries as "foreign officials."

The NPA imposed an independent monitor. The independent monitor filed the final report with the DOJ in May 2008. By July 2008, the DOJ confirmed that the monitorship had concluded.

5. Monsanto

On January 6, 2005, Monsanto Company ("Monsanto") settled actions with the SEC and DOJ in connection with illicit payments to Indonesian government officials. 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 as well as an administrative order requiring it to cease and desist from future FCPA

violations. Monsanto also entered into a three-year DPA with the DOJ under which the company agreed to accept responsibility for the conduct of its employees, pay a $1 million fine, continue to cooperate with the DOJ and SEC investigations, and adopt internal compliance measures, which would be monitored by a newly appointed independent compliance expert.

According to the SEC complaint and DOJ papers filed with the district court for the District of Columbia, Monsanto made and improperly recorded an illegal payment of $50,000 to a senior Indonesian official in an attempt to receive more favorable treatment of the products that the company develops and markets. These products include genetically modified organisms ("GMO"), which are controversial in Indonesia and other countries.

To increase acceptance of its products, Monsanto hired a consultant to represent it in Indonesia. The consultant, which the SEC complaint notes also represented other U.S. companies working in Indonesia, worked closely with the former Government Affairs Director for Asia for Monsanto, Charles Martin, in lobbying the Indonesian government for legislation favorable to Monsanto and monitoring Indonesian legislation that could affect Monsanto's interests. Martin and the consultant had some early success: in February 2001, they 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 biotechnology 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. 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, however, the senior official failed to remove the unfavorable language from the decree. Martin settled separately with the SEC in March 2007.

The SEC complaint also states that Monsanto inaccurately recorded approximately $700,000 of illegal or questionable payments made to at least 140 current and former Indonesian government officials and their family members over a five-year period beginning in 1997. According to the complaint, Monsanto affiliates in Indonesia established numerous nominee companies (without the knowledge of Monsanto), which it would over-invoice to inflate sales of its pesticide products in order to siphon payments to government officials.

Monsanto discovered the irregularities in March 2001, and following an internal investigation, notified the SEC of the illegal or questionable payments. The SEC noted its consideration of Monsanto's cooperation in determining to accept the settlement offer.

In furtherance of Monsanto's deferred prosecution with the DOJ, an independent counsel began a three-year review of the company's internal compliance measures in March 2005. On March 5, 2008, following a DOJ motion to dismiss, the U.S. District Court for the District of Columbia entered an agreed order dismissing the charges with prejudice.

a. Charles Martin

On March 6, 2007, the SEC filed a settled complaint against Martin. 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 required Martin to pay a civil monetary penalty of $30,000.

6. Robert E. Thomson & James C. Reilly

On May 20, 2005, the DOJ suffered a then-rare FCPA loss after an Alabama jury acquitted two HealthSouth executives of falsifying the company's books, records and accounts. Robert Thomson (former COO of HealthSouth's In-Patient Division) and James Reilly (former vice president of legal services) had been indicted the previous year for violations of the Travel Act and the FCPA relating to the company's efforts to win a healthcare services contract in Saudi Arabia.

The DOJ alleged that the large healthcare services corporation had engaged in a fraudulent scheme to secure a contract with a Saudi Arabian foundation to provide staffing and management services for a 450-bed hospital in Saudi Arabia that the foundation operated. The DOJ claimed in its indictment that HealthSouth allegedly agreed to pay the director of the Saudi Arabian foundation an annual $500,000 fee for five years under a bogus consulting contract through an affiliate entity in Australia. The indictment charged Thomson and Reilly with falsifying HealthSouth's books, records and accounts to reflect the $500,000 annual fee as a consulting contract, as well as with violations of the Travel Act.

Prior to that indictment, two former HealthSouth vice presidents had pleaded guilty to related charges. Former HealthSouth vice president Vincent Nico had pleaded guilty to wire fraud and had agreed to forfeit over $1 million in ill-gotten gains, including direct personal kickbacks from the Saudi foundation director. Another former HealthSouth vice president, Thomas Carman, admitted to making a false statement to the FBI during the agency investigation of the scheme.

Thomson and Reilly, however, exercised their right to a jury trial. On May 20, 2005, a jury acquitted the two defendants of all charges.

7. Titan

On March 1, 2005, The Titan Corporation ("Titan") agreed to pay combined civil and criminal penalties of over $28 million, which at the time constituted the largest combined FCPA civil and criminal penalty ever imposed. The penalties included $13 million in criminal fines resulting from a plea agreement with the DOJ and $15.5 million in disgorgement and prejudgment interest as part of Titan's settlement with the SEC. Under the agreements, Titan was also required to retain an independent consultant and to adopt and implement the consultant's recommendations regarding the company's FCPA compliance and procedures.

In announcing the plea agreement and settlement, U.S. Attorney Carol C. Lam stressed that the size of the penalties evinced "the severity and scope of the misconduct." Along with other violations, Titan—a "Top 100 Defense Contractor" with annual sales to the Department of Defense topping $1 billion—funneled over $2 million to the electoral campaign of the then-incumbent Benin president through

its in-country agent, falsely recorded such payments in its books and records, and failed to maintain any semblance of a formal company-wide FCPA policy, compliance program, or due diligence procedures.

In Benin, Titan partnered with the national postal and telecommunications agency to modernize the country's communications infrastructure by building, installing and testing a national satellite-linked phone network. To facilitate the project, Titan employed an agent whom the company referred to as "the business advisor" and "personal ambassador" to the President of Benin. From 1999 to 2001, Titan paid this agent $3.5 million. Approximately $2 million from these payments directly funded the then-incumbent President's re-election campaign, including reimbursing the agent for t-shirts featuring the President's face and voting instructions, which were handed out to the electorate prior to the elections. In return, the Benin agency increased Titan's management fee from five to twenty percent. From 1999 to 2001, Titan reported over $98 million in revenues from this project.

Particularly troubling to the SEC was the manner in which Titan paid its Benin agent. First, Titan wired payment for the agent's initial invoice—which totaled $400,000 to compensate for a litany of work purportedly completed within the first week of signing the consulting agreement—to a bank account held under the name of the agent's relative. Titan wired payments totaling $1.5 million to the agent's offshore accounts in Monaco and Paris. And between 2000 and 2001, Titan made several payments to the agent in cash totaling approximately $1.3 million, including payments made by checks addressed to Titan employees, which were cashed and passed along to the agent.

Second, both the SEC and DOJ placed particular emphasis on Titan's lack of FCPA controls. In particular, the agencies noted that Titan had failed to undertake any meaningful due diligence on its agent's "background, qualifications, other employment, or relationships with foreign government officials either before or after he was engaged," and that the company failed to implement FCPA compliance programs or procedures, other than requiring employees to sign an annual statement that they were familiar with and would adhere to the provisions of the FCPA. In summary, the SEC stated that "[d]espite utilizing over 120 agents and consultants in over 60 countries, Titan never had a formal company-wide FCPA policy, failed to implement an FCPA compliance program, disregarded or circumvented the limited FCPA policies and procedures in effect, failed to maintain sufficient due diligence files on its foreign agents, and failed to have meaningful oversight over its foreign agents."

Titan faced a host of other FCPA-related charges relating to misconduct such as: (i) making undocumented payments to three additional Benin consultants for a total of $1.35 million; (ii) purchasing a $1,900 pair of earrings as a gift for the president's wife; (iii) paying travel expenses for a government agency director; (iv) paying $17,000 to an official at the World Bank in cash or by wire transfer to his wife's account to accommodate his request that Titan not document his payments; (v) systematically and grossly under reporting "commission" payments to its agents in Bangladesh, Nepal, and Sri Lanka; and (vi) providing falsified documents to the governments of those countries, as well as to the United States.

In addition to the need for due diligence and FCPA controls, this case highlights the importance of responding adequately to red flags. In 2002, Titan's independent Benin auditor discussed in writing its inability to issue an opinion for the previous two years due to flaws in record keeping and $1.8 million in "missing cash." Beginning in 2001, Titan's external auditor, Arthur Anderson, also warned of an internal policy and oversight vacuum and of the danger in continuing to operate with "no accounting system set up in the company." Additionally, senior Titan officers and executives were made aware of two written

allegations that Titan employees in Benin were falsifying invoices and paying bribes. The SEC specifically noted Titan's failure to vet or investigate any of these issues and allegations.

In addition to Titan's criminal and civil fines, Steven Head, the former president and CEO of Titan-subsidiary Titan Africa, was charged in the Southern District of California with one count of falsifying the books, records, and accounts of an issuer of securities. He pleaded guilty to the charge and was sentenced on September 28, 2007 to six months of imprisonment, three years of supervised release, and a $5,000 fine.

On September 15, 2003, Titan entered into an agreement to be acquired by Lockheed Martin Corporation. On June 25, 2004, Lockheed terminated the agreement. As part of the merger agreement, Titan had affirmatively represented that, to its knowledge, it had not violated the FCPA. Although the merger agreement itself was not prepared as a disclosure document, the FCPA representation was later publicly disclosed and disseminated in Titan's proxy statement. On March 1, 2005, the same day that it announced the filing of the settled enforcement action, the SEC issued a Report of Investigation Pursuant to Section 21(a) of the Exchange Act to make clear that materially false or misleading representations in merger and other contractual agreements can be actionable under the Exchange Act when those representations are repeated in disclosures to investors.

III. <u>Other FCPA Developments</u>

In addition to the numerous settlements and criminal matters discussed earlier in this Alert, there have been a number of significant developments related to the FCPA, including important civil litigation, and regulatory guidance, among other things. Certain of these developments are discussed herein.

A. United States Developments and Regulatory Guidance

1. The Meaning of "Instrumentality": Esquenazi and Duperval

The FCPA prohibits bribes to "foreign officials," a category includes officers and employees of a "foreign government or any department, agency, or instrumentality thereof." What exactly constitutes an "instrumentality" of the state, however, has been a source of significant discussion, particularly for companies and individuals doing business in places such as China or Russia, where the state has extensive (and varied) involvement throughout the economy.

The DOJ's own interpretation of the term is expansive. In the *Resource Guide*, for example, the DOJ and SEC state that "the term 'instrumentality' is broad" and that the determination of whether an entity qualified as such required a fact-specific analysis of an entity's ownership, control, status, and function.

On May 16, 2014, the United States Court of Appeals for the Eleventh Circuit issued a decision in *U.S. v. Esquenazi*, in which it held that whether an entity is an "instrumentality" of a foreign government is a fact-specific inquiry based on the circumstances in each case. The Court then upheld the appellants' convictions under the circumstances of the case before it. Although such a facts-and-circumstances test does not provide the bright-line rule for which some commentators have clamored, it does articulate a framework for the evaluation of a given set of circumstances that is the result of adversarial proceedings before an appellate court.

a. Initial Convictions

The U.S. government charged Esquenazi, Rodriguez, and others with making corrupt payments on behalf of their company, Terra Telecommunications Corp. ("Terra"), to officials at Telecommunications D'Haiti S.A.M. ("Haiti Teleco") through several intermediary shell companies. In return for the payments, which totaled over $800,000, Haiti Teleco officials granted Terra preferred telecommunication rates, reduced the number of minutes for which payments were owed, and provided credits to reduce debts that Terra owed to Haiti Teleco. (*See* "Terra Telecommunications," below, for a more detailed discussion of the underlying conduct.)

Haiti Teleco, which the government alleged "was the Republic of Haiti's state-owned national telecommunications company," was the only provider of landline telephone service to and from Haiti and, accordingly, all international telecommunications companies had to contract with it to provide their customers with non-cellular telephone access to Haiti. In a pre-trial motion to dismiss his indictment, Esquenazi argued that the Haiti Teleco officials were not "foreign officials under the FCPA" merely because they were employed by a government-owned entity, and that it was improper to read into the FCPA an extension of the act's definition of "'Department, Agency, or Instrumentality' to entities controlled or partially controlled by departments, agencies, or instrumentalities."

In denying Esquenazi's motion to dismiss, the United States District Court for the Southern District of Florida ruled that the "plain language of [the FCPA] and the plain meaning of [the term instrumentality] show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government." Furthermore, the district court rejected a constitutional vagueness argument raised by Esquenazi because the defendant failed to show that the "statute is so unclear as to what conduct is applicable that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Finally, it held that any factual arguments relating to whether the Haiti Teleco employees were "foreign officials" (which they would be, if Haiti Telco were an instrumentality) could be raised during the trial.

At trial, the government presented evidence that Haiti Teleco was an instrumentality of the Haitian government. Robert Antoine, Haiti Teleco's former Director of International Relations "testified that Teleco was owned by Haiti." John Marsha, an insurance broker, testified that "when Messrs. Rodriguez and Esquenazi were involved in previous contract negotiations with Teleco, they sought political-risk insurance, a type of coverage that applies only when a foreign government is party to an agreement." The government also introduced emails from Terra Telecommunications' General Counsel to Mr. Masha (and copied to Messrs. Esquenazi and Rodríguez) that referred to Haiti Teleco as an "instrumentality" of the government of Haiti.

The government also solicited expert testimony regarding the history and ownership of Haiti Teleco from Luis Gary Lissade. Mr. Lissade testified that, upon the formation of the company in 1968, the Haitian government granted Haiti Teleco a monopoly of Haitian telecommunications services, and that the company enjoyed significant tax advantages. At the time, the Haitian government had the power to appoint two members to the company's board. The President appointed Haiti Teleco's "Director General, its top position, by an executive order that was also signed by the Haitian Prime Minister, the minister of public works, and the minister of economy and finance." Mr. Lissade explained that in the 1970s, the "National Bank of Haiti gained 97 percent ownership of Teleco," at which time the President of Haiti appointed all of Teleco's Board members. After the National Bank of Haiti split into two entities, one of

the successor entities retained ownership of Haiti Teleco. Additionally, Mr. Lissade testified that Haiti Teleco's business entity suffix (S.A.M., for *société anonyme mixte*) indicated partial government funding, that government officials considered Haiti Teleco a public administration, and that a 2008 anti-corruption law cited Haiti Teleco as a "public administration." In Mr. Lissade's expert opinion, Haiti Teleco "belonged 'totally to the state,'" and "was considered a . . . public entity."

The district considered the definition of "instrumentality" to be a question of fact for the jury. In its final instructions to the jury, the district court presented "a non-exclusive multi-factor definition that permitted the jury to determine whether Teleco was an instrumentality of a foreign government." The district court instructed the jury that to determine whether Haiti Teleco was an "instrumentality of the government of Haiti, you may consider factors including but not limited to: (1) whether it provides services to the citizens and inhabitants of Haiti; (2) whether its key officers and directors are government officials or are appointed by government officials; (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans, or revenue from government-mandated fees; (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and (5) whether Teleco is widely perceived and understood to be performing official or governmental functions."

Ultimately, both men were found guilty. The district court sentenced Esquenazi to 15 years' imprisonment, a record for an FCPA-related conviction, and Rodriguez to 7 years' imprisonment.

b. The Eleventh Circuit Decision

Esquenazi and Rodriguez appealed their convictions, arguing (among other things) that Haiti Teleco was not an instrumentality of the Haitian government and, therefore, its employees were not "foreign officials" under the FCPA. They argued, in essence, that only those entities that perform "traditional, core government functions" are "instrumentalities" of the state under the FCPA. In upholding the defendants' convictions, the Eleventh Circuit rejected this narrow reading and held that Haiti Teleco was a government "instrumentality." Accordingly, Haiti Teleco officials were thus "foreign officials" under the FCPA.

While the court stated that Haiti Teleco would be considered an instrumentality "under almost any definition we could craft," it was "mindful of the need of both corporations and the government for ex ante direction about what an instrumentality is." Accordingly, the court defined "instrumentality" as, "an entity controlled by the government of a foreign country, that performs a function the controlling government treats as its own." The court noted that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions" which must be answered on a case-by-case basis, and that that it would "be unwise and likely impossible to exhaustively answer them in the abstract." Thus, the court provided only non-exhaustive lists of "some factors that may be relevant to deciding the issue" of the case before it, and did not "purport to list all of the factors that might prove relevant to deciding whether an entity is an instrumentality of a foreign government."

To decide if a government "controls" an entity, the Eleventh Circuit instructed courts and juries to look to the following non-exhaustive list of factors: (i) "the government's ability to hire and fire the entity's principals;" (ii) "the extent to which the entity's profits, if any, go directly into the governmental fisc," (iii) "the extent to which the government funds the entity if it fails to break even;" (vi) "and the length of time

these indicia have existed." In propounding this list, the Eleventh Circuit indicated that they were informed by the commentary to the OECD Convention, and the "approach the Supreme Court has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts;" in particular, whether Amtrak and the Reconstruction Finance Corporation constituted instrumentalities of the United States government.

To determine if the entity performs a government function, the Eleventh Circuit formulated a second non-exhaustive list of factors, again citing the commentary to the OECD Convention and Supreme Court precedent. It instructed courts and juries to examine whether: (i) "the entity has a monopoly over the function it exists to carry out;" (ii) "whether the government subsidizes the costs associated with the entity providing services;" (iii) "whether the entity provides services to the public at large in the foreign country;" and (iv) "whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function."

c. Subsequent Developments – U.S. v. Duperval

Jean Rene Duperval was the Assistant Director General and Director of International Affairs for Haiti Teleco, responsible for, among other things, awarding contracts to foreign telecommunication companies. Duperval received bribes from Esquenazi and Rodriguez as well as from a second company, Cinergy Telecommunications, Inc., in exchange for favors from Teleco. In 2012, Duperval was convicted of two counts of conspiring to commit money laundering and 19 counts of concealment of money laundering in connection with a scheme to launder the bribes he received from Terra and Cinergy, and sentenced to nine years in prison.

In order to establish that Duperval laundered the proceeds of illegal activity, the government introduced evidence that his funds were the result of FCPA violations by Duperval's co-conspirators. In appealing his conviction, Duperval argued that the government had introduced insufficient evidence for the jury to find that Haiti Teleco was an "instrumentality" of Haiti under the FCPA.

In 2015, the Eleventh Circuit rejected Duperval's appeal, citing the two-part analysis it formulated in *Esquenazi* and concluding that "Haiti controlled Teleco and treated that entity as its own." The court noted that its "review of the sufficiency of the evidence is controlled by our recent decision in the appeal by Duperval's co-conspirators." Furthermore, the evidence introduced at Duperval's trial was "almost identical" to the trial of Esquenazi and Rodriguez, including information "that the Central Bank of Haiti owned 97 percent of the shares of Teleco; the government had owned its interest since about 1971; the government appointed the board of directors and the general director of Teleco; the government granted Teleco a monopoly over telecommunication services; and the 'government, officials, everyone consider[ed] Teleco as a public administration.'"

While certainly these decisions will not be the last word on the definition of "instrumentality," they establish a line of decisions interpreting "instrumentality" very broadly. This affirmation of a broad definition of the term is relevant to companies' and individuals' assessment of their own compliance risks when dealing with entities, like Haiti Teleco, that are to some degree tied to the state.

2. The Resource Guide to the U.S. Foreign Corrupt Practices Act

The DOJ and SEC jointly released the FCPA Resource Guide on November 14, 2012. The purpose of the initiative is to provide businesses of all sizes, as well as individuals, with information to help them comply with the FCPA, detect and prevent violations, and implement effective control systems.

While the Resource Guide is non-binding and does not set forth any enforceable rules or regulations, it does open a rare window into the minds of U.S. enforcement agencies, helpfully gathering into one comprehensive, current document an overview of the agencies' positions on several difficult issues that compliance professionals must address daily. However, as the DOJ and the SEC expressly warn, it does "not substitute for the advice of legal counsel on specific issues related to the FCPA" under the facts and circumstances of any particular conduct, and accordingly it should not be relied on as an ultimate legal opinion for any particular factual scenario.

The Resource Guide reaffirms the agencies' previously demonstrated enforcement principles and practices, but also features a detailed analysis of the law and summaries of key enforcements actions, numerous hypothetical scenarios, and actual agency enforcement declinations with the aim of clarifying multiple areas of concern. Among other things, the Resource Guide clearly emphasizes the importance of conducting anti-corruption due diligence on third parties and, in connection with M&A transactions, provides a detailed outline of the ten "hallmarks" of an effective compliance program, and summarizes the various documents that inform the agencies' enforcement principles. The Resource Guide also provides greater clarity into various enforcement issues, such as parent-subsidiary liability and the agencies' views on gifts, travel and entertainment, charitable contributions, and facilitating payments.

a. Risk-Based Due Diligence of Third-Party Business Partners

The Resource Guide stresses that companies must conduct due diligence to minimize the risks of FCPA liability associated with third parties. The Resource Guide endorses what has become common refrain—that the deployment of compliance resources and efforts should be "risk-based," undoubtedly a welcome endorsement for compliance professionals with finite budgets. The agencies stress that "[o]ne-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas." While the most compliance resources and attention should be paid to the greatest risks, the agencies acknowledge that lesser compliance risks warrant fewer resources and attention—and state that they will not deny "meaningful credit" to a company whose compliance program failed to prevent an unexpected violation in a low-risk areas.

Although it is common practice and often a business necessity to retain local agents, consultants, or representatives, such engagements carry significant and well-documented risks of liability. As enforcement actions over the years have consistently demonstrated, a company must conduct appropriate, good-faith due diligence of such third parties to ensure the appropriateness of such relationships and reduce their risk of liability. The Resource Guide confirms that a company's "degree of scrutiny should increase as red flags surface," and it identifies the following, non-exhaustive examples of such red flags:

- Excessive commissions to third-party agents or consultants;

- Unreasonably large discounts to third-party distributors;
- Vaguely defined services in third-party "consulting agreements";
- The third-party consultant is in a different line of business than that for which it has been engaged;
- The third party is related to or closely associated with a foreign official;
- The third party became part of the transaction at the express request or insistence of a foreign official;
- The third party is a shell company incorporated in an offshore jurisdiction; and
- The third party requests payment to offshore bank accounts.

The DOJ and the SEC expect that companies will implement an effective compliance program, a critical component of which is risk-based due diligence of any prospective third parties. As guiding principles for such due diligence procedures, they advise that companies ensure they understand the following with respect to third-party relationships:

- **Qualifications and Reputation.** The Resource Guide confirms that companies should seek to understand the qualifications and associations of its third-party partners, including in connection with their business reputation and potential relationships with government officials.
- **Business Justification.** Companies should be able to demonstrate a clear business rationale for including the third party in the transaction, which includes understanding the role of and need for the third party, describing specifically in the contract the services to be performed, and considering the timing of the third party's introduction to the business.
- **Reasonable Payment Terms.** The Resource Guide states that companies should pay particular attention to the payment terms included in their agreements with third parties, and they should ensure that such terms fall within typical market rates for the industry and country.
- **Commitment to Compliance.** A company should inform its third parties of its compliance program and seek assurances, through certifications and otherwise, that the third party commits to complying with the law and company policies.
- **Ongoing Monitoring Efforts.** Efforts to ensure that third-party relationships are compliant with the FCPA should continue after the initial due diligence review. Specifically, the DOJ and SEC advise that companies confirm and document that third parties are actually performing the work for which they are being paid and that the compensation is reasonable and proportionate to the work undertaken. Additionally, the enforcement agencies advise that companies also continue to monitor their third-party relationships through additional efforts, which may include updating due diligence periodically, exercising audit rights, providing periodic training, or requesting annual compliance certifications.

b. Due Diligence in M&A Transactions

Risk-based due diligence is also the touchstone of the Resource Guide's advice regarding compliance-risk mitigation in the merger and acquisition context. Generally, when a company merges with or acquires another, the successor company assumes all of the predecessor company's liabilities, which include FCPA violations. Every transaction does not, however, necessarily trigger successor liability; whether successor liability exists is a fact-specific inquiry and also depends on the range of laws applicable to the circumstances. For example, if an issuer acquires a foreign company that was not subject to the FCPA's jurisdiction pre-acquisition, the fact of the acquisition does not retroactively create FCPA liability for the acquiring issuer for the target company's pre-acquisition conduct.

In this context, the DOJ and the SEC expect that companies (i) conduct as much pre-acquisition FCPA due diligence as is possible under the circumstances (including applicable local law), (ii) conduct post-acquisition due diligence immediately to address what the pre-acquisition due diligence could not reach, and (iii) promptly implement their compliance programs and internal controls at the acquired operations. Such measures are essential to the termination of any conduct that would violate the FCPA post-acquisition and help to recalibrate a company's compliance program and internal controls going forward to account for the acquired operations' impact on the resulting company's overall anti-corruption risk profile.

Moreover, due diligence demonstrates to U.S. authorities a genuine commitment to uncovering and preventing FCPA violations, potentially leading to more favorable treatment by the enforcement agencies even in the event of post-acquisition violations. The DOJ and the SEC emphasize that "[i]n a significant number of instances, [they] have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context." The Resource Guide states that the enforcement agencies typically take action against a successor company only in limited situations that involve "egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition." For example, the Resource Guide cites one example where no action was taken against a successor company that uncovered prior instances of bribery by the predecessor during post-acquisition due diligence, because the successor disclosed the FCPA violations to the DOJ, conducted an internal investigation, cooperated fully with the authorities, and took appropriate remedial actions (which included terminating senior management at the predecessor).

As a general recommendation in this context, the DOJ and the SEC set forth a number of "practical tips to reduce FCPA risks in mergers and acquisitions." In particular, the Resource Guide notes that companies can seek an opinion from the DOJ in anticipation of a potential acquisition (such as occurred with Opinion Procedure Release 08-02, discussed in greater detail *below*), although it notes that such opinions would "likely contain more stringent requirements than may be necessary in all circumstances." More practicably, the Resource Guide recommends that a company engaging in a merger or acquisition (i) conduct thorough risk-based due diligence, (ii) ensure that the company's code of conduct and anti-corruption policies and procedures apply to the acquired or merged entity as quickly as possible, (iii) provide appropriate training to the directors, officers, and employees (as well as agents and business partners when appropriate) of the acquired or merged entity; and (iv) conduct an anti-corruption audit of the new entity. The Resource Guide also recommends that companies disclose any corrupt payments discovered as part of its due diligence or anti-corruption audit, noting that "DOJ and

SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions."

c. The Ten Hallmarks of an Effective Corporate Compliance Program

The DOJ and the SEC reinforce the requirement that an effective compliance program must be tailored to the company's specific business and its associated risks, and must be constantly improved and adapted to corporate changes. Although companies are not expected to prevent all criminal activity and FCPA violations, having a program that is well-designed and implemented in good faith may not only affect the outcome of an investigation (the authorities take it into account when deciding whether or not to take action, to sign a deferred prosecution agreement or non-prosecution agreement, or to impose corporate probation), but also influence the penalty amount and the imposition of a monitor or self-reporting obligations.

With the caveat that compliance needs and challenges vary for every individual company and that there is no "one-size-fits-all" formula, the DOJ and the SEC identified the following ten "Hallmarks of Effective Compliance Programs" that they consider (among other things) in determining whether a compliance program is "effective":

(1) ***Tone at the Top.*** There should be a "culture of compliance," adopted and adhered to by high-level executives, that is implemented by middle managers and clearly communicated and reinforced to all employees. The Resource Guide states that the agencies will "evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization."

(2) ***Code of Conduct and Compliance Policies and Procedures.*** Effective codes of conduct are "clear, concise, and accessible to all employees and to those conducting business on the company's behalf." They should be available in the local language for subsidiaries and third parties, and should also be reviewed periodically to remain current. With respect to their content, the DOJ and the SEC value policies that "outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures."

(3) ***Oversight, Autonomy, and Resources.*** Companies should assign responsibility for overseeing and implementing their compliance programs to one or more specific senior executives. Such executives must have appropriate authority within the company, as well as adequate autonomy from management, and sufficient resources to ensure effective implementation. In addition, companies should apply staffing and resources to the program in proportion to the size and risks of the business.

(4) ***Risk Assessment.*** It is recommended that companies develop a comprehensive and risk-based compliance program. Due diligence procedures should be fact-specific and vary according to the risks presented by "the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs."

(5) ***Training and Continuing Advice.*** Companies should provide periodic training for all directors, officers, relevant employees, and, where appropriate, agents and business partners. The training should be adapted to each audience, which includes conducting it in local languages. Additionally, where appropriate and feasible, companies should provide continued guidance and advice on compliance, including establishing a means for the provision of advice in urgent situations.

(6) ***Incentives and Disciplinary Measures.*** To be effective, a compliance program must be enforced, and "should apply from the board room to the supply room." The DOJ and SEC assess whether a company has clear disciplinary procedures and whether those are consistently and promptly applied. The DOJ and the SEC suggest publicizing disciplinary measures where possible, and remind companies that providing incentives for compliant behavior (as opposed to only punishing non-compliant behavior), such as promotions and rewards can also be effective. The agencies stress that "[n]o executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted."

(7) ***Third-Party Due Diligence and Payments.*** As discussed above, the DOJ and the SEC strongly encourage the implementation of risk-based due diligence, particularly with respect to third-party relationships.

(8) ***Confidential Reporting and Internal Investigation.*** Companies should provide a mechanism for employees and others to report misconduct or violations of the company's policies on a confidential basis and without fear of retaliation, such as anonymous hotlines (where permitted under local law) or ombudsmen. In addition, they should implement an efficient, reliable, and properly funded process for investigating alleged violations and documenting the company's response, including any improvements or revisions to their internal controls or compliance programs.

(9) ***Continuous Improvement.*** Companies should review and improve their compliance programs regularly in order to keep them current and effective, especially considering changes in operations, compliance weaknesses revealed through the company's experience, and enforcement actions brought against other companies.

(10) ***Pre-Acquisition Due Diligence and Post-Acquisition Integration.*** As discussed above, the DOJ and SEC emphasized the importance of effective anti-corruption due diligence in the merger and acquisition context, and identifies this as another element typically present in an effective compliance program.

d. An Overview of DOJ and SEC Enforcement Principles

The Resource Guide provides insight into the factors that the DOJ and SEC take into account when determining whether to open an investigation, bring charges, or negotiate plea agreements. As discussed above, one such factor is the nature and effectiveness of a company's compliance program. Following significant public discussion in the United States of the merits of self-reporting, the Resource Guide re-emphasizes the importance of other factors, including cooperation and remediation, to their enforcement decisions.

Beyond these issues, the Resource Guide also collects and summarizes the various pre-existing, public guidance regarding the factors that the DOJ and SEC consider in making enforcement decisions, including, for the DOJ, policy and public guidance, the Principles of Federal Prosecution (for individuals and business organizations), and the U.S. Sentencing Guidelines, and for the SEC, the Enforcement Manual, the Seaboard Report, and cooperation programs.

The DOJ's policy is to prosecute individuals whenever they are accused of a federal offense and there is admissible evidence that the DOJ believes will be sufficient to obtain and sustain a conviction, unless (i) there is no substantial federal interest in doing so (determined generally based on considerations of the nature and seriousness of the offense, the deterrent effect of prosecution, and the individual's culpability, criminal history, and willingness to cooperate); (ii) the person may be effectively prosecuted in another jurisdiction; or (iii) there is an adequate non-criminal alternative to prosecution. These principles are not legally binding, and an individual could not rely on the DOJ's guidance to block a U.S. enforcement action for conduct that has already been prosecuted in another country.

With respect to companies, under the DOJ's "Principles of Federal Prosecution of Business Organizations" and U.S. Sentencing Guidelines, the agency takes into account similar factors as discussed above in deciding whether to bring an enforcement action against a company, such as the nature and seriousness of the offense, the corporation's previous history of wrongdoing, and willingness to cooperate with the investigation (which could also be evidenced through self-disclosure). Additionally, the DOJ also considers (i) the pervasiveness of wrongdoing within the corporation and by corporate management, (ii) appropriate remedial actions, including disciplinary measures and targeted enhancements to the corporate compliance program, (iii) collateral consequences to innocent shareholders, pension holders, and employees, and (iv) the adequacy of the prosecution of responsible individuals or other alternatives to criminal enforcements, such as civil or administrative enforcement actions. Additionally, as discussed above, the DOJ considers the nature and effectiveness of a company's compliance program.

The SEC considers a number of similar factors to those discussed above when determining whether to open an investigation and to bring civil charges against individuals or corporations. In particular, the SEC's Enforcement Manual provides that the SEC analyzes the egregiousness and magnitude of the violation as well as whether the case involves a recidivist. The SEC also considers whether:

- The potentially harmed group is particularly vulnerable or at risk;
- The conduct is ongoing;
- The conduct can be investigated efficiently and within the statute of limitations period;
- Other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct;
- The case involves a possibly widespread industry practice that should be addressed; and
- The matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws.

In addition, the SEC identified four broad measures of corporate cooperation in its "Seaboard Report" (discussed further *below*) that could result in leniency ranging from reduced sentences to declinations. These measures include: (i) appropriate self-policing through effective compliance procedures and tone at the top, (ii) self-disclosure to the public, regulatory agencies, and self-regulatory organizations, (iii) appropriate remediation, and (iv) cooperation with law enforcement activities.

With respect to individuals, the SEC considers a number of similar factors in determining whether to give credit to cooperation and pursue reduced sentences or decline to bring an action. These factors include the level and value of the assistance provided, the importance of the matter in question, the societal interest in holding the individual accountable for his or her misconduct, and the appropriateness of granting such cooperation credit.

e. Parent-Subsidiary Liability

The Resource Guide seeks to clarify the DOJ's and SEC's views on parent-subsidiary liability. Under the FCPA, a parent company may be liable directly for bribes paid by its subsidiary when it directed or otherwise participated sufficiently in the activity of the subsidiary to be directly liable. Otherwise, a parent company may still be liable if the DOJ and SEC determine that it had sufficient control over the subsidiary's operations to establish an agency relationship. To determine the existence of such a relationship, the DOJ and SEC will look not only to the formal structure of the companies, but also to the reality of their interactions, including parent company knowledge and direction, reporting lines, the existence of shared management, and the involvement of the parent's legal department or corporate management in approving any relevant engagements or payments.

In the context of books and records and internal controls violations, however, the Resource Guide specifies that an issuer's responsibility "extends to ensuring that subsidiaries or affiliates under its control [and whose financial statements are consolidated into its books and records], including foreign subsidiaries and joint venture partners, comply with the accounting provisions" of the FCPA. In some circumstances, therefore, the DOJ and SEC may take the view that an issuer parent company is not liable for bribes paid by its subsidiary but nonetheless liable for violations of the books and records or internal controls provision of the FCPA.

Additionally, the Resource Guide recognizes the difficulty that companies may face in connection with minority-owned subsidiaries or affiliates, and it notes that in such circumstances "the parent is only required to use its best efforts to cause the minority-owned subsidiary or affiliate to devise and maintain a system of internal accounting controls consistent with the issuer's own obligations under the FCPA."

f. Gifts, Travel, and Entertainment

The Resource Guide reaffirms that the FCPA does not prohibit gifts, travel, and entertainment, so long as the expenses are not given corruptly to obtain or retain business. Consistent with the fact that there is no bright-line value threshold under the FCPA for when a gift becomes a bribe, the Resource Guide provides helpful insight into what the DOJ and SEC consider as relevant factors. For example, gifts are less likely to be considered bribes if they are given openly and transparently, accurately recorded in the gift-giver's books and records, provided only to reflect esteem or gratitude in accordance with local business culture, and permitted under local law. Similarly, corporate-sponsored travel and entertainment

that is reasonable and undertaken in connection with a bona fide business justification is unlikely to run afoul of the law.

The Resource Guide does not provide a threshold amount for gifts or expenses, but notes that single instances of large or extravagant gifts (such as sports cars, fur coats, or luxury items) or travel (such as multiple trips unrelated to business purposes) are more likely to suggest an improper purpose. Conversely, the Resource Guide notes that small items of nominal value (such as cab fare, reasonable meals and entertainment expenses, or company promotional items) are unlikely to improperly influence the recipient, but nevertheless added that "widespread gifts of small items [could be viewed] as part of a pattern of bribes"—a point reinforced recently by the Eli Lilly settlement in December 2012 (*see* Eli Lilly and Company at p.184).

The Resource Guide notes that, "[a]s part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company's directors, officers, employees, and agents."

g. Facilitating Payments

The Resource Guide notes that the FCPA "contains a narrow exception for 'facilitating or expediting payments' made in furtherance of routine governmental action." The Resource Guide provides various examples of "routine governmental action" for which the facilitating payment exception could apply, including processing visas or work orders, or providing police protection, mail pickup and delivery, phone service, or power and water supply. In a hypothetical example, the Resource Guide specifically states that a company would not violate the FCPA by using an agent "to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this 'grease' payment."

At the same time, however, the Resource Guide recognizes that the U.K. Bribery Act and other local laws do not contain such an exception, and that such payments could subject a company or individual to sanctions under those laws. Additionally, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer's books and records.

3. Rulings on the Statute of Limitations in Civil Penalty Actions

Recent rulings, including one by the U.S. Supreme Court, provide some clarity and additional limitations on when the SEC may file civil complaints to enforce the FCPA and other securities laws under 28 U.S.C. § 2462. Section 2462 provides that:

> An action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender . . . is found within the United States in order that proper service may be made thereon.

Recent rulings have found that the statute of limitations clock under § 2462 begins when a violation of securities law is completed, not when the violation is discovered. Moreover, an 11th Circuit

decision from 2016 found that § 2462 applies to disgorgement and certain types of declaratory relief in addition to civil penalties.

On February 27, 2013, the Supreme Court held in *Gabelli v. SEC* that the statute of limitations clock for civil penalties begins when a violation of securities law is completed, not when the violation is discovered. The case arose from an SEC enforcement action against two executives of Gabelli Funds, LLC, an investment adviser to a mutual fund. The SEC alleged that the two executives had aided and abetted violations of securities laws by allowing a client to fraudulently engage in certain trading transactions prior to August 2002. The SEC filed a complaint seeking civil penalties in April 2008, more than five years after the alleged fraud had been completed. A district court dismissed the case as untimely, but the Second Circuit reversed on the basis that, under "the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have been discovered with reasonable diligence, by the plaintiff."

In a unanimous decision delivered by Chief Justice Roberts, the Supreme Court reversed the Second Circuit's decision. In short, the Court argued that the discovery rule was only available to plaintiffs that had been wronged and sought recompense, not to an enforcement agency that sought to impose penalties. The Court noted that plaintiffs wronged by fraud required additional protections, because otherwise the fraud itself could work to conceal the injury until after the statute of limitations had expired:

> Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. . . . [Accordingly,] courts have developed the discovery rule, providing that the statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.

But the Court explained that "[u]nlike the private party who has no reason to suspect fraud, the SEC's very purpose is to root it out." Moreover, the Court noted that the enforcement action in question involved civil penalties that "are intended to punish, and label defendants wrongdoers." Accordingly, because the SEC was tasked with investigating fraud, had adequate tools and resources to do so, and sought more than mere recompense, and because Congress had not specified otherwise, the Court held that the discovery rule does not apply to civil penalty actions and that the SEC must file such complaints within five years of when the violations occurred.

One exception to that rule, however, was explored in a separate decision by the Southern District for the District of New York on February 8, 2013. In *SEC v. Straub*, the district court considered the applicability of the latter half of 28 U.S.C. § 2462, which provides that the five-year statute of limitations runs "if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

As with *Gabelli*, the *Straub* case involved a civil penalty enforcement action that was filed after five years after the alleged securities violation. The SEC filed a complaint on December 29, 2011 alleging that three executives of Hungarian telecommunication company Magyar Telekom, Plc. ("Magyar") had bribed government officials in Hungary through an intermediary in 2005 in order to soften the impact of new legislation that would have increased Magyar's fees and regulatory burdens.

Unlike in *Gabelli*, however, the court ruled that the SEC's complaint was timely. Because the three Magyar defendants had not been present in the United States during the relevant period, they had never been "found within the United States" and thus the statute of limitations had not run. The district court explained that it did not matter that service outside of the United States was now possible through the Hague Service Convention—which, incidentally, was the process through which the defendants were served—because "Congress has maintained the statutory carve-out for defendants not found within the United States." The defendants in *Straub* sought to file an interlocutory appeal to the Second Circuit on the statute of limitations issue, but their motion was denied in an order filed on August 5, 2013.

In May 2016, in *SEC v. Graham* the 11th Circuit held that § 2462 applies to not just civil penalties but disgorgement and certain declaratory relief. In *Graham*, the SEC filed a complaint in January 2013 alleged that the defendants had committed securities violations from November 2004 to July 2008. The SEC sought disgorgement, a declaration that defendants had violated securities laws, a civil penalty, and an injunction from any future violations of securities laws. The district court held that the violations had occurred more than five years prior to the compliant and that § 2462 thus prevented the SEC from seeking civil penalties. Moreover, the district court found that the injunctive and declaratory relief sought by the SEC were "nothing short of a penalty" and this covered by § 2462. Finally, the district court found that disgorgement should also be covered under § 2462 as it qualified as a "forfeiture." Thus, the district court dismissed the complaint.

The SEC appealed the ruling to the 11th Circuit as to the injunctive and declaratory relief and the disgorgement. The SEC argued that these types of relief are not "civil fines, penalties or forfeiture," and that § 2462 should not apply. The 11th Circuit agreed with the SEC that § 2462 does not apply to purely equitable remedies, such as the injunctive relief against future securities violations that the SEC was seeking.

However, the 11th Circuit upheld the district court's ruling that the SEC's requests for disgorgement and declaratory relief were time-barred. In particular, the 11th Circuit agreed that the declaratory relief that the SEC was seeking—a declaration that defendants had violated securities laws—was backward-looking and would thus operate as a penalty under § 2462. In making this determination, the 11th Circuit looked to *Gabelli,* in which the Supreme Court recognized that civil penalties "go beyond compensation, are intended to punish, label defendants as wrongdoers." The 11th Circuit found that a declaration of liability is similarly intended to punish and label the defendants as wrongdoers. Finally, the 11th Circuit agreed that forfeiture and disgorgement were effectively the same thing for the purposes of § 2462 and that § 2462's five-year limitation period applied to actions for disgorgement as well.

Although these case developments are significant for anti-corruption enforcement, their practical effect might be limited. First, § 2462 does not limit the SEC's exercise of its ability to use administrative orders, which are an important vehicle for SEC anti-corruption enforcement and settlements. Second, as noted, the SEC would not be time-barred under § 2462 from seeking to obtain injunctive relief from a U.S. district court against a company or individual that had violated the FCPA. Third, although criminal violations of the FCPA are also subject to a five-year statute of limitations pursuant to 18 U.S.C. § 3282, the DOJ can toll the limitations period for an additional three years in some circumstances to obtain evidence from outside the United States. Finally, the DOJ may also bring charges of conspiracy to violate the FCPA, and the five-year statute of limitations in connection with such charges would begin to run on the date of the last overt act of the conspiracy.

4. Resource Extraction Disclosure Rules

a. Disclosure Rules in the United States

On June 27, 2016, the Securities and Exchange Commission ("SEC" or "Commission") adopted Rule 13q-1 ("Resource Extraction Rules" or "Rules"), which requires publicly traded oil, gas, and mining companies to disclose certain payments made in connection with the commercial development of natural resources. The Commission also amended Form SD, the specialized disclosure report first adopted in 2012, to incorporate disclosure obligations for these payments.

Mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), the Resource Extraction Rules reflect Congress' goals to promote international transparency and "empower citizens" to hold their governments accountable for decisions made in managing their natural resources. The SEC has commented on how public disclosure obligations of such payments would advance the anti-corruption and accountability efforts that underlie the Rules and similar international initiatives. The Rules are effective as of September 26, 2016, with the obligation to comply commencing for the fiscal year ending on or after September 30, 2018.

i. Background

Section 1504 of the Dodd-Frank Act, which added section 13(q) to the Exchange Act, directs the SEC to issue final Rules requiring "resource extraction issuers" to include annual reports of payments made for commercial development of oil, natural gas or minerals to foreign governments and the U.S. federal government. On August 22, 2012, the SEC adopted Rule 13q-1 and form amendment. However, in July 2013, following a challenge brought by four industry groups, the U.S. District Court for the District of Columbia vacated and remanded the rule for "two substantial errors," holding that the SEC "misread the statute to mandate public disclosure of the reports, and [that] its decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious."

The following year, global anti-poverty organization Oxfam America filed a suit in the U.S. District Court for the District of Massachusetts to compel the SEC to promulgate a final rule in place of the vacated rule. The District Court granted summary judgment on September 2, 2015, finding that the SEC had "unlawfully withheld" agency action. The court also issued an order compelling the SEC to comply with its statutory duty and file an expedited schedule for promulgating the final rule. The Commission filed this schedule on October 2, 2015, and proposed the Resource Extraction Rules in their current form. The SEC adopted the Rules after the requisite comment period.

ii. Application

The Rules apply to resource extraction issuers, which are companies required to file annual reports under sections 13 or 15(d) of the Exchange Act, and who operate or acquire a license for the exploration, extraction, processing, and export of oil, natural gas, or minerals. The obligations include foreign private issuers, but do not extend to registered investment companies, issuers subject to Tier 2 reporting requirements under Regulation A, or crowdfunding reporting requirements.

Within 150 days apply for reporting after each fiscal year, covered issuers must submit annual reports of payments that are "not de minimis" (meaning "any payment, whether made as a single payment

or a series of related payments, which equals or exceeds $100,000, or its equivalent . . . during the [relevant] fiscal year"), made by them or their controlled subsidiaries, to the U.S. federal government or foreign governments. These payments include any amounts paid in furtherance of their operations, such as (i) taxes on corporate income, profits, and production; (ii) royalties; (iii) licensing, rental, entry, and other fees; (iv) production entitlements, dividends, bonuses; (v) infrastructure improvement expenses; and (vi) contractual or legally required community and social responsibility contributions. Disclosure of value-added taxes, personal income taxes, sales taxes, or other taxes levied on consumption as well as ordinary dividends are generally not required. In an effort to ensure that covered issuers do not attempt to evade the reporting requirements, the SEC has included an anti-evasion provision that requires issuers to report payments that are "part of a plan or scheme to evade" disclosure – such as those substituted for otherwise reportable payments, or those that are structured or split to avoid reporting obligations.

In line with the transparency promotion efforts of the Dodd-Frank Act, resource extraction issuers must submit Form SD on EDGAR, the SEC's publicly accessible database. Issuers must also provide an electronic folder containing the identity of the recipient country and government entity, the type, amount, and currency of the payments for each project, and other project details. The rule's definition of "Project"—particularly how broadly or narrowly the term should be construed—prompted a number of public comments and critiques. In the end, the Resource Extraction Rules adopted a project-level definition similar to those applied in the European Economic Area ("EEA") and Canada: defining "project" to mean operational activities governed by a single legal agreement that creates the obligation to pay. Certain industry groups have criticized this definition. For instance, in April 2014, the American Petroleum Institute ("API")—one of the plaintiffs in the suit that led the Court to vacate the previous Rules in July 2013—proposed a broader definition of "project" that would be defined as all activities involving the same resource within each subnational political jurisdiction. In February 2016, in response to the greater level of detail required under the SEC's contract-level definition of "project," the API argued that contract-specific disclosure not only creates a substantial burden on issuers and opportunity for commercial harm, but also frustrates the law's transparency objectives by requiring that issuers provide "overly granular information" that would be incomprehensible to the public. The SEC rejected these arguments and found that, by enabling civil society groups and citizens to better assess "revenue flows from projects in their local communities, the adopted definition better reflected (i) the economic and operational considerations applicable to issuers and (ii) the law's anti-corruption and accountability objectives.

The Rules allow greater flexibility for project definition in comparison to the EEA and Canadian regimes. Issuers may consider multiple agreements that are "operationally and geographically interconnected" as a single project, and whether or not the agreements are substantially similar. The Rules offer a list of non-exclusive factors to be considered in determining interconnectedness, such as whether a set of agreements: (i) relate to the same resource and the same or contiguous part of the field, mineral district or other geographical area; (ii) will be performed by shared key personnel or equipment; and (iii) are part of the same operating budget. This reduces the burden for issuers who will not have to disaggregate payments for multiple, interconnected agreements.

The Resource Extraction Rules define "foreign governments" to include national and subnational agencies, departments, and any "instrumentality of a foreign government" and similar entities affiliated with the states, provinces, counties, districts, municipalities or territories of foreign governments. While certain commenters had sought for an expanded definition so that the Rules would apply to payments to

any entity controlled by foreign states, the Resource Extraction Rules adopted a bright-line rule for companies "at least majority owned by a foreign government."

The SEC requires issuers to "identify the administrative or political level of subnational government that is entitled to a payment under the relevant contract or foreign law." It also states that reportable payments made by third parties on behalf of the issuer must also be disclosed.

iii. Accommodations

The Resource Extraction Rules provide for delayed reporting and transitional relief in two instances. First, to protect against the disclosure of commercially sensitive information, issuers may delay disclosure of payments related to exploratory activities for one fiscal year. Second, resource extraction issuers that acquire entities that had not been subject to disclosure obligations under the Resource Extraction Rules or those of a substantially similar jurisdiction enjoy a longer transition period. Disclosure obligations for such recently acquired entities do not commence until the Form SD filing for the fiscal year following the effective date of the acquisition.

Resource extraction issuers may also seek exemptions under Section 36 of the Exchange Act. For example, an issuer may apply to the SEC for such relief by showing that it would suffer "substantial economic harm" if it were required to comply with the Rules. The Resource Extraction Rules do not provide a broad exemption based on foreign law prohibitions. The Commission noted that while acknowledging such an exemption may offer potential savings of economic and compliance costs, it would undermine the transparency objective of the Rules. For instance, jurisdictions looking to thwart transparency provisions might be inclined to enact such anti-disclosure laws. The SEC considers that a "tailored case-by-case consideration" was not only more flexible and appropriate for targeted relief, but that it would encourage companies to negotiate for permission to disclose.

Issuers will also be considered compliant with the Rules under alternative reporting mechanisms in jurisdictions whose disclosure regimes the SEC considers to be "substantially similar" to the Rules. As this time, the SEC has recognized three disclosure regimes as being substantially similar to the Resource Extraction Rules: (1) Canada, (2) the European Parliament and Council of the European Union, and (3) the U.S. Extractive Industries Transparency Initiative ("USEITI"), a global coalition of oil, natural gas, and mining companies, foreign governments, investor groups and international organizations. According to the SEC, all three regimes also cover similar payment types, controlled entities and subsidiaries, and require foreign subnational payee reporting. In determining substantial similarity, the SEC considered the common requirements for annual, public disclosures of payment information and the identity of the issuer, and their application to companies operating in the natural resources sector. Because the USEITI disclosures rules differ from the Resource Extraction Rules in some respects—namely, they do not require disclosure of payments to foreign governments—the Rules will only be satisfied by an issuer claiming compliance based on compliance with USEITI requirements if the issuer additionally "supplement[s] its USEITI report by disclosing in its Form SD all payment information to foreign governments" and if the issuer supplements its USEITI reporting as necessary to ensure that information is disclosed on a fiscal year basis.

Issuers relying on the alternative reporting accommodation must tag their alternative reports using the common electronic format for reporting under the Rules (eXtensible Business Reporting

Language ("XBRL")), and must provide a fair and accurate translation of their entire report in English if the report was originally prepared in another language.

b. Disclosure Rules in the European Economic Area

In 2013, the European Parliament and the Council of the European Union approved its mandatory disclosure regime through amendments to the Accounting Directive and the Transparency Directive (together, the "EEA Disclosure Rules"). The EEA Disclosure Rules require member states to enact implementing legislation that would impose annual disclosure obligations for oil, gas, mining and logging companies. As previously noted, the SEC considers the EEA Disclosure Rules to be "substantially similar" to the U.S. Resource Extraction Rules.

Specifically, the EEA Disclosure Rules would require that all companies registered in the European Economic Area or listed on EU regulated markets disclose payments of at least €100,000 made to foreign governments in connection with any activity related to the exploration, prospection, discovery, development or extraction of minerals, oil, natural gas deposits, or other extractive materials. The EEA Disclosure Rules also require public disclosure of payment information and the issuer's identity. The Accounting Directive empowers the Commission to recognize reporting requirements of third countries whose regimes adhere to specific criteria; no such determinations have been made at this time.

The Rules had required that national transposition measures be completed by July 20, 2015, for the Accounting Directive, and November 26, 2015 for the Transparency Directive. However, as of August 25, 2016, only 25 of 43 states had implemented the Accounting Directive while 21 of 42 states have completed the Transparency Directive.

5. SEC Whistleblower Rules

The SEC whistleblower program was established in 2011 pursuant to Section 922 of the Dodd-Frank Act ("Act"). The program is administered by the SEC's Office of the Whistleblower, an office within the Division of Enforcement. The program allows the SEC to pay awards to whistleblowers who voluntarily provide original information that leads to the successful SEC enforcement actions that result in monetary sanctions in excess of $1 million. Under the Act, the SEC may award between 10% and 30% of monetary sanctions collected. On May 25, 2011, the SEC adopted Rule 21F that established the program, and it became effective in August 12, 2011.

From its inception through June 2016, the Commission has awarded over $100 million to more than 30 whistleblowers, including a $30 million award in September 2014, a $17 million award in June 2016, and an award in excess of $22 million in August 2016. The SEC has also received an increasing number of tips from potential whistleblowers for violations relating to offering fraud, manipulation, trading and pricing, market events, and the FCPA. For instance, whistleblower tips have grown from 3,238 in the 2013 fiscal year to 3,923 in 2015. Submissions are also geographically dispersed. In FY 2015, the Commission received submissions from individuals in 61 foreign countries, with the highest number from the United Kingdom and Ireland (92 tips), Canada (49), China (43), India (33), and Australia (29). The remaining sources of FY 2015 whistleblower tips are a diverse cross-section of the world's nations from each continent, such as Brazil (14), Bulgaria (7), Chile (11), Israel (7), Mexico (13), Nigeria (3), Thailand (7), and Zambia (2).

While the majority of tips relate to non-FCPA topics, the SEC continues to receive a significant and increasing number of tips relating to FCPA violations, from 115 tips in FY 2012 to 186 tips in FY 2015. In August 2016, certain news media published unverified reports that the SEC had issued its first FCPA-related award—reportedly $3.75 million—to an Australian whistleblower in relation to the BHP settlement (*see* p.95).

Since the enactment of the Dodd-Frank Act, the SEC has brought enforcement actions to emphasize that companies cannot stifle whistleblowers through confidentiality agreements. Courts have also wrestled with the appropriate scope of protections for employee whistleblowers. Recent cases indicate that there may be some tension between the SEC and courts regarding the interpretation of Dodd-Frank whistleblower protections, particularly whether whistleblowers must report to the SEC to qualify for Dodd-Frank protections against retaliation.

a. Companies Cannot Stifle Whistleblowers Through Confidentiality Agreements

On April 1, 2015, the SEC announced its first enforcement action for violations of whistleblower protections under Rule 21F-17, which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

Under the terms of the Cease-and Desist Order, KBR, Inc. ("KBR"), a Delaware corporation listed on the NYSE, agreed to pay a civil penalty of $130,000 and make specific remedial actions. According to the SEC, KBR's compliance program used a form confidentiality statement that prohibited employees who were participating in internal investigation interviews from disclosing details of the interview to third parties without the prior authorization of KBR's legal department. Penalties for violation included disciplinary actions, up to termination. The Commission found that these confidentiality obligations undermined the incentive to report and therefore violated Rule 21F. In its Press Release regarding the KBR settlement, the Commission noted that "KBR changed its agreements to make clear that its current and former employees will not have to fear termination or retribution or seek approval from company lawyers before contacting" the SEC.

Two similar actions were announced in August 2016. On August 10, 2016, the SEC announced a settlement with BlueLinx Holdings Inc. ("BlueLinx"), a Delaware corporation trading on the NYSE. BlueLinx agreed to pay a civil penalty of $265,000 for adopting language in severance agreements that, in violation of Rule 21F, prohibited sharing confidential information "unless compelled to do so by law or legal process." The agreements further required employees to provide written notice or obtain written consent from the company's legal department prior to providing information pursuant to such legal process. As with the KBR case, the confidentiality provisions did not exempt employees from voluntarily disclosing possible violations to the SEC or other enforcement agencies. The SEC found that BlueLinx violated legal protections by impeding participation in the whistleblower program and by "forc[ing] employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits." In addition to the civil penalty, the company modified its agreements to allow reporting of securities violations to federal agencies without approval, and to contact former signatories of these agreements and notify them of changes.

On August 16, 2016, the SEC announced that Health Net, Inc. ("Health Net"), a California-based health insurance provider, agreed to pay $340,000 for violations of Rule 21F in relation to employee severance agreements that included a clause for waiver and release of potential claims. Following the effective date of the regulations, the company amended the clause to allow participation in government investigations but also prohibited the filing or acceptance of SEC whistleblower awards. In June 2013, the company further amended its agreements to exclude the express prohibition against applying for SEC whistleblower awards but included a broader waiver of rights to "any individual monetary recovery . . . in any proceeding brought based on any communication by Employee to any federal, state, or local government agency or department." While the SEC noted that it was unaware of cases where former employees were restrained by the agreements or where Health Net took action to enforce the agreements, it found that Health Net's removal of "critically important financial incentives" for direct SEC communications violated the rule. In addition to the penalty, Health Net agreed to contact its former employees that had signed the agreements and inform them of these changes.

b. Circuit Split Regarding Whether Whistleblowers Must Report to the SEC to Qualify for Dodd-Frank Retaliation Protections

On August 4, 2015, the SEC released interpretative guidance on anti-retaliation protections provided under the whistleblower provisions. The rule sought to clarify whistleblower status required for the Dodd-Frank Act's anti-retaliation provisions, and to respond to the decision in *Asadi v. GE Energy*. The Fifth Circuit's 2013 *Asadi* decision limited retaliation protections to employees who report securities law violations to the SEC, and excluded those who reported within an organization's internal structure. The 2015 interpretative guidance expounded on arguments made in the SEC's *Asadi* amicus brief, noting that Section 21F's retaliation protections apply to whistleblowers who suffer adverse consequences from reporting internally regardless of whether reports were made to the SEC, and independent of qualification for whistleblower awards (which require SEC reports). The Commission described this interpretation as reasonable, describing the rationale to include:

> Specifically, by providing employment retaliation protections for individuals who report internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct, our interpretive rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting.

There appears to be growing support for this position. In a majority opinion issued on September 10, 2015, a 2-1 decision, the Second Circuit in *Berman v. Neo@Ogilvy LLC*, reversed and remanded a decision by the District Court for the Southern District of New York that dismissed a plaintiff's claim for retaliation protections on the grounds that reports were only made internally. While acknowledging that its decision created a circuit split, the Court observed that "a far larger number of district courts have deemed the statute ambiguous and deferred to the SEC's Rule." The majority opinion concluded that the provisions of the Dodd-Frank Act "create a sufficient ambiguity to warrant . . . deference to the SEC's interpretive rule."

While it is unclear if the circuit split may be resolved, the SEC continues to file *amicus curiae* briefs in private suits, urging courts to defer to its rule allowing for protections for internal reporting. For example, On February 4, 2016, the Commission filed a brief in *Verble v. Morgan Stanley Smith Barney, LLC*, an ongoing case before the Court of Appeals for the Sixth Circuit. The District Court for the Eastern District of Tennessee had dismissed the plaintiff's complaint for relief of protection from retaliation under the Dodd-Frank Act, and other laws. According to the District Court, the plaintiff, a former employee of the defendants, did not qualify as a whistleblower, and was not entitled to protection for alleged retaliation for cooperation with the FBI concerning fraud and securities violations. The SEC's amicus brief argued that its "interpretation is reasonable because it resolves the statutory ambiguity in a manner that effectuates the broad employment anti-retaliation protections" of the law.

6. Kleptocracy Asset Recovery Initiative

In July 2010, then-Attorney General Eric Holder announced the creation of the Kleptocracy Asset Recovery Initiative ("Kleptocracy Initiative" or "Initiative"), which aims to combat large-scale foreign official corruption by targeting the recipients of corrupt funds in actions to recover money and other assets obtained by foreign officials through corrupt means, and, when possible, to use the funds to benefit the victims of the corruption. While seizing assets purchased from corrupt foreign proceeds is not new to the DOJ, the Kleptocracy Initiative was launched to increase focus and cooperation in the DOJ's fight against public corruption, and to keep the U.S. from becoming a safe haven for assets pilfered by foreign kleptocrats. Since its creation, the Initiative has been spearheaded by prosecutors in the Asset Forfeiture and Money Laundering Section ("AFMLS") of the DOJ Criminal Division. These prosecutors work in partnership with U.S. Attorneys' Offices and other federal law enforcement agencies, including the Federal Bureau of Investigation ("FBI"), the Department of Homeland Security, and the International Revenue Services ("IRS") (all of whom have specialized teams dedicated to international corruption cases). Additionally, the Kleptocracy Initiative seeks to foster increased cooperation and support from international authorities and communities in its asset recovery activities and provide assistance to foreign countries seeking to recover assets located in the U.S.

The main weapon for prosecutors in the AFMLS, and other offices involved in the Initiative, is the U.S. government's "confiscation authority," which allows the U.S. to initiate forfeiture actions against any property, real or personal, within U.S. jurisdiction that constitutes, is derived from, or is traceable to various domestic and foreign offenses, including the misappropriation of public funds by or for the benefit of a public official. Since its inception, the Kleptocracy Initiative has used this confiscation authority, in addition to other asset recovery tools such as mutual legal assistance requests, to recover funds around the world traceable to corrupt schemes perpetrated by foreign officials from countries such as Nigeria, Equatorial Guinea, Ukraine, Uzbekistan, Kazakhstan, South Korea, Taiwan, and most recently Malaysia.

Two high-profile Kleptocracy Initiative actions are discussed below in detail.

a. 1MDB

On July 20, 2016, the DOJ, FBI, and IRS held a joint press conference to announce the largest civil forfeiture action ever under the Kleptocracy Initiative—an action aimed at recovering more than $1 billion in assets tied to an alleged public corruption and global money laundering conspiracy. The civil forfeiture action alleges that over a period of approximately four years (2009 to 2013), multiple individuals, including public officials and their associates, diverted more than $3.5 billion from a wholly-owned

Malaysian government fund, 1Malaysia Development Berhad ("1MDB"). More than $1 billion of the illegally diverted funds are believed to have been laundered through the U.S. financial system or are currently invested in assets located in the U.S. The complaints seek forfeiture of these assets.

1MDB was created to strategically invest and develop projects for the economic benefit of Malaysia and its people. Instead, according to the DOJ, its funds were systemically siphoned by public officials and their co-conspirators, mainly over three different phases: (i) the "Good Star" phase (2009-2011); (ii) "Aabar-BVI" phase (2012); and (iii) the "Tanore" phase (2013).

<u>The "Good Star" Phase</u>: According to the DOJ, 1MDB officials and their coconspirators diverted more than $1 billion from 1MDB's bank account to a Swiss bank account held in the name of Good Star Limited ("Good Star"). The Good Star account was beneficially owned by Jho Low ("Low"), a well-connected Malaysian who has no formal position within 1MDB but was involved in its creation. The DOJ has alleged that between 2009 and 2011, officials at 1MDB, under the pretense of investing in a joint venture between 1MDB and PetroSaudi, a private Saudi oil extraction company, provided false information to banks about the ownership of the Good Star account and fraudulently wired more than $1 billion of funds from 1MDB to the Good Star account. From these funds, the conspirators are accused of sending more than $400 million into the United States to be used by Low and others to cover gambling debts at Las Vegas casinos, rent luxury yachts, and purchase luxury real estate and a $35 million Bombardier jet.

<u>The Aabar-BVI Phase</u>: In 2012, two separate bond offerings were held to raise funds for 1MDB to invest for the benefit of the Malaysian government in certain energy assets. The bond issuances were jointly guaranteed by 1MDB and the International Petroleum Investment Company ("IPIC"), an investment fund wholly-owned by the Abu Dhabi government. The DOJ has alleged that almost immediately after those offerings, certain officials and their associates wired $1.37 billion, approximately 40% of the funds raised, out of 1MDB's account to a Swiss bank account held by a shell company incorporated in the British Virgin Islands ("BVI"). The BVI shell company was named Aabar Investments PJS Limited, which was purposefully similar to Aabar Investments PJS, a legitimate subsidiary of IPIC. In a March 2014 financial statement, 1MDB fraudulently recorded the payments to the BVI shell company as an asset, describing it as a "refundable deposit" held aside as collateral for the guarantee, although in reality, the funds were transferred in a series of transactions to other shell companies and bank accounts, to be used for the personal benefit of corrupt officials and their associates. For example, the DOJ has alleged that $238 million ended up in a Singaporean bank account owned by Red Granite Capital, an entity owned by Riza Aziz, the stepson of a senior 1MDB official (whom the press has identified as Malaysian Prime Minister Najib Razak). According to the DOJ complaints, Aziz used the money to buy U.S. luxury real estate and to fund Red Granite Pictures, a California-based motion picture company. Red Granite Pictures ultimately used more than $100 million of the funds to finance *The Wolf of Wall Street,* a 2013 Academy-Award-nominated movie. The future rights to that film are subject to forfeiture.

<u>The "Tanore" Phase</u>: In 2013, 1MDB raised $3 billion in a bond offering to promote growth in Malaysia and Abu Dhabi. The DOJ has alleged that 1MDB officials diverted $1.26 billion from this bond offering to a Singaporean bank account held in the name of Tanore Finance Corporation ("Tanore"), an entity beneficially owned by Tan Kim Loong ("Tan"), an associate of Jho Low. According to the DOJ, shortly after the bond offerings closed, in March 2013, $681 million was transferred from the Tanore bank account to other accounts owned or controlled by Tan, Low and their associates. The corrupt proceeds

were allegedly used by Tan and Low to purchase $137 million in art work, including a $35 million work by Claude Monet, an interest (purchased for $106 million) in the world's third largest music publishing company, EMI Music Publishing, and an interest in the Park Lane Hotel in New York City.

In total, the U.S. seeks civil forfeiture of $1 billion worth of assets traceable to funds that it believes have been laundered through U.S. financial institutions, and has filed 16 forfeiture complaints against Bombardier Jet; EMI Music; several luxury real estate properties located in New York, California, and London; artwork by Monet and Van Gogh; and future interests (including copyright and intellectual property rights, as well as rights to profits, royalties, and distribution proceeds) in *The Wolf of Wall Street*. As stated by the U.S. Attorney General Loretta Lynch at a July 20, 2016 joint press conference, "this case and the Kleptocracy Initiative as a whole, should serve as a sign of our firm commitment to fighting international corruption and it should also send a signal that the Department of Justice is determined to prevent the American financial system from being used as a conduit for corruption. And it should make clear to corrupt officials around the world that we will be relentless in our efforts to deny them the proceeds of their crimes."

b. Sani Abacha

In August 2014, the DOJ received more than $480 million of corrupt funds from bank accounts located around the world of the now-deceased former Nigerian Dictator, Sani Abacha, and his associates. The forfeiture judgment includes $303 million in two bank accounts in the Bailiwick of Jersey, $145 million in two bank accounts in France, and an expected $27 million in three bank accounts in the United Kingdom and Ireland.

According to the DOJ's unsealed complaint filed in November 2013 at the U.S. District Court for the District of Columbia, Sani Abacha, his son Mohammed Sani Abacha, and his associate Abubakar Atiku Bagudu, among others, embezzled, misappropriated, defrauded, and extorted millions from the Nigerian government and laundered corrupt proceeds through U.S. banks. The DOJ's complaint identified three main schemes perpetrated by Abacha and his associates: (i) the systematic embezzling of $2 billion in public funds from the Central Bank of Nigeria ("CBN") under false pretenses of national security; (ii) the purchasing of non-performing government debt from a company controlled by Bagudu and Mohammed Abacha at inflated prices, generating a profit of over $282 million; and (iii) the extortion of more than $11 million from a French company and its Nigerian affiliate. According to the complaint, the resulting embezzled funds were laundered out of Nigeria to accounts located in Europe and London through U.S. financial institutions.

National Security: In connection with the first scheme, the DOJ's complaint alleged that from 1993 to 1998, Abacha directed Nigeria's National Security Advisor to write over 60 one- to two-page "security votes" letters to the CBN, requesting funds purportedly for national security purposes. Rather than using the more than $2 billion obtained through these letters for national security, however, the funds were transferred to the personal accounts of Abacha and his co-conspirators. These fraudulent letters are described as having been endorsed by Abacha, which was contrary to the proper protocol that required approval from Nigeria's Minister of Finance and Accountant-General.

Government Debt: In the second scheme, the DOJ alleged that Abacha and his associates defrauded Nigeria into purchasing back its own debt at more than twice the market price. The complaint alleges that in 1979, Nigeria agreed to give Tiajpromexport ("TPE"), a Russian company constructing a

steel plant in Nigeria, a debt instrument to guarantee payment of $2 billion to partially finance construction of the plant. Due to a dispute, Nigeria suspended payment on the debt, prompting TPE to stop construction. Abacha's associate, Bagudu, arranged to purchase the debt from TPE, but only after obtaining a guarantee from the Nigerian government that it would ultimately purchase or repay the debt. The complaint alleges that four months after obtaining the purchase guarantee, TPE sold approximately $920 million worth of debt to a company named Panar for approximately $200 million. Panar then immediately resold the debt for approximately $280 million to Mecosta, a company owned by Bagudu and Abacha's son. Mecosta then immediately resold the same debt to the government of Nigeria for approximately $560 million. According to the DOJ, the purchase of the debt by the Nigerian government was approved by Abacha, and as a result, Abacha's son and his associates gained profits of approximately $280 million.

French Engineering Company: In the third scheme, Abacha allegedly stopped paying certain foreign government contractors in Nigeria in November 1993. Unable to collect on the $469 million it was owed by Nigeria, the Dumez Group, a French civil engineer company, agreed to a kickback scheme with the Abacha family in return for payment on the outstanding amounts owed. Dumez agreed to pay 25% of any amounts it received to a company named Allied Network Ltd ("Allied"). From December 1996 through May 1998, Dumez paid $97 million (twenty-five percent of $390 million of proceeds it received from Nigeria) to Allied's Swiss bank account. In late 1997, Mohamad Abacha transferred $11 million from the Allied account to his personal bank account.

In its press release announcing the freezing of the corrupt funds, the DOJ asserted that it "will not let the U.S. banking system be a tool for dictators to hide their criminal proceeds," and that it was "determined and equipped to confiscate the ill-gotten riches of corrupt leaders who drain the resources of their countries."

B. U.S. Investigations, Disclosures, and Prosecutions of Note

1. JPMorgan Chase

Since at least August 2013, when JP Morgan Chase & Co. ("JPMorgan") disclosed that it had received a request from the SEC for information regarding its employment practices in Hong Kong, the company has been under investigation by authorities in the United States for allegedly hiring the children of government officials in China and other countries as part of an effort to secure business. Later that month, *The New York Times* published a series of stories on JPMorgan's so-called "Sons and Daughters" program. JPMorgan allegedly established this program initially to ensure that the bank would properly scrutinize Chinese job applicants who were related to the country's "ruling elite." Over time, however, various bank employees are suspected of having commandeered the program to instead ensure that well-connected Chinese applicants were subjected to fewer interviews and lowered employment standards.

As a result, JPMorgan is being investigated for potentially hiring the children of Chinese officials in order to help obtain business. The articles report, for example, that JPMorgan hired the son of the chairman of the China Everbright Group, a state-controlled financial conglomerate, as well as the daughter of a deputy chief engineer of China's railway ministry. After hiring the chairman's son, JPMorgan secured multiple contracts with China Everbright, including assisting one of its subsidiaries on a $162 million share sale and helping the company reshape its digital advertising firm in what was the

largest private equity deal in China at the time. Similarly, the railway ministry official's daughter was hired around the time that JPMorgan was selected to advise The China Railway Group, a state-controlled railway construction company, on its initial public offering. JPMorgan was also awarded a number of additional contracts with Chinese railway companies during the time that the official's daughter worked for the bank.

In connection with the reports, JPMorgan launched and has conducted an internal review that has reportedly revealed up to 250 employees in China, India, South Korea, and Singapore with familial connections to government officials or to officials of prominent private entities. It has also been reported that these types of hiring practices were widespread in China and that JPMorgan may have modeled its hiring program on the practices of other major financial services companies. According to the *Times*, banks competed over who could make the most prestigious hires and were well aware of their competitors' practices in this regard. In one email a JPMorgan executive even complained that the bank lost a deal because their competitor, Deutsche Bank, hired the client's daughter the previous summer.

In July 2016, the *Wall Street Journal* reported that JPMorgan is expected to pay around $200 million in connection with a potential resolution of this matter. The *Times* has also stated that a number of other banks, including Credit Suisse, Citigroup, Deutsche Bank, Goldman Sachs, and Morgan Stanley, were also being investigated by U.S. authorities for similar practices.

On August 18, 2015, the SEC announced the first settlement relating to bank hiring practices under which the Bank of New York Mellon Corporation ("BNY Mellon") agreed to pay U.S.$14.8 million to resolve charges that it violated the FCPA when it hired family members of foreign sovereign wealth fund officials. (*see* BNY Mellon at p.97)

2. Halliburton

Beginning in October 2011, oilfield services company Halliburton Co. ("Halliburton") made a series of disclosures regarding the company's investigations into possible FCPA violations in Angola and Iraq. The Houston-based company first explained that it had received an anonymous email in December 2010 alleging that conduct by former and current personnel in connection with an Angolan vendor had violated the company's Code of Business Conduct and the FCPA. Halliburton stated that it had retained outside counsel and independent forensic accountants to assist with an internal investigation, and had self-reported the violation to the DOJ. On February 16, 2012, Halliburton disclosed that it had received a subpoena regarding its Angola investigation and that an employee had also received an SEC subpoena.

Halliburton later disclosed that it had initiated new, unrelated investigations into possible FCPA violations in Angola and Iraq. In a July 27, 2012, SEC filing, Halliburton explained that the new investigations related to customs matters in Angola and to customs, visa matters, and to the use of third-party agents in Iraq. As of Halliburton's August 1, 2016, Form 10-Q filing, the company indicated that the investigations were ongoing and that it would continue cooperating with inquiries and requests from the DOJ and SEC.

Halliburton and its former subsidiary, KBR, previously paid $579 million to resolve investigations relating to allegations the company bribed Nigerian government officials to win contracts to build a liquefied natural gas facility on Bonny Island, Nigeria (*see* KBR/Halliburton Company at p.292). Halliburton's settlement with the SEC permanently enjoined the company from violating the record-

keeping and internal control provisions of the FCPA and required an independent consultant to review the company's anti-corruption policies and procedures.

3. Wal-Mart

On December 8, 2011, Wal-Mart disclosed that it had begun an internal investigation into whether its anti-corruption policies and internal control procedures complied with the FCPA. Wal-Mart also disclosed that it had voluntarily reported the investigation to the DOJ and SEC.

In April and December 2012 two front-page investigative articles in *The New York Times* brought Wal-Mart's compliance program and its international operations under greater scrutiny. The Pulitzer Prize-winning articles presented detailed allegations of corrupt payments, bribery, and other possible improper conduct by the retail giant's subsidiary in Mexico. The first story appeared on April 21, 2012, and detailed allegedly improper payments to Mexican officials by Wal-Mart de México, S.A.B. de C.V. ("Walmex") as well as alleged shortcomings in the company's handling of its response to the allegations which, according to the *Times*, had initially been raised by a former executive in September 2005 to the then-General Counsel of Wal-Mart International. The *Times* reported that, in connection with the construction of new stores in Mexico, Walmex had paid bribes to obtain zoning approvals, reductions in environmental impact fees, and the allegiance of neighborhood leaders. The *Times* further reported that the former executive had implicated Walmex's CEO, Board Chairman, General Counsel, chief auditor, and a top real estate executive as being involved in the payments. According to the *Times*, some of these payments were made through local lawyers and had been recorded in Walmex's books and records as legal fees.

The *Times* article also included details concerning the company's handling of the internal investigation that resulted from the former executive's allegations. According to the *Times*, Wal-Mart sought to downplay and disregard the allegations by transferring responsibility for the internal investigation to Walmex, the unit that was implicated in the alleged misconduct. More specifically, responsibility for the investigation was given to the Walmex General Counsel, who had been personally implicated by the whistleblower. This transfer occurred, wrote the *Times*, despite concerns raised by the then-General Counsel of Wal-Mart International about "assigning any investigative role to management of the business unit being investigated." According to the *Times*, a few weeks after he took control of the investigation, the Walmex General Counsel cleared Walmex (and himself) of wrongdoing and concluded, based on denials of other Walmex executives, that there was no evidence or clear indication of bribery.

On December 17, 2012, *The New York Times* published a second front-page investigatory article focusing on a specific case study of how Walmex allegedly made over $200,000 in improper payments to a local mayor, zoning officials, and officials of the National Institute of Anthropology and History ("INAH") in order to build a Wal-Mart store in an alfalfa field only one mile from the ancient pyramids of Teotihuacán, Mexico. The article traced how the local zoning council, state traffic regulation agency, and the Mayor and City Council of Teotihuacán each reversed previous decisions or took unorthodox actions to provide necessary approvals for Wal-Mart's new location, and included allegations by whistleblowers and circumstantial evidence that the company made payments to influence these actions. Additionally, the article alleged that the Wal-Mart store was built without the legally required archeological excavation studies being conducted, or proper approval being issued by INAH; the *Times* alleged that Walmex achieved this by making an "official donation" to the INAH of $45,000 as well as a "personal gift" of as much as $36,000 to an INAH official.

In addition to its reporting on Teotihuacán, the December 2012 article also alleged that Walmex paid a total of $341,000 to build a Sam's Club in Mexico City near the Basilica of Guadalupe without the appropriate licenses and permits, and another $765,000 in bribes to build a refrigerated distribution center in an environmentally fragile area where electricity was so scarce that smaller developers had been rebuffed.

a. Response to Times Articles

The day after the first *Times* article was published, Wal-Mart stock dropped 4.7%, though within months it fully recovered. Several days later, the *Washington Post* published its own front-page story alleging that Wal-Mart had "participated in an aggressive and high-priced lobbying campaign to amend" the FCPA. In response, two Democratic Congressmen wrote letters stating that they were "concerned about the role that Wal-Mart officials may have played" in efforts to amend the FCPA, and criticized the "conflict of interest for Wal-Mart officials to advise on ways to weaken the [FCPA] at a time when the leadership of the company was apparently aware of corporate conduct that may have violated the law." Wal-Mart denied the criticisms and claimed to have provided all requested materials and cooperated fully with the federal investigation.

On May 17, 2012, Wal-Mart reported that it was conducting an internal investigation, with the assistance of outside counsel, into alleged misconduct by its foreign subsidiaries, including Walmex, and into "whether prior allegations of such violations and/or misconduct were appropriately handled by the Company." In November 2012, Wal-Mart reported that it had expanded its internal investigation to include activities in Brazil, China, and India. In addition to the ongoing investigation by U.S. authorities, Wal-Mart has also faced investigations in Mexico and India.

In the years since the *Times* articles, Wal-Mart has invested significant resources into revamping its compliance program. In aggregate, the company's disclosed FCPA pre-enforcement professional fees and compliance expenses for 2014, 2015, and 2016 have topped $600 million. Wal-Mart's new compliance efforts include the development and implementation of: (i) an externally managed, centralized electronic screening and due-diligence system for all third-party service partners; (ii) a methodology for regularly auditing companies in high-risk environments; (iii) an anti-corruption training program for third-party organizations; and, (iv) a web-based application to manage all charitable donations to governments and non-governmental organizations. The charitable donation application includes both a centralized website to manage due diligence, registration, and approval of potential donation recipients, as well as a local component for managing approval of and accounting for product donations made by each of Wal-Mart's 11,200 stores.

Wal-Mart has also significantly increased its global compliance staff, adding more than 500 compliance employees. At the executive level, compliance targets have been incorporated into executive compensation. In addition, at least eight of Wal-Mart's senior executives in Mexico, India, and the United States have left the company since its initial FCPA disclosures. The Audit Committee of the Wal-Mart Board of Directors, comprised entirely of outside Directors, has also been active since the announcement of the FCPA investigations, meeting 15 times in the fiscal year ending January 2015 (seven of which were primarily dedicated to the ongoing FCPA-related investigation and compliance matters) and 10 times in the fiscal year ending January 2016.

In October 2015, the *Wall Street Journal* reported that the DOJ's investigation had not found evidence to support the most serious allegations against Wal-Mart: that it had made payments to government officials in exchange for licensing, zoning, and other local support, and that and the company had subsequently failed to respond appropriately. In March 2016, *Bloomberg* reported that U.S. prosecutors had not identified evidence of widespread corrupt payments in Wal-Mart's Chinese operations, apparently one of the last areas of the company to be investigated. *Bloomberg* also reported that the investigation into Wal-Mart could be concluded by the end of 2016. As of August 2016, neither the DOJ nor the SEC have filed charges and the statute of limitations has potentially run for much of the alleged misconduct.

Federal courts have so far dismissed private civil litigation stemming from the accusations. In March 2015, a federal court in Arkansas dismissed a shareholder derivative suit that alleged that Wal-Mart's directors failed to properly investigate the alleged wrongdoings of its Mexican subsidiary; a decision the Eighth Circuit affirmed in July 2016. Citing this dismissal, in May 2016, the Delaware Chancery Court rejected similar claims.

C. FCPA-Related Civil Litigation

The FCPA does not provide for a private cause of action. Nevertheless, enterprising shareholders, employees, competitors, and even foreign governments have sought alternative means to use allegations of bribery as a basis to bring derivative actions, securities class-action suits, and whistleblower complaints, among other legal actions.

1. Derivative Actions

When a publicly traded company resolves an FCPA investigation brought by the DOJ or the SEC, or discloses that such an investigation is underway, the company's shareholders can file derivative suits. These suits typically attempt to prove that the company's board of directors breached its fiduciary duty by failing to implement or adequately monitor internal anti-bribery controls.

Upon filing a derivative suit, a plaintiff must allege with particularity that either (a) the plaintiff has satisfied the demand requirement (*i.e.*, the plaintiff has sent a demand to the board of directors that it immediately cease the challenged behavior or action) or (b) exercising the demand requirement would be futile. Ordinarily, a plaintiff is expected to first notify the board of directors of the demand in writing. However, once a prospective plaintiff undertakes that action, if the board of directors decides not to pursue the shareholder-plaintiff's demand, the board of directors is ordinarily shielded under the business judgment rule from liability. Therefore, many plaintiffs seek to allege that making such a demand would be futile because the board of directors is self-interested in the outcome of such litigation. Courts have required that "a plaintiff must show with particularized facts that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as failing to act in the face of a known duty to act" to establish liability for inadequate oversight. *Freuler v. Parker*, 803 F. Supp. 2d 630, 640 (S.D. Tex. 2011) (applying Delaware law and citing *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (emphasis in original)). Moreover, plaintiffs must further show that "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, [they] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Midwestern Teamsters Pension Trust Fund v. Baker Hughes, Inc.*,

Civil Action No. H-08-1809, 2009 WL 6799492, *4 (S.D. Tex. May 7, 2009) (quoting *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006)). The mere fact of a violation is not sufficient to prove bad faith on the part of the directors. *Id.*

a. Dismissed Cases

Plaintiffs have a heavy burden to shoulder in order to survive a motion to dismiss and pursue their claims successfully. Indeed, courts have regularly noted that "a 'breach of [directors'] duty of attention or care in connection with the on-going operation of the corporation's business . . . is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Freuler*, 803 F. Supp. 2d at 639 (citing *Caremark*, 698 A.2d at 967).

Numerous shareholder derivative actions based on the claim of a director's breach of his fiduciary duties have been dismissed. On July 25, 2012, for example, the U.S. District Court for the District of Massachusetts dismissed a lawsuit filed by shareholders against officers and directors of Nevada-based Smith & Wesson Holding Corporation ("Smith & Wesson"). The suit followed an indictment of the company's former international sales director based on FCPA allegations (*see* Smith & Wesson at p.151), and was dismissed based in part on the difficult threshold to prove director liability. Similarly, the U.S. District Court for the Eastern District of Louisiana dismissed a shareholder derivative suit with prejudice on March 5, 2013, after the plaintiff's motion to stay a previous order to dismiss was denied. The suit was filed against officers and directors of Delaware-incorporated Tidewater Inc. in connection with alleged bribes paid to Azerbaijani and Nigerian government officials (*see* Tidewater at p.268).

In May 2015, the U.S. District Court for the Southern District of New York dismissed for lack of subject-matter jurisdiction a shareholder derivative suit surrounding violations of the FCPA by Avon Products, Inc. in Argentina, Brazil, China, India, Japan, and Mexico. In this case, the Court ruled that state law claims of breach of fiduciary duty, waste of corporate assets, and unjust enrichment predicated on FCPA violations do not invoke a federal question granting federal court jurisdiction.

Several current and former board members of HP Inc. faced three sets of derivative shareholder lawsuits, all of which have been dismissed. The first suit, filed in October 2010, alleged violations of the False Claims Act, the Anti-Kickback Act of 1986, the Truth in Negotiations Act, and the FCPA. This suit was dismissed by the U.S. District Court for the Northern District of California dismissed this suit in March 2012. In addressing the FCPA violations, the Court found that the Plaintiff had failed to plead with particularity that the Board knew or disregarded information about alleged bribery in Russia by personnel at its German subsidiary prior to learning of the arrests in December 2009. The second suit, filed in 2011, cited investigations into allegations of bribery in Austria, Germany, the Netherlands, Serbia, and the Commonwealth of Independent States. The U.S. District Court for the Northern District of California dismissed the case twice with leave to amend prior to dismissing the case with prejudice in May 2013, which the Ninth Circuit affirmed in October 2015. Each time, the District Court found that the complaint did not meet the particularized pleading standard required of shareholder derivative suits. The third suit was filed in February 2014, in the U.S. District Court for the Northern District of California, and stated, in part, that HP's Board, "as a de facto matter of policy, manifested over and over again in the various bribery schemes alleged herein, consistently elevated revenues and profits over compliance with laws and regulations designed to protect the Company and its shareholders." In light of the October 2015 Ninth Circuit ruling in the second suit above, the parties voluntarily dismissed the third case in April 2016.

Other FCPA–related shareholder derivative actions that have been dismissed include (i) a shareholder derivative suit brought against directors of Archer-Midlands-Daniels in the Chancery Division of the Cook County (Illinois) Circuit Court on January 16, 2014, (dismissed by the trial court on December 2, 2015, and appeal dismissed on May 4, 2016); (ii) suits against the officers and directors of Parker Drilling Company by shareholders, filed in Texas state and federal court, alleging that the plaintiff shareholders had not been sufficiently informed that the company was under investigation by the DOJ and the SEC for its use of "customs and freight forwarding agents" in Kazakhstan and Nigeria (with the federal case being dismissed on March 14, 2012, and the state case on July 23, 2012); (iii) a derivative suit by the Rohm and Haas Company, which sought specific performance against the Dow Chemical Company regarding an aborted acquisition (dismissed by a Delaware Chancery court in January 2010) (*see* Dow Chemical at p.337); (iv) a lawsuit filed by a Teamsters' pension trust fund in the Southern District of Texas against current and former officers and directors of Baker Hughes (magistrate judge's memorandum and recommendation of dismissal adopted in May 2010) (*see* Baker Hughes at p.333); (v) a derivative claim against current and former directors of BAES by the City of Harper Woods (Michigan) Employees' Retirement System in the U.S. District Court for the District of Columbia (dismissal affirmed in December 2009) (*see* BAE Systems at p.239); and (vi) an ironworkers' pension fund's claim in the Western District of Pennsylvania against current and former Alcoa officers and directors based on the alleged bribes to Bahraini government officials (dismissed in July 2008) (*see* Dahdaleh at p.494).

b. Settlements

A few derivative suits, however, have resulted in settlements in which the defendant companies adopted enhanced anti-corruption programs and paid the attorney fees of the plaintiff shareholders, including *NCR Corporation*, *Johnson & Johnson*, *Halliburton*, *SciClone Pharmaceuticals*, and *Maxwell Technologies*.

In January 2014, Georgia-based ATM manufacturer NCR Corporation reached a settlement with a shareholder over allegations that company executives and board members knowingly allowed NCR to violate the FCPA in China and the Middle East, and to violate U.S. sanctions imposed on Syria. The litigation began in 2012 following a story in *The Wall Street Journal* in which a tipster accused the company of violating U.S.–imposed economic sanctions on Syria by continuing to do business in the country. An NCR shareholder subsequently filed a derivative lawsuit in Georgia state court which was then removed to federal court in April 2013. Following several months of negotiations, the parties reached a settlement which provided, in part, that NCR would increase compliance training for its employees and implement a process for tracking company gifts given to government officials, with a special focus on NCR's policies in China. The settlement was approved by Judge Steven C. Jones in the U.S. District Court for the Northern District of Georgia on April 8, 2014. In October 2012, the U.S. District Court for the District of New Jersey approved a settlement in a shareholder derivative case filed against Johnson & Johnson that alleged corrupt practices by Johnson & Johnson in Greece, Poland, and Romania, as well as under the U.N. Oil for Food Program in Iraq. Under the settlement, Johnson & Johnson agreed to (i) adopt and reinforce governance and compliance procedures; (ii) evaluate and compensate its employees on their adherence to those procedures; (iii) fund the governance and compliance reforms for the five-year term of the agreement; and (iv) reimburse plaintiffs' legal fees and expenses up to a cap. An appeal challenging the settlement was dismissed on January 15, 2014.

In June 2012, Halliburton entered into a proposed settlement agreement to resolve shareholder actions brought against it based in part on its alleged involvement in a Nigerian bribery scheme.

Litigation began in May 2009 when two pension funds filed separate shareholder derivative suits in Texas state court against current and former Halliburton directors. In January 2011, a Halliburton shareholder submitted a separate demand to the board, alleging essentially the same conduct in violation of the FCPA, which gave rise to the consolidated complaint. Without admitting liability, Halliburton entered into a settlement agreement with plaintiffs, later approved by the Harris County District Court, under which Halliburton agreed to pay the plaintiffs' legal fees and implement changes to its corporate governance policies, which included a revision of its code of business conduct and the introduction of FCPA training.

In February 2012, Maxwell Technologies entered into a proposed settlement to resolve consolidated derivative actions filed by shareholders in connection with allegations that the company bribed officials of a Chinese state-owned electric utility company (*see* Maxwell Technologies at p.218). Maxwell Technologies agreed to pay $3 million in attorneys' fees and to adopt enhanced compliance measures. Although the settlement did not require a Mandarin-fluent compliance coordinator, the company did agree to establish a new FCPA and Anti-Corruption Compliance department, which would be spearheaded by a Chief Compliance Officer. In addition to other enhanced governance measures, including due diligence procedures, training, and audit control testing, the settlement agreement also provided for changes to the company's executive compensation policy.

In December 2011, a California state court approved a settlement agreement to resolve consolidated derivative lawsuits against SciClone Pharmaceuticals, which had disclosed previously that it was under investigation by the SEC and the DOJ in connection with its interactions with government-owned entities in China. In addition to agreeing to pay $2.5 million in plaintiffs' attorneys' fees, SciClone agreed to adopt enhanced corporate governance measures, including: (i) the engagement of a compliance coordinator, fluent in English and Mandarin, who would conduct annual compliance reviews, report directly to the company's audit committee, and file quarterly reports with SciClone's legal counsel, CEO, CFO, and internal and external auditors; (ii) an enhanced "Global Anti-Bribery & Anti-Corruption Policy" designed to prevent and detect violations of the FCPA and other applicable laws; (iii) maintaining the company's internal audit and control function; (iv) due diligence reviews in connection with the hiring of all "foreign agents and distributors;" (v) mandatory employee compliance training; and (vi) modifications to the company's whistleblower program.

c. Pending cases

The high legal burden and historical lack of success in eliciting large monetary settlements or judgments have not precluded plaintiff shareholders from attempting to bring similar lawsuits, and a number of shareholder derivative actions are pending.

The most publicized pending shareholder lawsuits have been filed against Wal-Mart in connection with allegations that it bribed Mexican government officials in order to facilitate the granting of building permits for the construction of its stores in 2005 and 2006 and later sought to conceal the evidence (*see* Wal-Mart at p.396). Following the publication of these allegations in the *New York Times*, Wal-Mart has been mired in litigation, having spent hundreds of millions of dollars on compliance and FCPA–related matters. Proceedings were separately consolidated in the Delaware Court of Chancery and the U.S. District Court for the Western District of Arkansas. The Delaware case, which was consolidated on September 3, 2012, focused on the production and inspection of relevant books and records pursuant to Del. Code Ann. tit. 8, § 220. On May 20, 2013, the chancery judge heard oral arguments and ruled that Wal-Mart must provide plaintiffs with substantial additional internal files, including all documents in the

custody of eleven custodians, certain director-level documents, as well as documents protected by the attorney-client privilege and the attorney work-product doctrine. Wal-Mart appealed, but in a sweeping July 23, 2014 opinion, the Supreme Court of Delaware upheld the Chancery Court's ruling, finding that all of the categories of documents were "necessary and essential" to the shareholders because they addressed the "crux of the shareholder's purpose" and were unavailable by other means.

In the Arkansas case, the U.S. District Court granted Wal-Mart's motion to dismiss on March 31, 2015, and this decision is currently on appeal with the Eighth Circuit. The plaintiffs in the Arkansas case are seeking to initiate a derivative action against 19 named directors and officers and argued that any demand on the Wal-Mart board to initiate the claims against the named defendants would be futile. The Court, in dismissing the action, agreed with Wal-Mart that the plaintiffs failed to plead with particularity that a majority of the board at the time of the filing of the action lacked independence and was not disinterested. Out of the 15 directors at the time of the filing of the action, five were not members of the Board during the relevant period, and the pleadings do not have any particularized allegations on a director-by-director basis as to another five directors as to why they would not be able to exercise disinterested business judgment.

On May 1, 2015, one month after the Arkansas case was dismissed with prejudice, the Plaintiffs in the Delaware case filed a complaint alleging breach of fiduciary duty. This case was dismissed on May 13, 2016, on the grounds of issue preclusion, with the Delaware Chancery Court ruling that the issue of demand futility had been litigated by the Arkansas plaintiffs.

Nevada-based gambling company Wynn Resorts Limited Corporation ("Wynn") faces a lawsuit by shareholders for alleged FCPA violations related to casino resort projects in Macau. The shareholder derivative suits were filed in federal and state courts following an inquiry by the SEC regarding the company's $135 million donation made to the University of Macau's Development Foundation. The federal and state suits allege that Wynn made the donation to the University of Macau in an improper attempt to influence the Macanese government and to expedite its approval of a land concession agreement needed by Wynn to build a new casino resort. The federal plaintiffs filed a consolidated claim on August 6, 2012 in the U.S. District Court for the District of Nevada. On February 1, 2013, the district court granted Wynn's motion to dismiss for failure to meet the requirements of the heightened pleading standard of Fed. R. Civ. P. 23.1, but permitted the plaintiffs to file an amended complaint. Plaintiffs subsequently filed an amended complaint on April 8, 2013. Wynn's motion to dismiss on the same grounds was granted on March 13, 2014, and an appeal is pending with the Ninth Circuit.

Och-Ziff Capital Management is currently facing a shareholder derivate suit that was filed in September 2015 in the New York Supreme Court in New York County for alleged FCPA violations in Africa. The Compliant alleges that the board of directors breached their fiduciary duties in relation to the events leading to FCPA investigations by the DOJ and SEC including allegations that: (i) Och-Ziff extended a $100 million no interest loan to President Mugabe of Zimbabwe in exchange for access to platinum reserves; (ii) Och-Ziff extended questionable loans in the Democratic Republic of Congo that ultimately allowed it to acquire or control various natural resource assets at underpriced value, including several that had been nationalized from foreign investors shortly before their re-sale; and (iii) Och-Ziff is entered into a hotel deal for the benefit of Muammar Gaddafi after receiving approximately $300 million in investments from the Libya Investment Authority sovereign wealth fund.

2. Class Action Securities Suits

In addition to derivative actions, would-be plaintiffs also have the option of bringing class action securities lawsuits pursuant to Section 10(b) of the Exchange Act and Rule 10b-5, which states that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme, or artifice to defraud, (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

To state a claim under Section10(b) or Rule 10b-5, a shareholder plaintiff must plead that the defendant company or directors "made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff injury."

Moreover, the Private Securities Litigation Reform Act ("PSLRA") established more stringent pleading standards, requiring that the complaint must (i) "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed," and (ii) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."

Providing detailed factual allegations that the defendants acted with the necessary scienter has proved the most difficult element for plaintiffs to plead sufficiently. To meet the "strong inference" requirement, the United States Supreme Court has required that the pleaded facts be cogent and create an inference "at least as compelling as any opposing inference of nonfraudulent intent" that the defendant sought to deceive, manipulate, or defraud.

In addition, in 2010, the U.S. Supreme Court made it even more difficult for plaintiffs who acquired shares extraterritorially to file claims in U.S. federal courts. In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the Court reversed previous federal jurisprudence, holding that Section 10(b) and Rule 10b-5 do not apply extraterritorially. The Court specified that plaintiffs could only bring such cases if "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange."

a. Notable Dismissed Cases

A number of plaintiffs have failed to meet these stringent standards, including:

- a capital management fund that filed suit following GE's acquisition of InVision, alleging that InVision and its officers had misrepresented that InVision was in compliance with the law before announcing that an internal investigation revealed possible violations of the FCPA, resulting in a drop of the InVision stock price (dismissal by the U.S. District Court for the

Northern District of California affirmed by the Court of Appeals for the 9th Circuit in November 2008);

- shareholders who filed suit against Siemens, claiming that that the company had misrepresented the scope and magnitude of the corruption discovered by multiple ongoing investigations (dismissed by the U.S. District Court for the Eastern District of New York in March 2011);

- class action plaintiffs who alleged that the stock of SciClone Pharmaceuticals, Inc. ("SciClone") had dropped 40 percent the day it was announced that the SEC and the DOJ were investigating possible FCPA violations related to the company's business in China (voluntarily dismissed by plaintiffs in the U.S. District Court Northern District of California on December 1, 2010);

- class action plaintiffs alleging that PetroChina engaged in bribery, political corruption, and undisclosed related party transactions but falsely claimed to have adequate internal controls (dismissed by the U.S. District Court for the Southern District of New York on August 3, 2015 for failing to establish that the underlying fraud occurred during the applicable timeframe and for failing to establish that PetroChina's statements about its compliance practices were false or misleading); and

- shareholders who filed suit against Wal-Mart alleging unlawful and unethical conduct in connection with allegations of a bribery scheme at Wal-Mart's largest subsidiary, Wal-Mart de Mexico (dismissed by the U.S. District Court for the Western District of Arkansas on March 31, 2015 for failing to satisfy the requirements for pleading demand futility).

b. Notable Settlement Agreements

Despite the substantial pleading threshold burdens and limitations on extraterritoriality, some plaintiffs have successfully obtained substantial court-approved settlements. Such cases include:

- a class action lawsuit initiated in the U.S. District Court for the Southern District of New York against Avon Products Inc., in which plaintiffs alleged that the company had falsely assured investors that it had effective internal controls and accounting systems ($62 million settlement in August 2015);

- a securities fraud suit in the U.S. District Court for the Northern District of California against UTStarcom, Inc., which included allegations by plaintiffs of FCPA violations involving the company's activities in China, India, and Mongolia ($30 million settlement in August 2010);

- an action filed in the U.S. District Court for the District of Utah against Nature's Sunshine Products wherein plaintiffs alleged that the company and several officers made false statements in order to hide serious financial fraud and FCPA violations ($6 million settlement in September 2009);

- a class action lawsuit in the U.S. District Court for the Middle District of Florida in which plaintiffs alleged that Faro Technologies had overstated sales, understated the cost of goods

sold, and concealed its overstatement of profit margins as a result of violations of the FCPA ($6.875 settlement in October 2008);

- a securities fraud suit initiated in the U.S. District Court for the District of Texas wherein plaintiffs alleged that Willbros Group inflated its stock price through violations of the FCPA and utilized that inflated stock price to complete a $70 million offering of Convertible Senior Notes and enter into a $150 million credit agreement ($10.5 million settlement in February 2007);

- a securities action filed in the U.S. District Court for the Northern District of Georgia against Immucor, Inc., wherein plaintiffs claimed that the company made false or misleading statements about the scope and gravity of corruption-related investigations in Italy ($2.5 million settlement in May 2007); and

- a class action lawsuit brought in the Superior Court for the State of California, County of San Diego, against Titan Corporation, in which plaintiff shareholders alleged that the company's FCPA violations prevented it from entering into a definitive merger agreement with Lockheed Martin ($61.5 million settlement in December 2005).

c. Class-Action Suit Against Petrobras

Following the revelations and allegations that arose in late 2014 in connection with the Brazilian federal police investigation *Operation Car Wash* (discussed in detail in our Focus Issues, above), investors filed a class-action lawsuit against Petrobras (whose ADRs are listed on the NYSE) on December 8, 2014 in the U.S. District Court for the Southern District of New York.

In the complaint, plaintiffs alleged that Petrobras "made false and misleading statements by misrepresenting facts and failing to disclose a multi-year, multi-billion dollar money-laundering and bribery scheme." The plaintiffs alleged that former Petrobras senior executives received kickbacks from companies operating in the Brazilian oil and gas industry in exchange for inflated contracts. The plaintiffs have attempted to meet the scienter requirements by arguing that Petrobras executives' "knowledge of the fraud is attributable to [Petrobras] for the purposes of assessing [its] scienter."

On February 2, 2016, Judge Jed Rakoff granted a motion by plaintiffs to certify two classes—a class for Securities Act claims under Sections 11, 12(a)(2) and 15 and a class for Exchange Act claims under Sections 10(b) and 20(a)—and also appointing representative parties and class counsel. Conducting a detailed Rule 23 class-certification analysis, Judge Rakoff concluded that the classes satisfied the numerosity requirement, that there existed common questions of law and fact, that the claims or defenses of the representative parties were typical of the claims or defenses of the class, and that the representative parties will adequately represent the interests of the class. In reaching his decision, Judge Rakoff rejected Petrobras' argument that the high volume of actions brought by individual plaintiffs weighed against the superiority of a class action, concluding instead that the stream of individual actions risked "growing into an unmanageable flood."

3. Civil Actions Brought by Partners or Competitors

Competitors have brought claims under federal and state statutes alleging harm related to lost contracts stemming from FCPA-related violations. Most notably, competitors have brought claims under the Racketeering Influenced Corrupt Organization ("RICO") Act in addition to other federal and state laws that prohibit anticompetitive practices.

a. Supreme Fuels v. IOTC

On October 21, 2008, the Dubai-based Supreme Fuels filed suit in the U.S. District Court for the Southern District of Florida against International Oil Trading Company ("IOTC"), and its co-owners, Harry Sargeant, the then-Finance Chairman of the Republican Party of Florida, and Mustafa Abu-Naba'a, a Jordanian resident of the Dominican Republic, asserting multiple claims under the RICO Act, the Clayton Act, and various Florida state laws. The suit alleged a conspiracy to bribe key Jordanian government officials—beginning in 2004—that would ensure that IOTC would be the sole recipients of more than $1 billion in U.S. government contracts for the supply of fuels to the U.S. military in Iraq. On May 6, 2011, the parties' settlement was approved by the court. Under the settlement, the defendants agreed to pay $5 million, plus post-judgment interest.

A Florida jury also found Harry Sargeant and Mustafa Abu-Naba'a liable for a separate breach of contract and fraud action filed by their former business partner in IOTC Jordan, Mohammad Al-Saleh. Sargeant and Abu-Naba'a contracted with Al-Saleh—a member of the Jordanian royal family by virtue of his marriage to Princess Alia Al Hussein, the half-sister of King Abdullah II—to curry favor with the royal family, but later sought to replace Al-Saleh with a former CIA agent after the lucrative contracts had been secured. Following the two-and-a-half week trial in Palm Beach Florida Circuit Court in July 2011, the jury awarded Al-Saleh over $28 million in damages. On August 7, 2013, the District Court of Appeal of the State of Florida, Fourth District, denied the defendants' direct appeal of the judgment, but remanded the case to the circuit court to determine the proper amount of pre-judgment interest due to the plaintiff. Although the circuit court eventually determined Al-Saleh was owed over $3 million in prejudgment interest, the case has continued and involved appeals back to the Fourth District as well as applications to the Florida Supreme Court. As of July 2016, the case in the Palm Beach Florida Circuit Court was still active.

b. NewMarket v. Innospec

On July 23, 2010, NewMarket Corporation ("NewMarket") filed a lawsuit against Innospec in the U.S. District Court for the Eastern District of Virginia. Bringing claims under the Sherman Act, the Robinson-Patman Act, the Virginia Antitrust Act, and the Virginia Business Conspiracy Act, NewMarket alleged that Innospec paid bribes and kickbacks to foreign officials to ensure that NewMarket's fuel additive, which competed with Innospec's, would be at a competitive disadvantage in Iraq and Indonesia. On September 13, 2011, the parties reached a settlement, with Innospec agreeing to pay NewMarket a total of $45 million through a combination of cash payments, promissory notes, and common stock.

c. Extraterritoriality, Morrison, and TJGEM v. Republic of Ghana

Recently, defendants have sought to dismiss such lawsuits by challenging the extraterritoriality of federal securities fraud statutes following the Supreme Court's April 2010 decision in *Morrison v. National*

Australia Bank. The *Morrison* Court found that because the plain language of Section 10(b) of the Securities Exchange Act of 1934 referred only to the purchases or sales of securities listed on an American stock exchange or in the United States, the law did not reach securities purchased on foreign exchanges, despite the fact that the underlying fraud upon which the suit was based occurred in Florida.

In *TJGEM v. Republic of Ghana*, a case in the U.S. District Court for the District of Columbia in March 2013 against various Ghanaian officials—including the Mayor of Accra—and the New Jersey-based Conti Construction Co. Inc. ("Conti Construction"), the plaintiff alleged that the defendants engaged in various racketeering, fraud, and other corrupt practices to induce and coerce TJGEM to pay bribes and kickbacks in connection with a sewer redevelopment project, which occurred primarily in Ghana. The defendants moved to dismiss all of the claims in TJGEM's complaint on multiple grounds, including sovereign immunity, the doctrine of *forum non conveniens*, and lack of personal jurisdiction. The defendants, however, have taken aim most directly at the RICO claims, both on the merits and on the grounds that the claims are barred under the holding of *Morrison*. After defendants filed their motion to dismiss, plaintiffs amended their complaint, significantly expanding the factual matrix showing the defendants' actions in the United States.

On September 11, 2013, the Ghanaian defendants filed a motion to dismiss the amended complaint, which was granted on December 31, 2013. The District Court dismissed the complaint against the Ghanaian defendants for lack of subject matter jurisdiction because they were undisputedly foreign sovereigns under the Foreign Sovereign Immunities Act ("FSIA") and TJGEM had not pleaded facts sufficient to show that one of the enumerated exceptions to the FSIA applied. TJGEM's claims against Defendant Conti were also dismissed by the court as required by the rules of comity and Supreme Court precedent in *Republic of the Philippines, et al. vs. Pimentel*, which provides that a case must be dismissed if an un-joined foreign sovereign is a required party to the suit under Federal Rule of Civil Procedure 19.

TJGEM appealed the decision of the District Court on March 20, 2014, and on June 9, 2015, the Court of Appeals for the D.C. Circuit upheld the District Court's decision in full.

4. Lawsuits by Foreign Governments and State-Owned Entities

Companies that have resolved charges with the DOJ and SEC occasionally face additional U.S.–based lawsuits from the countries or state-owned entities implicated in the action. The mere fact that those government entities may themselves have solicited or received the payments in question has not prevented them from bringing suit. Courts, however, have appeared reluctant to allow such entities to bring claims when the foreign entities could themselves be considered co-conspirators in the matter. Moreover, these types of plaintiffs face the same challenges as more typical shareholders in meeting the stringent pleading standards, and the limitation of the application of the securities laws extraterritorially under *Morrison*. But if the foreign government or state-owned entity can survive a motion to dismiss, a substantial settlement can be attained.

a. Alcatel-Lucent

On December 27, 2010, Alcatel-Lucent agreed to pay substantial criminal and civil penalties to the DOJ and the SEC, and agreed to a three-year deferred prosecution agreement, to resolve investigations of FCPA violations in Costa Rica, Taiwan, Honduras, Malaysia, and Kenya, among others.

(See Alcatel-Lucent p.229) In Costa Rica, for example, Alcatel-Lucent was alleged to have paid $18 million in bribes through consultants to officials at the Instituto Costarricense de Electricidad ("ICE"), the state-owned telecommunications company, and earned over $23 million in profits on the substantial contracts it secured with ICE.

In April 2010, shortly after Alcatel-Lucent disclosed the tentative agreements in February 2010, ICE sued Alcatel-Lucent and three of its subsidiaries in Florida state court, seeking over $200 million in damages, arguing that Alcatel-Lucent had operated a racketeering enterprise. The state court dismissed that suit under the doctrine of *forum non conveniens*, and noted that ICE could not transform the criminal prosecution into a civil RICO claim "because civil RICO claims do not apply extraterritorially to foreign plaintiff's foreign injury for bribes made to foreign officials."

ICE then sought to have the U.S. District Court for the Southern District of Florida reject the plea agreements between Alcatel-Lucent and the Department of Justice, and to be recognized as a "crime victim" under the Crime Victims Rights' Act, which affords a qualifying victim the right to seek restitution. *See* 18 U.S.C. § 3771.

In its petition for relief, ICE argued that as soon as it learned of the corruption, it immediately terminated the directors and employees who were involved in taking the bribes. It also argued that ICE itself did not profit from the bribes, and that the corrupt activities of Alcatel-Lucent and the ICE's corrupt employees caused ICE significant losses. ICE further claimed that the DOJ's decision not to provide the Costa Rican company with the monetary fines it obtained was "the product of the same imperialist view of Latin America, the Caribbean and lesser-developed nations that spawned Alcatel's fraudulent scheme."

At a subsequent status conference, the DOJ made clear, however, that it was not mere ICE "employees," but "nearly half of ICE's board of directors [that] were soliciting and taking hundreds of thousands of dollars in bribes." The district court agreed, rejecting ICE's petition for victim status and restitution, in part because it considered the company to be a "co-conspirator" in the scheme:

I think you have, even though not a charged conspirator co-conspirator relationship, that's essentially what went on here; that given the high-placed nature of the criminal conduct within [ICE's] organization, the number of people involved, that basically it was 'Bribery Is Us,' meaning that everybody was involved in it. Even though you didn't know specifically, it's enough to say that the principals were involved here.

On June 14, 2011, the Court approved guilty pleas of the subsidiaries and the deferred prosecution agreement between Alcatel-Lucent and the United States, which did not include an award of restitution. On the same day, ICE filed its notice of appeal of the Court's order.

On June 15, 2011, ICE petitioned the United States Court of Appeals for the Eleventh Circuit, requesting that the circuit court issue a writ of mandamus directing the district court to recognize ICE as a "crime victim," allow for restitution, and direct the district court to vacate Alcatel-Lucent's guilty pleas and the deferred prosecution agreement. On June 17, 2011, the Eleventh Circuit denied ICE's petitions.

On August 3, 2011, the Eleventh Circuit denied ICE's appeal of the district court's approval of the guilty pleas and the deferred prosecution agreement for lack of jurisdiction, noting that the district court had not entered a final judgment, but had simply approved a deferred prosecution agreement. Moreover,

the Court relied on the well-established default rule in the Eleventh Circuit, that "crime victims have no standing to appeal a defendant's sentence in a criminal proceeding." Following the Eleventh Circuit's denial, ICE petitioned for a writ of certiorari with the United States Supreme Court, which was denied on December 10, 2012.

b. Aluminium Bahrain

Bahrain's state-owned steel company, Aluminum Bahrain ("Alba"), filed a suit in U.S. Court for the Western District of Pennsylvania against Alcoa on February 27, 2008 (and again on November 28, 2011 after the end of a DOJ-requested stay). Alba claimed that the Pennsylvania-based company had engaged in misconduct including overcharging, fraud, and bribery of Bahraini officials over a 15-year period, and had violated the RICO statute. On January 27, 2012, Alcoa filed a motion to dismiss, contending that the "enterprise" identified by Alba in connection with the racketeering activities under RICO was "essentially foreign." As a result, Alcoa urged the district court to treat Alba's RICO–based claims as extraterritorial applications of the statute, and unreachable under *Morrison*.

The district court, however, rejected Alcoa's argument. Finding that Alba had adequately established that Alcoa, its affiliated entities, and senior executives were domestic, the Court denied Alcoa's motion to dismiss on June 11, 2012. The district court pointed to the 60-percent ownership of Alcoa in its Australian subsidiary, which had supplied the aluminum involved in the alleged bribery scheme. The Court also criticized case law relied upon by the defendants, which judged the applicability of RICO by testing whether the wrongful conduct occurred in the United States, stating that the so-called "conduct test" had been rejected by the Supreme Court in *Morrison*.

On October 9, 2012, Alba and Alcoa entered into a settlement agreement to permanently resolve the pending lawsuit. Pursuant to the agreement, Alcoa, without admitting liability, agreed to pay Alba $85 million in two equal installments—one-half at the time of settlement, and the balance after one year—in exchange for a dismissal of all claims against Alcoa.

Alba filed a second, similar suit on December 18, 2009, in the U.S. District Court for the Southern District of Texas against the Sojitz Corporation ("Sojitz") and its American subsidiary. Alba described a 12-year scheme in which Sojitz's two predecessor entities paid over $14 million in bribes to two Alba employees in exchange for unauthorized discounted prices. In May 2010, the DOJ intervened and sought a stay of discovery. The enforcement agency noted that it had been investigating FCPA violations committed by Alcoa and stated that, although it did "not mean to overstate the relationship between the government's investigation into Sojitz and its investigation into Alcoa, the [Department of Justice's] Fraud Section believes that some individuals may have been involved in both alleged bribery schemes." On January 16, 2013, the parties settled the case out of court, and jointly stipulated to the dismissal of the action.

c. The Republic of Iraq v. ABB AG et al.

On June 27, 2008, the Iraqi government filed suit in the U.S. District Court for the Southern District of New York based on allegations of bribery in connection with the U.N. Oil-for-Food Programme ("OFFP") (*see* ABB at p.225). The Iraqi Government brought the suit against over 90 corporations—almost 50 parent companies and over 40 of their affiliates—including the companies discussed in this Alert in connection with the OFFP settlements. The lawsuit sought damages in connection with RICO

and common law claims, including fraud and breach of fiduciary duty, which the Iraqi government asserted both directly and as *parens patriae* on behalf of the Iraqi people.

On January 15, 2010, defendants filed a consolidated motion to dismiss the claims on the basis of multiple grounds. The defendants argued that Iraq lacked standing because (i) it was the mastermind behind the alleged conspiracy; (ii) any injury that Iraq suffered was the result of its own conduct; and (iii) only U.S. states—not foreign nations—may seek redress for injuries under the doctrine of *parens patriae*. The defendants also argued that Iraq's own misconduct bars the claims, because "a primary wrongdoer may not recover from secondary participants in the alleged scheme."

Much of the jockeying between the parties centered on the issue of attribution, as well as whether the current Iraqi government and the government under the "Hussein Regime" are one and the same. The defendants cited *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, arguing that a change in government, regime or ideology has no effect on that state's international rights and obligations because the state continues to exist despite that change. The Iraqi government countered that although the nation has continued to exist, the "Hussein Regime was not the nation, but the nation's self-proclaimed ruler (that is, its self-appointed agent)."

On February 6, 2013, the district court granted defendants' consolidated claim and dismissed Iraq's complaint with prejudice. Although the Court agreed with the defendants' argument that Iraq's status as a foreign nation bars it from making a *parens patriae* claim, it found that Iraq had standing to recover for the injury of its proprietary interest, which was caused by the wrongful depletion of the U.N. escrow account holding the proceeds of the OFFP. But although Iraq had standing in terms of an injury in fact, the Court found that the RICO claims could not be brought because the actions took place extraterritorially, as in *Morrison*, and there is no private right of action under the FCPA. With respect to the issue of attribution, the Court sided with the defendants, concluding that the "[Hussein] government, however deplorable it may have been, represented Iraq and its acts, however allegedly depraved, are attributable to the sovereign." The Court noted that its finding comports with the International Law Commission's Articles which state that when "a person acts in an apparently official capacity, or under the color of authority, the actions in question will be attributable to the State."

Iraq appealed the district court's decision and, on September 18, 2014, the Second Circuit upheld the order of the district court. Writing for the Second Circuit, Judge Kearse applied the doctrine of *in pari delicto* to dismiss Iraq's RICO claims, which stands for the principal that a plaintiff "who has participated in wrongdoing equally with another person may not recover from that other person damages resulting from the wrongdoing."Although primarily applied by courts to antitrust claims, Judge Kearse held that, as a common law defense, *in pari delicto* also applied to RICO claims. Accordingly, Iraq could not bring claims against the defendants for wrongs committed by the Hussein Regime, because the legal position of a foreign state survives changes in its government. The Court dismissed Iraq's FCPA claims because it did not find any evidence that Congress had intended to create a private right of action in the FCPA, and, lastly, the Court affirmed that the district court had properly declined to exercise supplement jurisdiction over Iraq's common law claims because they were essentially state law claims.

On October 2, 2014, Iraq filed for rehearing by the Second Circuit *en banc*; its petition for rehearing was denied on December 2, 2014.

d. Petróleos Mexicanos & Pemex-Refinanción v. SK Engineering & Siemens

On July 30, 2013, the U.S. District Court for the Southern District of New York dismissed the complaint of Petróleos Mexicanos, Mexico's national oil exploration corporation, and its subsidiary Pemex-Refinanción (collectively "Pemex"). Pemex sought $160 million in damages from SK Engineering & Construction Co. Ltd., a Korean conglomerate, and Siemens Aktiengesellschaft stemming from bribes the latter allegedly paid to Pemex officials to retain an oil refinery rehabilitation contract suffering from significant overruns. The complaint alleged that the defendants violated the RICO Act.

Relying on *Morrison*, Judge Stanton granted defendant's motion to dismiss, stating that Pemex's "RICO claims are extraterritorial: they allege a foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises." Pemex's original complaint, which had been dismissed, had sought as much as $1.5 billion in damages and alleged that the contract itself was a product of bribery. Judge Stanton was affirmed by the Court of Appeals for the Second Circuit in a summary opinion issued on September 3, 2014.

e. Petróleos Mexicanos & Pemex Exploración y Producción v. Hewlett-Packard Co.

On November 4, 2015, Petróleos Mexicanos & Pemex Exploración y Producción (collectively "Pemex") reached a settlement with Hewlett-Packard Co. ("HP") and Hewlett-Packard Mexico S. de R.L. de C.V. ("HP Mexico") to end a lawsuit over HP Mexico's alleged bribery of Pemex officials. The settlement came after Pemex made statements in a securities filing that seemed to contradict its claims against HP and HP Mexico.

On December 2, 2014, Pemex filed suit against HP and HP Mexico in the U.S. District Court for the Northern District of California alleging violations of RICO and the California Unfair Competition Law as well as fraudulent concealment and tortious interference with contracts in connection with HP Mexico's alleged bribery of Pemex officials. As discussed above, on April 9, 2014, HP had settled civil charges with the SEC and three HP subsidiaries had settled criminal charges with the DOJ in connection with conduct in Russia, Poland, and Mexico. HP Mexico entered into an NPA with the DOJ that required it to forfeit over $2.5 million.

As part of the NPA, HP Mexico admitted to paying more than $1 million in commissions to a consulting company that had close ties to a Pemex official in an effort to win a software sales contract with Pemex. HP Mexico agreed to pay the intermediary an "influencer fee" of 25% if awarded the $6 million contract. Because the intermediary was not a pre-approved partner and had not been subject to due diligence, HP Mexico instead passed the funds through another previously approved partner, which kept a small percentage of the fee.

The District Court initially granted in part the Defendants' motion to dismiss the suit, ruling that the complaint failed to meet a number of key elements that would give rise to a RICO action. Judge Freeman specifically found that Pemex's suit failed to allege facts sufficient to show that the pattern of activity in the alleged scheme was domestic. The Plaintiffs also failed to allege a "continuous" pattern of racketeering activity, either internationally or in the U.S., and the alleged activity fell outside of RICO's four-year statute of limitations. However, the Judge granted Pemex leave to amend its compliant to cure these deficiencies.

In August, 2015, however, the Defendants filed a motion to dismiss the (by then) amended complaint, reiterating many of the same arguments that had led to the partial dismissal of the first complaint and citing to Pemex's April 2015 SEC Form 20-F, which stated that the Internal Control Body of Petróleos Mexicanos had concluded after conducting an internal investigation that there had been no improper payments by HP Mexico to the former Pemex official. The Defendants chastised Pemex for taking a contradictory position in the litigation, claiming that Pemex was taking "its obligations under Federal Rule of Civil procedure 11—and to [the] Court—far less seriously than it does its obligations under the U.S. federal securities laws" and arguing that Pemex should voluntarily dismiss its case given the admission. Approximately two and half months later, HP and Pemex settled the case for undisclosed terms.

5. Whistleblower Complaints

The Dodd-Frank Act enacted the SEC's whistleblower protection program. In the 2012 fiscal year, the SEC received over 3,000 whistleblower tips, and 115 tips related to FCPA violations. However, since the enactment of the Dodd-Frank Act, courts have wrestled with the appropriate scope of protections for employee whistleblowers. Recent cases indicate that there may be some tension between the SEC and courts regarding the interpretation of the Dodd-Frank whistleblower provisions.

a. Internal Reporting and Whistleblowers Protections: Asadi v. GE Energy and the SEC's Response

Courts have split over the question of whether an individual who reports violations of secutities laws internally—but not to the SEC—qualifies as a "whistleblower" under the Dodd Frank Act and is eligible for the whistleblower anti-retaliation provisions. Section 922 of the Dodd Frank Act defines whistleblowers in part as those who provide information "to the Commission," while it also defines whistleblowers as those who make disclosures "protected under [SOX and any other law, rule, or regulation subject to the jurisdiction of the Commission." Some Courts, including the Fifth Circuit and some U.S. district courts have found that this laugnage is unambiguous and requires that an individual must have reported his or her concerns to the Commission to qualify for whistleblower protections.

In the 2013 case *Asadi v. GE Energy*, 720 F.3d 620 (5th Cir. 2013), the Court of Appeals for the Fifth Circuit held that, for an employee to qualify for Dodd-Frank whistleblower protections under the Dodd Frank Act, the employee must provide information relating to a violation of securities laws to the Commission. The Court held that, because Mr. Asadi only reported his concerns internally, he was not protected by the Dodd-Frank whistleblower protections when he was later terminated. Several district courts have followed the *Asadi* reasoning. *See, e.g., Wiggins v. ING U.S., Inc.*, 2015 WL 3771646, at *9–11 (D.Conn. June 17, 2015); *Verfuerth v. Orion Energy Sys. Inc.*, 65 F.Supp.3d 640, 642–46 (E.D.Wis.2014); *Banko v. Apple Inc.*, 20 F.Supp.3d 749, 756–57 (N.D.Cal.2013); *and Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–6 (D.Colo. July 19, 2013).

In response to the *Asadi* decision, the SEC adopted Release No. 34-75592 to explicitely clarify that, for purposes of the employment retaliation protections provided by Section 21F of the Exchange Act, an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9(a), which requires reporting specifically to the SEC, but is instead determined solely by Exchange Act Rule 21F-2(b)(1), which is broader and includes those who report internally. The Second Circuit and district courts in the First, Second, Third, Sixth, Eighth, Ninth, and

Tenth Circuits have found that Section 922 is ambiguous and that the SEC's final rule (giving protection to those who only report internally) therefore deserves *Chevron* deference. Thus, these courts—in contrast to the *Asadi* decision—give effect to the SEC's final rule and extend whistleblower protection to those who report their concerns internally without reporting to the SEC. *See, e.g, Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153–55 (2d Cir.2015); *Lutzeir v. Citigroup Inc.*, No. 4:14–cv–183, 2015 WL 7306443, at *2–3 (E.D.Mo. Nov. 19, 2015); *Somers v. Digital Realty Trust, Inc.*, 119 F.Supp.3d 1088, 1094–1106, No. C–14–5180 EMC, 2015 WL 4483955, at *4–12 (N.D.Cal. July 22, 2015); and *Yang v. Navigators Grp., Inc.*, 18 F.Supp.3d 519, 533–34 (S.D.N.Y.2014).

b. Extraterritoriality: Meng-Lin Liu v. Siemens A.G

Meng-Lin Liu v. Siemens A.G., decided by the Second Circuit on August 14, 2014, held that the whistleblower anti-retaliation provisions do not apply extraterritorially. In that case, Liu was a Taiwanese compliance officer who, while working in a Chinese subsidiary of the German company Siemens, internally reported corrupt payments in China and North Korea to Chinese and North Korean officials. Liu was terminated shortly thereafter and subsequently reported the suspected FCPA violations to the SEC. He then brought a claim against Siemens A.G. under the anti-retaliation provisions of the Dodd-Frank Act, but his claim was dismissed by the Southern District of New York on the grounds that he had alleged "essentially no contact with the United States regarding either the wrongdoing or the protected activity" and that Dodd-Frank does not apply extraterritorially. The Second Circuit affirmed, noting that none of the individuals or entities involved were U.S. citizens or entities, and that all alleged conduct and the whistleblowing itself took place outside the United States.

Most notably, however, the SEC filed an *amicus curiae* brief to the Second Circuit in *Meng-Lin Liu*, arguing that Liu should have been protected as a whistleblower under Dodd-Frank's whistleblower provisions. In its brief, the SEC argued against the Fifth Circuit's stance in *Asadi*, reasoning that it was Congress' express intent in crafting Dodd-Frank's whistleblower provisions not to reduce the effectiveness of existing compliance departments and that denying the Act's protections to internal reporters defeated that intent. Furthermore, the SEC argued that the statute's text was ambiguous and, therefore, the SEC's interpretation of the whistleblower provisions deserved judicial deference under *Chevron*. However, the Second Circuit declined to address the SEC's arguments, finding that it had sufficient grounds to dismiss the claim for other reasons and—in contrast to the Fifth Circuit's view in *Asadi*—"assum[ing] without deciding that internal reporting is sufficient to qualify for the statute's protection."

6. Suits Against Former Employees

On the other side of the coin, corporations that face FCPA investigations or charges can find themselves in the position of bringing suit against the employees who allegedly caused the violations. Most prominently, in late 2009, Siemens agreed to settle potential claims against two former CEOs and nine other former executives for alleged breaches of organizational and supervisory duties relating to the massive bribery scandal (*see* Siemens at p.315). The two former CEOs, Heinrich von Pierer, who ran the company from 1992-2005, and his successor, Klaus Kleinfeld, denied any wrongdoing, but agreed to settle the matters for €5 million and €2 million, respectively. Other former board members who have reached a settlement with Siemens include Uriel Sharef, who agreed to pay €4 million, Juergen Radomski and Johannes Feldmayer, who each agreed to pay €3 million, former Chairman Karl Hermann, who agreed to pay €1 million, and Klaus Wucherer, Rudi Lamprecht, and Edward Krubasik, who each settled

for €500,000. On November 28, 2012, Siemens reached a settlement with former management board member Thomas Ganswindt, terminating litigation proceedings between Siemens and Ganswindt in Munich, Germany.

On February 19, 2012, the casino resort developer Wynn filed a complaint in the District Court of Clark County Nevada against its then-director Kazuo Okada, Okada's Tokyo-based company Universal Entertainment Corp ("Universal"), and its wholly-owned U.S. subsidiary Aruze USA Inc. ("Aruze") (collectively the "Okada Parties"), alleging a breach of fiduciary duty and related claims. The complaint was prompted by allegations of FCPA violations committed by the Okada Parties in a resort development project in the Philippines. Okada then filed a petition in Nevada state court to compel Wynn to disclose its books and records relating to a $135 million donation made by the company in Macau, China.

According to Wynn's February complaint, Okada attempted to convince Wynn's board to pursue business opportunities in the Philippine gaming market throughout the 2000s. When Okada's suggestions were ignored, Okada pursued the opportunities through his own business, Universal. Wynn also contends that Okada sought to obtain those business opportunities by falsely implying to the local clients that Wynn would also be involved in the projects.

Questioning Okada's actions, Wynn commissioned several internal risk assessments on the regulatory and compliance climate in the Philippines in early 2011. Okada claims that he continued to press Wynn's board to participate in a project—planned by Okada and Universal—for a casino resort in Manila Bay. Wynn's internal assessments concluded that there was wide-spread corruption in the Philippine gaming industry and, with respect to Okada specifically, found certain anomalies regarding Universal's and Okada's dealings in the Philippines. Wynn retained a former FBI director to conduct an independent investigation into Okada's activities in the Philippines, the findings of which were summarized and issued in February 2012 in the so-called "Freeh Report." The Freeh Report uncovered illicit payments made by Okada to officials of the Philippine gaming regulator, including luxury lodging, dinners, and cash advancements for shopping sprees for the regulators and their families. These findings prompted Wynn to (i) redeem and cancel Aruze's shares in Wynn, which represented a 20% stake of Wynn's common stock, (ii) commence its efforts to remove Okada from the boards of Wynn and Wynn's affiliates (Okada was eventually removed from all such boards one year later, in February 2013), and (iii) on February 19, 2011, file the above-mentioned complaint with the Nevada state court.

On March 12, 2012, Okada filed an answer denying the claims, and alleging counterclaims against Wynn. The case was removed to the U.S. District Court for the District of Nevada, but was ultimately remanded. On April 8, 2013, the DOJ filed a motion to intervene and seeking partial stay of discovery. The DOJ stated that it had been conducting a criminal investigation of the Okada Parties based on the same allegations of FCPA violations. On May 2, 2013, the state court granted the DOJ's motion to intervene, and ordered a six-month stay of discovery to allow the DOJ to conduct its investigation. On October 31, 2013, in response to personal safety issues disclosed in a sealed DOJ declaration, the court ordered an additional six-month stay of discovery, barring new discovery requests but allowing the parties to compel responses to certain discovery requests that had already been served. On May 2, 2014, the court denied the DOJ's request for a second extension of the temporary stay but did grant its request to have the names of anyone cooperating with the DOJ investigation redacted from the file. A jury trial has been scheduled for February 6, 2017.

IV. DOJ Advisory Opinions

As originally passed in 1977, the FCPA contained no mechanism through which companies faced with questions about the appropriateness of certain conduct could obtain guidance from federal regulators. This changed in 1980 when, at the direction of President Carter, the DOJ instituted a Review Procedure aimed at providing guidance to entities subject to the FCPA. As initially instituted, the procedure only indicated that the DOJ would make a "reasonable effort" to respond to inquiries within thirty days, and provided the DOJ with freedom to either (i) state its enforcement position, (ii) decline to state its enforcement position, or (iii) "take such other position or action as it considers appropriate." Concern also existed that the DOJ and SEC would arrive at different interpretations as to the propriety of particular conduct. However, in 1981, the SEC issued a statement indicating that it would not commence an enforcement action against a company that received a favorable DOJ review letter.

In 1988 amendments to the FCPA, Congress directed the Attorney General to adopt revised review procedures to address some of the perceived drawbacks to the Review Procedure process. The DOJ finally adopted revised procedures, known as the Opinion Procedures, in 1992.

Under the DOJ's advisory opinion procedures, issuers subject to the FCPA and domestic concerns have been able to obtain an opinion as to whether future conduct would violate the FCPA's anti-bribery provisions. Under the revised procedures, companies may seek guidance on actual—not hypothetical—conduct so long as the request is "specific" and "all relevant and material information bearing on the conduct . . . and on the circumstances of the prospective conduct" is described. If the DOJ approves the conduct, there is a rebuttable presumption that the conduct as described in the request does not violate the FCPA.

Traditionally, DOJ advisory opinions contain language indicating that the opinion has "no binding application to any party which did not join in the Request, and can be relied upon by the requestor only to the extent that the disclosure of facts and circumstances in its request is accurate and complete and remains accurate and complete." In DOJ Opinion Procedure Release 08-02, however, the Department specifically referred to prior Opinion Release 01-01 as "precedent," suggesting that the guidance offered in the Opinion Releases may arguably be given greater weight by regulators than the traditional caveat language suggests. In addition, recent Opinion Releases have addressed increasingly complex transactions and factual circumstances, particularly in the mergers and acquisition context.

Summarized below are all of the DOJ Review and Opinion Procedure Releases issued to date.

1. DOJ Review Procedure Release 80-01

On October 29, 1980, the DOJ issued its first ever Review Procedure Release (later to be called Opinion Procedure Releases) in response to a request by an American law firm that sought to do business in an unnamed foreign country. The law firm had sought to establish a fund, amounting to approximately $10,000 per annum, for the American education and support of two adopted children of an elderly and "semi-invalid" honorary foreign official of the same country in which the firm sought to do business.

The foreign official's duties were described as "ceremonial," such that he was not in a position to make substantive decisions on behalf of the foreign government. The natural parents of the two children

were also employees of the foreign government, but they too were described as being "not in a position to make or to influence official decisions that would in any way benefit either the law firm or any corporations which may contribute to the education fund." In issuing no-action comfort, the DOJ noted that there had been no suggestion of any preferential treatment as a result of the proposed fund, nor had the firm obtained or retained (and did not expect to obtain or retain) any business as a result of its actions.

2. DOJ Review Procedure Release 80-02

Also on October 29, 1980, the DOJ issued Review Procedure Release 80-02, addressing a request by the American firm Castle & Cooke and two of its subsidiaries about a potential run for political office by the employee of one of its subsidiaries in a foreign country. The employee, who had worked for the subsidiary for ten years, was approached by a political party in the foreign country about running for office, and desired to retain his employment with the subsidiary during his campaign and while serving in office if elected. According to the Release, the employee's duties with the subsidiary did not involve any sort of advocacy work before the foreign government, and his continued employment by the corporation would be fully disclosed to the political party, the electorate and the foreign government.

In providing no-action relief, the request indicated that the employee would, if elected, refrain from participating in any legislative or other governmental action that would directly affect the corporation and his salary would be based on the amount of time he actually worked for the corporation. According to the Release, the government position was essentially part time and it was common for legislators to hold outside employment. Finally, the Release noted that local counsel opined that the arrangement, as structured, did not violate local conflict of interest or other laws.

3. DOJ Review Procedure Release 80-03

In a somewhat unique Release, the DOJ, also on October 29, 1980, released Review Procedure Release 80-03 in response to the submission by a domestic concern of a proposed contract with an attorney domiciled and functioning in West Africa. The original request contained merely a cover letter and a copy of the proposed contract, which apparently referenced the FCPA twice. First, the contract indicated that the attorney represented that he was not, and during the course of the contract would not be, a foreign official. The contract also expressly prohibited, with language that tracked the statute, payments that would violate the FCPA. The DOJ sought, pursuant to Section 50.18(g) of the Review Procedure, additional information about the attorney's background and qualifications, including potential "[g]overnment connections, his relationship with the domestic concern, the nature of the African business, particular performance expectations and pending projects of special interest in Africa . . . ."

The Release indicated that neither the original request (consisting of the contract and cover letter) nor the results of the DOJ's follow-up questions revealed anything that would cause concern about the application of the FCPA to the arrangement. The DOJ stated that "[i]f in fact there was a reasonable concern, a mere contract provision, without other affirmative precautionary steps, would not be sufficient" to avoid a possible violation of the statute. Although there lacked any reasonable concern, based on the facts as then known, about the application or possible violation of the FCPA, the DOJ "declined to respond to this Review Request by stating whether or not it will take an enforcement action" as it deemed review of a contract not to be appropriate use of the Review Procedure.

4. DOJ Review Procedure Release 80-04

On October 29, 1980, the DOJ provided no-action comfort to a joint request by the Lockheed Corporation ("Lockheed") and the Olayan Group ("Olayan"), a Saudi Arabian trading, services and investment organization. Lockheed and Olayan represented that they intended to enter into agreements with each other for the purpose of entering into prospective business transactions with the Saudi Arabian government and the Saudi Arabian Airlines Corporation (known as "Saudia"). The Release indicates that Suliman S. Olayan, the Chairman of Olayan, was also an outside director of Saudia.

The Release indicated that Olayan would disclose the relationship between Olayan and Lockheed to the Saudia board, and would abstain from voting on any decisions affecting Lockheed or its subsidiaries. In addition, Olayan would not use his position on the Saudia board to influence acts or decisions of the Saudi government (including departments, agencies or instrumentalities such as Saudia) on Lockheed's behalf. The Release indicated that Olayan devoted an insubstantial amount of his business activity to his position on the Saudia board, and he held no other position within the Saudi government (in fact, the release indicated that board positions such as Olayan's are reserved for individuals considered under Saudi law *not* to be civil servants.) Further, Olayan was to receive confirmation from the Director General of Saudia that his position as a director did not make him an officer of Saudia and that he had no authority to act on Saudia's behalf (other than to vote on matters before the Board.) Finally, the Release indicates that his activities with Lockheed on behalf of Olayan and his directorship did not violate the laws of Saudi Arabia.

5. DOJ Review Procedure Release 81-01

On November 25, 1981, the DOJ issued Review Procedure Release 81-01 in response to a joint request by the Bechtel Group ("Bechtel") and the SGV Group ("SGV"), described as "a multinational organization headquartered in the Republic of the Philippines and comprised of separate member firms in ten Asian nations and Saudi Arabia which provide auditing, management consulting, project management and tax advisory services."

According to the release, Bechtel had already known the principals of SGV for a number of years at the time of the Release, and SGV had served, since 1977, as a business consultant on Bechtel's behalf in the Philippines. The Release indicated that the previous relationship had been successful, both in terms of the level of service provided and the professionalism, integrity and ethics shown by SGV. Bechtel and SGV had proposed to enter into contractual relationships whereby SGV would provide various services to Bechtel, and these relationships apparently raised concern about the application of the FCPA. The Release also stated that both requestors were familiar with the FCPA and its prohibitions on improper payments to foreign officials.

In selecting SGV as its proposed consultant, Bechtel apparently considered several factors, which may be viewed as instructive for other entities considering third-party relationships. Among the factors considered were (i) the number of years the firm had been operating; (ii) the size of the firm in both manpower and geographic reach; (iii) the substantial probability of the firm's continued growth; (iv) the number and reputation of its clientele; (v) the qualifications of its professional staff; (vi) the presence of technical experts and specialists on staff; (vii) the adequacy of its support staff; and (viii) the firm's familiarity with and adherence to the principles embodied in the FCPA.

The Release spelled out a number of representations that Bechtel and SGV made in order to ultimately gain no-action comfort from the DOJ. First, the parties agreed that all payments would be made by check or bank transfer, with no payments made by cash or with bearer instruments. In addition, payments would only be made to SGV member firms (or officers or employees of such) and would be made to the Philippines unless Bechtel received written instructions to make payment to a location in which a member firm provided services to Bechtel.

SGV represented that none of its partners, owners, principals, and staff members were government officials, officers, representatives or political party candidates, and that no part of its compensation would be used for any purpose that would violate the FCPA or the law of any jurisdiction in which it performed services. Bechtel represented that it would not request of SGV any service that would or might be considered to be a violation of such laws.

In addition, SGV indicated that it would provide the opinion of Philippine legal counsel stating that SGV did not need further authorization from the Philippine government to perform the services enumerated in the agreement, and that the proposed arrangement itself, including the payment of travel expenses as contemplated therein, did not violate Philippine law. SGV also indicated that it would provide to Bechtel similar local legal opinions in other jurisdictions in which it could provide services prior to it actually doing so.

The Release also specified restrictions on the use of third parties in connection with the Bechtel-SGV arrangement. For instance, the agreement was said to restrain SGV from assigning any portion of its rights to a third party and from obligating Bechtel to a third party with which SGV has made an agreement or may direct payments without Bechtel's prior written consent. In addition, unless otherwise approved by Bechtel in writing, only SGV partners, principals and staff members could perform work on Bechtel's behalf. Both parties agreed that it was their intent in placing conditions such as these on the arrangement that neither party (or their representatives) could authorize payments to foreign officials potentially in violation of the FCPA. The arrangement also apparently indicated that SGV was to make Bechtel's general counsel immediately aware of any request by a Bechtel employee that might constitute a violation of the FCPA.

SGV had agreed that full disclosure of the existence and terms of its agreement with Bechtel, including compensation provisions, could be made at any time and for any reason to whomever Bechtel's general counsel determine has a legitimate reason to know such terms, including the government of any country where Bechtel is performing services, the U.S. government or Bechtel clients.

Under the agreement, reimbursements of expenses (for travel, gifts and entertainment) were governed by strict guidelines generally requiring Bechtel's prior approval and confirmation that the expenditures complied with local laws and custom and were directly related to a legitimate business purpose. Entertainment or meal expenses for Bechtel's clients or prospective clients would only be reimbursed without prior approval if the expense occurred on the same day as a substantial business meeting. Bechtel would only reimburse SGV for gifts or other tangible items given without its prior approval if (i) the gift was permitted under local law; (ii) its ceremonial value exceeded its intrinsic value; (iii) it did not exceed $500 per person; and (iv) it was generally accepted in local custom as acceptable for such gifts from private business persons in the country.

The proposed agreement also contained audit and termination provisions. For example, all compensation and expenditure reimbursements were subject to audit by Bechtel, and Bechtel indicated that it intended to audit SGV's expenses and invoices when deemed appropriate based on (i) the amount paid in relation to the total payments under the agreement; (ii) the nature of the expense; (iii) the SGV services rendered during the period; and (iv) the Bechtel customers or potential customers with whom SGV had contact. In addition, should either party have a good faith belief that the other party had breached the terms of the agreement, it would be entitled to terminate the agreement without further liability or obligation. Actions that might constitute a violation of the FCPA by either party would result in automatic termination.

6. DOJ Review Procedure Release 81-02

On December 11, 1981, the DOJ issued Review Procedure Release 81-02, which provided no-action comfort to Iowa Beef Packers, Inc. ("IBP") in response to its proposed intention to furnish samples of beef products to the officials of the former Soviet Union in an effort to promote sales in that region. The samples, which in total amounted to around 700 pounds with an estimated value of less than $2,000, were to be provided to officials of the former Soviet Ministry of Foreign Trade ("MVT"), the agency responsible for purchasing such products. According to IBP, sales of packaged beef products to the Soviet government would be in minimum amounts of 40,000 pounds each.

The Release indicates that the individual samples, which would not exceed $250 each, were intended not for the personal use of the MVT officials, but rather for the inspection, testing and sampling of the product and to make the MVT officials aware of the product's quality. In addition, it was not the intent of IBP to provide the samples to the MVT officials in their personal capacity, but rather as representatives of the government agency responsible for purchasing such products. The Release further stated that the Soviet government had been informed of the intended provision of samples to the MVT officials.

7. DOJ Review Procedure Release 82-01

On January 27, 1982, the DOJ issued Review Procedure Release 82-01, which provided no-action comfort to the Department of Agriculture of the State of Missouri ("Missouri DOA"). Missouri DOA proposed to host a delegation of approximately ten representatives, including representatives of Mexican government agencies and instrumentalities (such as a state-owned bank) and members of the Mexican private sector, for a series of meetings between Mexican officials and representatives of Missouri agriculture business and other business organizations, to promote sales of Missouri agricultural products in Mexico.

Missouri DOA proposed to pay for the expenses of the Mexican delegation, including lodging, meals, entertainment, and travel within Missouri. In the event that the Mexican officials inadvertently paid these expenses themselves, Missouri DOA intended to reimburse the delegation members directly. The Release stated that all these expenses were to be paid from Missouri DOA funds and contributions from private individuals within the state. The Release also indicated that Missouri business representatives would likely provide the Mexican officials with samples of Missouri products, such as Missouri cheeses or other items of "minimal value."

8. DOJ Review Procedure Release 82-02

On February 18, 1982, the DOJ issued Review Procedure 82-02, in response to a joint-request submitted by Ransom F. Shoup & Company ("Shoup, Inc."), a Pennsylvania closely held corporation in the business of selling, repairing, and designing voting machines, and Frederick I. Ogirri, a citizen of Nigeria and temporary employee of the United States Consulate of Nigeria. The Release stated that Shoup, Inc. had a contract with the Federal Election Commission of Nigeria ("Fedeco"), an independent commission of Nigeria, to design and sell voting machines.

According to the requestors' representations, Shoup, Inc. would pay Ogirri a 1% "finder's fee" on all contracts with Nigeria and other West African governments for a period of ten years. The fee was payment for Ogirri's advice to Shoup, Inc. regarding the marketability of voting machines in Nigeria, the customs, protocol, and business practices of Nigeria, and his help in introducing Shoup, Inc. to a business agent in Nigeria. These activities did not relate to Ogirri's duties at the Consulate. Under the law of Nigeria, as supported by a legal opinion submitted by the requestors, Ogirri was not regarded as a civil servant or staff member of the Federal Ministry of External Affairs in Nigeria, and his relationship with Shoup, Inc. did not violate Nigerian conflict of interest laws.

The Release noted that Ogirri represented that he had no influence with the Nigerian government and that he did not use any influence to assist Shoup, Inc. in obtaining its contract with Fedeco. Ogirri indicated that his work at the Consulate was ministerial and clerical in nature, stating that he was only responsible for gathering newspaper articles and maintaining a library, and that the Consulate paid him a bi-weekly wage of $300.

In determining that it would not take enforcement action, the Release noted a number of factors. Ogirri and Shoup, Inc. agreed that no payments would be made to government officials and all payments to Ogirri would be made in the United States. Moreover, both parties would keep records and verify every six months that no FCPA violations had occurred. The contract would be void if a violation did occur. Lastly, the requestors agreed that the relationship and the fee would be disclosed to Fedeco.

9. DOJ Review Procedure Release 82-03

In Review Procedure Release 82-03, dated April 22, 1982, the DOJ provided no-action protection to a Delaware corporation that sought to do business with a government department of the former Federal Socialist Republic of Yugoslavia ("FSRY"). The government department was principally responsible for Yugoslav military procurement. The company proposed to hire a sub-unit of the department to handle duties normally handled by commercial sales agents, having been advised by a senior officials of the government sub-unit that such an arrangement was required by Yugoslav law.

According to the Release, the agreement would require the company to pay the government subunit a percentage of the total contract price of the pending defense acquisition, as well as a percentage of each subsequent purchase made by the government procurement department or any other customer in the FSRY. The company proposed to include the identity of the commission agent and all commission fees in the written agency agreement, while also requiring that all fees be paid directly in the FSRY. The contemporaneous purchase contract was also to include a reference to the agency agreement. The requestor further represented that no individual government official was to benefit personally from the arrangement.

10. DOJ Review Procedure Release 82-04

On November 11, 1982, the DOJ responded to a request from Thompson & Green Machinery Company, Inc. ("T&G"), in connection with an agency agreement T&G made with a foreign businessman.

T&G sought to compensate the businessman whom it had hired and used as an agent in connection with the sale of a generator in a foreign country. The agreement required T&G to pay the businessman a commission for his efforts and stated that no part of the fee could be used by the businessman to pay a commission or fee, directly or indirectly, to a third party. The agreement also referenced the FCPA prohibition on providing anything of value to employees or officials of foreign governments.

T&G later learned that the businessman was in fact the brother of an employee of the foreign government to which T&G sold the generator. After making this discovery, T&G obtained affidavits from the businessman and his brother that pledged adherence with the anti-bribery provisions of the FCPA. T&G further represented that payment was to be made by check or bank transfer in the country where services were rendered, and the company would require the businessman to comply with all applicable currency control laws of the foreign country. The DOJ deemed these precautions sufficient to merit no-action comfort.

11. DOJ Review Procedure Release 83-01

On May 12, 1983, the DOJ granted no-action comfort to a California corporation that sought to use a Sudanese corporation as its sales agent. The Sudanese corporation was an autonomous legal entity whose head was appointed by the President of Sudan, and was primarily in the business of disseminating national and international news and developing a communications network. The company was also a member of a trade group composed of entities from several countries in the same general business as the Sudanese corporation. Within its operating parameters, the Sudanese company was permitted to act as an agent for foreign companies.

The California corporation represented that it wished to sell its equipment to commercial and governmental customers in Sudan and other countries associated with the trade group. The Sudanese corporation was to act as the California corporation's sales agent with respect to these sales.

The requestor represented that, pursuant to a written agreement, the California corporation would pay the Sudanese corporation a percentage of the standard list price of all products sold through the Sudanese corporation. Payment would be made directly to the Sudanese corporation (not to any individual) in a financial institution in Khartoum, Sudan. The requestor also represented that it would give notice of the agency relationship, and make specific reference to the agency agreement, in any purchase agreement that would result in a commission for the Sudanese corporation. The requestor did not expect that any Sudanese government official would personally benefit from the proposed agency relationship.

12. DOJ Review Procedure Release 83-02

On July 26, 1983, the DOJ issued Review Procedure Release 83-02, relating to a proposed promotional tour. The requestor, a wholly owned subsidiary of a publicly held American corporation, participated in a joint venture in a foreign country. This joint venture had a long-term contractual

relationship with an entity owned and controlled by the foreign country. The joint venture had negotiated three phases of a four-phase contract with the foreign entity; the contracts totaled approximately $7 million, with $2.7 million going to the requestor. The price for the final phase had not been negotiated. It was anticipated, however, it would also be for several million dollars, of which the requestor would receive a substantial portion.

The general manager of the foreign entity had planned to travel to the United States on vacation with his wife. After the requestor learned that the manager planned to vacation in the United States, the requestor invited the manager and his wife to extend their vacation for 10 days in order to tour the American facilities of the requestor and its parent company. These facilities related to the performance of the joint venture's contracts with the foreign entity. In addition, the manager and his wife would be shown one or more projects not operated by the requestor in order to demonstrate facilities similar to those being constructed in the foreign country. Visits to these facilities would require minimal travel from the requestor's facilities. The purpose of these visits was to familiarize the foreign entity's manager with the requestor's operations and capabilities.

In providing no-action comfort, the Release notes that the requestor would only pay reasonable and necessary actual expenses that the general manager and his wife incurred during the tour. These expenses, which would not exceed $5,000, would include airfare from the city where the general manager and his wife planned to vacation (in the United States) to the three company sites (also within the United States) and return airfare to the vacation site. The requestor would also pay for lodging, meals, ground transportation and entertainment during the tour. The requestor proposed to pay all service providers directly, accurately record all expenses in its books and records, and reflect that the general manager and his wife were the persons for whom the expenses were incurred.

13. DOJ Review Procedure Release 83-03

In Review Procedure Release 83-03, also dated July 26, 1983, the DOJ responded to a joint request from the Department of Agriculture of the State of Missouri ("Missouri DOA") and CAPCO, Inc. ("CAPCO"), a Missouri corporation engaged in the management of properties by foreign investors. CAPCO proposed to pay, via a representative of Missouri DOA, the reasonable and necessary expenses of a Singapore government official in connection with a series of site inspections, demonstrations, and meetings in Missouri. The visit was intended to promote the sale of certain Missouri agricultural products and facilities.

CAPCO proposed to pay for airfare for one official, as well as travel, lodging, entertainment and meal expenses in Missouri. In addition, Missouri DOA represented that it might pay for certain additional costs, such as travel, lodging, entertainment, and meal expenses. In the event that the Singapore official inadvertently paid these expenses himself, CAPCO and Missouri DOA intended to reimburse the official, provided an adequate receipt was furnished.

CAPCO represented that there was no agreement between the firm and the Government of Singapore to manage any of the Government's investments in the future. The Release noted, however, that individual owners and officers of CAPCO owned properties and firms that may enter into supply or service contracts or sales agreements with that government.

14. DOJ Review Procedure Release 84-01

On August 16, 1984, the DOJ issued Review Procedure Release 84-01 in response to a request from an American firm that wished to engage a foreign firm ("Marketing Representative") as its marketing representative in a foreign country. The engagement raised FCPA concerns because the Marketing Representative's principals were related to the head of state of the foreign country and one of the principals personally managed certain private business affairs for that head of state.

In selecting the Marketing Representative for the proposed engagement, the American firm listed several factors that may guide firms considering such relationships. These factors included (i) the number of years the Marketing Representative had been in operation; (ii) the Marketing Representative's successful representation of several other large corporations; (iii) the qualifications of the Marketing Representative's principals; and (iv) the reputation of the Marketing Representative among businessmen and bankers in both the United States and abroad.

In light of the Marketing Representative's close connection with the foreign head of state, the Marketing Representative (via the requestor) made a number of representations. First, the Marketing Representative represented that it would not pay or agree to pay anything of value on behalf of the requestor to any public official in the foreign country for the purpose of influencing the official's act or to induce the official to use his or her influence to the Marketing Representative's benefit. If the Marketing Representative violated that pledge, the agreement would automatically terminate and the Marketing Representative would surrender all claims for sales. The agreement was also terminable by either party without cause upon thirty days notice and was governed by the law of the state in which the American firm had its principal place of business.

The Marketing Representative also represented that no owner, partner, officer, director, or employee was (or would become) an official of the foreign government during the term of the agreement.

Furthermore, the Marketing Representative agreed that it would assume all costs and expenses incurred in connection with its representation of the American firm, unless the American firm provided prior written approval. Such approval would include a detailed itemization of expenses claimed and a written authorization from the American firm. Prior written approval was also required before the Marketing Representative could assign any of its rights under the agreement to a third party or before it could obligate the American firm to third parties. All commissions were to be paid in U.S. dollars in the Marketing Representative's country of principal business.

Finally, the Marketing Representative agreed that it would disclose its identity and the amount of its commission to the U.S. government, when required.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to the proposed engagement of the Marketing Representative.

15. DOJ Review Procedure Release 84-02

The DOJ issued Review Procedure Release 84-02 on August 20, 1984. The Release discusses an American firm's proposed transfer of assets from one of the firm's foreign branch offices to a separate, foreign-owned company. The requestor, the American firm, then intended to invest in the foreign-owned

company. FCPA concerns arose when an agent of the foreign company made a remark that indicated the agent's possible intent to make a "small gratuity" to low-level government employees to facilitate the foreign government approval needed for the transaction.

In deciding not to take enforcement action, the DOJ emphasized several factors:

- The employee of the foreign company represented that no payments were ever made to officials of the foreign government; the American firm confirmed this fact to the best of its knowledge. At the time the "gratuity" statement was made, the American firm discouraged any payments. Both parties subsequently represented that they would not violate the provisions of the FCPA.

- The American firm was to assume a minority interest in the foreign company after the transaction, with proportionate representation on the foreign company's Board of Directors so long as it was a shareholder. Once it assumed that interest, the requestor represented that it would retain the rights to have the foreign company's books and records audited by a major U.S. accounting firm to determine if violations of the FCPA had occurred.

- If the American firm were to learn that the foreign company violated (or intended to violate) the FCPA, it represented that it would notify DOJ and responsible foreign government authorities. Furthermore, the American firm represented that it would retain the right (but not the obligation) to end the relationship if FCPA violations were discovered.

16. DOJ Review Procedure Release 85-01

Opinion Release 85-01 was released on July 16, 1985. Atlantic Richfield Company ("ARCO"), doing business through a wholly owned subsidiary, announced plans to build a chemical plant in France. ARCO intended to invite officials of French Government Ministries responsible for industrial finance and development programs and for the issuance of permits and licenses necessary for the project to Texas and Philadelphia to meet with ARCO management and to inspect a plant.

The French government was to designate the officials for the trip. ARCO obtained an opinion that the proposed conduct did not violate French law. Further, it represented that the travel would occur only during one week and ARCO would pay the necessary and reasonable expenses of the French delegation, which will include those for air travel, lodging and meals.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to trip.

17. DOJ Review Procedure Release 85-02

Release 85-02 was a press release concerning the W.S. Kirkpatrick settlement, which related to allegations that the company made approximately $1.7 million in improper payments through a Nigerian agent to obtain a $10.8 million contract to provide medical equipment to the Nigerian government. W.S. Kirkpatrick pleaded guilty to a single count of bribery in violation of the FCPA violation and was fined $75,000. Harry Carpenter, the Chairman of the Board and CEO of W.S. Kirkpatrick, pleaded guilty to one

count of FCPA bribery and was sentenced to three years probation, community service, and a fine of $10,000.

18. DOJ Review Procedure Release 85-03

On January 20, 1987, the DOJ released Opinion Procedure Release 85-03. The requestor, an American company, had been attempting to resolve a claim against a foreign country and wished to enter into a settlement agreement. The requestor was unable, however, to identify the agencies or officials in the foreign country most responsible for and capable of settling the claim. The company wished to hire a former official of the foreign government as an agent to locate the correct agency. The requestor proposed paying the agent $40 per hour, plus expenses, up to a limit of $5,000.

The DOJ issued no action comfort in light of the representations that the proposed agent would enter into a written agreement specifying that the agent, among other things: (i) was not presently an official of the foreign country's government or an official of a political party or candidate for political office in the foreign country; (ii) understood and would abide by the FCPA; (iii) would not pass on his compensation to any official of the foreign government or government official; and (iv) would perform only those functions specifically authorized by the requestor.

The Release notes that action in the matter was taken in December 1985, although the Release was not published until January 1987.

19. DOJ Review Procedure Release 86-01

On July 18, 1986, the DOJ issued Opinion Procedure Release 86-01. The subject of the release was three United States corporations' intentions to employ members of the Parliaments of Great Britain and Malaysia to represent the firms in their business operations in the respective nations.

The first U.S. Corporation wished to retain a British Member of Parliament, described as a backbencher, as a consultant at a rate of $6,000 per month for six months. The Member occupied no other government position and did not have any authority with respect to the business of the U.S. corporation in Britain.

The second U.S. corporation wished to enter into a joint venture also with a British Member of Parliament who held no other position in the British Government. The joint venture was to purchase and operate airports in Great Britain. The Member would receive compensation in the range of $40,000 to $60,000 per year, and would be involved in the actual conduct of the joint venture's business operations.

The third U.S. corporation sought to retain a Member of the Malaysian Parliament as its representative in the purchase and sale of commodities in that nation. The MP occupied no position in the Malaysian government other than his seat in the Parliament, was to be paid $4,000 per month for a period of one year and would receive 30% of the net profits generated by his representation, to the extent that amount exceeded his basic compensation.

All companies represented the compensation paid to the Members was reasonable and would be paid directly.

The Release noted that each Member of Parliament in the three requests occupied no special legislative position of influence other than that possessed by any single member in a large legislative body (Great Britain, over 600 members; Malaysia, over 350 members). Furthermore, each Member had entered into a written employment agreement in which he agreed to make full disclosure of his representation relationship with the U.S. corporation and agrees not to vote or conduct any other legislative activity for the benefit of the corporation. Each corporation and member also agreed that the Member would not use his position as a Member of Parliament to influence any decisions that would benefit the U.S. corporation.

Based on the facts and circumstances as represented, the DOJ issued no action comfort.

20. DOJ Review Procedure Release 87-01

On December 17, 1987 the DOJ issued Opinion Procedure Release 87-01, relating to a request from Lantana Boatyard, Inc. ("Lantana"), a company wishing to sell military patrol boats to an English corporation, Milverton Holdings, Ltd. ("Milverton"), owned by a Nigerian, Tayo Amusan. Milverton intended to resell the boats to the Nigerian government.

By the terms of the proposed transaction, Lantana was to be fully paid before any of the boats were delivered to Milverton, and Lantana would have no involvement in negotiations between Milverton and the Nigerian government except that Lantana was to send a representative to give a technical briefing to the Nigerian officials at Milverton's expense.

Lantana represented that the contract between Lantana and Milverton would include provisions to the effect that neither Milverton nor any of its shareholders, directors, officers, employees or agents would perform any act in violation of the FCPA. Lantana also represented that it would obtain written certifications from each of its officers, directors and employees involved in the transaction, stating that he or she had no knowledge that Amusan, or any entity which he controls, has done or will do any act in violation of the FCPA. Lantana further represented that, if requested, it would disclose to any authorized official of the Nigerian government the price and term of the sales contract with Milverton.

Lantana also intended to pay a 10% commission to an international marketing organization that brought the opportunity to Lantana, which would be paid at the organization's principal place of business. Lantana represented that the payment was consistent with normal business practices. Lantana further represented it would obtain written FCPA certifications from the marketing organization and the responsible officials.

The DOJ indicated that based on the facts and circumstances as represented, it did not intend to take any enforcement action with respect to proposed arrangements.

21. DOJ Review Procedure Release 88-01

On May 12, 1981 the DOJ issued Opinion Procedure Release 88-01 responding to a request from Mor-Flo Industries, Inc. and two of its subsidiaries ("Mor-Flo"), which intended to construct a facility for the production of gas and electric water heaters in Baja California, Mexico. As part of the project, Mor-Flo intended to participate in a Mexican Government program under which Mor-Flo would acquire certain deeply discounted debt instruments of the Government of Mexico or agencies thereof and exchange that

debt paper with the Government of Mexico at a government-determined exchange rate. The funds received by Mor-Flo in exchange for the debt paper would then be restricted to expenditures in Mexico for plant and equipment.

Mor-Flo represented that it paid a fee to an agency of the Government of Mexico and that it would also be required to pay a fee to the financial institution serving as the Mexican Government's financial agent in the United States. Those fees, approximately $42,000 and $320,000, respectively, were to be nonrefundable and paid without the assurance that Mor-Flo would be accepted into the program.

The DOJ issued no action comfort based on several representations from Mor-Flo. Mor-Flo represented that it would secure written confirmation from the financial institution that it was the duly authorized representative of the Government of Mexico and that none of the fees would be used in violation of the FCPA. Mor-Flo also represented that it would secure a written opinion of Mexican counsel that the payment of fees to the Government of Mexico and to its financial representative were not in violation of any Mexican law, rule or regulation.

22. DOJ Review Procedure Release 92-01

In February 1992, the DOJ issued Review Procedure Release 92-01 granting no action comfort in response to a request of Union Texas Pakistan, Inc. ("UTP"). UTP wished to enter into a joint venture agreement with the Ministry of Petroleum and Natural Resources of the Government of Pakistan under which it would provide training, travel and subsistence expenses to officials and employees of the Government of Pakistan.

According to UTP, under Pakistan law, the Government of Pakistan may require petroleum exploration and production companies to provide training to government personnel to assist them in performing their duties of supervising the Pakistan petroleum industry. The joint venture agreement proposed to UTP by the Ministry of Petroleum and Natural Resources contained a provision implementing this provision of law and obligating UTP to expend a minimum of $200,000 per year for such training. UTP represented that the training would take place in Pakistan as well as at seminars, symposia and workshops in the United States and Europe. UTP proposed to pay the officials' training expenses, including seminar fees, airfare, lodging, meals, and ground transportation. UTP also agreed that, in the event it proposed to exceed $250,000 in annual expenditures for training outside Pakistan, it would request further review by the DOJ.

23. DOJ Opinion Procedure Release 93-01

On April 20, 1993, the DOJ issued Opinion Procedure Release 93-01 at the request of a major commercial organization based in Texas. The requestor had entered into a joint venture partnership agreement to supply management services to a business venture owned and operated by a quasi-commercial entity owned and supervised by the government of a former Eastern Bloc country (the "Foreign Partner").

The partnership was registered as a separate legal entity in the foreign state, and the companies proposed to select a board of directors, some representing the requestor and the others drawn from the Foreign Partner. The directors' fees to the foreign directors would be approximately $1,000 per month, which would approximate their regular income from the Foreign Partner.

The requestor represented that although the requestor or another entity owned by the requestor would pay the directors' fees in the first instance, the fees ultimately would be reimbursed by the Foreign Partner either from its share of the profits or from its other funds. The requestor also represented that it would educate the foreign directors regarding the FCPA.

The DOJ indicated that based on the facts and circumstances as represented by the requestor, it did not intend to take any enforcement action with respect to directors' fee payments described in the request.

24. DOJ Opinion Procedure Release 93-02

On May 11, 1993, the DOJ issued Opinion Release 93-02. The Release concerned an American company which sought to enter into a sales agreement with a foreign government-owned business that held an exclusive license to manufacture, sell, purchase, import, and export all defense equipment for that country's armed forces. The law of that country required the military to deal only through the government-owned business.

The government-owned business acted as an agent for the foreign military. However, in order to do business with the military in that country, all foreign suppliers were required to enter into written agreements with the government-owned business, under which the supplier agreed to pay to the government-owned business a commission.

Nevertheless, the company represented that it would not enter into such an agreement, but rather would pay all commissions directly to the country's treasury or, in the alternative, the commissions would be deducted and withheld by the government customer from the purchase price. Therefore, the company would make no payments to the government-owned business or to any foreign officials. Under these circumstances, the DOJ issued no action comfort.

25. DOJ Opinion Procedure Release 94-01

On May 13, 1994, the DOJ issued Opinion Procedure Release 94-01 in response to a request from an American company, its wholly owned subsidiary and a foreign citizen. The subsidiary manufactures clinical and hospital laboratory products. Its manufacturing operations are located on property acquired from a state-owned enterprise that, at the time of the request, was being transformed into a joint stock company.

The subsidiary desired to enter into a contract with the general director of the state-owned enterprise, a longtime resident of the area who possessed experience dealing with the local authorities and public utility service providers. The subsidiary intended to obtain direct electric power service for its plant by constructing a substation, which required the subsidiary to enter into a service agreement with the local power authority and obtain authorization from the authority to connect to its power grid. Also, in order to gain direct access to the substation, the subsidiary planned to perform minor road construction and install fences, which would require certain abutter consents and incidental governmental approvals.

The company wished to engage the individual to assist in obtaining the relevant permits and authorizations for these projects, which the company represented would be far more difficult to complete

without his assistance. For the individual's consulting assistance, the subsidiary would pay him $20,000 over twelve months.

Local counsel advised the company that, under the nation's law, the individual would not be regarded as either a government employee or a public official. Nevertheless, for the purposes of the Release, the DOJ considered him to be a "foreign official" under the FCPA.

The DOJ provided the requested no action comfort based on these circumstances and a series of representations by the foreign official.

- He would enter into the consulting agreement in his personal and private capacity and not as an officer, employee, or agent of the enterprise, or any other entity or individual. This included a representation that the consulting did not violate any rules of, or applicable to, the enterprise, and that his consultancy would not interfere with his duties as an officer and employee of the enterprise, and that he obtained approval from the enterprise.

- He would abstain from voting or taking any action in the event that any corporate actions or approvals of the state-owned enterprise were necessary for the subsidiary to seek or obtain consents, and instead he would refer all such matters to the governing body of the enterprise.

- He would not use his position as a director of the enterprise to influence any act or decision of the government on behalf of the subsidiary.

- No payments which he would receive under the consulting agreement would be used directly or indirectly to offer, pay, promise, give, or authorize payment of money or anything of value to any governmental or public official for the purpose of influencing any act or decision of such public official in his official capacity.

- The proposed relationship was lawful under the written laws and regulations of the nation, and all applicable reporting or disclosure laws would be satisfied.

- Payment would only be for consulting services and his compensation was not dependent on the success of the subsidiary in securing direct electric power service or the incidental access approvals. Also, he represented that he had no right to any future relationship with the subsidiary beyond that set forth in the consulting agreement.

- He would not appear on behalf of the subsidiary before any agency of the local government, and any communication to him concerning the approvals from representatives of any local governmental agency would be referred for response to the subsidiary.

- He would serve as an independent contractor for the subsidiary without authority to legally bind the subsidiary.

- If he violated these representations or breached the consulting agreement in any manner, the agreement would automatically be rendered void *ab initio* and he would surrender any claim for payment under the consulting agreement, even for services previously performed.

26. DOJ Opinion Procedure Release 95-01

On January 11, 1995, the DOJ issued Opinion Procedure Release 95-01 granting no action comfort in response to a request submitted by a U.S. energy company with prospective operations in a South Asian country. The requestor planned to acquire and operate a plant in a region of the foreign country that lacked modern medical facilities. A modern medical complex, with a budget in excess of one hundred million dollars, was then under construction and the requestor proposed donating $10 million to the project for construction and equipment costs. The requestor represented that this donation would be made through a charitable organization incorporated in the United States and through a public limited liability corporation located in the South Asian country.

The requestor represented that prior to releasing any funds it would require all officers of the charitable organization and the foreign limited liability corporation to certify that none of the funds would be used in violation of the FCPA, and that none of the persons employed by either organization were affiliated with the foreign government. In addition, the requestor represented that it would require audited financial reports from the charitable organization, "accurately detailing the disposition of the donated funds."

27. DOJ Opinion Procedure Release 95-02

On September 14, 1995, the DOJ issued Opinion Procedure Release 95-02 in response to a joint request from two companies ("Company A" and "Company B"). Company A had acquired offset obligations through contracts with the government of a foreign country. Offset obligations were handled by an Offset office that is part of the foreign country's Ministry of Defense. Company B was owned by a U.S. citizen who established a program in the foreign country to generate offset credits for sale. In October 1993, Company B received an oral agreement from the Offset office's chairman that Company B would receive millions of dollars in offset credits in exchange for the establishment of a new company ("Newco") in that country. Company A then intended to purchase offset credits from Company B generated by the development of Newco.

A majority of the investors in Newco were to be foreign government officials. However, no official of the Ministry of Defense would be an investor, nor would the investors be in positions to grant or deny offset credits. Under the arrangement, Company B would receive offset credits from Newco by meeting certain program milestones. Company B represented that the milestones triggering the credits would not be tied to Newco's profitability and that Company B and the chairman of the Offset office would negotiate a written agreement stating that the offset credits will not be contingent upon the success of Newco.

Company A would not be an investor in Newco, but, under a management services agreement, Company A would provide a general manager and would subcontract out the remaining services necessary to operate Newco to a third company ("Company C"). Company B would provide financing to Newco for its operations. Company A would be paid a fee equal to a percentage of Newco's gross revenues and a percent of Newco's profits. Out of this fee, Company A would compensate Company C and Company B for their services and Company B's loan to Newco. None of the companies would have an equity interest in Newco.

Companies A and B certified to the DOJ that neither company had made or would make any improper payments in violation of the FCPA in connection with the organization or operation of the

proposed Newco, nor any payments to government officials in connection with the proposed transactions. The companies further warranted that Company B had not paid and would not pay any funds from Company A for the sale of the offset credits to any investors in Newco or to any government officials.

The shareholders of Newco—some of who were foreign government officials—also provided certifications to the DOJ. These certifications contained seven representations.

- The shareholders would not take any actions that would result in a violation of the FCPA by Company A and Company B; use payments received by Newco in a manner that would violate the FCPA; use Newco's funds or assets to take any action that would violate the FCPA; request that any of the parties to this opinion request or any local official perform any service or action that would violate the FCPA.

- The shareholders would be passive investors in Newco and would exercise no management control in Newco while holding a government office.

- The shareholders would recuse themselves from any government decision with respect to any matter affecting Newco or Company A; although a shareholder may hold a foreign government position, his official duties do not include responsibility for deciding or overseeing the award of business by that government to the parties to this request, and he will not seek to influence other foreign government officials whose duties include such responsibilities.

- The shareholders would notify Company A of any third-party assignment of rights, and if such assignment would violate the FCPA, permit Company A to withdraw as a management contractor without penalty.

- The shareholders would not take any action to oppose Newco manager's power to ensure compliance by Newco with the FCPA.

- If the nature of political positions or responsibilities of any shareholder changed so that the representations in the preceding paragraphs would not be correct if applied to such new positions or responsibilities, he would promptly notify Company A in writing. If, after consultation by Companies A and B and Newco shareholders, any such concerns cannot be resolved to the satisfaction of the DOJ, then the parties would be entitled to withdraw from or terminate Newco.

- An opinion of local counsel would be obtained to the effect that Newco and its proposed activities, including those of the shareholders, are lawful under local laws; that Newco would not be established without such an opinion; and that the opinion, when obtained, would be given to the DOJ.

The shareholders also agreed to the following additional steps to address any potential FCPA-related concerns.

- Newco's Supervisory Board would meet periodically and report on its activities and compliance with the FCPA. The board would cause a record of the meeting to be prepared and distributed to the parties to the opinion request.

- The board would keep accurate expense, correspondence, and other records, including minutes of its meetings; the board will make financial records available to the auditors for Company A whenever requested.

- All payments by Newco to the shareholders in connection with Newco would be made solely by check or bank transfer, and no payments would be made in cash or bearer instruments. No payments in connection with Newco owed to a shareholder would be made to a third party.

- Any third parties retained by Newco to professional services would be retained only with the express written permission of Newco's general manager and would be required to sign an FCPA compliance representation as part of the consultancy or retainer agreement.

Based on these circumstances and representations, DOJ issue no action comfort.

28. DOJ Opinion Procedure Release 95-03

Also on September 14, 2005, the DOJ issued Opinion Procedure Release 95-03. The Release concerned an American company that wished to enter into a joint venture in a foreign country with an entity that was the family investment firm of a foreign official. The foreign official was a prominent businessperson in the country and held public and political offices. In addition, the foreign official was a relative of the leader of the foreign country.

The foreign official's responsibilities in the Joint Venture would include making contacts within the foreign country, developing new business, and providing investment advice and consulting services. The foreign official was to receive payments annually for services to the Joint Venture as well as a percentage of the profits received as a result of government projects awarded to the Joint Venture.

The foreign official and the official's relatives involved in the Joint Venture signed the FCPA Opinion Request and represented to the DOJ that they would comply with the FCPA as if they were subject to it. In addition, the American company and the foreign official and relatives made eight representations to the DOJ:

- Each of the requestors was familiar with and in compliance with the FCPA and laws of the foreign country and each would remain in compliance for the duration of the Joint Venture.

- None of the payments received from the American company would be used for any purpose that would violate the FCPA or the laws of the foreign country; and no action would be taken in the interest of the Joint Venture that would violate the FCPA or the laws of the foreign country.

- The foreign official's government duties did not involve making decisions in connection with the government projects sought by the Joint Venture or involve appointing, promoting or compensating any other officials who were involved in deciding which companies would receive such projects.

- If the government official's office or responsibilities changed so that the official's representations in the request no longer applied, the official would notify the other requestors so that appropriate action could be taken.

- The foreign official would not initiate any meetings with government officials and any meeting between a government official and a member of the Joint Venture would be attended by at least two representatives of the Joint Venture.

- For each meeting between a government official and the foreign official on behalf of the Joint Venture, the foreign official would provide a letter to the Minister and the most senior civil servant of the relevant government department stating that the official was acting solely as a participant in the Joint Venture.

- No member of the Joint Venture would assign its rights under the Joint Venture to a third party without the approval of the other Joint Venture members.

- Special procedures would be in place with respect to the operation of the Joint Venture, including "the keeping of accurate expense, correspondence, and other records of the business of the Joint Venture" and special requirements that all payments by the Joint Venture would be by check or bank transfer and no payments would be made in cash. In addition, all payments owed to a Joint Venture member would be made directly to that member and all payments to foreign parties would be made in the foreign country.

Based on these representations, the DOJ issued no action comfort.

29. DOJ Opinion Procedure Release 96-01

On November 25, 1996, the DOJ issued Opinion Procedure Release 96-01 granting no action comfort in response to a request submitted by a nonprofit corporation established to protect a particular world region from the dangers posed by environmental accidents. The requestor proposed sponsoring a series of training courses in the United States and paying certain expenses for up to ten foreign government "representatives" to attend these courses. The requestor represented that it did not seek to obtain or retain business with the regional governments.

According to the Release, the requestor proposed paying—or arranging for a "leading non-governmental organization" to pay—for certain travel, lodging, and meal expenses for the government representatives. The expenses would include: (i) round-trip airfare to a U.S. city; (ii) transportation by van to and from the airport; (iii) hotel accommodations; and (iv) lunch. The requestor represented that all other expenses, "including meals other than lunch, taxis, phone calls, etc.," would not be covered by the sponsorship. The estimated cost of this sponsorship was $10,000 to $15,000 per year.

The requestor represented that the sponsorship recipients would be paid in part by the foreign governments and in part by the nonprofit. First, the requestor would invite nominations for sponsorship from particular foreign governments. Second, the requestor would select nominees based on the certain criteria, including: financial need; a demonstrated interest in enhancing government/industry coordination; the position of the nominee and the nominee's ability to convey information to appropriate agencies within his or her government; and the completion of a particular survey.

30. DOJ Opinion Procedure Release 96-02

On November 25, 1996, the DOJ issued Opinion Procedure Release 96-02 in response to a request submitted by a U.S. company, a wholly owned subsidiary of another U.S. company. The requestor was engaged in the manufacture and sale of equipment used in commercial and military aircraft. The requestor proposed modifying and renewing an existing marketing representative agreement ("Agreement") with a state-owned enterprise of a foreign country ("Representative").

The DOJ granted the requested no-action comfort based on various representations. According to the Release, the requestor represented that it had not conducted any business with the Representative pursuant to the existing agreement. The requestor further represented that, under the modified agreement, the Representative would: (i) serve as the requestor's exclusive sales representative in the foreign country, (ii) identify ultimate purchasers, who would then receive parts and services directly from the requestor, and (iii) be compensated a commission based on a percentage of net sales. The requestor represented that the commission rate established by the Agreement was commensurate with rates paid by the requestor to other marketing representatives around the world. In addition, both parties represented that the Representative was not in a position to influence the procurement decisions of the requestor's potential customers, because the Representative and the potential customers were under the control of separate regulatory entities of the foreign government.

The requestor represented that the Agreement would include a number of warranties by the Representative as well as certain terms and conditions related to the FCPA. First, all commission payments would be made to a designated bank account held in the name of the Representative. Second, the Representative would warrant that: (i) it was under different regulatory control than requestor's potential customers; (ii) it had no governmental connection to any ultimate customer of requestor; (iii) it had been designated by its government as a "preferred representative" for foreign companies; (iv) it had the authority to act as a marketing representative for foreign companies; (v) it was not in the position to and would not improperly influence any sales transactions of the requestor. Third, the Representative would additionally warrant to its familiarity and compliance with local laws and with the "Code of Ethics and Standards of Conduct" of the requestor's parent company, as well as its familiarity and compliance in all respects with the FCPA. Fourth, the requestor could terminate the Agreement at any time, and without prior notice, if the Representative failed to comply with any of its warranties.

In addition, the requestor represented that the Agreement would include a certification by the Representative, to be filed with the DOJ, wherein the Representative would promise not to violate the FCPA and immediately to notify the requestor if future developments made its certifications inaccurate or incomplete.

31. DOJ Opinion Procedure Release 97-01

On February 27, 1997, the DOJ issued Opinion Procedure Release 97-01 in response to a request submitted by a U.S. company with a wholly owned subsidiary that was submitting a bid to sell and service high-technology equipment to a foreign government-owned entity. In connection with the bid, the requestor entered into an agreement (the "Representative Agreement") with a privately held company (the "Representative") in that same foreign country. An unsubstantiated allegation of a past unlawful payment by Representative led the requestor to seek DOJ guidance.

According to the Release, the requestor represented that the Representative was a privately held company and that none of the owners, officers, or employees of the company was a government official. The requestor initially selected the Representative after interviewing several other prospective companies and determining that the Representative had the most experience and expertise with projects involving similar technology. The requestor also represented that the commission rate payable to the Representative was commensurate with the rates it paid for similar services in comparable sales. The requestor further obtained an opinion from local counsel in the foreign country that the Representative Agreement complied with local law.

The requestor represented that it had conducted a due diligence investigation of the Representative and that this investigation did not uncover improper conduct. However, subsequent to the requestor's initial due diligence investigation, the requestor learned of an allegation that the Representative had been involved in an improper payment more than fifteen years ago. The requestor undertook a second due diligence investigation in response to this allegation, including hiring an international investigative firm, interviewing principals of the Representative, the Commercial Counselor at the U.S. Embassy in the foreign country, and other persons with extensive commercial and other experience in the country. The second investigation did not uncover evidence substantiating the allegation, but did reveal that a number of persons might have been motivated, for political reasons, to disparage the Representative or its associated person.

The Representative warranted to its familiarity and compliance with the FCPA and indicated that the Representative would execute a certificate, a copy of which would be filed with the DOJ, stating that: (i) it had not made any improper payments in violation of the FCPA; (ii) it would not make any such improper payments in connection with its agreement with requestor's subsidiary; and (iii) it would notify requestor's subsidiary immediately if subsequent developments caused any of its representations to no longer be accurate or complete.

The DOJ granted the requestor the no-action comfort sought, but advised the requestor to closely monitor the performance of the Representative "in light of the unsubstantiated allegations."

32. DOJ Opinion Procedure Release 97-02

On November 5, 1997, the DOJ issued Opinion Procedure Release 97-02 in response to a request submitted by a U.S. utility company with operations in an Asian country. The requestor had commenced construction of a plant in a region with inadequate primary-level educational facilities. An elementary school construction project had been proposed and the requestor was considering donating $100,000 directly to the government entity responsible for the project. This donation amount was less than the proposed budget of the project. The requestor represented that, prior to releasing any funds, it would require a written agreement from the government entity setting forth promises to fulfill a number of conditions, including that the funds be used solely to construct and supply the school.

Granting the requested no-action comfort, the DOJ noted that because the requestor's donation would be made directly to a government entity and not to any foreign official, the provisions of the FCPA did not appear to apply to the prospective transaction.

33. DOJ Opinion Procedure Release 98-01

On February 23, 1998, the DOJ issued Opinion Procedure Release 98-01 in response to a request submitted by a U.S.-based industrial and service company with operations in Nigeria. According to the Release, Nigerian authorities had held the requestor liable for environmental contamination at a site formerly leased by a subsidiary of the requestor, assessing a $50,000 fine. To remove the contamination and resolve this liability, the requestor retained a Nigerian contractor that had been recommended by officials of the Nigerian Environmental Protection Agency.

According to the Release, when the requestor solicited a proposal for the project from the contractor, one of the contractor's representatives orally advised the requestor's representatives that (i) the $50,000 fine would need to be paid through the contractor, and (ii) the contractor's fee would include $30,000 in "community compensation and modalities for officials of the Nigerian FEPA and the Nigerian Ports Authority." "Reasonably" concluding that all or a portion of the "fine" and "modalities" would be paid to Nigerian government officials, the requestor sought DOJ guidance.

The DOJ informed the requestor that it would indeed take enforcement action if the requestor were to proceed with the requested payments. The DOJ, however, would "reconsider" its position if: (i) the requestor paid the fine directly to an official account of the appropriate government agency; (ii) the contractor were to reduce its fee by the amount included for "modalities"; and (iii) the requestor made arrangements to pay the contractor's fee to the Government of Nigeria, who would in turn pay the contractor provided that it was satisfied with the results of the cleanup.

34. DOJ Opinion Procedure Release 98-02

On August 5, 1998, the DOJ issued Opinion Procedure Release 98-02 granting no action comfort in response to a request submitted by a U.S. company with a wholly owned subsidiary operating in a foreign country. In connection with a bid by the subsidiary to sell a military training program to a government-owned entity, the requestor planned to establish a relationship with, and secure the services of, a privately held company in that same foreign country (the "Representative"). The requestor sought DOJ's guidance regarding several agreements it intended to make with the Representative and the intended payments to the Representative for past and future services.

According to the Release, the requestor had previously acquired an entity that had an International Representation Agreement with the Representative for certain marketing and consulting services. Subsequently, the requestor determined that the Agreement (for unspecified reasons) was invalid under local law, terminated the agreement, and offered the Representative a lump-sum payment for past services pursuant to a proposed Settlement Agreement. Still desiring to partner with the Representative, requestor proposed two new agreements with the Representative: an International Consultant Agreement and a Teaming Agreement. The requestor's obligations under all three of these proposed agreements were conditioned on a favorable response from DOJ under the FCPA Opinion Procedure.

In relation to the Settlement Agreement, the requestor represented that the amount to be paid to the Representative for past services had been reviewed—and determined "commercially reasonable under the circumstances"—by an independent accounting firm. In addition, the requestor represented

that: (i) the Representative was familiar—and in full compliance—with relevant U.S. laws and regulations, including the FCPA; and (ii) the Representative had not made any unlawful payments.

In relation to the International Consultant Agreement, requestor represented that it would pay the Representative a monthly retainer, with reimbursements for extraordinary expenses. In relation to the International Consultant Agreement and the Teaming Agreement, the requestor represented that: (i) the Representative was familiar with relevant U.S. laws and regulations, including the FCPA; (ii) the Representative warranted that no government official had an interest in Representative; and (iii) none of Representative's officers, employees, principals or agents were also government officials.

In addition, the requestor represented that it had conducted a due diligence investigation of the Representative, including interviews with principals of the Representative and consultation with officials of the U.S. Embassy regarding the Representative and its principals, which revealed no improper conduct. The requestor also obtained an opinion from counsel in the foreign country, which stated that the Agreements complied with local law.

Finally, the Representative executed a certification (and agreed to the filing of a duplicate certification with the DOJ), which stated: (a) neither the owner, any director, officer, employee or agent of Representative was a government official; (b) no government official had any legal or beneficial interest in Representative, and no portion of the fees paid to Representative would be paid to any government official; and (c) the Representative would immediately advise the requestor if subsequent developments caused its certification to be incomplete.

35. DOJ Opinion Procedure Release 00-01

On March 29, 2000, the DOJ issued Opinion Procedure Release 00-01 in response to a request submitted by a U.S. law firm and a foreign partner of the firm ("Foreign Partner"). The Foreign Partner had recently been appointed to a high-ranking position in the government of a foreign country and had taken a leave of absence from the firm in order to accept the appointment. The requestor proposed making certain payments and providing certain benefits to the Foreign Partner while he served as a foreign public official: (i) continued access to the firm's group rate for health, accidental, life and dependent insurance; (ii) a one-time payment of prospective "client credit" calculated to approximate the payments to which the Foreign Partner would otherwise be entitled as a partner for the following four years (discounted to present value); (iii) continued payments of interest on the Foreign Partner's partnership contribution; and (iv) a guarantee of return to full partnership when the Foreign Partner left office.

According to the Release, the requestor represented that it had obtained a legal opinion of foreign counsel that stated the proposed payments would not violate local law. The requestor further represented that, at the time of the Request, it did not represent or advise the foreign government nor did it represent any client in a matter involving the foreign government. Acknowledging an inability to predict future business, however, and seeking to avoid the possibility that the benefits could be construed as intended to influence the Foreign Partner in the exercise of his official duties, the requestor filed a declaration in which it agreed to: (i) not represent any clients before the Foreign Partner's ministry; (ii) maintain a list of all clients previously represented by the Foreign Partner or to which he would be entitled a client credit; and (iii) not represent or advise such clients in any matter involving doing business with or

lobbying the foreign government. Finally, the requestor undertook to inform the Foreign Partner whenever he should recuse himself in a matter involving the requestor or a client.

The Foreign Partner also filed a declaration in which he agreed to recuse himself and to refrain from participating in any decisions by the foreign government related to: (i) the retention of the requestor to advise or represent the foreign government; (ii) any government business with any of the requestor's current or former clients; (iii) any government business with any client Foreign Partner had previously represented or to which he would be entitled a client credit; and (iv) any matter in which the requestor or a client had lobbied the foreign government.

In granting no action comfort, the Release notes that, although foreign officials, such as Foreign Partner, are not ordinarily covered by the FCPA and cannot be the recipient of an Opinion Procedure Release, here the Foreign Partner was also a director of a U.S. law firm and therefore qualified as a "domestic concern."

36. DOJ Opinion Procedure Release 01-01

On May 24, 2001, the DOJ issued Opinion Procedure Release 01-01 in response to a request submitted by a U.S. company, which planned to enter into a joint venture with a French company. Each company planned to own fifty-percent of the joint venture and share in the profits and losses of the venture equally. Both companies planned to contribute certain pre-existing contracts and transactions to the joint venture, including contracts procured by the French company prior to January 1, 2000, the effective date of the French Law No. 2000-595 Against Corrupt Practices ("FLAC"). The requestor sought DOJ comfort regarding whether it could be held liable if it later became apparent that one or more of the contracts contributed by the French company had been obtained or maintained through bribery.

According to the Release, the requestor represented that it had taken a number of precautions to avoid violations of the FCPA. First, the French company had represented that none of the contracts it planned to contribute had been procured in violation of applicable anti-bribery or other laws. Second, the joint venture agreement permitted the requestor to terminate the joint venture if: (i) the French company was convicted of violating the FLAC; (ii) the French company entered into a settlement with an admission of liability under the FLAC; or (iii) the requestor learned of evidence that the French company violated anti-bribery laws and that violation, even without a conviction or settlement, had a "material adverse effect" upon the joint venture. Third, the French company terminated all agent agreements that were related to contracts the company planned to contribute and which were effective prior to January 1, 2000. All payment obligations to these agents had been liquidated by the French company such that neither the requestor nor the joint venture would make any payments in relation to such agreements. Fourth, although the French company would retain some payment obligations to agents whose agreements came into effect after January 1, 2000 for work done on contracts the company planned to contribute to the joint venture, none of these obligations would be contributed to or retained by the joint venture. Accordingly, neither the requestor nor the joint venture would make any payments in relation to such agreements. Fifth, the joint venture would enter into new agent agreements in accordance with a "rigorous compliance program designed to avoid corrupt business practices."

The DOJ's response indicated that it had no intention to take any enforcement action "absent any knowing act in the future on the part of requestor in furtherance of a prior act of bribery (or the offer or

promise to pay a bribe, or authorization thereof) on the part of, or on behalf, the French company concerning the contracts contributed by the French company."

In addition, the DOJ subjected its opinion to "several important caveats." First, the opinion relied on a particular interpretation of the French company's representation that the contracts it planned to contribute had not been procured in violation of applicable anti-bribery and other laws. The DOJ interpreted the representation to mean that the contracts had been obtained "without violation of either French law *or* the anti-bribery laws of *all* of the jurisdictions of the various government officials with the ability to have influenced the decisions of their government to enter into the contracts" (emphasis added). If, however, the representation had been limited to violation of then-applicable French law, the DOJ warned the requestor that it could face liability under the FCPA "if it or the joint venture knowingly [took or takes] any act in furtherance of a payment to a foreign official with respect to previously existing contracts irrespective of whether the agreement to make such payments was lawful under French law when the contract was entered into." Second, the DOJ expressed concern regarding, and specifically declined to endorse, the "materially adverse effect" standard for terminating the joint venture agreement. Believing the standard could be "unduly restrictive," the DOJ warned that the requestor could face liability if its inability to extricate itself from the joint venture resulted in the requestor taking acts in furtherance of original acts of bribery by the French company. Third, the DOJ indicated the opinion should not be deemed an endorsement of any specific aspect of the joint venture's compliance program's restrictions on the future hiring of agents. Fourth, the opinion did not speak to prospective conduct by the requestor following the commencement of the joint venture.

37. DOJ Opinion Procedure Release 01-02

On July 18, 2001, the DOJ issued Opinion Procedure Release 01-02 in response to a joint request, submitted on April 13, 2001, by a foreign diversified trading, manufacturing, contracting, service and investment organization and an American company (the "requestors"). The requestors indicated that they planned to form a Consortium (with the American company doing so through an offshore company in which it held a 50% beneficial interest) to bid on and engage in a business relationship with the foreign company's host government. The requestors sought the DOJ's guidance due to the fact that the chairman and shareholder of the foreign company acted as an advisor to the country's senior government officials and also served as a senior public education official in the foreign country.

In providing no-action relief, the DOJ highlighted a number of representations made by the American company, the foreign company and the foreign company chairman that sought to allay concerns over the chairman potentially influencing government decisions that could affect the Consortium. Specifically, the requestors represented that the foreign company's chairman did not have oversight or influence over the prospective contract by virtue of his positions (as advisor or public education official), nor did his duties involve him acting in any official capacity concerning the award of the project. The requestors provided the DOJ with a legal opinion of local counsel indicating that the relevant tender had not been issued by ministries or agencies under the chairman's control, and that the Consortium's formation and planned activities did not violate the laws of the foreign country.

In addition, the requestors represented that the chairman would not initiate or attend any meetings with government officials on behalf of the Consortium, as doing so would violate the laws of the foreign country. The chairman would also recuse himself from any discussion, consideration, or decision regarding the project that might be construed as promoting the activities or business of the Consortium.

The requestors further represented that all its bid submissions had and would disclose the chairman's relationship with the Consortium as well as his recusal from related matters.

Finally, the requestors represented that the Consortium agreement would require each member to agree not to violate the FCPA as well as explicitly acknowledge each member's understanding of the FCPA's applicability to the project bid. Any failure to comply with the provision would provide the non-breaching member a right to terminate the agreement.

38. DOJ Opinion Procedure Release 01-03

On December 11, 2001, the DOJ issued Opinion Procedure Release 01-03 granting no action comfort in response to a request submitted by a U.S. company with a wholly owned subsidiary operating in a foreign country. Requestor's subsidiary, with the help of a foreign dealer ("Foreign Dealer"), had submitted a bid to a foreign government for the sale of equipment. At the time of the bid's submission, the relationship between the requestor and the Foreign Dealer had been governed by an agreement ("Original Dealer Agreement").

Following the bid's submission, Foreign Dealer's president and principal owner made comments that one of the requestor's representatives understood as suggesting that payments had been, or would be, made to government officials to ensure acceptance of the bid. The Original Dealer Agreement subsequently expired, and the requestor sought to enter into a new agreement with the Foreign Dealer ("Proposed Dealer Agreement") should the bid be accepted.

According to the Release, the requestor made the following representations in regard to the comments made by the Foreign Dealer's owner. First, the requestor, through its counsel, had conducted an investigation and did not find any information substantiating the allegation. Second, the Foreign Dealer's owner represented to the requestor that no unlawful payments had been made or promised. The Foreign Dealer's owner made the same representation to the DOJ directly. Third, the requestor would timely notify the DOJ if it became aware of any information substantiating the allegations regarding unlawful payments.

The requestor also made the following representations in regard to the Proposed Dealer Agreement. First, the Foreign Dealer would certify that no unlawful payments were made or would be made to government officials. Second, the requestor would have the right to terminate the agreement if such payments are made. Third, the requestor would have the right to conduct an annual audit of the books and records of the Foreign Dealer and the requestor planned to fully exercise this right.

39. DOJ Opinion Procedure Release 03-01

On January 15, 2003, the DOJ issued Opinion Procedure Release 03-01 in response to a request submitted by a U.S. issuer concerning its planned acquisition of a U.S. company ("Company A"), which had both U.S. and foreign subsidiaries. According to the Release, requestor's pre-acquisition due diligence revealed payments authorized or made by officers, including United States officers, of one of Company A's foreign subsidiaries to employees of foreign state-owned entities in order to obtain or retain business. The requestor notified Company A of its findings and both companies commenced parallel investigations of Company A's operations worldwide. The companies then disclosed the results of their investigations to the DOJ and the SEC. The requestor desired to proceed with the acquisition, but was

"concerned that by acquiring Company A it is also acquiring potential criminal and civil liability under the FCPA for the past acts of Company A's employees."

According to the Release, Company A took certain remedial actions, with requestor's encouragement and approval, after discovering the unlawful payments, including (i) making appropriate disclosures to the investing public; (ii) issuing instructions to each of its foreign subsidiaries to cease all payments to foreign officials; and (iii) suspending the most senior officers and employees implicated pending the conclusion of the investigation.

In addition, the requestor promised to take the following actions once the transaction closed. First, the requestor would continue to cooperate with the DOJ and SEC in their respective investigations of past payments and would similarly cooperate with foreign law enforcement authorities. Second, the requestor would ensure that any employees or officers of Company A that had made or authorized unlawful payments would be appropriately disciplined. Third, the requestor would disclose to the DOJ any additional pre-acquisition payments to foreign officials discovered following the acquisition. Fourth, the requestor would extend its existing anti-corruption compliance program to Company A, and modify its program, if necessary, to detect and deter violations of relevant anti-bribery laws. Fifth, the requestor would ensure that Company A implemented a system of internal controls as well as make and keep accurate books and records.

The DOJ granted the requestor no-action relief, but cautioned that the relief did not apply to the individuals involved in making or authorizing payments nor would it apply to any unlawful payments occurring after the acquisition.

40. DOJ Opinion Procedure Release 04-01

On January 6, 2004, the DOJ issued Opinion Procedure Release 04-01 in response to a request submitted by a U.S. law firm that proposed to sponsor a one-and-a-half day seminar in Beijing, China, along with a ministry of the People's Republic of China (the "Ministry"). The stated purpose of the seminar was to educate legal and human resources professionals of both countries about labor and employment laws in China and the United States and "to facilitate understanding, compliance, and development of the laws of both jurisdictions."

The requestor represented that it had no business before the foreign government entities that might send officials to the seminar, nor was it aware of any pending or anticipated business between clients (presumably of the requestor) who would be invited and government officials who would attend. The requestor further indicated that the Chinese Ministry, and not requestor, would select which officials attended the seminar.

The requestor proposed paying for the following costs of the seminar: conference rooms, interpreter services, translation and printing costs of seminar materials, receptions and meals during the seminar, transportation to the seminar for Chinese government officials who did not live in Beijing, and hotel accommodations for Chinese government officials. The requestor indicated that all payments would be made directly to the service providers and any reimbursed expenses would require a receipt. The requestor also represented that it would not advance funds, pay reimbursements in cash, or provide free gifts or "tokens" to the attendees. Additionally, the requestor would not compensate the Ministry or any other Chinese government official for their participation in the seminar. In support of its submission, the

requestor obtained written assurance from a Deputy Director in the Ministry's Department of Legal Affairs (and provided such assurance to the DOJ) that its proposed seminar and payments would not violate the laws of China.

The DOJ provided no-action relief to the requestor based on the facts and circumstances as described in the Release.

41. DOJ Opinion Procedure Release 04-02

On July 12, 2004, the DOJ issued Opinion Procedure Release 04-02, which provided no-action comfort (subject to certain caveats described below) in connection with the purchase by an investment group consisting of, "among others, JPMorgan Partners Global Fund, Candover 2001 Fund, 3i Investments plc, and investment vehicles ['Newcos']" (collectively, "requestors") of certain companies and assets from ABB Ltd. ("ABB") relating to ABB's upstream oil, gas and petrochemical business ("OGP Upstream Business").

On July 6, 2004, six days prior to the Opinion Procedure Release, the DOJ had announced guilty pleas for violations of the FCPA by two of the entities being acquired by the requestors, ABB Vetco Gray, Inc. and ABB Vetco Gray (U.K.) Ltd. On the same date, the SEC filed a settled enforcement against ABB, charging it with violating the anti-bribery, books and records, and internal controls provisions of the FCPA related to transactions involving business in several foreign countries, including Nigeria.

Previously, after executing a Preliminary Agreement on October 16, 2003, the requestors and ABB agreed to conduct an extensive FCPA compliance review—through separately engaged counsel and forensic auditors—of the acquired businesses for the prior five-year period. The Release details a voluminous review, involving more than 115 lawyers manually reviewing over 1,600 boxes of printed emails, CD-ROMS, and hard drives of electronic records (all amounting to more than 4 million pages) as well conducting over 165 interviews of current employees, former employees, and agents. In addition, the forensic auditors visited 21 countries and assigned more than 100 staff members to review thousands of transactions. The requestors' counsel produced 22 analytical reports with supporting documents of the acquired businesses, which were provided to the DOJ and SEC along with witness memoranda as they were produced.

The requestors represented that they would undertake a number of precautions to avoid future knowing violations of the FCPA. First, requestors would continue to cooperate with the DOJ and SEC in their respective investigations of the past payments. Second, requestors would ensure that any employee or officer found to have made or authorized unlawful or questionable payments and still employed by Newco would be "appropriately disciplined." Third, requestors would disclose to the DOJ any additional pre-acquisition unlawful payments that they discovered after the acquisition. Fourth, requestors would ensure that Newco adopted a proper system of internal accounting controls and a system designed to ensure that their books and records were accurate. Fifth, requestors would cause Newco to adopt a "rigorous" anti-corruption compliance code ("Compliance Code") designed to detect and deter violations of the FCPA.

The Release details the various elements of Newco's Compliance Code, which would include, among other things: (i) a clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures aimed at reducing the

likelihood of future offenses to be followed by all directors, officers, employees and "all business partners" (defined as including "agents, consultants, representatives, joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction"); (ii) the assignment of one or more independent senior corporate officials, who would report directly to the Compliance Committee of the Audit Committee of the Board, responsible for implementing compliance with those policies, standards, and procedures; (iii) effective communication of the policies to all shareholders, employees, directors, officers, agents and business partners that included the requirement of regular training regarding the FCPA and other applicable anti-corruption laws and annual certifications by those parties certifying compliance therewith; (iv) a reporting system, including a "Helpline," for all parties to report suspected violations of the Compliance Code; and (v) appropriate disciplinary procedures to address violations or suspected violations of the FCPA, foreign anti-corruption laws, or the Compliance Code; (vi) procedures designed to assure that Newco takes appropriate precautions to ensure its business partners are "reputable and qualified;" (vii) extensive pre-retention due diligence requirements and post-retention oversight of all agents and business partners; (viii) procedures designed to assure that substantial discretionary authority is not delegated to individuals that Newco knows, or should know through the exercise of due diligence, have a propensity to engage in improper activities; (ix) a committee to review and record actions related to the retention of agents and sub-agents, and contracts with or payments to such agents or sub-agents; (x) the inclusion of provisions in all agreements with agents and business partners (a) setting forth anti-corruption representations and undertakings, (b) relating to compliance with foreign anti-corruption laws, (c) allowing for independent audits of books and records to ensure compliance with such, and (d) providing for termination as a result of any corrupt activity; (xi) financial and accounting procedures designed to ensure that Newco maintains a system of internal accounting controls as well as accurate books and records; and (xii) independent audits by outside counsel and auditors at least every three years.

The DOJ provided no-action relief to requestors and their recently acquired businesses, for violations of the FCPA committed *prior* to their acquisition from ABB. The Release was subject to two caveats, however. First, although the DOJ viewed requestors' compliance program as including "significant precautions," it cautioned that the Release should not be deemed to endorse any specific aspect of requestors' program. Second, the DOJ cautioned that the Release did not speak to any future conduct by requestors or its recently acquired businesses.

42. DOJ Opinion Procedure Release 04-03

On June 14, 2004, the DOJ issued Opinion Procedure Release 04-03 in response to a request by a U.S. law firm that proposed paying certain expenses for a visit to three cities within the United States by twelve officials of a ministry of the People's Republic of China ("Ministry"). The purpose for the ten-day, three-city visit was to provide the officials with opportunities to meet with U.S. public-sector officials and discuss various labor and employment laws, institutions, and resolution procedures in the United States. In connection with the proposal, the requestor represented that it had secured commitments from various relevant federal and state agencies, courts and academic institutions to meet with the officials.

The DOJ issued no action comfort based on the requestor's representations that it had no business before the foreign government entities that would send officials on the visit and that the officials would be selected solely by the Ministry; it would host only officials working for the Ministry or related government agencies (and interpreters), and would not pay expenses for spouses, family or other guests

of the officials; it would pay for the travel, lodging, meals and insurance for the twelve officials and one translator; all payments would be made directly to the providers and no funds would be paid directly to the Ministry or other government officials; apart from events directly connected to the meetings, requestor would not fund, organize, or host any entertainment or leisure activities, nor would requestor provide the officials with any stipend or spending money; and the requestor had obtained written assurance from a Deputy Director in the Ministry's Department of Legal Affairs that its proposed payments would not violate Chinese law.

43. DOJ Opinion Procedure Release 04-04

On September 3, 2004, the DOJ issued Opinion Procedure Release 04-04, which provided no-action relief to a U.S. company operating in the mutual insurance industry. The requestor proposed funding a "Study Tour" to the United States for five foreign officials who were members of a committee drafting a new law on mutual insurance for the foreign country to help the officials "develop a practical understanding of how mutual insurance companies are managed and regulated" and "to help the Committee further understand the differences (if any) in the organization, daily operation, capitalization, regulations, demutualization, and management of mutual insurance companies versus stock insurance companies (life and non-life)." The requestor indicated that the Tour would include visits to requestor's offices, as well as meetings with state insurance regulators, insurance groups, and other insurance companies.

According to the Release, the requestor represented that it did not have, nor did it intend to organize, a mutual insurance company in the foreign country. As such, the law to be drafted by the Committee would not apply to requestor regardless of its terms. In addition, the requestor represented that it did not write any insurance in the foreign country nor did it have any business there or with the foreign government except for certain reinsurance contracts purchased in the global market and a "Representative Office." However, the requestor acknowledged that it intended to apply for a non-life insurance license at some point and that, under current practice, an applicant for such a license needed to "demonstrate that it has been supportive of the country's socio-economic needs, proactive in the development of the insurance industry, and active in promoting foreign investment." According to the Release, the requestor's proposed Study Tour intended to help satisfy those criteria.

The requestor represented that the Study Tour would last for approximately nine days and that the officials would be selected solely by the foreign government. The requestor proposed paying for the foreign officials' economy airfare, hotels, local transportation, a $35 *per diem*, and occasional additional meals and tourist activities. The requestor estimated the Tour would cost approximately $16,875. All payments would be made directly to the service providers and reimbursed expenses would require a receipt. Further, the requestor would not provide any gifts or tokens to the officials. Apart from these expenses, requestor would not compensate the foreign government or the officials for their participation in the visit.

44. DOJ Opinion Procedure Release 06-01

On October 16, 2006, the DOJ issued Opinion Procedure Release 06-01 in response to a request submitted by a Delaware corporation with headquarters in Switzerland. The requestor proposed contributing $25,000 to either a regional Customs department or the Ministry of Finance (collectively, the "Counterparty") of an African country as part of a pilot project to improve local enforcement relating to

seizure of counterfeit products bearing the trademarks of requestor and its competitors. The requestor believed that such a program was necessary because of the African country's reputation as a major point of transit for such counterfeit goods and because of the local customs officials' compensation included a small percentage of any transit tax they collected, giving them a disincentive to conduct thorough inspections for counterfeit goods.

The requestor represented that in connection with its contribution, it would execute a formal memorandum of understanding with the Counterparty to (i) encourage the exchange of information relating to the trade of counterfeit products; (ii) establish procedures for the payment of awards to local Customs officials who detain, seize and destroy counterfeit products; (iii) establish eligibility criteria for the calculation and distribution of awards; and (iv) provide that the awards be given to those Customs officials directly by the Counterparty or given to local customs offices to distribute to award candidates.

The requestor further represented that it would establish "a number of procedural safeguards designed to assure that the funds made available by the [requestor's] contribution were, in fact, going to provide incentives to local customs officials for the purposes intended." The Release identified five such procedural safeguards. First, the requestor would make its payment via electronic transfer to an official government account and require written confirmation of the validity of the account. Second, requestor would be notified upon seizure of suspected counterfeit goods and would confirm the counterfeit nature of those goods. In addition, payments to local Customs officials would not be distributed unless destruction of the goods had been confirmed. Third, the Counterparty would have sole control over, and full responsibility for, the appropriate distribution of funds. The requestor would, however, require written evidence that its entire contribution was distributed according to the award eligibility criteria and calculation method. Fourth, requestor would monitor the efficacy of the incentive program and conduct periodic reviews, including periodic reviews of seizure data. Fifth, requestor would require the Counterparty to retain records of the distribution and receipt of funds for five years and allow requestor to inspect those records upon request. In addition to the above, requestor would also ensure that the Ministry of Justice in the African country was aware of the pilot program and that all aspects of the program were consistent with local laws.

The requestor stated in its request that its pending business in the African country was relatively small and "entirely unrelated" to the request. The requestor also stated that its future business in the country was not dependent upon the existence of the program and that the program was not intended to influence any foreign official to obtain or retain business. Finally, requestor stated that it intended to fund the program on an as-needed basis (and encourage its competitors to do so as well), provided that the program proved successful.

The DOJ granted requestor no-action relief subject to two "important caveats." First, as the language of the MOU and the proposed methodology for the selection of award recipients and distribution of funds was not provided to the DOJ, its opinion was not to be deemed an endorsement of either. The opinion was also not intended to opine on any possible expansion of the program within or outside the African country. Second, the Opinion did not apply to any payments by requestor for purposes other than those expressed in the request, nor did it apply to any individuals involved in authorizing or distributing the monetary awards.

45. DOJ Opinion Procedure Release 06-02

On December 31, 2006, the DOJ issued Opinion Procedure Release 06-02 in response to a request submitted by Company A, a wholly owned subsidiary of a U.S. issuer, Company B. One of Company A's foreign subsidiaries, known as Company C, sought to retain a law firm in the foreign country to assist it in obtaining required foreign exchange from an Agency of the country in which it operated. According to requestor (who had operational control over the prospective retention), although the Agency had promptly approved and processed Company C's applications for foreign exchange in the past, in the months prior to its request, approval from the Agency had been slow, unpredictable, and sometimes unforthcoming.

Noting that its applications had recently been rejected for minor reasons, Company C proposed retaining the law firm to prepare and perfect its Agency applications and represent Company C during the review process to avoid or diminish pretextual delays and denials by the Agency. Company C proposed paying the firm a "substantial" flat fee for preliminary and preparatory work and an ongoing "substantial" rate, representing approximately 0.6% of the value of the foreign exchange requested each month, once the firm's representation before the Agency began.

In granting no-action relief, the DOJ relied upon representations (described in more detail below), that include that: (i) no improper payment had been made or requested and the parties' agreement did not contemplate such activity; (ii) the firm and its principle attorney had a reputation for honest dealing and Company C performed due diligence on the firm; (iii) the parties agreed to implement anti-corruption measures; and (iv) the fees, although high, appeared competitive and reasonable under the circumstances.

The Release details a number of due diligence steps that requestor undertook in determining whether or not to hire the proposed law firm. The requestor examined the source of the firm—noting that the firm's principal attorney had been recommended on previous occasions to Company C by a firm with which it has a long-standing relationship and by a prominent criminal attorney. In addition, Company C has retained the principal attorney for the firm on other occasions and has been impressed with the quality of his representation. Finally, both the General Counsel of requestor and outside U.S. counsel interviewed the principal attorney and discussed, among other things, his understanding of the FCPA and ethical commitment to the engagement. Both found him to be professional and competent.

The proposed agreement between Company C and the law firm also contained several provisions aimed at minimizing the likelihood of an FCPA violation. The attorneys and third parties working on the matter were required to certify that they had not made and would not make improper payments and would comply with U.S. and other applicable law. In addition, employees of the firm and third parties working on the matter had to certify that they and their "parents, spouses, siblings and children" were not present or former government officials. The contract required that no payments be made that would violate the FCPA or other applicable law, and it required the law firm to know and understand Company B's Government Relations policy. Further, the contract required weekly progress reports, including details on negotiations and a full account of payments, and allowed for Company C to audit the firm's records in connection with this engagement.

The Release also notes that the requestor reviewed the proposed fees and determined that they were reasonable. Among other things, (i) the labor-intensive nature of the work; (ii) the considerable time

already devoted on the matter by the firm's principal attorney; (iii) the existence of competing bids by other firms that were substantially higher than the proposed firm's; and (iv) the customary nature of a flat fee (as opposed to hourly) within the foreign country, supported its conclusion as to the reasonableness of the fees.

Finally, the requestor made the following representations. First, that there had been no suggestion by anyone that improper payments were necessary to resolve the foreign exchange issue. Second, although the principal attorney for the firm was an advisor to the foreign country's central bank, his position as such had no bearing on the Agency's foreign exchange determinations. Third, the parties understood that the issue may not be resolved through hiring of the firm and that a successful resolution might not be achieved.

In granting its no-action relief, the DOJ cautioned that the Release should not be understood as an endorsement of the adequacy of the requestor's due diligence and anti-corruption measures "under facts and circumstances other than those described in the request."

46. DOJ Opinion Procedure Release 07-01

On July 24, 2007, the DOJ issued Opinion Procedure Release 07-01 in response to a request submitted by a U.S. company that was classified as both an "issuer" and a "domestic concern" under the FCPA. The requestor proposed paying for certain expenses for a six-person delegation from an Asian government for an "educational and promotional tour" of one of requestor's U.S. operations sites. The requestor's stated purpose for the tour was to demonstrate its operations and business capabilities to the delegation in hopes of participating in future operations in the foreign country similar to those that the requestor conducted in the United States.

The requestor represented that it did not conduct operations in the foreign country or with the foreign government at the time of the request. The delegation would consist of government officials working for "relevant foreign ministries" and one private government consultant. These delegates had been selected by the foreign government and not by requestor. In addition, to the requestor's knowledge, the delegates had no direct authority over decisions relating to potential contracts or licenses necessary for operating in the foreign country.

The requestor represented that the delegation's visit would last four days and be limited to a single operations site. It proposed paying for domestic economy class travel to the site as well as domestic lodging, local transport and meals for the delegates. (The foreign government would pay for the international travel.) All payments would be made directly to the service providers with no funds being paid directly to the foreign government or delegates. In addition, requestor would not provide the delegates with a stipend or spending money, nor would it pay the expenses for any spouses, family members, or other guests of the delegation. Further, any souvenirs provided would be branded with requestor's name and/or logo and be of nominal value. Apart from meals and receptions connected to meetings, speakers, and events planned by requestor, it would not fund, organize or host any entertainment or leisure activities. Finally, requestor had obtained written assurance from legal counsel that its planned sponsorship of the delegation was not contrary to the law of the foreign country.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances and were directly related to the promotion of requestor's products or services, therefore falling within the "promotional expenses" affirmative defense under the FCPA.

47. DOJ Opinion Procedure Release 07-02

On September 11, 2007, the DOJ issued Opinion Procedure Release 07-02 in response to a request submitted by a U.S. insurance company, classified as a "domestic concern" under the FCPA. The requestor proposed paying for certain expenses for six junior to mid-level officials of a foreign government for an "educational program" at requestor's U.S. headquarters to "familiarize the officials with the operation of a United States insurance company." The requestor proposed that this program occur after the officials completed a six-week internship in the United States for foreign insurance regulators sponsored by the National Association for Insurance Commissioners ("NAIC").

According to the Release, requestor represented that it had no "non-routine" business pending before the foreign government agency that employed the six officials. In addition, requestor's routine business before the agency (which was apparently governed by administrative rules with identified standards) consisted of reporting operational statistics, reviewing the qualifications of additional agents, and on-site inspections of operations, all of which were "guided by administrative rules and identified standards." The requestor's only work with other foreign government entities consisted of collaboration on insurance-related research, studies, and training.

The requestor represented that the visit would last six days and that the officials would be selected solely by the foreign government, and further represented that it would not pay any expenses related to the six officials' travel to or from the United States or their participation in the NAIC internship program. The requestor proposed paying only those costs and expenses deemed "necessary and reasonable" to educate the visiting officials about the operation of a U.S. company within this industry, including domestic economy class air travel, domestic lodging, local transport, meals and incidental expenses and a "modest four-hour city sightseeing tour." All payments would be made directly to the providers and reimbursed expenses would be limited to a modest daily amount and would require a receipt. The requestor would not pay any expenses for spouses or family members and any souvenirs would be branded with requestor's name and/or logo and be of nominal value. Additionally, requestor would not fund, organize, or host any entertainment or leisure activities, nor would requestor provide the officials with any stipend or spending money.

In providing no-action relief, the DOJ determined that the expenses were reasonable under the circumstances and were directly related to the promotion of requestor's products or services, therefore falling within the "promotional expenses" affirmative defense under the FCPA. In addition to its usual caveats about the Release applying only to the requestor and being based on the facts and circumstances as described, the DOJ also noted that it was not endorsing "the adequacy of the requestor's anti-corruption policies and procedures."

48. DOJ Opinion Procedure Release 07-03

On December 21, 2007, the DOJ issued Opinion Procedure Release 07-03 in response to a request submitted by a lawful permanent resident of the United States, classified as a "domestic concern" under the FCPA. The requestor was party to a legal dispute in an Asian country relating to the disposition

of real and personal property in a deceased relative's estate. In connection with the dispute, requestor proposed making a payment of approximately $9,000 to the clerk's office of the relevant family court to cover expenses related to the appointment of an estate administrator and other miscellaneous court costs. The requestor apparently did not make the payment out of concerns about its propriety under the FCPA, and she withdrew her application for an estate administrator pending a favorable opinion from the DOJ.

According to the Release, nothing in requestor's communications with the foreign court indicated any improper motives on behalf of the judge or court with respect to the payment. In addition, the requestor represented that the payment would be made to the family court clerk's office and not to the individual judge presiding over the dispute. The requestor provided to the DOJ a written legal opinion from a lawyer who had law degrees in both the United States and the foreign country, which stated that the request was not contrary to, and in fact was explicitly lawful under the law of the foreign country. The requestor further represented that she would request an official receipt, an accounting of how the funds were spent, and a refund of any remaining amount of the payment not spent in the proceedings. The requestor's submission was accompanied by translated versions of the applicable foreign law and regulation relating to family court proceedings.

Although it is not readily apparent from the Release how the proposed payment would do so, the DOJ assumed that the payments could be reasonably understood to relate to requestor's efforts "in obtaining or retaining business for or with, or directing business to, any person" in order "to provide requestor with the guidance she seeks."

The DOJ identified two separate grounds on which to provide no-action relief to requestor. First, the requestor's payment would be made to a government entity (the family court clerk's office) and not to a foreign *official*. There was nothing in requestor's submission to suggest that the presiding judge or estate administrator (both of whom potentially could have been considered "officials" under the statute) would have personally benefited from the payment after it had been made to the court clerk's office. Second, consistent with one of the FCPA's affirmative defenses, requestor's payment appears to be "lawful under the written laws and regulations" of the foreign country, at least as represented by the experienced attorney retained by requestor in the Asian country.

49. DOJ Opinion Procedure Release 08-01

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

Release 08-01 addresses the potential acquisition by the requestor's foreign subsidiary of a controlling interest in an entity responsible for managing certain public services for an unidentified foreign municipality. (The requestor is described as a Fortune 500 United States company with annual revenues of several billion dollars and operations in over 35 countries.) At the time of the proposed transaction, the public utility (the "Investment Target") was majority-owned (56%) by a foreign governmental entity ("Foreign Government Owner") and minority-owned (44%) by a foreign private company ("Foreign Company 1"). The foreign private company was owned and controlled by a foreign individual ("Foreign

Private Company Owner"), who had substantial business experience in the municipality and with the public services provided by the Investment Target.

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

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

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

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

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

The requestor asked the Foreign Private Company Owner to make the necessary disclosures. Initially, the Foreign Private Company Owner refused, indicating that such disclosures were contrary to

normal business practices in the foreign country and could result in competitive concerns, and the requestor abandoned the transaction. However, after approximately three weeks, the parties resumed discussions. Ultimately, through a series of discussions with relevant government officials and attorneys, the requestor learned that the foreign government took the position that the Foreign Private Company Owner was not subject to the foreign privatization regulations, as he was an unpaid, minority representative with the Investment Target. Further, the requestor informed these officials and attorneys of Foreign Private Company Owner's roles in both Foreign Company 1 and Foreign Company 2 and the substantial premium he would receive upon completion of the transaction. These agencies and officials informed the requestor that they were aware of these issues and had taken them into consideration in approving Foreign Company 2's bid.

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

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

- The requestor conducted "reasonable" due diligence of the Foreign Private Company Owner, focused on both FCPA risks and compliance with local laws and regulations. The DOJ also noted that the documentation of such diligence would be kept within the United States.

- The requestor required and obtained transparency relating to the significant premium that the Foreign Private Company Owner would realize from the sale of the formerly government-owned stake to the requestor.

- The requestor obtained from the Foreign Private Company Owner representations and warranties regarding past and future compliance with the FCPA and other relevant anti-corruption laws.

- The requestor retained the contractual right to discontinue the business relationship in the event of a breach by the Foreign Private Company Owner, including violations of relevant anti-corruption laws.

50. DOJ Opinion Procedure Release 08-02

On June 13, 2008, the DOJ issued Opinion Release 08-02, which provided no-action comfort in connection with Halliburton's proposed purchase of the English oil-services company Expro International Group PLC ("Expro").[35] Expro, traded on the London Stock Exchange, provides well-flow management for the oil and gas industry. At the time of the Release, Halliburton was competing with a largely foreign investment group known as Umbrellastream to acquire Expro.

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

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

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

Second, within ten business days of the closing, Halliburton was to present to the DOJ a comprehensive, risk-based FCPA and anti-corruption due diligence work plan organized into high-risk, medium-risk, and low-risk elements. The work plan was to include each of the critical due diligence areas including: (i) use of agents and third parties; (ii) commercial dealings with state owned companies; (iii) joint venture, teaming and consortium arrangements; (iv) customs and immigration matters; (v) tax matters; and (vi) government licenses and permits. Such due diligence was to be conducted by external counsel and third-party consultants with assistance from internal resources as appropriate. A status report was to be provided to the DOJ with respect to high-risk findings within 90 days, medium-risk findings within 120 days, and low-risk findings within 180 days. All due diligence was to be concluded within one year with periodic reports to the DOJ throughout the process.

[35] In a break from typical Opinion Release practice, Halliburton is identified by name. Requestors often remain anonymous. Expro and other involved parties were not identified by name but were identifiable through context and publicly available sources.

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

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

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

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

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

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

The DOJ also determined that, in light of the restrictions placed on Halliburton in performing pre-acquisition due diligence, and the company's commitment to implement extensive post-acquisition due diligence, remedial and reporting measures, that it did not intend to take enforcement action with regard to any FCPA liabilities Halliburton could be argued to have inherited by Expro based on pre-acquisition

unlawful conduct or for post-acquisition unlawful conduct by Expro prior to Halliburton's completion of its FCPA due diligence, if such conduct were disclosed to the DOJ within 180 days of closing.

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

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

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

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

51. DOJ Opinion Procedure Release 08-03

On July 11, 2008, the DOJ issued Opinion Procedure Release 08-03 in response to a request submitted by TRACE International, Inc. ("TRACE"), a membership organization that specializes in anti-bribery initiatives around the world. TRACE, which is organized under the laws of the District of Columbia and therefore a "domestic concern" for the purpose of the FCPA, proposed paying for certain expenses for approximately twenty Chinese journalists in connection with an anti-corruption press conference to be

held in Shanghai. The journalists were employed by Chinese media outlets, most of which are wholly owned by the Chinese government, arguably making them "foreign officials" for purposes of the FCPA.

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

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

52. DOJ Opinion Procedure Release 09-01

On August 3, 2009, the DOJ published Opinion Procedure Release 09-01. The requestor, a "domestic concern" under the FCPA, is a manufacturer of medical devices that is attempting to enter into the market to sell its products to the government of a foreign country.

According to the Release, in or around March 2009, representatives of the requestor visited the foreign country to meet with a senior official ("Official") of a government agency. The Official indicated that the government intended to provide a type of medical device to patients in need by purchasing the medical devices and reselling them to patients at a subsidized lower price. The Official explained that the government would only endorse products for the program that it had technically evaluated and approved and advised the requestor that its products would need to be evaluated.

The requestor was asked to provide sample devices to government health centers for evaluation. The foreign government and the requestor jointly determined that the optimal sample size for such a study was 100 units distributed among ten health centers as this number would ensure results free from anomalies that might result from a smaller sample size or sampling at a smaller number of centers. The requestor indicated that it would also provide accessories and follow-on support for the medical devices free of charge. The approximate total value of the devices and related items and services is $1.9 million.

According to the Release, the evaluation of the devices will be based on objective criteria that were provided to the DOJ, and the results of the evaluation will be collected by the requestor's Country Manager, a physician, who will, along with two other medical experts, review the results and provide reports to a senior health official in the foreign country who will share his assessment with the Government Agency. The Government Agency will then evaluate the results and assessments to determine whether to endorse the device.

The foreign government has advised the requestor that none of the companies' devices will be promoted by the foreign government above any of the other qualified devices in the program, and the requestor indicated that it has no reason to believe that the Official who suggested providing the devices will personally benefit from the donations.

The DOJ provided no action comfort and noted that the proposed provision of medical devices and related items and services would "fall outside the scope of the FCPA" because the goods and services will be provided to the government health centers (selected by the requestor), as opposed to individual government officials, and the ultimate end-users will be determined based on the following criteria and limitations:

- The 100 recipients will be selected from a list of candidates provided by the medical centers. The centers will be expected to nominate candidates that best meet certain objective criteria, which requestor provided to the DOJ. All candidates will be required to present a certificate establishing their inability to pay.

- The 100 recipients will be selected from the list of candidates by a working group of health care professionals who are experienced in the use of this type of medical device. Requestor's Country Manager will participate in the working group, enabling the requestor to ensure that the selection criteria are met. According to the Release, the Country Manager had previously received FCPA training.

- The names of the recipients will be published on the Government Agency's web site for two weeks following the selection.

- Close family members (defined as "immediate relatives, as well as nieces, nephews, cousins, aunts, and uncles") of the Government Agency's officers or employees, working group members, or employees of the participating health centers will be ineligible to be recipients under the program unless:

    - The relatives hold low-level positions and are not in positions to influence either the selection or testing process;

    - The relatives clearly meet the requisite economic criteria; and

    - The recipient is determined to be a more suitable candidate than candidates who were not selected based on technical criteria.

- The Country Manager will review the selection of any immediate family members of any other government officials to ensure that the criteria were properly applied and will report his determination to the requestor's legal counsel.

53. DOJ Opinion Procedure Release 10-01

On April 19, 2010, the DOJ issued Opinion Procedure Release 10-01. The Release arises out of an agreement between the U.S. government and a foreign country government, under which a U.S. government agency provides assistance to the foreign country. The requestor, a U.S. company, entered into a contract with the U.S. government agency to design, develop, and build an unnamed facility for the

foreign country. Under the agreement, the requestor is also required to hire and compensate individuals in connection with the facility.

The foreign country notified the U.S. government agency that it had appointed an individual to be the Facility Director. The foreign country selected the candidate based on his or her qualifications, and the U.S. government agency subsequently directed the requestor to hire the selected person as the Facility Director. The requestor will pay the $5,000 per month salary of the Facility Director, although indirectly through the in-country subsidiary of a subcontractor hired by the requestor to handle personnel staffing issues. The foreign country is expected to assume the obligation to compensate the Facility Director after the initial one-year period of employment.

The requestor approached the DOJ because the designated Facility Director is also a “Foreign Official” under the FCPA by virtue of his or her current position as a paid officer for an agency of the foreign country. As described in the release, the individual’s position as a Foreign Official does not relate to the facility, and the services that he or she will provide as Facility Director are separate and apart from those performed as a Foreign Official. Additionally, in his or her positions both as Facility Director and Foreign Official, the person will not perform any services on behalf of, or make any decisions affecting, the Requestor, including any procurement or contracting decisions, and the Requestor will not provide any direction to the individual with respect to his or her position as Facility Director. Accordingly, the Foreign Official designated to become the Facility Director will have no decision-making authority over matters affecting the requestor.

In providing no-action relief, the DOJ highlighted several important facts relevant to its analysis of the request. The DOJ stressed that the Facility Director is being hired pursuant to a contractual agreement between a U.S. government agency and the foreign government, and that the Facility Director—although a Foreign Official under the FCPA—will not be in a position to influence any act or decision affecting the Requestor. The DOJ noted that pursuant to the agreement between the U.S. government agency and the foreign country, the requestor is obligated and bound to hire as the Facility Director this specific person, whom the requestor had no part in choosing, and who was chosen based on his or her personal qualifications for the job. Finally, the DOJ emphasized that the person’s new job as Facility Director is separate and apart from his or her existing job as a Foreign Official, and that both jobs are truly independent of the requestor. The individual, in his or her capacities as both Foreign Official and Facility Director, will not take any directions from the requestor, nor have any decision-making authority over matters affecting the requestor, including procurement and contracting decisions.

54. DOJ Opinion Procedure Release 10-02

On July 16, 2010, the DOJ issued Opinion Procedure Release 10-02 in response to a request by a U.S.-based nonprofit microfinance institution (“MFI”) that provides loans and basic financial services to low-income entrepreneurs around the world who may otherwise lack access to loans or financial services. The requestor intended to convert all of its local operations to commercial entities licensed as financial institutions. One of these operations was a wholly owned subsidiary in a country in Eurasia (the “Eurasian Subsidiary”) that wished to transform itself from a limited liability company regulated by an agency of the Eurasian country (the “Regulating Agency”) into an entity that would permit it to apply for regulation by the Central Bank of the Eurasian country, with the ultimate goal of acquiring a license as a bank.

The Regulating Agency expressed concern that allowing the MFI to transition from "humanitarian" status to commercial status could result in grant funds and their proceeds either being withdrawn from the country or being used to benefit private investors. The Regulating Agency pressured the Eurasian Subsidiary to take steps to "localize" its grant capital to ensure that it remained in the Eurasian country. Specifically, the Regulating Agency insisted that the Eurasian Subsidiary make a grant to a local MFI in an amount equal to approximately 33 percent of the Eurasian Subsidiary's original grant capital and provided a list of local MFIs from which to choose.

The requestor believed that compelled grants to an institution on a designated short list could raise red flags under the FCPA. The Eurasian Subsidiary undertook a three-stage due diligence process to vet the potential grant recipients and select the proposed grantee. First, it conducted an initial screening of six potential grant recipients by obtaining publicly available information and information from third-party sources. Based on this review, it ruled out three of the six MFI candidates as unqualified. Second, the Eurasian Subsidiary undertook due diligence on the remaining three potential grant recipients to learn about each organization's ownership, management structure and operations. This review involved requesting and reviewing key operating and assessment documents for each organization, as well as conducting interviews with representatives of each MFI. The Eurasian Subsidiary eliminated one organization for conflict of interest concerns, and another after the discovery of a previously undisclosed ownership change in the entity. Third, the Eurasian Subsidiary undertook targeted due diligence on the remaining potential grant recipient, the Local MFI. This diligence was designed to identify any ties to specific government officials, determine whether the organization had faced any criminal prosecutions or investigations, and assess the organization's reputation for integrity.

The third round of due diligence revealed that one of the board members of both the Local MFI and the Local MFI's Parent Organization was a sitting government official in the Eurasian country and that other board members are former government officials. The DOJ noted, however, that the sitting government official serves in a capacity that is completely unrelated to the micro financing industry, and, under the law of the Eurasian country, sitting government officials may not be compensated for this type of board service. Further, the Local MFI confirmed that neither its own board members nor the board members of the Local MFI's Parent Organization receive compensation for their board service.

The requestor indicated that the Proposed Grant would be governed by a written grant agreement with the recipient and be subject to numerous controls. First, the Eurasian Subsidiary would pay the grant funds in eight quarterly installments, in order to allow interim monitoring and to assist the Local MFI in effectively managing the inflow of capital. Each successive installment would be retained by the Eurasian Subsidiary until the satisfactory completion of a quarterly monitoring review and/or semi-annual audit. Second, each quarter, the Local MFI's use of grant funds would be reviewed by an independent monitor. In addition, every six months, the Local MFI's use of the donated funds would be audited by an accounting firm selected by the Eurasian Subsidiary. The monitoring and audits would continue for three years beyond the disbursement of the final installment of loan capital. Third, a portion of the grant funds would be dedicated to capacity-building to help the Local MFI develop the organizational infrastructure needed to make effective use of the new loan capital. Fourth, as discussed, the grant agreement would expressly prohibit the Local MFI from transferring any of the grant funds to the Local MFI's Parent Organization or otherwise using the grant funds to compensate board members of either the Local MFI or the Local MFI's Parent Organization.

Finally, the grant agreement would include a series of anti-bribery compliance provisions, including provisions: (i) prohibiting the Local MFI from paying bribes or giving anything else of value to benefit government officials personally; (ii) requiring the Local MFI to keep and maintain accurate financial records and to provide the Eurasian Subsidiary's representatives access to its books; (iii) requiring the Local MFI to adopt a written anti-corruption compliance policy; (iv) requiring the Local MFI to certify its compliance with these obligations upon request by the Eurasian Subsidiary; (v) prohibiting the Local MFI from undergoing a change in ownership or control, upon penalty of forfeiting the grant; and (vi) permitting the Eurasian Subsidiary to terminate the agreement and recall the grant funds if it obtains evidence that reasonably suggests a breach of the compliance provisions.

The DOJ provided no action comfort and stated that, based on the due diligence performed and the controls in place, "it appears unlikely that the payment will result in the corrupt giving of something of value to [government] officials." The Release further states that, "the Requestor has done appropriate due diligence and … the controls that it plans to institute are sufficient to prevent FCPA violations."

The Release is notable in that it expressly relies on three previous Releases (95-01, 97-02, and 06-01) dealing with charitable grants and bases its approval of the Requestor's due diligence in part on its completion of the due diligence steps outlined in those prior Releases. In doing so, the Release further clarifies what due diligence the DOJ expects in such situations, including: (i) FCPA certifications by the recipient; (ii) due diligence to confirm recipients' officers are not affiliated with the foreign government; (iii) the provision of audited financial statements; (iv) a written agreement with the recipient restricting the use of funds; (v) steps to ensure the funds are transferred to a valid bank account; (vi) confirmation that contemplated activities had taken place before funds were disbursed; and (vii) ongoing monitoring of the program.

The Release is also notable because it expressly states that the Eurasian Subsidiary's Proposed Grant to the Local MFI "is for the purpose of obtaining or retaining business (nonprofit business, to be followed by for-profit business) in the Eurasian country; that is, the Proposed Grant would be made as a condition precedent to obtaining a license to operate as a financial institution." This suggests the DOJ may, in appropriate circumstances, view payments made by non-profit organizations engaged in charitable or humanitarian work as payments to "obtain or retain business" under the FCPA.

55. DOJ Opinion Procedure Release 10-03

On September 1, 2010, the DOJ released Review Procedure Release 10-03 in response to a request from a limited partnership established under U.S. law and headquartered in the United States. The requestor planned to engage a consultant and its sole owner (collectively, the "Consultant") to assist with the requestor's attempt to obtain business from a foreign government. The Consultant was a U.S. partnership and its owner was a U.S. citizen.

The requestor developed natural resource infrastructure and sought to enter into discussions with the foreign government about a particularly novel initiative. It felt that it required the assistance of an agent in order to break through a market dominated by established companies and gain the necessary audience with the foreign government.

The complicating factor was the Consultant's past and present representation of that same foreign government and a number of its ministries in unrelated matters. The Consultant held contracts to

represent the foreign government and act on its behalf, including performing marketing on behalf of the Ministry of Finance and lobbying efforts in the United States. It was a registered agent of the foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611, *et seq.*, and it had previously represented ministries of the foreign government that would play a role in discussions of the Requestor's initiative.

The requestor represented that the Consultant had taken steps to wall off employees who would work on the contemplated representation from those working on the various representations of the foreign government or its ministries, and that the Consultant would provide, at the requestor's insistence, full disclosure of the representation to the relevant parties. The requestor had also confirmed the legality of the Consultant representing both it and the foreign government under local law and had secured from the Consultant contractual obligations to limit further representation of the foreign government for the duration of the consultancy.

At issue was whether the Consultant would be considered a "foreign official" for the purposes of the FCPA. The DOJ indicated that the answer depended on the circumstances of the engagement. The DOJ emphasized that the FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, *or any person acting in an official capacity for or on behalf of any such government* or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis supplied by DOJ). Thus, where the Consultant had acted or would act *on behalf of* the foreign government (in its capacity as an agent of that government), the Consultant likely would be deemed a "foreign official" for the purposes of the FCPA. However, where the Consultant was not acting *on behalf of* the foreign government, it likely would not fall within that definition.

In this particular case, the DOJ indicated that the steps taken by the requestor were sufficient to ensure that the Consultant would not be acting on behalf of the foreign government for the purposes of the consultancy and therefore it would not be deemed a "foreign official" in that context. As a result, the DOJ would not take enforcement action based solely on payments to the Consultant. The DOJ cautioned the requestor, however, that while the Consultant would not be deemed a "foreign official" for FCPA purposes under the circumstances described, the proposed relationship increased the risk of potential FCPA violations, and the Review Procedure Release did not foreclose the DOJ from taking enforcement action should an FCPA violation occur during the consultancy.

Release 10-03 is particular noteworthy for several reasons. First, it reemphasized that the definition of "foreign official" under the FCPA is independent of—and almost always broader than—the definitions of similar terms in the local laws of foreign countries. In the present case, it did not matter that the Requestor had represented that as a matter of local law, the Consultant's owner and its employees were not employees or otherwise officials of the foreign government. As the DOJ pointed out, the FCPA's definition of "foreign official" is broader than persons formally designated by the foreign government as employees or officials and might have captured the Consultant in different circumstances.

Second, it makes clear that the definition of "foreign official" is, at times, conduct-specific. The DOJ indicated that when an individual is deemed to be a "foreign official" by virtue of acting on behalf of a foreign government, that classification attaches only in certain circumstances, *i.e.* when that individual is actually acting in that capacity and not necessarily when he is acting in other capacities.

Third, it is an example of the DOJ extending an analytical framework that it previously applied to one category of cases to another category of cases and underscores the influential—if not precedential—value of previous guidance to future circumstances. The DOJ cited, and appeared to draw support for its determination in this case from, a number of previous releases wherein the DOJ stated its lack of enforcement intent relating to various proposals to hire *employees and officials* of foreign governments. In those cases, the DOJ stated that it looked to determine whether there were any indicia of corrupt intent, whether the arrangement was transparent to the foreign government and the general public, whether the arrangement was in conformity with local law, and whether there were safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal. That analytical framework is the same or similar to the one applied in the present release, even though here the DOJ was addressing a slightly different category, *i.e.* individuals who in certain circumstances might be deemed a "foreign official" because they were acting *on behalf of* a foreign government in those circumstances.

56. DOJ Opinion Procedure Release 11-01

On June 30, 2011, the DOJ issued Opinion Procedure Release 11-01 in response to a request submitted by an adoption service provider that facilitates foreign adoptions. The requestor, a domestic concern, proposed to pay the expenses for a trip to the United States by one official from each of two foreign government agencies to educate the officials about the operations and services of U.S. adoption service providers.

The requestor made several representations that are now a common refrain in similar requests for DOJ advisory opinions. The requestor represented that it had no "non-routine business" (such as licensing or accreditation) before the relevant foreign government agencies and that the respective agencies—not the requestor—would select which officials would travel. The requestor would pay all costs directly to the service providers and that costs and expenses would be only those necessary and reasonable to educate the visiting officials about the operations and services of U.S. adoption service providers. The requestor represented that any gifts would be nominal in value and reflect the requestor's business and/or logo and that it would not host officials' spouses or family members. The requestor also represented that its routine business with the relevant foreign government agencies is guided by international treaty and administrative rules with defined standards, and that it had invited another adoption service provider to participate in the visit. The DOJ determined that the proposed expenses were reasonable under the circumstances and directly related to promotion of the requestor's services.

Similar sponsorship of trips to familiarize foreign officials with the requestors' business operations, in which requestors made substantially similar representations, were approved under Opinion Procedure Releases 07-01 and 07-02. The fact that the requestor sought guidance for a relatively straightforward set of circumstances may reflect heightened FCPA compliance sensitivity even among smaller entities conducting international operations. Although the DOJ expressly disavows that its opinion procedure releases (including 11-01) carry precedential value, Opinion Procedure Release 11-01 is noteworthy in that it specifically cited to Opinion Procedure Releases 07-01 and 07-02 as "instances, with appropriate protections, [in which] the Department . . . recently issued favorable Opinion Releases with respect to sponsoring travel and related expenses for foreign officials . . . ."

57. DOJ Opinion Procedure Release 12-01

On September 18, 2012, the DOJ released Opinion Procedure Release No. 12-01, which addressed a request by a U.S. lobbying firm ("Requestor") seeking to engage a third-party consulting company ("Consulting Company") to assist with potential lobbying activities that the Requestor wished to provide to the Embassy and Ministry of a particular Foreign Country.

The Requestor hoped to provide lobbying services and strategic advice to the Embassy of a Foreign Country, including in connection with monitoring the activities of Congress and the U.S. government relevant to that country, to improve the image and visibility of the Foreign Country within the United States. In connection with these activities, the Requestor proposed to engage the Consulting Company to provide introductions to Embassy personnel, advise on cultural issues, serve as the Requestor's sponsor (as is required by the law of the foreign country), help the Requestor form an office, and identify potential business opportunities.

The request stemmed from the fact that one of the three partners of the Consulting Company was a member of the Foreign Country's royal family. The DOJ therefore addressed two issues: (1) whether the Royal Family Member was a "foreign official" under the FCPA; and (2) whether Requestor's engagement of the Consulting Company would prompt an enforcement action.

a. Royal Family Members Are Not Foreign Officials Per Se

In the Release, the DOJ noted that it had never before directly addressed the precise question of whether a member of a royal family qualified as a "foreign official" for purposes of the FCPA. In addressing the issue, the DOJ concluded that a "person's mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a 'foreign official.'"

Instead, the Release provided that the question of who constitutes a "foreign official" requires a "fact-intensive, case-by-case determination." In particular, the DOJ looked to at least one other Opinion Procedure Release (No. 10-03) as well as discussion contained in the District Court decision *United States v. Carson, et al.*, which arose from the federal government's prosecution of individuals associated with Control Components, Inc. In *Carson*, for example, the court was asked to assess whether a particular state-owned entity should be considered an "instrumentality" of a foreign government and did so by examining factors such as (i) the foreign state's characterization of the entity and its employees; (ii) the foreign state's degree of control over the entity; (iii) the purpose of the entity's activities; (iv) the entity's obligations and privileges under foreign law; (v) the circumstances surrounding the entity's creation; and (vi) the foreign state's extent of ownership in or financial support of the entity.

Based on the Release, the DOJ confirms that the *Carson* analysis applies to individuals as well, and that the relevant inquiry turns on the amount of control or influence that a particular individual has over governmental functions and how the individual is characterized by the government, as well as whether (and under what circumstances) the individual acts on the government's behalf. The DOJ indicates that the determination will hinge upon factors such as:

- The structure and distribution of power within a country's government;
- A royal family's current and historical legal status and powers;

- The individual’s position within the royal family;
- An individual’s present and past positions within the government;
- The mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as royal succession);
- The likelihood that an individual would come to hold such a position; and
- An individual’s ability, directly or indirectly, to affect governmental decision-making

With respect to the proposed engagement, the DOJ noted that the Royal Family Member “holds no title or position in the government, has no governmental duties or responsibilities, is a member of the royal family through custom and tradition rather than blood relation, and has no benefits or privileges because of his status.” The Release also noted that the Royal Family Member held only one governmental position throughout his career during the late 1990s, when he oversaw a governmental construction project. The Royal Family Member had never served in any capacity for the Foreign Country and was not in a position to ascend to any governmental post in the future. The DOJ also noted that the Royal Family Member has previously served as the legally required sponsor to other companies operating in the Foreign Country, and in doing so had acted on behalf of those companies only in his personal capacity rather than as a representative of the Foreign Country.

Based on its review of the above factors, the DOJ determined that the Royal Family Member was not a “foreign official” for purposes of the FCPA, so long as he did not hold himself out as acting on behalf, or in his capacity as a member, of the royal family.

b. The DOJ Provides No-Action Comfort But Cautions Against Improper Payments

The DOJ further assessed whether the proposed engagement of the Consulting Company (and therefore the Royal Family Member) by the Requestor would be grounds for an enforcement action. The Release indicates that the Consulting Company was proposed to help introduce the Requestor to the Foreign Embassy, provide advice on cultural and policy-related issues concerning the Foreign Country, and make selected introductions and liaisons as requested. Under a separate agreement, the Consulting Company would also identify business development opportunities for the Requestor in the Foreign Country. The draft agreement between the Requestor and the Consulting Company contained FCPA representations and warranties and the Consulting Company agreed that all of its partners and employees would be bound by the procedures set forth in the OECD’s Good Practice Guidance on Internal Controls, Ethics and Compliance.

In proposing to engage the Consulting Company, the Requestor represented that the relationship between it and the Consulting Company would be treated with complete transparency, including by referencing the Consulting Company’s and the Royal Family Member’s name in the retainer agreement between the Requestor and the Foreign Embassy. The Requestor and the Consulting Company would also determine transparently a fee amount that accurately reflected the amount of work provided by the Consulting Company (estimated to be approximately $6,000 per month), equally divided between the three partners of the Consulting Company. The Requestor represented that this fee was less than or

comparable to the fee amount charged by other entities - including the Requestor itself - to provide similar services.

Based on these factors, as well as the fact that the Royal Family Member did not have familial, professional or personal relationships with the key decision makers of the Foreign Embassy (*i.e.*, the Ambassador and the Foreign Minister), the DOJ stated that it would not take enforcement action against the Requestor for the proposed relationship.

Notably, however, the DOJ did not preclude itself from taking action in the future should the relationship in practice involve conduct that could violate the FCPA. In particular, the DOJ noted that the FCPA also prohibited improper payments to foreign officials through third parties and emphasized that this could serve as a potential basis for liability should the Requestor and the Consulting Company behave inappropriately.

58. DOJ Opinion Procedure Release 12-02

On October 18, 2012, the DOJ issued Opinion Procedure Release 12-02. The Release is another in a series of Releases, several of which are directly cited in Release 12-02, relating to the provision of travel expenses to government officials. In this case, the requestors were 19 non-profit adoption agencies based in the United States that sought to host 18 government officials of varying ranks and responsibilities during a four-day trip to the United States. The requestors indicated that the purpose of the trip was to demonstrate their work to the government officials, each of whom had responsibilities or authority that extended or could extend to adoption-related matters, including two members of the national legislature, so that the officials could review how children adopted from their country have adjusted to life in the United States and to facilitate proper communication between the requestors and the relevant government agencies during the adoption process. During the trip, the officials would interview the requestors' staff, meet with families, and review the requestors' files.

Among the relevant conditions placed on the travel expenditures by the requestors were the provision only of economy class airfare for all but certain senior officials, who received business class airfare on international flights, and lodging and meals that would not exceed General Services Administration rates. The requestors represented that any entertainment provided would be of nominal cost and involve families of adopted children, no per diems or spending money would be provided, no expenses would be paid for family members, any souvenirs would be of nominal value and include a requestor's logo, and the requestors would not themselves select the particular government officials who would travel. Further they represented that they would pay no additional money to the officials' government or any other entity in connection with the trip.

The DOJ determined that, as presented, the expenditures would fall under the FCPA's affirmative defense for reasonable and bona fide expenditures related to the promotion, demonstration, or explanation of products or services.

59. DOJ Opinion Procedure Release 13-01

On December 19, 2013, the DOJ issued Opinion Procedure Release 13-01 to address the payment of medical expenses to a non-U.S. government official's family member on humanitarian grounds. According to the release, a partner in a U.S. law firm sought to pay the medical expenses for

the daughter of a government official who worked in the Office of the Attorney General ("OAG") of another country.

The partner had stated that he had become personal friends with the OAG official, whose daughter was suffering from a severe illness that could not be effectively treated in his home country. The partner proposed to pay between $13,500 and $20,500 for medical treatment in another country, as the OAG official lacked the financial means to pay for treatment overseas himself. The requestor further represented that the payment would be made directly to the medical facility using his personal funds, and that both he and the OAG official had discussed the matter transparently with their respective employers, neither of whom had any objections.

The partner and other attorneys with the law firm actively represented the country on several matters, and the OAG was the entity responsible for selecting and contracting with international counsel on behalf of the government. The partner stated, however, that he was not the law firm's lead attorney for the country, and that the OAG official had not had and would not have any role, influence on, or involvement in the hiring of international legal counsel by the OAG or otherwise (which the OAG official confirmed in a certified letter). The partner stated that the country's laws required the OAG to publish a reasoned decision justifying the engagement of international counsel, and that any corrupt behavior by government officials in connection with public contracting is punishable by imprisonment.

The OAG also provided a certified letter stating that (i) the decision to pay or not to pay for the medical treatment would not have any impact on current or future decisions of the OAG in hiring international legal counsel; (ii) under the circumstances the payment would not violate local laws; and (iii) the OAG official had not and would not take part in any decisions regarding the retention of the law firm.

In addressing what it described as a matter of first impression, the DOJ cited OPR 10-3 in noting that "the FCPA does not per se prohibit business relationships with, or payments to foreign officials." The DOJ stated that the relevant inquiry regarding such payments is "whether there are any indicia of corrupt intent, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business or to otherwise assist the company, for example through a policy of recusal." Notably, the DOJ added that it had previously expressed its "lack of enforcement intent in matters where the requestor provided adequate assurances that the proposed benefit to the foreign official would have no impact on the requestor's present or future business operations."

The DOJ noted that the payment of medical expenses for a government official's family member could violate the FCPA under certain circumstances, but it found that the present facts suggested an absence of corrupt intent. The DOJ provided the partner with no-action comfort in light of the adequate assurances that he had taken, as discussed above, to ensure that the proposed benefit to the OAG official's daughter would not have any impact on his or his firm's present or future business with the country.

60. DOJ Opinion Procedure Release 14-01

On March 17, 2014, the DOJ issued Opinion Procedure Release 14-01 regarding a U.S. financial services company and investment bank that sought to purchase the remaining shares of its majority-owned non-U.S. subsidiary company. At the time of the request, the minority shares of the subsidiary

were owned by a shareholder who had served as its Chairman and CEO, but who had recently been appointed to serve as a high-level public official at the country's central and banking agency. Given his new status as a "foreign official" under the FCPA, the bank sought the DOJ's guidance on the proposed transaction.

The bank noted that the proposed purchase price for the shares deviated from the value contemplated by the original 2007 Shareholders Agreement, explaining that the price calculation formula therein would have provided that the shares had no value in light of operating losses that the subsidiary incurred as a result of the global financial crisis of 2008. The bank stated that this "was not the commercial intention of the parties, as the shares have substantial value," and noted any attempt to enforce the 2007 valuation formula would likely lead to unfavorable consequences, such as litigation or sale of the shares to another third party. The parties therefore engaged a highly regarded global accounting firm to determine an independent and binding fair market value of the shares instead.

In responding to the bank, the DOJ noted that it "typically looks to determine [i] whether there are any indicia of corrupt intent, [ii] whether the arrangement is transparent to the foreign government and the general public, [iii] whether the arrangement is in conformity with local law, and [iv] whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal."

The DOJ stated that it found no indicia of corrupt intent, as the proffered purpose of the payment was to sever the parties' existing financial relationship, which began before the Shareholder held an official position. Given the justification provided, the DOJ stated that the alternative valuation appeared reasonable, and that engagement of an independent global accounting firm provided additional assurance that the payment reflected a fair market value rather than an attempt to overpay the Shareholder for any corrupt purpose. The shareholder had also signed a written warranty that the buyout payments were in consideration of the value of his shares only, and that they would not represent consideration for any present or future action.

With regard to the second and third factors, the DOJ noted that (i) the minority shareholder had disclosed his ownership interest and the proposed sale to the relevant government authorities (who had no objection to the proposed transaction), (ii) the bank obtained a local legal opinion confirming the legality of the buyout, and (iii) the bank would obtain multiple approvals that would be sought from both U.S. and non-U.S. agencies and regulators.

With respect to the fourth factor, the DOJ cited and discussed OPR 00-01, in which it had previously discussed the severance of an existing business relationship with an individual who became a government official. In that release, the DOJ had "highlighted the very strict recusal and conflict-of-interest-avoidance measures that were put in place . . . to prevent [the new government official] from assisting the requestor in obtaining or retaining business." The DOJ noted that the bank had represented that it would implement measures in light of the facts that the soon-to-be-former minority shareholder (i) ceased to have any role or function at the subsidiary, other than as a passive shareholder since his appointment to the government, (ii) had recused himself from any decision concerning the award of business to the bank or its affiliates, (iii) would not be involved in any supervisory or regulatory matters regarding the bank, and (iv) would recuse himself from post-buyout involvement in any of bank's business that was "under negotiation, proposed, or anticipated at the time of, or prior to" the buyout ("Prior Business").

The bank further warranted that it would seek to identify all Prior Business and take reasonable steps to avoid contact with the soon-to-be former shareholder in those circumstances. To this end, the subsidiary circulated written instructions to its senior employees explaining the minority shareholder was "prohibited from participating in any discussion, consideration, or decision, or otherwise influencing any decision related to the award of business" to the bank's companies.

61. DOJ Opinion Procedure Release 14-02

On November 7, 2014, the DOJ issued an Opinion Procedure Release confirming that an issuer's acquisition of a non-U.S. company not previously subject to the FCPA's jurisdiction would not retroactively create FCPA liability for the acquiring issuer. The guidance was issued in response to a request from a U.S. consumer products company that had discovered a number of potentially improper payments during the due diligence of a non-U.S. company that it hoped to acquire. The requestor's pre-acquisition due diligence had revealed a number of problematic issues, including a number of improper payments to government officials in the form of gifts, charitable contributions, and sponsorships.

The DOJ conceded that, assuming the truth of the Requestor's representations, it did not have jurisdiction over the target company, given in particular that (i) the target company has negligible business contacts with the United States, (ii) none of the payments were made in the United States or through a U.S. person or issuer, and (iii) the Requestor would not gain any financial benefit from the contracts that had been determined to have been potentially obtained through bribery, as they would have all concluded prior to the acquisition.

The DOJ stated again, however, that it encouraged companies engaging in mergers and acquisitions to take a number of mitigating steps, including (i) conducting thorough risk-based due diligence, (ii) implementing the company's anti-corruption compliance program as quickly as possible, (iii) conducting anti-corruption compliance training, (iv) conducting an FCPA-specific audit, and (v) disclosing any corrupt payments discovered during the due diligence process. The DOJ stated that, in situations where it possessed jurisdiction, a company's adherence to these factors may determine whether and how it seeks to impose liability in case of violations.

CHAPTER 4: U.K. ANTI-BRIBERY DEVELOPMENTS

On April 8, 2010, the House of Commons passed legislation to consolidate, clarify and strengthen U.K. anti-bribery law. The previous U.K. anti-bribery legal regime was an antiquated mix of common law and statutes dating back to the 19th century, a legal framework that in 2009 then Justice Secretary Jack Straw conceded was "difficult to understand . . . and difficult to apply for prosecutors and the courts."

The Bribery Act creates four categories of offenses: (i) offenses of bribing another person; (ii) offenses related to being bribed; (iii) bribery of foreign public officials; and (iv) failure of a commercial organization to prevent bribery. The first category of offenses prohibits a person (including a company as a juridical person) from offering, promising, or giving a financial or other advantage: (a) in order to induce a person to improperly perform a relevant function or duty; (b) to reward a person for such improper activity; or (c) where the person knows or believes that the acceptance of the advantage is itself an improper performance of a function or duty. The second category of offenses prohibits requesting, agreeing to receive, or accepting such an advantage in exchange for performing a relevant function or activity improperly.

The third category of offenses, bribery of foreign public officials, is the most similar to the FCPA. According to the Bribery Act's Explanatory Notes, Parliament intended for the prohibitions on foreign bribery to closely follow the requirements of the OECD Convention, to which the United Kingdom is a signatory. Under the Bribery Act, a person (again, including a company) who offers, promises, or gives any financial or other advantage to a foreign public official, either directly or through a third-party intermediary, commits an offense when the person's intent is to influence the official in his capacity as a foreign public official and the person intends to obtain or retain either business or an advantage in the conduct of business. In certain circumstances, offenses in this category overlap with offenses in the first category (which generally prohibits both foreign and domestic bribery). The MOJ Guidance, however, highlights that the offense of bribery of a foreign public official does not require proof that the bribe was related to the official's improper performance of a relevant function or duty. The overlap between the general bribery offenses and the offenses relating to bribery of foreign officials also allows prosecutors to be flexible, enabling them to bring general charges when a person's status as a foreign official is contested or to seek foreign official bribery charges when an official's duties are unclear.

Finally, and most significantly for large multinational corporations, the Bribery Act creates a separate strict liability corporate offense for failure to prevent bribery, applicable to any corporate body or partnership that conducts part of its business in the United Kingdom. Under this provision, a company is guilty of an offense where an "associated person" commits an offense under either the "offenses of bribing another person" or "bribery of foreign public officials" provisions in order to obtain or retain business or a business advantage for the company. An "associated person" includes any person who performs any services for or on behalf of the company, and may include employees, agents, subsidiaries, and even subcontractors and suppliers to the extent they perform service on behalf of the organization. While failure to prevent bribery is a strict liability offense, an affirmative defense exists where the company can show it had in place "adequate procedures" to prevent bribery.

The offense of failure to prevent bribery stands in contrast to the FCPA's standard for establishing liability for the actions of third parties, such as commercial agents. Whereas the FCPA's anti-bribery provisions require knowledge or a firm belief of the agent's conduct in order for liability to attach, the U.K. Act provides for strict liability for commercial organizations for the acts of a third party, with an express

defense where the company has preexisting adequate procedures to prevent bribery. This strict liability criminal offense creates significant new hazards for corporations when they utilize commercial agents or other third parties. In effect, the actions of the third party will be attributable to the corporation, regardless of whether any corporate officer or employee had knowledge of the third party's actions. The affirmative defense places a great premium on having an effective compliance program, including, but not limited to, due diligence procedures. In the United States, the existence of an effective compliance program is not a defense to an FCPA charge, though the DOJ and SEC do treat it as one of many factors to consider in determining whether to bring charges against the company, and the U.S. Sentencing Guidelines include it as a mitigating factor at sentencing.

The Bribery Act has several other notable differences from the FCPA, and in many ways, the U.K. law appears broader. Portions of the Act are applicable to any entity that carries on a business, or part of a business, in the United Kingdom, whether or not the underlying conduct has any substantive connection to the United Kingdom. As the then-SFO Director Richard Alderman explained in a June 23, 2010 speech:

> I shall have jurisdiction in respect of corruption committed by those corporates anywhere in the world even if the corruption is not taking place through the business presence of the corporate in this jurisdiction. What this means is this. Assume a foreign corporate with a number of outlets here. Assume that quite separately that foreign corporate is involved in corruption in a third country. We have jurisdiction over that corruption.

Furthermore, the Bribery Act criminalizes bribery of private persons and companies in addition to bribery of foreign public officials. The Act also provides no exception for facilitation or "grease" payments, nor does it provide any exception for legitimate promotional expenses, although it is arguable that properly structured promotional expenses would not be considered as intended to induce a person to act improperly and therefore would not violate the Act.

I. The MOJ Guidance

On March 30, 2011, the MOJ Guidance, officially titled "Guidance About Procedures Which Relevant Commercial Organizations Can Put Into Place To Prevent Persons Associated With Them From Bribing (Section 9 of the Bribery Act 2010)," was released. Although the MOJ Guidance is "non-prescriptive" and does not change the legal standards contained within the Bribery Act, the MOJ Guidance focuses on a specific set of core principles to explain what the Ministry would consider to be "adequate procedures" sufficient to invoke the affirmative defense. Even though this Guidance is non-prescriptive, it is a useful showing of how the current MOJ interprets the language of the Act and what U.K. authorities and prosecutors will consider when assessing a company's internal policies and procedures.

The MOJ Guidance describes six principles it urges commercial organizations to consider when implementing procedures designed to prevent bribery. These principles—which are consistent with U.S. and international best practices—are not meant to propose any particular procedures but are instead to be "flexible and outcome focused, allowing for the huge variety of circumstances that commercial organizations find themselves in." This reflects the MOJ's stance that there is no "one-size-fits-all"

solution to preventing bribery. The MOJ Guidance also contains an Appendix A (which it specifically states is not part of the actual Guidance) that illustrates how the principles may be applied to various hypothetical problem scenarios. Although these scenarios may not be part of the formal Guidance, they nonetheless provide a starting point for the dialogue or negotiations with U.K. prosecutors regarding whether a company's procedures are "adequate."

Organizations accused of violating the Bribery Act through associated persons bear the burden of proving the adequate procedures defense through a "balance of probabilities" test largely by demonstrating their commitment to the following six principles:

1. Principle 1 — Proportionate Procedures

Commercial organizations should have clear, practical, and accessible policies and procedures that are proportional both to the bribery risks they face and to the nature, scale, and complexity of their commercial activities. Organizations should tailor their policies and procedures—as well as the manner by which they implement and enforce those policies and procedures—to address the results of periodic and case-by-case risk assessments. Effective bribery prevention policies are those that both mitigate known risks and prevent deliberate, unethical conduct by associated persons.

Effective preventative policies and procedures are particularly important when dealing with third parties that negotiate with foreign public officials, which the MOJ flags as a category of "associated persons" that presents a significant amount of risk. The Guidance recognizes the challenges of enforcing policies on third-parties, as well as retrospectively introducing new policies into existing business relationships, and encourages companies to approach these situations "with due allowance for what is practicable" based on their "level of control over existing arrangements."

2. Principle 2 — Top-Level Commitment

The MOJ Guidance makes clear that a key concern of U.K. authorities will be the tone of the culture fostered by an organization. Top-level management—including the board of directors—must be committed to preventing bribery and establishing a culture within the company in which bribery is not condoned. In doing so, they should take an active role in communicating anti-bribery policies to all levels of management, employees, and relevant external actors. The manifestation of this commitment will vary based on the size and industry of the organization, but should communicate both internally and externally the management's zero-tolerance of bribery.

The Guidance further suggests that companies adopt a statement of commitment to counter bribery in all parts of the organization's operation that could be made public and communicated to business partners and third parties. It also suggests personal involvement by top-level management in developing a code of conduct, overseeing the development and implementation of an anti-bribery program, and conducting regular reviews of the effectiveness of those policies.

3. Principle 3 — Risk Assessment

Commercial organizations are expected to regularly and comprehensively assess the nature and extent of the bribery-related risks to which they are exposed. The MOJ Guidance acknowledges that what constitutes adequate risk procedures will vary from company to company and notes that companies

should adopt risk assessment procedures that are proportionate to their size, their structure, and the nature, scale, and location of their activities. Effective risk assessment should include oversight by top-level management and appropriate resourcing proportional to the scale of an organization's business and the need to identify all relevant risks, identify internal and external sources of information related to risk, contain appropriate due diligence inquiries, and ensure the accurate and appropriate documentation of both the risk assessment and its conclusions.

The Guidance also states that companies should, as part of their risk assessments, consider both internal and external bribery risks. Internally, the MOJ Guidance suggests evaluating such areas as the company's remuneration structure, training program, and anti-bribery policies. Externally, it identifies five categories of risk—country risk, sector risk, transaction risk, business opportunity risk, and partnership risk—that should be evaluated for each business venture. Above all, risk identification must be periodic, informed, and documented.

4. Principle 4 — Due Diligence

Companies are expected to have proportionate and risk-based due diligence procedures that cover *all parties to a business relationship*, including the organization's supply chain, agents and intermediaries, all forms of joint venture and similar relationships, and all markets in which the company does business.

The MOJ Guidance notes that due diligence is a "firmly established" element of good corporate governance that both assesses and mitigates risk. Due diligence is particularly important when committing to relationships with local entities and in mergers/acquisitions. The Guidance urges commercial organizations to expand their due diligence programs beyond initial screenings—which are expected for all associated persons, including employees—to include continued monitoring of all recruited or engaged associated persons. The Guidance also recommends that organizations take a risk-based approach to their immediate suppliers and ask that suppliers both agree to anti-corruption representations and agree to seek such representations from their own suppliers.

5. Principle 5 — Communication and Training

The MOJ Guidance indicates authorities will evaluate not only whether a company has adopted anti-bribery policies and procedures, but whether they have been implemented in such a fashion that they are "embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks [the company] faces." This involves more than just proper tone from top-level management; the Guidance notes that effective communication is a two-way channel and requires organizations to establish secure and confidential means for internal and external parties to report potential bribery. Internal communications should focus on the implementation of compliance policies and emphasize the implication of those policies. External communication of bribery prevention policies, such as a code of conduct, can also reassure existing and prospective associated persons and deter those who intend to bribe on the company's behalf. Effective training is required for all employees and should be continuous as well as regularly monitored and evaluated.

6. Principle 6 — Monitoring and Review

Companies should institute continual monitoring and review mechanisms to ensure compliance, identify issues as they arise, and adjust policies and procedures as needed. The MOJ Guidance suggests that companies may want to go beyond regular monitoring and examine the processes that occur in response to specific incidents, such as governmental changes in countries where they operate, incidents of bribery, or negative press reports. The MOJ Guidance encourages companies to consider using both internal and external review mechanisms to conduct formal, periodic reviews and reports for top-level management. In addition, the Guidance notes that organizations "might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures," but cautions that "certified compliance" within the industrial sector "may not necessarily mean that a commercial organization's bribery prevention procedures are 'adequate' for all purposes." Consequently, companies should continually monitor and review mechanisms to ensure compliance, identify issues as they arise, and adjust policies and procedures as needed.

In addition to the Six Principles, the MOJ Guidance also discusses six specific issues pertaining to the failure to prevent bribery offense, each discussed below: (a) the impact of local law; (b) hospitality and promotional expenditures; (c) when a company is "doing business" in the United Kingdom; (d) the definition of "associated persons" whose bribery corporations attempt to prevent through adequate procedures; (e) facilitation payments; and (f) prosecutorial discretion.

a. Local Law

U.K. prosecutors will be required to prove that, in cases of bribery of foreign public officials, the payment or advantage given to the official was neither permitted nor required by the written laws applicable to that official, including potentially the laws of the foreign country. The MOJ Guidance clarifies that "offset" arrangements, whereby additional investment is offered as part of a tender, will generally not violate the Bribery Act where the additional investment is subject to legislative or regulatory provisions. This would appear to cover what are often referred to as "social payments" and "local content" requirements where those payments are legitimate and made in compliance with written local law. Where local law is silent, however, authorities will have the discretion to prosecute such payments where it is in the public interest.

b. Hospitality and Promotional Expenditures

The MOJ Guidance reassures companies that reasonable and proportionate hospitality or promotional expenses which seek to improve the company's image, better present products, or simply establish cordial relations are not prohibited by the Act, and such expenses will only trigger liability if they are made or intended to induce improper activity or influence an individual in their official role to secure business for the company. The inquiry as to whether an expenditure is a bribe will necessarily depend on the surrounding circumstances, and the greater and more lavish the expenditure, the greater the inference will be that it is intended to influence the official. The MOJ Guidance also indicates that, for a violation to occur, the hospitality or promotional expenditure must be one the official would not otherwise receive from his employer. A company may, for example, pay travel expenses for a foreign official if the foreign government would otherwise have covered the same costs itself. The Guidance also suggests that entertainment expenses—even relatively lavish ones, such as tickets to Wimbledon, the Six Nations rugby tournament, or the Grand Prix—are permitted when linked to a legitimate promotional goal.

c. Doing Business in the United Kingdom

One of the more controversial aspects of the Bribery Act is the application of the failure-to-prevent-bribery offense to non-U.K. companies that "carry on a business, or any part of a business, in any part" of the United Kingdom. The MOJ Guidance appears to narrow the scope of non-U.K. companies that would fall within the offense's reach by asserting that having a U.K. subsidiary is not, "in itself," sufficient to establish that the parent company is carrying on part of a business in the United Kingdom, nor is raising capital on the London Stock Exchange, "in itself," sufficient to establish that a company is carrying on part of a business in the United Kingdom.

Companies should be wary, however, of concluding that their U.K. subsidiary or U.K. stock listing will not require them to enact adequate procedures to prevent bribery. The Guidance asserts that the government will take a holistic, "common sense approach" to each case and warns that "the final arbiter, in any particular case, will be the courts . . . ." This latter caveat should be cold comfort to non-U.K. corporations, as a "wait-and-see" approach to compliance is never sensible when criminal convictions and penalties are at stake.

d. Associated Persons

The MOJ Guidance expands upon the definition of "associated persons" contained within the Bribery Act. As discussed above, the Bribery Act uses a broad definition of associated persons that includes all employees, agents, subsidiaries, subcontractors, and even suppliers that "perform services" for or on behalf of a company. The Guidance, however, suggests that a factor in determining whether a corporation is liable for the acts of an associated person is the degree of control the corporation exercises over the associated person. This factor could significantly limit a parent corporation's liability in the United Kingdom for the actions of subcontractors and agents hired by foreign subsidiaries that operate with sufficient autonomy, particularly in the case of suppliers not directly dealing with the corporation and joint venture partners in the context of a joint venture that exists as a separate entity from its members (unlike a contractual joint venture arrangement).

e. Facilitation Payments

The Bribery Act contains no exemption for facilitation payments, and the MOJ Guidance cautions that such payments will trigger liability under the Act, as "exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused." The MOJ Guidance specifically distinguishes the Act's treatment of facilitation payments from the FCPA, which provides an exception for facilitation payments. The Guidance recognizes that this zero-tolerance policy on facilitation payments may present challenges in many countries and industrial sectors, and notes that the "eradication of facilitation payments is recognized as a long-term objective." More so, the Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, published on March 30, 2011 ("Joint Prosecution Guidance"), which gives guidance to prosecutors on the implementation of the Bribery Act, reiterates the illegality of facilitation payments, while highlighting factors that may support non-prosecution. These factors include whether the bribe was a "single small payment" or whether the payer was in a vulnerable position. The Joint Prosecution Guidance also suggests a consideration whether the

commercial organization had a clear and appropriate policy for facilitation payments, and if they were correctly followed.

Richard Alderman, then Director of the SFO, provided the SFO's policy on facilitation payments in light of the MOJ Guidance. During a speech on April 7, 2011, he stated:

> I do not expect facilitation payments to end the moment the Bribery Act comes into force. What I do expect though is for corporates who do not yet have a zero tolerance approach to these payments, to commit themselves to such an approach and to work on how to eliminate these payments over a period of time. I have also said that these corporates should come and talk to the SFO about these issues so that we can understand that their commitment is real. This also gives the corporate the opportunity to talk to us about the problems that they face in carrying on business in the areas in which they trade. It is important for us to know this in order to discuss with the corporate what is a sensible process.
>
> The type of case where we are likely to want to consider prosecution will be one where corporations have no intention of ceasing to use facilitation payments. Instead they want to continue. Indeed, they look at this as a way of obtaining an advantage over those corporations that have banned them.

This policy suggests a path forward for corporations operating in environments where the choice is between making facilitation payments and not doing business at all.

f. Prosecutorial Discretion

The MOJ Guidance explicitly identifies hospitality, promotional expenses, and facilitation payments as areas where prosecutorial discretion provides a degree of flexibility. The Guidance outlines a two-stage test prosecutors must apply in determining whether to prosecute an offense under the Bribery Act: (i) whether there is sufficient evidence to provide a realistic prospect of a conviction; and (ii) if so, whether a prosecution is in the public interest. The more serious the offense, the more likely a prosecution will meet the second prong.

II. Other Developments

A. The Crime and Courts Act 2013

The Bribery Act itself does not explicitly provide a process for the SFO to enter into settlement agreements with corporate offenders. Although the SFO appeared to believe that it possessed the necessary authority to enter into such agreements under the Act itself, that belief was quickly dispelled by the Crown Court. In April 2010, only days before the House of Commons passed the Bribery Act, Lord Justice John Thomas (who was appointed as Lord Chief Justice of England and Wales on July 16, 2013) criticized the SFO for entering into a civil recovery order with Innospec in connection with that company's activities in Indonesia.

Specifically, then-Lord Justice Thomas stated:

> It is clear, therefore, that the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offense charged. . . . [S]ave in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary. Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. . . . This has always been the position under the law of England and Wales. Agreements and submissions of the type put forward in this case can have no effect. . . .
>
> I have concluded that the Director of the SFO had no power to enter into the arrangements made and no such arrangement should be made again . . . unless any change is made to the rules of procedure or to the practice direction . . . .

Because of the SFO's inability to enter into further negotiated agreements, companies facing likely prosecution in the United Kingdom had little incentive to self-report or cooperate with ongoing investigations. That, in turn, would likely prevent the SFO from handling corporate bribery cases with the same efficiency and effectiveness as the DOJ and SEC do. Consequently, U.K. authorities sought to devise an effective means to facilitate resolutions of bribery-related offenses and other crimes.

The Crime and Courts Act 2013, which received Royal Assent on April 25, 2013, addressed these shortcomings by authorizing enforcement authorities in the United Kingdom to resolve certain economic crimes, such as violations of the Bribery Act, through Deferred Prosecution Agreements ("DPAs"). Under the Act, however, only corporate bodies, partnerships, and unincorporated associations may enter into DPAs. Unlike such arrangements in the United States, the DPAs are explicitly not available to individuals.

Schedule 17 of the Crime and Courts Act 2013 provides that DPAs must contain a statement of facts and a date of expiry. While the statute does not appear to require a formal admission of guilt, it is thought that the statement of facts implicitly incorporate this requirement. In a recent speech by the SFO's General Counsel, Alan Miliford:

> First, it should be obvious that a company that does not accept any criminal liability on its part cannot enter into a DPA, whatever view we may take of the evidence against it. Whilst the DPA process does not require a formal admission of guilt, a company which considers it has nothing to account for cannot agree to a statement of facts which sets out wrongdoing it denies, or to the payment of a financial penalty consequent on that wrongdoing, or to the payment of compensation when it considers it owes none or to rehabilitative measures when it considers there is nothing to rehabilitate.

> Secondly, it should also be obvious from a cursory review of the public policy guidance that we will not enter into a DPA with a company that has not co-operated with us.

Schedule 17 also provides a non-exhaustive list of requirements that may be imposed on the organization pursuant to a DPA, including enhanced compliance measures, cooperation, as well as financial obligations such as penalties, victim compensation, disgorgement, or even donations. When a DPA includes a financial penalty, the Crime and Courts Act 2013 request that the penalty must be "broadly comparable to the fine that a court would have imposed" following a guilty plea.

Under the Act, and perhaps influenced by Lord Justice Thomas' comments, the judiciary plays a more robust role in approving the DPAs than U.S. courts do. When the prosecutor and the organization have agreed to a statement of facts, they must apply to the Crown Court for a declaration that entering into the DPA is "in the interests of justice" and that the proposed terms are "fair, reasonable, and proportionate." A hearing on this request must be held in private, and any reasons the court gives for granting or denying the request must also be given in private. Once a final agreement has been reached, the prosecutor and organization must again apply to the Crown Court and attend a final hearing to obtain a declaration that the DPA is in the interests of justice and fair, reasonable, and proportionate. The prosecutor must, unless prohibited by statute or a court order, publish the approved DPA, as well as the Crown Court's initial declaration (or reason for denying the initial request), and its final declaration and reasons for the grant. A court may postpone the publication to avoid substantial risk of prejudice to the administration of justice in any legal proceedings.

B. Deferred Prosecution Agreements Code of Practice

Schedule 17 of the Crime and Courts Act 2013 also obliged the Director of Public Prosecutions ("DPP") and the Director of the Serious Fraud Office ("DSFO") to issue a joint code that provided guidance to prosecutors on DPAs. Among others, the code was envisaged to provide general principles that would guide prosecutors in determining the appropriateness of DPAs and disclosure of information to parties entering into the agreement. The final version was published on February 14, 2014, as the Deferred Prosecution Agreements Code of Practice ("DPA Code"). As contemplated under the Crime and Courts Act, the DPA Code provides guidance to prosecutors for negotiating DPAs, seeking court approval of DPAs, and overseeing approved DPAs. Following the release of the Code, prosecutors were authorized to begin using DPAs starting February 24, 2014.

The DPA Code outlines a two-step process for determining whether to pursue a resolution through a DPA. The first stage addresses the adequacy of available evidence. The Code instructs that a DPA will be appropriate if there is either (i) a realistic prospect of conviction or (ii) "at least a reasonable suspicion based upon some admissible evidence" that the organization has committed the offense and "reasonable grounds" to believe that an investigation would produce "further admissible evidence within a reasonable time period" to create a realistic prospect of conviction. The DPA Code adds that a reasonable time period will depend on the facts of the case, including its size, type, and complexity.

After the evidentiary evaluation, the DPA Code instructs the prosecutor to determine whether the public interest would best be served by a DPA or a prosecution. With respect to the public interest, the Code states that the "more serious the offense, the more likely it is that prosecution will be required in the public interest," and that a prosecution will usually take place unless public interest factors against

prosecution "clearly outweigh those tending in favor of prosecution." Public interest factors to be considered include whether the company had an effective compliance program, undertook a "genuinely proactive" approach to self-reporting and remedial measures, and has not committed similar violations previously. While the presence of such factors support the negotiation of a DPA, their absence favors prosecution. The DPA Code also instructs prosecutors to consider other factors that weigh in the favor of prosecution, including whether the misconduct (i) was an established business practice at the company, (ii) was known but not reported within a reasonable time, (iii) caused severe economic harm, or (iv) otherwise presents substantial adverse impact to the "integrity or confidence of markets, local or national governments." Finally, the code asks prosecutors to consider whether a conviction would have "disproportionate consequences" for the company under the domestic laws of the United Kingdom or any other jurisdiction, including but not limited to the EU.

The DPA Code incentivizes thorough and prompt self-reporting and cooperation by calling on prosecutors to emphasize the effectiveness of a company's compliance and internal investigation mechanisms in determining whether a DPA is an appropriate tool for the resolution of a given matter. The guidance also instructs prosecutors to give "considerable weight" to a company's efforts to identify witnesses, make witnesses available, and provide reports of "any internal investigation including source documents." Conversely, efforts by a company to withhold material that would jeopardize further investigation of individuals implicated by the misconduct would be a "strong factor in favor of prosecution." Furthermore, prosecutors are instructed under the DPA Code to consider the timing of the self-report and whether any actions taken by the company prior to self-reporting may have prejudiced the investigation, including whether the company's conduct "could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication [had] been afforded."

At present, the DPA Code provides limited protection for materials disclosed during unsuccessful DPA negotiations. Aside from limitations on certain evidence directly related to the negotiation, the DPA Code explains that there is "no limitation on the use to which other information obtained by a prosecutor during the DPA negotiation period may subsequently be put during criminal proceedings," so long as the evidence is admissible under the rules of evidence.

C. Sentencing Council Guideline

The U.K. Sentencing Guideline ("Sentencing Guideline"), formally titled, "Fraud, Bribery and Money Laundering Offences: Definitive Guideline," was first published on May 23, 2014 and came into force on October 1, 2014. The document was updated with a minor amendment to its money laundering section in May 2016. The Sentencing Guideline applies to all adult individual offenders and organizations sentenced on or after its commencement date, and regardless of the date of the offense. By section 125 (1) of the Coroners and Justice Act 2009, all U.K. courts are required to follow the applicable Sentencing Guideline unless contrary to the interests of justice.

With respect to corporate violations of sections 1, 2, 6, and 7 of the Bribery Act, the Sentencing Guideline sets out a series of steps that courts should follow to calculate a criminal fine. Courts must first consider the appropriateness of making an order for compensation to address any resulting personal injury, loss or damage resulting from the offense, and with regard to the evidence and means of the offender. Where the offender is of limited means, the court should give priority to the payment of compensation over other financial penalties. Where the court considers that compensation may not be

appropriate, its reasons should be specified. Next, the court should consider the appropriateness of confiscation if the Crown requests or on its own accord. Where confiscation is appropriate, the court must decide on the amount prior to assessing other fines or financial orders except for compensation. The third step involves the determination of the offense category based on culpability and level of harm. The offense should be classified as High Culpability, Medium Culpability, or Lower Culpability, upon assessment of the offending corporation's role and motivation. For instance, a corporation should be found to have High Culpability if it had a leading role in an organized, planned unlawful activity, or with regard to an offense under section 7 of the Bribery Act, for a corporate culture of willful disregard by employees or agents within a corporation that lacks effective systems. Offending organizations shown to demonstrate willful obstruction of detection (such as destruction of evidence, misleading investigations and suborning employees), involvement of other parties through pressure or coercion, or targeting vulnerable or numerous victims, are also in this category. Further, where corruption involves local or national government officials or ministers or law enforcement, a company might also be found to have High Culpability. Harm is represented by a financial sum calculated with reference to the specific offense. For offenses under the Bribery Act for instance, harm is measured by the gross profit obtained as a result or the cost avoided by failing to put appropriate preventive measures in place.

To determine the "starting point" of the fine, the Sentencing Guideline instructs the courts to multiply the level of harm by the level of culpability (300% for High Culpability, 200% for Medium Culpability, and 100% for Lower Culpability). Each starting point has a range and is further adjusted within the range for aggravating or mitigating factors. Aggravating factors include conduct such as setting up a corporation or subsidiary to commit fraudulent activity, attempting to conceal misconduct, and causing substantial harm to the integrity of markets, and of local or national governments. Potential mitigating factors include co-operation with the investigation, making early admissions, voluntarily reporting offending conduct, and voluntary compensations to victims.

The Sentencing Guideline asks courts to "step back" and consider whether the amount of the fine meets the objectives of punishment, deterrence, and removal of ill-gotten gain. Fines may therefore be adjusted to ensure that these objectives are fairly met, incorporating factors that ensure proportionality, having regard to the size and financial position of the offending corporation, and the seriousness of the offenses. Fundamentally, the fine should be "substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law." Of particular note, courts are required to consider whether the size of a fine might put the offending company out of business, recognizing that "in some bad cases this may be an acceptable consequence." The Sentencing Guideline also allows courts to permit payments in installments upon consideration of the offending corporation's ability to pay.

The Sentencing Guideline lists a number of factors to consider when potentially adjusting the level of the fine, but expressly notes that the impact of the fine on shareholders (as distinct from employees, customers, and the local economy) is not to be considered. The court should also consider factors that would indicate a reduction of the fine, including assistance to the prosecution. In addition to considering whether to make ancillary orders, courts should consider the totality principle, i.e., whether the total sentence is just and proportionate to the offending behavior. In accordance with section 174 of the Criminal Justice Act 2003, courts must articulate the reasons for, and the effect of all sentences.

For individuals found guilty under the Bribery Act 2010, the Sentencing Guideline uses similar steps and factors to determine the amount of prison time that is appropriate. First, courts should determine the offense category based on an assessment of culpability and harm. Culpability is determined by a consideration of all the factors to determine the offender's role, extent of coordination, and the sophistication. For example, offenders shown to have led the offending activities, involved others through pressure or influence, abused their position of significant power, trust, or responsibility, or were motivated by expectations of substantial financial, commercial or political gain would fall under the High Culpability category. Harm is assessed by looking at the impact of the offending conduct and the actual or intended gain to the offender. For instance, Category 1 harm is demonstrated by serious detrimental effect on individuals, serious environmental impact, or serious actual or intended financial gain, among other factors. Individuals shown to demonstrate "High Culpability" for Category 1 harm for instance, would be subject to a starting point of a 7 year sentence. Similarly, aggravating and mitigating factors apply, although consecutive sentences may be applied for multiple offenses in appropriate cases. Examples of aggravating factors include previous convictions, commission of offenses while on bail, and attempts to conceal or dispose of evidence. Mitigating factors include remorse, evidence of good character, serious medical conditions, mental disorder or learning disability, and little or no prospect of success. As with corporate offenders, the totality principle applies.

III. U.K. Enforcement Actions of Note

1. F.H. Bertling Ltd

On July 13, 2016, the SFO charged F.H. Bertling Ltd ("Bertling") and seven former and current employees for payment of bribes in Angola between January 2005 and December 2006, resulting in violation of section 1 of the Prevention of Corruption Act 1906. Bertling is a U.K.-based provider of logistics and project freight operations, and a subsidiary of Bertling Group, a privately-owned multinational with headquarters in Germany. The charged individuals are: Joerg Blumberg, Stephen Emler, Peter Ferdinand, Marc Schweiger, Dirk Juergensen, Giuseppe Morreale and Ralf Peterson. Mr. Morreale is currently employed by Berling, while Blumberg, Juergensen, and Petersen work for the Bertling Group, the parent entity. Messrs. Emler, Ferdinand (former Bertling Managing Director), and Schweiger are no longer affiliated with the company. The parties will appear before the Westminster Magistrates' Court on August 4, 2016.

According to the SFO, Bertling conspired to bribe an agent of Sonangol EP, Angola's state-owned oil company in an effort to further Bertling's operations in the country.

2. DPA with Undisclosed U.K. Company

On July 11, 2016, the SFO announced the approval of its second application for a DPA. Under the terms of the agreement, "XYZ Ltd" ("XYZ"), an undisclosed small to medium sized U.K. enterprise, agreed to pay £6,201,085 in disgorgement of gross profits and £352,000 in financial penalty to the SFO for violations of the Bribery Act, and the Criminal Law Act 1977. The DPA will be effective for at least three years. At the time of the final approval of the judgment, the Crown Court indicated that there were related ongoing criminal proceedings against undisclosed parties.

XYZ was acquired in February 2000 by an unnamed American corporation, ABC Companies LLC ("ABC"), and generates the majority of its revenue from exports to Asian markets. While both companies

were unnamed in the judgment, the Preliminary Judgment refers to the "global steel industry," suggesting that XYZ operates in that sector. Between June 2004 and June 2012, a small but important group of XYZ employees were involved in a systematic bribery scheme relating to 28 contracts in Asia and other foreign jurisdictions. These payments were described in correspondence as fixed, special, and additional commissions to XYZ's agents, and were made on behalf of XYZ to parties able to exert influence or control over contract awards in the applicable markets. The 28 contracts straddled the commencement of the Bribery Act in 2011, with four contracts postdating the law. Altogether, the bribery scheme resulted in a gross profit of £2.5 million, representing 20.82% of XYZ's total gross profit over the eight year period.

According to the Crown Court, the misconduct was first discovered by ABC in 2012 during the implementation of a global compliance program within XYZ. ABC took immediate action including the retention of a law firm to conduct independent internal investigations and verbal notification to the SFO. Subsequently, XYZ (i) collected, processed, and searched over 90 GB of electronic data from its servers, (ii) reviewed over 27,000 electronic records, (iii) collected and reviewed hard copy documents such as personal notebooks, agency and contract files, and invoices, and (iv) conducted 13 interviews of four employees. Findings, as well as oral summaries of first accounts of interviews, were submitted to the SFO in three batches. The SFO also seized evidence retrieved from XYZ's personal email caches, and conducted over twenty interviews of current and former employees and auditors within and outside the U.K. XYZ had facilitated these interviews, and provided timely and complete responses to requests for information of material, subject to what the court described as "a proper claim of legal professional privilege." Thus, the SFO made clear that the DPA resulted from effective cooperation without waiving legal privilege.

The court considered the role of ABC, finding that it was "entirely ignorant" of the occurrence of the offending activities until discovered. ABC, however, agreed to contribute £1,953,085 of the disgorged amount, representing repayment of a proportion of £6 million received in dividend payments during the relevant period, albeit "entirely innocently."

In assessing the "interests of justice" element, the Crown Court considered the weight given to the timeliness and completeness of the self-disclosure, which it considered to be integral to discovering the offending activities. XYZ took steps to remediate the reoccurrence of the misconduct including dismissal of two senior employees, termination of seven suspected agents and withdrawal of bids of two suspect potential contracts, which the court considered resulted in a "culturally different company." The court also found that while the bribe payments were egregious and spanned over an eight-year period, the majority of the bribes had been instigated by the agents and did not reflect an elaborate corporate conspiracy to hide the payments. In addition, the court found that the evidence did not demonstrate a history of bribery and corruption. Rather, as both XYZ and ABC demonstrated full and genuine cooperation and were in the process of implementing an extensive compliance program, and in the face of XYZ's insolvency risk from a conviction, the court found it likely that the interests of justice would be served with the DPA. During the term of the DPA, XYZ agreed to continue to review, maintain, and report on its compliance program, as well as cooperate with the SFO's related investigations.

3. Peter Michael Chapman (Securency PTY Ltd.)

On May 12, 2016, Peter Michael Chapman, the former director of business development in Africa for Securency PTY Ltd. ("Securency"), was sentenced to 30 months in prison for his role in a scheme to bribe Nigerian officials to obtain contracts to supply the plastic material on which the Nigerian banknotes

are printed. Securency is a Melbourne-based banknote company that is owned in part by the Reserve Bank of Australia. Among other things, Securency sells a sophisticated polymer compound that can be used in the manufacture of currency to make it more durable and harder to counterfeit than paper banknotes.

Chapman was initially arrested in Rio de Janeiro in late 2014. While awaiting extradition, he spent six months in the notorious Ary Franco prison in Brazil before returning to London in April 2015. Chapman went on trial in the Southwark Crown Court in London in April 2016. Prosecutors argued that Chapman orchestrated a series of bribe payments to Nigerian officials amounting to over $200,000 between 2007 and 2009, first to induce the Nigerian mint to switch to polymer notes, and then to obtain contracts for Securency. Prosecutors argued that Chapman passed bribes through a company called Swingaxe, incorporated in the Seychelles. Chapman was found guilty of four counts of making corrupt payments to a foreign official contrary to the Prevention of Corruption Act of 1906. In sentencing, the judge noted that Chapman appeared to have been pressured into corrupt practices by his superiors at Securency and noted the time he had already served in prison, including the difficult six months in Brazil. Based on these factors, Chapman was released at the time of sentencing to serve the remaining sentence on license.

According to prosecutors, other Securency executives were aware of the scheme, including David Ellery, the former financial controller and company secretary who testified against Chapman in the trial as part of the plea agreement with prosecutors. Ellery testified that he discussed the corrupt scheme with at least three senior executives at Securency International. According to press reports, Ellery received a suspended sentence on one count of false accounting in return for his cooperation as a witness in other trials.

4. Alstom

The SFO has announced a series of investigations and charges against British companies and individuals within the Alstom Group related to alleged corruption in India and Hungary amongst other places. A full description of the underlying conduct and related U.S. charges and settlements is included in the U.S. Enforcement Action section.

- On July 24, 2014, the SFO announced that it had commenced preliminary criminal proceedings against Alstom Network U.K. Ltd. (formerly, Alstom International Ltd) in connection with activities involving contracts for transport projects in India, Poland, and Tunisia, and in violation of the Prevention of Corruption Act 1906, and the Criminal Law Act 1977. The SFO also charged former Managing Director Robert John Hallett and Director Graham Denis Hill for the same offences. The trials for Hallett and Hill are expected to start in 2016.

- In December 2014, the SFO announced further charges against Alstom Power Ltd., and employees, Nicholas Paul Reynolds and John Venskus (also known as Johanes Villi Venskus) for alleged offences committed between February 2002 and March 2010. The trial is expected to start on January 9, 2017.

- In April and May 2015, the SFO brought charges against Alstom Network U.K. Ltd. and two individuals, Michael John Anderson and Jean-Daniel Lainé, under the Prevention of

Corruption Act and Criminal Law 1977. Until his retirement, Lainé had been Senior Vice President of Ethics & Compliance. Anderson worked as Business Development Director for Alstom Transport SA in France. Anderson, Lainé, and Alstom Network U.K. Ltd. were accused of corruption-related offenses in connection with contracts for the supply of trains to the Budapest metro in Hungary. The trial is currently scheduled to start on May 15, 2017.

- The SFO announced further charges on March 29, 2016 against Alstom U.K. Country President and Managing Director of Alstom Transport U.K. & Ireland, Terence Stuart Watson. Watson, a British national, is joined to the ongoing Budapest Metro case against Alstom Network U.K. Ltd, Anderson, and Lainé, for offenses carried out between January 2003 and December 2008.

5. Sweett Group

On December 18, 2015, U.K. construction and professional services company, Sweett Group Plc. ("Sweett") became the first company to be convicted under the Bribery Act. The charges relate to corrupt payments made by its subsidiary, Cyril Sweett International Limited ("Cyril"), in the United Arab Emirates. In its guilty plea, Sweett admitted to the failure to prevent Cyril from paying bribes between December 1, 2012 and December 1, 2015. Sweett was sentenced in February 2016, and ordered to pay £ 2.25 million. The SFO was also awarded £95,031.97 in costs. The SFO has announced that ongoing investigations into individual culpability will continue.

According to admissions in the plea agreement, Cyril paid approximately £ 680,000 to Khaled Al Badie, Vice President and Chair of the Real Estate and Investment Committee of Al Ain Ahlia Insurance Company ("AAAI") to secure a contract for the construction of the Rotana Hotel in Abu Dhabi. The payments to Mr. Al Badie were made through a subcontract entered into between Cyril and Mr. Al Badie's company. Although the subcontract was purportedly made for "hospitality development services," no such services were provided. AAAI, an insurance underwriter, is listed on the Abu Dhabi Securities exchange, and about 19.7% of its shares are owned by the Abu Dhabi Investment Council, the state's sovereign wealth fund.

Sweett was convicted under Section 7 of the Bribery Act, which holds companies responsible for bribes paid by associated persons. As Sweett lacked adequate procedures designed to prevent unlawful conduct, it was unable to use that as a defense under Section 7.

6. Standard Bank

On November 26, 2015, the London-based ICBC Standard Bank PLC ("Standard Bank"), entered into a Deferred Prosecution Agreement with the U.K. Serious Fraud Office under Section 7 of the U.K. Bribery Act for failure to prevent persons associated with its affiliate, Stanbic Bank Tanzania Ltd. ("SB Tanzania"), from committing bribery in connection with a $600 million sovereign debt security private placement by the Government of Tanzania in 2013. The DPA between Standard Bank and the SFO is the first-ever DPA in the U.K. Under the agreement, Standard Bank (which has been controlled since February 2015 by the Industrial and Commercial Bank of China (ICBC)) was required to pay a $6 million in "Compensation" plus interest of $1,046,196.58. This amount will be initially held by the SFO for the benefit of the Government of Tanzania. The DPA also requires disgorgement of profit of $8.4 million, payment of a financial penalty of $16.8 million, and a payment of costs of £330,000. In detailing how the

size of the financial penalty was determined, the Crown Court at Southwark (which scrutinized the DPA to ensure that it comported with the interests of justice), indicated that it should be 300% of the total fee earned by Standard Bank with a 1/3 reduction to credit the bank's early admission of responsibility.

Standard Bank also committed to (i) cooperate with the SFO and any other U.K. or foreign authorities and to disclose any relevant information relating to the underlying conduct; and (ii) submit to an independent review of its corporate compliance program. The materials supporting the DPA also noted that SB Tanzania's CEO had been dismissed for failing to cooperate with the investigation, and that SB Tanzania's Head of Legal Services & Compliance was dismissed for failing to comply with a board instruction relating to required reporting on EGMA and its fee.

In accepting the DPA, the Crown Court also highlighted the fact that upon learning of the issue from staff at SB Tanzania, Standard Bank retained an external law firm to conduct a thorough internal investigation and, within three weeks of receiving the first report from the investigation, disclosed the matter to the SFO. The Statement of Facts noted that the law firm made available to the SFO (i) email servers and shared drives; (ii) email inboxes of relevant individuals; (iii) hard copy documentation; (iv) CCTV images recovered from Africa; and (v) recorded telephone conversations relating to the transaction, and that both the law firm and the SFO conducted a detailed review of this data as part of the investigation.

Related to the same conduct, Standard Bank also was subject to an administrative cease-and-desist order by the U.S. Securities and Exchange Commission. A full description of these settlements and the underlying conduct is including in the U.S. Enforcement Action section above.

7. Smith & Ouzman Ltd

On December 22, 2014, U.K.-based printing company Smith & Ouzman Ltd. ("Smith & Ouzman") was convicted at Southwark Crown Court of violating the Prevention of Corruption Act of 1906. Two employees—Chairman Christopher John Smith and Sales and Marketing Director Nicholas Charles Smith—were also convicted. Two other individual defendants were acquitted.

Following a trial, Smith & Ouzman (which specializes in printing security documents such as ballot papers, currency, payment vouchers and checks) and the two above-mentioned employees were found guilty of paying a total of £395,074 in bribes to public officials in Kenya and Mauritania to win lucrative ballot paper supply contracts.

Many bribes were concealed using inflated contracts, while others were provided directly to officials and their family members. The SFO alleged that Christopher John Smith had provided government officials in Kenya with various gifts, including a Samsung Mini Notebook, a PlayStation and an iPod. In one instance, he received a wish list from the son of a Kenyan official. Emails produced by the SFO included numerous discussions between Smith & Ouzman, its agent, and Kenyan officials discussing "chicken," which they used as a code word for the improper payments.

In January 2016, Smith & Ouzman was convicted and ordered to pay £ 2.2 million. Christopher John Smith was sentenced to eighteen months' imprisonment, which was suspended for two years. He was also ordered to carry out 250 hours of unpaid work, and placed under a three-month curfew. Nicholas Charles Smith was sentenced to three years' imprisonment.

SFO Director David Green noted that the case marked the SFO's first corporate conviction for bribery of foreign public officials (although not under the Bribery Act).

8. Former Sustainable AgroEnergy PLC Executives

On December 5, 2014, the SFO announced that its investigation into Sustainable Growth Group ("SGG") and its subsidiary Sustainable AgroEnergy plc ("AgroEnergy" or "SAE"), already the source of the SFO's first charges brought under the Bribery Act, had resulted in its first convictions under the Act.

Former SAE executive Gary West and independent consultant Stuart Stone were convicted under Section 1 (Offences of bribing another person) and Section 2 (Offences relating to being bribed) of the Bribery Act, making them the first to be convicted under the Act by an SFO-led prosecution. West is also the first to be convicted under Section 2 of the Act. Stone and West, along with former SGG CEO and Chairman James Whale, were also convicted for fraudulent trading activities and furnishing false information under the Criminal Act of 1977.

On December 8, 2014, West, Stone, and Whale were sentenced, respectively, to 13, 6 and 9 years in prison. West and Whale were disqualified from being directors for 15 years and Stone was disqualified for 10 years. Former SAE Financial Controller Fung Wong was also charged with violating the Bribery Act but was acquitted of all charges by a jury. Applications for permission to appeal the lengths of their sentences were subsequently refused. The SFO has also commenced proceedings for compensation and confiscation orders.

The SFO's investigation into the Sustainable Growth Group began as early February 23, 2012, when the SFO obtained an order from the Southwark Crown Court to freeze related corporate and personal bank accounts. In March 2012, the company entered administration, a U.K. procedure to rescue insolvent companies and protect the interests of creditors. SGG's founder, Gregg Fryett, was not charged by the SFO but was arrested in Cambodia in March 2013 by local anti-corruption police on charges of forgery. West, Stone, Whale and Wong were charged by the SFO on August 14, 2013.

The charges stemmed from a plot to deliberately mislead investors into believing that AgroEnergy owned a Jatropha tree plantation in Cambodia destined to be harvested for biofuel production. Between April 2011 and February 2012, AgroEnergy sold approximately £23 million of investment products related to these Jatropha plantations, primarily to U.K. investors via self-invested pension plans. However, reports indicate that although SAE purchased land to farm Jatropha trees, allegedly from the wife of a prominent politician and a Cambodian military officer, the crops failed and no biofuel was ever produced. Instead, the SFO alleged, AgroEnergy used the investments it received to fund a pyramid scheme, using new investors' money to pay previous investors' returns. As part of the scheme, Stone knowingly sold the fraudulent investments and West approved invoices from Stone's consulting company, which paid commission rates of up to 65% on the funds invested. In return, West received approximately £126,000 in bribes from Stone.

9. JLT Specialty Limited

On December 19, 2013, the Financial Conduct Authority ("FCA"), the U.K.'s regulator for the financial services industry, imposed a £1.88 million (approximately USD 3.06 million) fine on JLT Specialty Limited ("JLT") for breaching its duty to establish adequate risk management systems for

countering the risks of bribery and corruption. JLT is a London based subsidiary of the Jardine Lloyd Thompson Group that provides insurance broking, risk management and claims consulting services to a wide range of national and international corporate clients.

According to the FCA's Final Notice, JLT made payments to overseas third parties, referred to as "Overseas Introducers," to help it win and retain business from clients in foreign countries. The Final Notice stated that JLT failed to conduct adequate due diligence before entering into a relationship with these Overseas Introducers, even though in many cases there was a significant risk that the third party would commit acts of bribery. Notably, the FCA found no evidence that JLT permitted or intended to permit any illicit payment or inducement to any Overseas Introducers. Instead, JLT was fined by virtue of the fact that it breached Principle 3 of the FCA's Principles for Businesses by failing to take reasonable care to counter the risks of bribery and corruption.

The FCA noted in particular that JLT had failed to adequately implement its own anti-bribery policies or to carry out checks, which would have enabled it to identify that its policies were not being implemented correctly. JLT introduced an Employee Handbook and a Group Anti-Bribery and Corruption Policy, which both prohibited its employees from engaging in any form of bribery, and it later introduced an Operation Procedure Manual. While the new manual contained a procedure that employees had to follow in order to establish relationships with Overseas Introducers, it did not require employees to take specific proactive steps to identify whether, for instance, an Overseas Introducer had a 'special relationship' with a public official.

JLT had introduced a "7 Alarm Bells" mechanism in June 2011. Under this system, alarm bells should start to ring if certain risk factors, such as the nature of the role of the third party agent, or the countries involved in the transaction, required further attention, and the number of ringing bells determined the level of sign-off required to authorize the relationship with that third party agent. According to FCA's review, however, JLT had not properly utilized its Alarm Bell system. The FCA reviewed 17 total cases involving Overseas Introducers and found that the 7 Alarm Bells mechanism had not been implemented correctly (or at all) in any of those cases.

In assessing the amount of the imposed penalty, the FCA emphasized that JLT's breaches had been set against a backdrop of heightened awareness in the insurance broking industry of the FCA's requirements. The FCA pointed specifically to the fines imposed on Aon Limited in 2009 and Willis Limited in 2011, suggesting that those actions within the same industry should have put JLT on notice of the need for effective compliance systems.

10. News Corporation

In June 2014, the sensational trial of former *News of the World* executives, editors, and reporters concluded with a high-profile conviction, guilty pleas, noteworthy acquittals, and a hung jury. The trial—which followed a long-standing investigation into allegations that News Corporation's now-defunct tabloid had not only hacked into the mobile phones of politicians, celebrities, and families of murder victims, but had also bribed police officers and other government officials to obtain news "scoops" and other information—captured the public's attention.

The personal stories of defendants Rebekah Brooks and Andrew Edward Coulson added to the *cause célèbre*. Brooks had rocketed from an early position as a secretary at Rupert Murdoch's tabloid to

become the youngest editor of a nationwide paper and ultimately the head of all Murdoch's British newspapers. She was known to be a neighbor and close friend of then-Prime Minister David Cameron. Coulson, the former editor of *News of the World*, had become Prime Minister Cameron's Director of Communications. In another salacious twist, details emerged about Brooks and Coulson's secret six-year love affair.

The story was too much for Hollywood to resist. In late 2014, George Clooney announced that he would begin shooting and directing a movie about the scandal in 2015. Sony Pictures Entertainment, the rival to Murdoch's 21st Century Fox, will produce the film.

In addition to the continuing bad publicity, however, various other U.K. journalists await trial on charges of bribery and illicit hacking. Also, as discussed below, the case has caught the attention of U.S. regulators, who have reportedly been investigating potential FCPA violations.

a. Background of the Scandal

The scandal began simply enough, with a November 2005 article in *News of the World* reporting that Prince William had suffered a knee injury while playing soccer. The story, however, appeared to quote directly from information recorded on a private voicemail message, raising suspicions that journalists had hacked into the mobile phones owned by the royal family.

In August 2006, police arrested Editor Clive Goodman and private investigator Glenn Mulcaire. The two eventually admitted to hacking the phones and pleaded guilty to conspiracy to intercept communications. In January 2007, Goodman and Mulcaire were sentenced to four months and six months in prison, respectively. Coulson, then-editor of *News of the World*, took "ultimate responsibility" for the incident and resigned.

News International Limited ("News International"), which owned *News of the World* on behalf of News Corporation, conducted an internal review and found "no evidence" that Coulson or other executives were aware of Goodman or Mulcaire's misconduct. By June 2009, however, reports had emerged that other senior staff were aware that *News of the World* reporters had illegally accessed the mobile phones of celebrities and politicians from 2003 through 2007.

b. Investigations Begin in Earnest

Scotland Yard, which had been criticized for failing to fully investigate *News of the World* initially because of its "close relationship" with the tabloid, opened a second formal investigation in early 2011 following allegations that the tabloid's staff was continuing to hack phones. As the investigation continued, the list of alleged hacking victims grew to include numerous public officials and celebrities, including two former British Prime Ministers, members of the royal family, Brad Pitt, Angelina Jolie, Sean Connery, Paul McCartney, and David and Victoria Beckham. Private individuals have also allegedly been targeted, including the families of two 10-year-old murder victims, families of 9/11 victims, families of victims of the 2005 London "7/7" bombings, and families of British soldiers killed in Iraq and Afghanistan.

By April 5, 2011, Ian Edmondson, Neville Thurlbeck, and James Weatherup (the former editor, chief reporter, and journalist, respectively, at *News of the World*) were arrested on suspicion of conspiring to intercept mobile phone messages. Three days later, News International issued "an unreserved

apology and an admission of liability" for illegally accessing people's cell phones. The statement came as News International agreed to resolve some of the 24 civil cases then filed against it, which it hoped to settle for less than £20 million. News International also acknowledged that its "previous inquiries failed to uncover important evidence" and "were not sufficiently robust."

News of the World could not withstand the public backlash. After 168 years in business, the tabloid printed its last edition on July 10, 2011. It was subsequently replaced by a Sunday edition of another News Corporation tabloid, *The Sun*.

Brooks and Coulson were both arrested in July 2011. In addition to phone hacking, Brooks was charged with conspiring to pay $160,000 in bribes to a U.K. Defense Ministry official in exchange for information used in a series of news stories. Coulson was also charged with conspiring to bribe public officials to obtain a confidential royal telephone directory.

By June 2012, Scotland Yard had arrested 32 people in relation to the phone hacking scandal, including an employee at the British Ministry of Defense, a member of the British military, current and former U.K. police officers, a former prison officer arrested on suspicion of money laundering, and over a dozen journalists from News Corporation's U.K. papers.

c. The Trial of the Century

The trial against Brooks, Coulson and others spanned from October 2013 to June 2014—one of the longest and most expensive in English history. Brooks alone testified for a marathon thirteen days on the witness stand. During the proceedings against the eight defendants who had pleaded not guilty, prosecutors argued that telephone hacking was condoned and conducted on a "systemic" scale, and that over 5,500 victims were hacked over a period of many years.

The trial ended in June 2014 with one conviction, five acquittals, and a hung jury. Brooks was acquitted of all charges, including those related to hacking, conspiracy to conceal evidence, and bribery of public officials—despite the fact that she testified that, in return for information, she had authorized the payment of bribes to public officials a "half a dozen" times while serving as a newspaper editor. She defended her actions as having been rare, carefully considered, and serving "an overwhelming public interest." Brooks' husband and three other defendants were also acquitted.

The sole conviction in the trial was Coulson, who was found guilty of conspiring to intercept phone messages. Controversially, after Coulson's conviction but before his sentence, then-Prime Minister Cameron made a televised statement apologizing for having hired Coulson and claiming that Coulson had misled him about his involvement in the phone hacking. Amidst calls for a mistrial, the presiding judge took the rare step of condemning the sitting Prime Minister from the bench for having potentially prejudiced the jury. Coulson was subsequently sentenced to 18 months in prison. He was released on November 21, 2014 after serving five months of his term.

The jury was dismissed after it could not reach a decision against Coulson and Goodman on the other charges, including bribery. British prosecutors have indicated that they will seek a retrial of Coulson on some of the charges. Meanwhile, he also faces perjury charges that he previously testified under oath that he did not know of the phone hacking.

Four defendants had pleaded guilty to a variety of charges at the outset of the trial. Former Chief Reporter Neville Thurlbeck and former News Editor Greg Miskiw were each sentenced to six months in prison. Former reporter James Weatherup was given a suspended four-month sentence. Private investigator Glenn Mulcaire, who as noted above had already been imprisoned for six months at the outset of the scandal, was given a suspended sentence of six months.

Edmondson, who did not participate in the proceedings for health reasons, was convicted separately in a later trial and sentenced to eight months in prison.

d. Other Alleged Bribery Offenses

Since 2011, information and media reports have emerged suggesting that other members of the News Corporation organization may have bribed U.K. police officers and members of the U.K. military to obtain "scoops" on news stories. By August 2014, sprawling investigations had resulted in the arrest of 63 journalists (including 50 from *The Sun* or *News of the World*).

A three-month trial began in October 2014 against six former staffers of *The Sun* and ended with a mix of acquittals and a hung jury. Prosecutors sought to prove that the journalists had bribed police officers, prison guards, and soldiers for newsworthy tips on "a grand scale" between 2002 and 2011. In the midst of the trial, the six defendants were acquitted of an umbrella conspiracy to bribe public officials, and the trial focused instead on various conspiracies involving subsets of the defendants. Prosecutors have stated that they will seek a retrial on the charges that were not decided.

Various other journalists are awaiting trial. Former *Daily Mirror* journalist Greig Box-Turnbull faces charges that he bribed officials at two different prisons. Prison officer Marc Alexander was charged as a co-conspirator for allegedly receiving £2,500, and prison officer Grant Pizzey and his wife were charged as co-conspirators for allegedly receiving £20,000.

Former *News U.K.* tabloid reporter Vince Soodin faces charges of paying £500 in bribes to police officer Darren Jennings in exchange for information about witnesses involved in ongoing investigations. Jennings was also charged with allegedly seeking £10,000 from *The Sun* in September 2010 in exchange for information about a fellow officer facing criminal charges as well as other individuals in police custody.

e. FCPA Liability

Following requests from U.S. Senators Jay Rockefeller, Barbara Boxer, and Frank Lautenberg to then-Attorney General Eric Holder and then-SEC Chairman Mary Schapiro to investigate the allegations, the DOJ and the SEC reportedly began an investigation into News Corporation for potential FCPA violations, as well. However, on January 28, 2015, the DOJ notified News Corporation of its decision not to prosecute the company.

11. Sandals Resorts International

In January 2013, a Special Investigation and Prosecution Team ("SIPT") established by the U.K. government reached a settlement agreement with Sandals Resorts International in connection with its Beaches resort in the Turks and Caicos Islands ("TCI"). Although the details of the settlement with Sandals were not disclosed, press reports indicate that the investigation centered around several transactions that former Sandals executive Jeffrey Pyne allegedly made in 2005 and 2006, transferring

approximately $1.65 million from Sandals to then-TCI Chief Minister Michael Misick and his Progressive National Party through various third-party firms controlled by his brothers, including Misick and Stanbrook (a law firm headed by Ariel Misick), Chalmers and Company (a law firm headed by Chalmers Misick), and Prestigious Properties (a real estate company headed by Washington Misick).

Sandals agreed to pay $12 million to the Turks and Caicos Islands Government, but did not admit liability by the company, its directors, or its officers. In 2011, however, Sandals had brought a lawsuit in Jamaica alleging that Pyne breached his fiduciary duties by transmitting the funds without permission. Moreover, according to a statement issued by Neil Smith, the Governor's Spokesman for TCI, the agreement "does not prevent the prosecution of any other persons" regarding any of the underlying facts.

The SIPT noted that the agreement was in part a result of the internal investigation that Sandals had launched in January 2011 into "various unauthorized transactions" related to the investigation by U.K. and U.S. authorities into general corruption in TCI. The SIPT remarked that Sandals' cooperation with the U.S. authorities had been "both extraordinary and unique and included the early and voluntary release of valuable evidence." Following the announcement of the settlement Sandals stated that they were "pleased at the outcome" and "satisfied in the manner in which it has been resolved."

Other private developers also settled with the SIPT. Mario Hoffman and the Salt Cay Development Companies announced a settlement with the SIPT in July 2012. Under the terms of that agreement, the companies paid $7 million and transferred 1,506 acres of land to the TCI government. Separately, the government recovered 806 acres of land through a judgment against Star Platinum, a company owned by Turkish national Cem Kinay—regarding whom Interpol issued an international arrest warrant on July 13, 2012 in connection with these matters. Varet Jak Civre, one of the thirteen defendants discussed above, settled charges with the SIPT following a payment of $5 million.

The investigations trace back to a June 2008 report the Foreign Affairs Committee of the United Kingdom House of Commons published on Overseas Territories. The report described widespread corruption within the government of TCI and noted, among other things, that "[o]ver 50 individuals from TCI wrote to us, many alleging corruption, for instance in regard to the sale of Crown land, the distribution of contracts and development agreements, the granting of Belongerships (a status which indicates freedom from any immigration restrictions and also confers rights normally associated with citizenship, including the right to vote) and the misuse of public funds."

The Report detailed specifically several "allegations of corrupt practices in relation to distribution of contracts" for international development, and that there had been widespread departures from competitive tendering. Specifically, the TCI Leader of the Opposition alleged to the Foreign Affairs Committee that "[i]t appears that any and every investment in the country is gotten as a result of kickback to a government minister or his/her immediate family."

The Report concluded with a recommendation for a Commission of Inquiry to investigate these allegations, and the outgoing governor of TCI established such a commission in July 2008. The investigation by the Commission provided further evidence that Misick had acquired public lands and sold them to developers improperly, unjustly enriching himself and amassing a multi-million-dollar fortune. Witnesses before the Commission testified to Misick's mansions, private jets, and a $200,000 per month clothing allowance for his American ex-wife, LisaRaye McCoy, an actress and fashion designer.

Following the publication of an initial report by the Commission of Inquiry in March 2009, Misick abruptly resigned and fled the country. Several months later, in August 2009, the U.K. government suspended parts of the TCI constitution and imposed direct rule on the islands. At that time, the United Kingdom established the SIPT to work with the DOJ in connection with the ongoing investigation of fraud and corruption by Misick's regime. In total, the SIPT and DOJ reviewed over 100,000 pages of evidence.

The ongoing investigation has ensnared government officials as well as the international developers that allegedly paid them bribes. Misick himself was arrested in Brazil in December 2012 on an Interpol red notice and a warrant from the Brazilian Supreme Court. Among other things, Misick allegedly used $1 million in improper payments from Sandals to pay personal debts (including payments to the mother of his children).

Misick was extradited to TCI in January 2014, and released on a $10 million bail. After various legal challenges, the trial of Misick and nine other co-defendants began on December 2015 on the island of Providenciales.

In February 2016, Misick's legal team filed an application for a mistrial, arguing that a press release issued on behalf of Sandals and Beaches' owner and chairman that referenced the prosecutor's opening statement was "so highly prejudicial to his client's rights and to his presumption of innocence, that it defeat[ed] his opportunity for a fair trial." However, High Court Judge Justice Paul Harrison dismissed the application. According to press reports, the trial has since been severely delayed by several weeks of evidentiary arguments, including disputes over a list of 1,425 proposed facts.

12. Mawia Mushtaq and Yang Li

In December 2012 and April 2013, two individuals were convicted under the U.K. Bribery Act. The cases involve instances of minor domestic bribery and not the types of commercial activity typically seen in anti-corruption enforcement actions. First, Mawia Mushtaq was sentenced to two months imprisonment (suspended for twelve months with curfew) after he offered a licensing officer payments of £200 and £300 to change his score on a driving test for a private-hire taxicab license so that he would pass. The Oldham Council conducted the prosecution, with the consent of the Director of Public Prosecution, the first instance of a local jurisdiction bringing charges under the Bribery Act.

Second, Yang Li, a student at the University of Bath, was convicted of violating the Bribery Act by trying to bribe his tutor to obtain a passing grade. Li was enrolled at the University of Bath and studying for a Masters degree in innovation and technology management when he received a score of 37% on his final dissertation, below the 40% score required to pass.

Li's professor told him was told he had three options: resubmit the essay, appeal the grade, or accept it and withdraw from the course. Li reportedly placed £5,000 in cash on the table and said "I am a businessman. There is a fourth option, you can keep the money if you give me a pass mark and I won't bother you again." When the professor refused, Li put the money back in his pocket. During this process, a loaded air pistol fell out of the same pocket. Li subsequently admitted to the charges of bribery and possession of an imitation firearm; he was sentenced to 12 months in prison and ordered to pay a fine of £4,880.

13. Munir Patel

On October 14, 2011, Munir Yakub Patel, a former court clerk at the Redbridge Magistrates' Court in London, became the first individual to be convicted under the U.K. Bribery Act of 2010. The U.K. Bribery Act entered into force on July 1, 2011—the conduct that lead to Patel's indictment occurred shortly afterwards in August 2011.

The Patel case was brought by the Crown Prosecution Service ("CPS"), which has the authority to bring cases under the Bribery Act and which investigates, charges, and presents criminal cases investigated by the police in England and Wales. Because of the simplicity of the case and the small value, it was not prosecuted by the Serious Fraud Office ("SFO"), which focuses on cases that exceed £1M in value or that are significantly complex.

Jayraj Singh, a U.K. motorist, received a speeding ticket and called the Magistrates' Court with questions regarding his summons. It is reported that, shortly after Singh contacted the court, Patel phoned Singh and told the him that he (Singh) could pay £500 to make the situation "go away" or that he should expect to have penalty points added to his driving record and to pay a hefty fine. Patel allegedly sent text messages to Singh to warn him that his insurance would go up if he were convicted of a moving violation. In August 2011, Patel promised to use his access to the Magistrates' Court system to tamper with the official databases on behalf of Singh, in exchange for a payment of £500.

Instead of paying the solicited bribe, Singh contacted *The Sun*, a popular British tabloid, which developed the idea to catch Patel's solicitation and acceptance of a bribe on film. According to *The Sun*'s exclusive article on its sting operation, Patel met with an undercover investigator who posed as Singh. *The Sun* arranged for the exchange between Patel and the investigator to be recorded by a hidden video camera within the vehicle where the two arranged to meet. *The Sun* also managed to take photographs of Patel leaving the rendezvous with the bribe money in his hand. Ironically, *The Sun* acknowledged that, technically, it had itself violated the Bribery Act by setting up and following through on the sting operation. The Justice Secretary indicated that prosecutors would dismiss such technical breaches as not being within the public interest to prosecute.

Patel pled guilty to two counts of the indictment brought against him. Under Count 1, Patel pled guilty to the violation of Section 2 of the Bribery Act, which declares that a person is guilty of an offense if that person "requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly."

Under Count 2, Patel pled guilty to the charges for misconduct in a public office, a common law offense. A charge for misconduct in public office applies where a public officer, acting in an official capacity, willfully neglects to perform that officer's duty and/or willfully misconducts themselves, such that it rises to the level of an abuse of the public's trust in that officer, without reasonable excuse or justification.

Though Patel admitted to and was convicted of only one count of bribery, CPS alleged that he earned approximately £20,000 and "helped" approximately 53 offenders. During the trial, the court reportedly heard evidence that £53,814 in cash deposits and £42,383 in wire transfers had been made to Patel's account. Patel's salary from the courts was just £17,978 per year, and no suitable explanation was provided for the large sums of money in his account.

Regarding Patel's guilty plea, Gaon Hart, Senior Crown Advocate for the CPS Special Crime and Counter Terrorism Division, stated,

> This prosecution is the first of its kind under the Bribery Act 2010 which has provided a significant weapon in the armoury of prosecutors that enables us to focus on the bribery element rather than general misconduct behaviour. We will continue to target those who act corruptly purely for personal gain and tailor the charge to reflect their wrong-doing.

On November 18, 2011, Patel was sentenced to three years in prison for the Count 1 bribery offense and six years in prison for the Count 2 misconduct in a public office charges. The two prison sentences are to be served concurrently. Additionally, Patel was also ordered to pay back £7,500, an amount that police believe is a mere fraction of the bribes that he received. Patel's sentence was reduced based on several factors, including that he plead guilty "at the earliest reasonable opportunity", that he was young (22 years old at the time of sentencing) and that he was even younger when he began his criminal conduct; and finally, that he had previously had a good character. Judge Alistair McCreath weighed these factors with the nature and seriousness of Patel's offenses and the length and incidence rate of Patel's activities to determine the sentence.

Just before announcing Patel's sentence, Judge McCreath stated,

> It is important that those who are tempted to behave in this way understand that there will be serious consequences. Sentences for this sort of offence must act to deter offending of this kind. They must also reflect the determination of the courts to protect the process from corrupt practices and to maintain public confidence in the justice system.

14. Julian Messent

On October 22, 2010, Julian Messent pleaded guilty in Crown Court in London to making or authorizing corrupt payments of almost $2 million to officials of the Costa Rican state insurance company, Instituto Nacional de Seguros ("INS"), and the national electricity and telecommunications provider, Instituto Costarricense de Electricidad ("ICE"). Four days later, Messent was sentenced to 21 months in prison, ordered to pay £100,000 compensation to the Republic of Costa Rica, and barred from acting as a company director for five years by Judge Geoffrey Rivlin QC of the Southwark Crown Court.

At the time the payments were made, Messent was head of the Property (Americas) Division at PWS International Ltd. ("PWS"), a London-based insurance company. In that capacity, he was responsible for securing and maintaining contracts for reinsurance in the Central and South America regions. One of those contracts was to act as the broker of a lucrative reinsurance policy for INS, which in turn served as the insurer for ICE. This policy was known as the "U-500" contract. According to the SFO, between 1999 and 2002, Messent authorized 41 corrupt payments totaling nearly $2 million to at least three Costa Rican officials, their wives, and associated companies as inducements or rewards for assisting in the retention of PWS as the broker of that policy. The covert payments were routed through bank accounts in the names of the wives of two of the Costa Rican officials and through accounts in Panama and the United States, and a travel agency in Florida.

The corrupt payments were first discovered by Costa Rican authorities. The 2002 elections resulted in the replacement of a number of officials at INS and ICE. Though it is not clear whether the recipients of the PWS payments were among those officials ousted, it is clear that shortly after this turnover, the authorities began making inquiries into the contract with PWS and payments made in connection with it. According to news reports, Costa Rican authorities attempted to contact the company about the payments in September 2005, and when PWS failed to respond, Costa Rica complained to the British embassy and hired U.K. counsel to threaten PWS with a lawsuit. The British embassy quickly referred the case to the SFO.

In August 2006, the SFO initiated an investigation (conducted jointly with the City of London Police) in response to Costa Rica's allegations. Messent, who had been promoted to the chief executive post at PWS in 2003, resigned shortly thereafter. PWS was placed in administration by early 2008 and a substantial portion of its assets sold to another U.K. insurer, the THB group. An attorney for the SFO told Judge Rivlin that the exposure of the illicit payments was "one of the factors" in PWS going into administration.

Under an agreement with the SFO, Messent pled guilty to two counts of making corrupt payments contrary to §1(1) of the Prevention of Corruption Act 1906. Specifically, Messent admitted to paying $25,832 to the wife of Alvaro Acuna, an agent of INS, in February 1999 and $250,000 to a company associated with Cristobal Zawadski, another agent of INS, in June 2002.

Judge Rivlin sentenced Messent to 21 months incarceration for each count, with the terms to be served concurrently. Rivlin reportedly reduced Messent's sentence from what would have otherwise been four-to-five years on account of his cooperation with the SFO's investigation and the plea agreement.

At sentencing, Messent's attorney emphasized that his client had not acted alone in making the corrupt payments. He claimed that Messent had "inherited" the arrangements when he became head of the firm's Latin America department in 1996, that he had not concealed the payments from other employees, and that the details were known to the heads of the finance department and the compliance unit. According to observers, Judge Rivlin said he "accepted" that Messent did not act alone in making the payments and "did not attempt to hide or disguise these payments" within the company or in accounting records. Yet Judge Rivlin thought it plain—and sufficient—that Messent had been "deeply involved in the decision making" and "authorized" the corrupt payments, which "represent[ed] a loss to the Republic of Costa Rica."

The SFO apparently chose to forgo pursuing prosecutions of any other individuals or PWS in connection with the illicit payments. According to the SFO, it declined to prosecute the company because any fine levied against it would likely have been enforced against its pension funds, which already faced a "substantial deficit," and so the punishment would have been disproportionately felt by the company's employees.

Messent's case is notable to observers of the U.K. justice system for several reasons. First, it makes clear that even where circumstances are present that justify not prosecuting an organization, the SFO will hold individuals accountable for corrupt activity. In this case, because PWS was in administration, and any fines levied would have been paid out by the company's employee pension funds, the U.K. authorities decided not to pursue a case against the entity. This practice may be especially

relevant in prosecutions under the Bribery Act, as an organization might avail itself of the defense of "adequate procedures" as currently written in that legislation, while an individual could not.

Second, it affirms the unremarkable proposition that the fact that bribery is a standard industry practice constitutes neither a defense nor a mitigating factor in U.K. courts. Here the former-CEO and Chairman of PWS, Lord Malcolm Person, was quoted in *The Guardian* as stating, "It is very regrettable that something like this should happen. But in 1997 when this started, it was regarded as perfectly normal. Under that regime, all the other insurance brokers were doing exactly the same thing." Judge Rivlin directly rejected this line of argument at sentencing.

Third, it clarifies the status of plea agreements entered into with the SFO. The viability of plea agreements had been thrown into some doubt in early 2010 when two U.K. judges expressed concern that the SFO had exceeded its authority by agreeing to sentences with defendants in overseas corruption cases and warned the SFO against plea deals that purported to bind the courts in sentencing decisions. Some commentators questioned whether those warnings threatened the SFO's whistleblower program and its partnership with the U.S. Justice Department in resolving international bribery cases. Here, however, Messent entered into a plea agreement with the SFO that appears to have been largely respected. According to observers of the sentencing, Judge Rivlin made clear that he was applying a substantial reduction to the sentence he otherwise would have handed down precisely because of the plea agreement reached between Messent and the SFO, which reflected Messent's cooperation with the SFO's investigation. And then-SFO director Richard Alderman was quoted as saying, "This case is also a good example of how an early plea agreement can bring a swift resolution."

15. Victor Dahdaleh and Bruce Allan Hall

On April 6, 2010, the Wall Street Journal reported that U.S. and U.K. authorities were investigating the activities of Victor Dahdaleh, a Canadian citizen, suspected of bribing officials at Aluminium B.S.C. ("Alba"), a Bahraini state-owned smelting company formed in 1968, on behalf of Alcoa (formerly "Aluminum Company of America"). The Alba board of directors included a number of government ministers with Sheikh Isa Bin Ali Al Khalifa ("Sheikh Isa"), the brother-in-law of Bahrain's Prime Minister, as Chairman of the Board during the material time between 2002 and 2005.

On October 24, 2011, Dahdaleh voluntarily traveled to a U.K. police station to be arrested by the SFO. Dahdaleh's voluntary surrender caused speculation that he may have "chosen" to face charges in the United Kingdom rather than the United States in order to leverage his strong presence in the U.K. business community and British high society. The SFO alleged that Dahdaleh made these payments to guarantee shipments of alumina from Bahrain to Australia and as part of a scheme to overcharge Alba by hundreds of millions of dollars for the purchase of alumina. Additionally, the SFO accused Dahdaleh of making payments in connection with contracts to supply goods and services to Alba. The SFO charged Dahdaleh with violations of corruption under the Prevention of Corruption Act, conspiracy to corrupt contrary to the Criminal Law Act and the Prevention of Corruption Act, and acquiring and transferring criminal property contrary to the Proceeds of Crime Act. Dahdaleh was charged in criminal court on April 16, 2012.

On 25 June, 2012, in connection with the same scheme, former Alba CEO Bruce Allan Hall pleaded guilty in the U.K. to conspiring to violate and violating the Prevention of Corruption Act and of committing money laundering in violation of the Proceeds of Crime Act. Hall admitted that he had entered

into a pre-existing conspiracy with Sheikh Isa and Dahdaleh to receive corrupt payments in exchange for securing shipment of alumina from Bahrain to Australia. Hall admitted that he received payments as part of a deal to allow the existing corrupt scheme between Dahdaleh and Sheikh Isa to continue. Hall admitted to having received twenty of corrupt payments as part of this scheme totaling about £2.88 million including 10,000 Bahraini dinars in cash from Sheikh Isa. On July 22, 2014, Hall was sentenced to 16 months in prison and required to pay £3.67 million in disgorgement, compensation and contribution to prosecution costs.

Despite the cooperation of Hall, on December 10, 2013, the SFO announced it would be dropping its case against Dahdaleh, noting that there was no longer a realistic prospect of conviction. The SFO provided two main reasons for this decision. First, according to the SFO, Hall's statement as part of his plea deal differed materially from that he had previously provided to the SFO. Second, the SFO was unable to secure the cooperation of two key-witnesses, both partners at the American law firm Akin Gump Strauss Hauer & Feld LLP ("Akin Gump"). According to U.K. press reports, the SFO had delegated much of its investigation in Bahrain to Akin Gump. However, Akin Gump had been retained as counsel for Alba in a civil lawsuit against Dahdaleh, calling into question the objectiveness of that investigation.

16. Mabey & Johnson

On July 10, 2009, Mabey & Johnson, a privately owned U.K. company that specializes in bridge building, pleaded guilty in Westminster Magistrates Court to charges of conspiracy to corrupt in relation to its activities in Ghana and Jamaica and charges of paying kickbacks in connection with the United Nations Oil-For-Food Programme in Iraq. The guilty plea came after an internal investigation led to a voluntary disclosure by Mabey & Johnson regarding corrupt activities in Jamaica and Ghana. Mabey & Johnson also disclosed information regarding corruption in Angola, Bangladesh, Mozambique, and Madagascar, but the SFO decided not to pursue charges related to those activities. The prosecution is significant because it marked the United Kingdom's first successful prosecution of a company for corrupt practices in overseas contracts and for breaching a United Nations embargo on trade with Iraq. It also set the stage for many of the principles that would be incorporated into the Bribery Act and related guidance.

Mabey & Johnson was sentenced on September 25, 2009 and received a £6.6 million fine. The fine included £4.6 million in criminal penalties comprised of £750,000 each for bribes paid in Ghana and Jamaica, £2 million for breach of the U.N. sanctions relating to the Oil-For-Food Programme, and a confiscation order for £1.1 million. Additionally, Mabey & Johnson was ordered to pay £2 million in reparations and costs, including £658,000 to be paid to Ghana, £139,000 to be paid to Jamaica, and £618,000 to be paid to Iraq. Further, the company replaced five of the eight members of its board of directors and implemented a comprehensive compliance program. Mabey & Johnson is required to submit its compliance program to the review of a SFO-approved independent monitor. On February 10, 2011, David Mabey, the Sales Director of Mabey & Johnson, and Charles Forsyth, the Managing Director of Mabey & Johnson, were found guilty of making illegal payments in violation of United Nations sanctions by a jury in Southwark Crown Court. A third defendant, Richard Gledhill, Mabey & Johnson's Sales Manager for Iraq, had pleaded guilty to sanctions offenses at an earlier hearing and gave evidence for the prosecution. On February 23, 2011, Judge Geoffrey Rivlin of the Southwark Crown Court sentenced Forsyth to 21 months' imprisonment, ordered him to pay prosecution costs of £75,000, and disqualified Forsyth from acting as a company director for five years. Judge Rivlin also sentenced Mabey to eight

months' imprisonment, ordered him to pay prosecution costs of £125,000, and disqualified Mabey from acting as a company director for two years. In issuing the sentences, Judge Rivlin noted that Forsyth's sentence reflected that he "bears the most culpability" and that, in regards to Mabey, "[w]hen a director of a major company plays even a small part, he can expect to receive a custodial sentence." Gledhill, on the other hand, received a suspended sentence of eight months in recognition of his cooperation with prosecutors.

The Prosecution Opening Note in the Mabey & Johnson proceeding referencing the allegations in Jamaica and Ghana stated that, "it is . . . beyond reasonable argument that unless properly monitored and controlled, the employment of local agents and payment of commissions is a corruption 'red flag' exposing the company to risk. What it may provide is a convenient smokescreen to deny corporate or individual knowledge of arrangements conducted overseas."

The Prosecution Opening Note also contains an Appendix including a "non-exhaustive list of the factors which the Director of the SFO takes into account when considering whether to investigate and prosecute allegations of overseas corruption by United Kingdom-based companies and individuals." This list includes the imposition of a "monitoring system to ensure absolute compliance with U.K. law . . . ." In this regard, the SFO noted that in appropriate circumstances it will "seek to follow the model provided by the United States of America's [FCPA]."

On January 12, 2012, the SFO took action against Mabey Engineering (Holdings) Ltd. ("Mabey Engineering"), the parent company of Mabey & Johnson. The U.K. High Court issued an Order that Mabey Engineering pay £131,201 under Part 5 of the U.K. Proceeds of Crime Act 2002 in recognition of sums it received through share dividends derived from contracts won through unlawful conduct by Mabey & Johnson and former officers Mabey, Forsyth, and Gledhill. The Director of the SFO noted that the SFO initiated the civil action to recover the proceeds of the Mabey & Johnson-related crimes even though "[i]n this particular case…[Mabey Engineering] was totally unaware of any inappropriate behavior." The Director stated that this reinforced the SFO's position that investors are obligated to satisfy themselves with the business practices of their portfolio companies.

The Director acknowledged the Mabey Group's cooperation throughout the SFO's enforcement action and stated that the SFO had been "very impressed by [the Mabey Group's] attitude and the clear commitment of [its] new management to ethical trading." The SFO Director added that "it appears that in many ways the Mabey Group is now leading the way in implementing controls and procedures to ensure that it is able to trade ethically in high-risk jurisdictions." According to the SFO, the January 2012 civil action represents the "final piece in an exemplary model of corporate self-reporting and cooperative resolution."

a. Iraq

Mabey & Johnson was allegedly involved in providing funds to the Iraqi government in order to obtain a contract for the supply of bridges valued in excess of €4.2 million as part of the United Nations Oil-Food-Food Programme discussed in Part II. The kickbacks, 10% of the total contract value, were paid in two separate installments to Jordanian bank accounts and exactly reflected the kickback sum that was required by the Iraqi government. The payments were made through Upper Gulf Agencies, Mabey & Johnson's agent in Iraq. The three individual defendants noted above participated in the Iraq scheme.

b. Jamaica

According to the Prosecution Opening Note, Mabey & Johnson paid bribes to Jamaican officials, through agents, in order to secure contracts for the building of bridges. The SFO contends that Mabey & Johnson knew that the appointed agents were hired to facilitate corruption. Although Mabey & Johnson denied this contention, it acknowledged that there was a risk that payments might be passed on as bribes.

The SFO alleged that bribes were paid by Deryck A. Gibson, an agent of Mabey & Johnson, to Joseph Uriah Hibbert with the authorization of Mabey & Johnson directors to secure projects and increase project costs. Hibbert served as the Jamaican Chief Technical Director of the Ministry of Transport and Works from November 1993 until October 2000 and had a longstanding relationship with Mabey & Johnson dating back to 1993. While in this position, Hibbert held delegated powers to act on behalf of the Permanent Secretary of the Ministry, which included the ability to enter into financial commitments when there was a vacancy in the Secretary of the Ministry position. During this period, Hibbert received payments of £100,134.62 from Mabey & Johnson. Payments from Mabey & Johnson to Gibson were originally paid into accounts under Gibson's own name, but later were made to an offshore vehicle.

The primary project at issue was the Priority Flyover Program, known as the "Jamaica 1" contract. In February 1999, Mabey & Johnson entered into a joint venture with Kier International Ltd. for implementation of the Jamaica 1 contract after a presentation was made to the Jamaican Ministry of Transport. Hibbert approached Gibson to make a bid that Hibbert later approved. The contract was valued at £13.9 million but later increased in value to £14.9 million, seemingly as a result of bribes paid to Hibbert. The alleged bribes were paid to Hibbert through commissions paid to Mabey & Johnson agent, Gibson, which were set at an inflated 12.5% rate. In addition to payments made directly to Hibbert, payments were also made to Hibbert's niece and funeral expenses were covered for Hibbert's mother.

c. Ghana

According to the Prosecution Opening Note, Mabey & Johnson paid commissions to agents in relation to business it won through the Ghana Development Fund ("GDF"). This fund was to be used for the development of business in Ghana but in actuality was used as a slush fund for Mabey & Johnson to pay bribes. A number of individuals were involved in making and receiving corrupt payments out of the GDF. Consequently, bribes made during the relevant period totaled £470,792.60, which resulted in Mabey & Johnson receiving the award of three principal contracts. These contracts were Priority Bridge Programme Number 1, worth £14.5 million, Priority Bridge Programme Number 2, worth around £8 million, and the Feeder Roads Project, worth £3.5 million. Many of the illicit payments were distributed to members of the Ghanaian government, including Dr. Ato Quarshie, the Minister of Roads and Highways. Mabey & Johnson accepted that in creating and making payments from the GDF, its executives facilitated corruption on behalf of the company and that its executives were in corrupt relationships with public officials in order to affect Mabey & Johnson's affairs.

CHAPTER 5: MULTILATERAL DEVELOPMENT BANKS (MDBs)

I. Context

Multilateral Development Banks (MDBs) continue to play an important role in the global fight against corruption and, as in past years, the effort is spearheaded by the World Bank.

Indeed, the World Bank started to dramatically expand its anti-corruption capabilities ever since the seminal "cancer of corruption" speech held by the Bank's then-President James D. Wolfensohn in October 1996. Almost 20 years later, in December 2013, the World Bank's current president Mr. Jim Yong Kim reaffirmed the same anti-corruption message and boldly declared corruption to be "public enemy number one." Among other things, President Kim has led a major restructuring effort of the Bank which gave rise to the creation of a "Governance Global Practice" intended to act as "a single pool of technical experts in rule of law, public sector, financial and state management, and public procurement." Supporting anti-corruption and transparency initiatives in over 100 countries, and counting over 750 staff members, the Governance Global Practice is now the largest of the World Bank's 14 global practices (which have replaced the Bank's previous six regional departments).

Aside from such governance reforms and initiatives, a significant portion of the World Bank's anti-corruption efforts lies in the Bank's sanctions regime, encapsulated in its so-called "Sanctions Procedures." The sanctions regime was created shortly after President Wolfensohn's 1996 speech and has undergone (and continues to undergo) a series of revisions and improvements. In essence, the sanctions regime gives the World Bank the ability to investigate and sanction firms and individuals for so-called "sanctionable practices" (*i.e.*, fraud, corruption, collusion, obstruction and/or coercion) committed during the procurement or implementation of a World Bank-financed project. Depending on the gravity of the misconduct, a range of sanctions may be imposed, including letters of reprimand (generally reserved for minor misconduct), debarment with conditional release (the baseline sanction, recommended in most cases) and indefinite debarment from participating in any future World Bank-financed project, (reserved for the most severe misconduct). The World Bank's jurisdiction is contract-based, *i.e.*, the Sanctions Procedures apply whenever a contract between a borrower and the World Bank is governed by the Bank's Anti-Corruption, Procurement or Consultant Guidelines. The World Bank's sanctions regime mainly focuses on contractors, subcontractors and consultants and does not cover public officials of governments. The sanctions regime also does not cover World Bank staff members who have engaged in misconduct, who are subject to separate administrative proceedings.

The World Bank regime is the most mature of—and serves as the de facto model to—sanctions regimes of other MDBs. In fact, over the course of the past decade, there have been a number of initiatives to harmonize various MDB sanction regimes and increase cooperation between MDBs. For instance, on September 17, 2006, several MDBs, including the World Bank, the African Development Bank ("AfDB"), the Asian Development Bank ("ADB"), the European Bank for Reconstruction and Development ("EBRD"), and the Inter-American Development Bank ("IDB") entered into a landmark agreement that, among other things, harmonized their definitions of fraudulent and corrupt practices and their investigative processes. The resulting cooperation was further enhanced by the April 2010 Agreement for Mutual Enforcement of Debarment Decisions—commonly referred to as "Cross-Debarment Agreement"—between the AfDB, ADB, EBRD, the IDB, and the World Bank, pursuant to which debarments greater than one year in length issued by one participating MDB trigger cross-debarments by the other participating MDBs.

Interestingly, 2016 has seen the birth of a new MDB: the Asian Infrastructure Investment Bank ("AIIB"), declared open for business on January 16, 2016. First proposed in 2013 by the government of the People's Republic of China, the AIIB's declared goal is to support infrastructure development and regional connectivity in the Asia-Pacific region. With its initial capital of $100 billion and a membership roster including over a quarter of the world's nations and 16 of the world's 20 largest economies, including Britain, Germany, Australia, and South Korea, the AIIB is poised to play a major role in the Asian infrastructure financing sector (a first joined-loan with the ADB was announced in March 2016). On the anti-corruption front, the AIIB plans to have a special compliance-and-integrity unit that will oversee its management and report directly to the AIIB's board. The AIIB also has a sanctions regime, which appears designed to share many common features with the regimes of other major MDBs, including the sanctions regime of the World Bank.

II. <u>Why the MDB Sanction Process Matters From a Business Perspective</u>

Far from being only a theoretical Damocles' Sword, sanctions regimes have started to be actively implemented by most MDBs. Indeed, according to official statistics, in fiscal year 2015 alone, the World Bank investigated 93 contracts and 61 projects, worth $523 million, pursuant to allegations of sanctionable practices. Such investigations have, between 2008 and 2015, led to the sanctioning of 368 firms and individuals under the World Bank's sanctions regime. The number of sanctions is much higher if one were to add cross-debarments honored and take into account the affiliates of sanctioned firms falling with the scope of such firms' sanctions (both of which are excluded from the World Bank's official statistics). By way of comparison, the ADB has, as of May 31, 2016, imposed sanctions on 444 firms and 497 individuals in addition to honoring cross-debarments for 456 firms and 143 individuals. Under the sanctions regime of most MDBs, including the World Bank Sanctions Procedures, the identity of the sanctioned party and the sanctions imposed are publicly disclosed, causing significant reputational harm which could prove ruinous for the party involved.

Even before a final sanction is imposed and publicized, sanctions procedures can severely disrupt the business operations of companies in various ways, be it by impacting employee morale or dedicating scarce resources and staff to oversee ongoing investigations and proceedings. Such disruption typically increases with the duration of the sanctions procedures, which can, indeed, take a long time to conclude. Practice shows, for example, that sanctions procedures before the World Bank are rarely concluded within a year and can last several years if one takes into account the Bank's initial investigation.

Overall therefore, the increase in sanctioning activity, the potential impact for disruption caused by the sanctions procedures as well as the severity of the sanctions imposed underscores the growing need for companies operating in the development sector to familiarize themselves with the respective sanctions regimes of the MDBs they are dealing with.

III. <u>Overview of MDB Sanctions Regimes</u>

A. World Bank Sanctions Regime

The World Bank's current sanctions regime is set out in full in the April 15, 2012 version of the Sanctions Procedures.

1. Investigation and Adjudication: Main Actors and Process

The core of the World Bank's sanctions regime is built around three main actors and their respective responsibilities: the Integrity Vice Presidency, the Office of Suspension & Debarment and the Sanctions Board, which respectively represent the Bank's investigatory branch and two adjudicatory bodies.

Integrity Vice Presidency (INT): INT is a World Bank internal body, whose main responsibility is investigating allegations of sanctionable practices on Bank-funded projects. Such allegations are mostly reported to INT by government officials of the borrowing country (*e.g.*, members of the implementation agency or the bid evaluation committee), World Bank staff participating in the project or other types of whistleblowers (*e.g.*, competitors). Typically, once INT has concluded its investigation and finds that there is sufficient evidence supporting the allegations of sanctionable practices, INT summarizes its findings in a "Statement of Accusations and Evidence" and refers the case to the Office of Suspension & Debarment for first-level adjudication.

Office of Suspension & Debarment (OSD): The OSD, headed by the Suspension and Debarment Officer, acts as the initial (and, often final) adjudicator of cases brought to it by INT. The OSD determines if the evidence supports a finding of a sanctionable practice under the applicable World Bank Procurement, Consultant or Anti-Corruption Guidelines and, if so, may recommend the imposition of sanctions by issuing a "Notice of Sanctions Proceedings" to the respondent. If the respondent does not contest the OSD's recommended sanctions, the sanctions are imposed as recommended and the OSD's decision is published on the OSD's website. If the respondent wishes to contest the recommended sanctions, the respondent can do so through two non-exclusive options. The respondent may, within 30 days of receipt of the Notice, submit a written "Explanation" to the OSD, who, upon review of the Explanation, can either (i) maintain the initial recommendation, (ii) revise the recommended sanctions or (iii) withdraw the Notice. The OSD's decision may then, in turn, be appealed before the Sanctions Board. The Respondent can also chose to bypass the OSD and file a written "Response" directly with the Sanctions Board, within 90 days of the receipt of the Notice. As of 2015, two thirds of all cases (67%) were resolved at the level of the OSD and only one third (33%) proceeded to the Sanctions Board.

Sanctions Board: The Sanctions Board is the final adjudicator of contested cases. The Board is also the first non-purely Bank affiliated body to review the case: unlike the OSD, which is composed entirely of World Bank-appointed staff, four of the Sanctions Board's seven members are external (*i.e.*, have never held a World Bank position); the remaining three are selected among the World Bank's senior staff by the World Bank president. The Sanctions Board reviews any allegations *de novo* on the basis of the written record before it (which includes the "Response" submitted by respondents and a "Reply" submitted by INT). If requested, or if decided *sua sponte* by the Chair of the Sanctions Board, evidence may also be presented during a hearing. Final decisions made by the Sanctions Board, which describe the Board's reasoning in reaching the decision in detail, are posted on the World Bank's website. As per the Sanctions Procedures, decisions of the Sanctions Board are non-appealable and the Sanctions Board has confirmed that it will only reconsider its decisions in narrowly defined and exceptional circumstances, such as the discovery of new and potentially decisive facts, fraud in the proceedings and/or a clerical mistake in the original decision (Decision No. 62 ¶ 6 (January 2014).)

2. Temporary Suspensions and Early Temporary Suspensions

When the proposed debarment exceeds a period of six months (which it does in most cases), the OSD will—at the time of the initiation of the sanctions proceedings—simultaneously impose a temporary suspension on the respondent which will remain in effect while proceedings are underway. Like debarments which can be imposed as part of a final decision, temporary suspensions render the respondent ineligible for World Bank contracts; however, they are not announced publicly. Instead, they are shared only with the limited number of persons specified in the Sanctions Procedures.

Since 2009, the OSD also has (and increasingly uses) the power to issue so-called early temporary suspensions ("ETSs") before INT has concluded its investigation. As of the end of fiscal year 2015, a total of 18 ETSs had been imposed.

The Sanctions Procedures set a relatively low standard for the imposition of ETSs, which—given their potential to cause irreversible economic damage (before INT's investigation is even concluded)—has been criticized as a potential violation of the concerned entity's due process rights. Indeed, under the Sanctions Procedures, OSD can grant an ETS request if (i) the evidence presented by INT is sufficient to support a finding that the potential respondent has engaged in a sanctionable practice and (ii) the sanctionable practice as presented in the evidence would warrant a two-year period of debarment at a minimum. The decision to grant an ETS thus appears to depend mainly on the gravity of the underlying conduct and not on the existence of an urgent threat or imminent harm. Urgency/imminent harm, however, usually constitute *sine qua non* conditions for temporary restraining order-type mechanisms across common or civil, private or administrative systems of law.

3. Settlements and Voluntary Disclosures

In 2009, INT began to resolve some of its investigations through negotiated resolution agreements ("NRAs"). In 2015, roughly one-third of all sanctions imposed were imposed pursuant to such NRAs. INT and the company/individual alleged to have engaged in the misconduct can enter into settlement discussions any time during the investigation phase and even once the proceedings have begun. Depending on the terms of the NRA, the case can be closed, sanctions reduced or proceedings merely deferred pending compliance with specified conditions, which often includes ongoing cooperation (*i.e.*, providing INT with valuable information about potential misconduct, either by the cooperating party or other companies and individuals).

High profile NRAs reached in the past include the February 2012 settlement with French engineering firm Alstom SA (described in more detail in our 2013 Alert) and, more recently, the April 2015 settlement with French global telecommunications equipment company Alcatel Lucent. Alcatel had been under investigation for the failure of two of its Egyptian and Italian subsidiaries to disclose agents, which had been hired on behalf of two other Alcatel subsidiaries (Alcatel-Lucent Trade International A.G. and Alcatel Saudi Arabia Limited) to assist in securing $30 million worth of telecommunications services and training contracts in 2006. While the terms of the NRA foresaw a conditional non-debarment for four implicated Alcatel subsidiaries (including the Italian and Egyptian subsidiaries), Alcatel-Lucent Trade International A.G. and Alcatel Saudi Arabia Limited were debarred for a period of 18 months by the World Bank (and, by virtue of the Cross-Debarment Agreement, by other MDBs).

It is also worth noting that the World Bank has—since 2006—put in place a leniency/clemency program which encourages companies to disclose misconduct prior to INT starting its investigation. The World Bank's so-called Voluntary Disclosure Program ("VDP") allows companies and individuals who self-disclose misconduct to continue to compete for World Bank-financed contracts and not have their identity publicized. In return, the companies have to comply with the VDP's terms and conditions, which—among other things—include the commitment to cooperate with INT and adopt a compliance program to be monitored by an external compliance monitor. Any violation of the VDP's terms will trigger a mandatory 10-year debarment. In practice, the VDP has known only limited success.

4. Ongoing Review of World Bank Sanctions Regime

The World Bank is currently undertaking a two-phase review of its sanctions regime, which may lead to changes to the Bank's sanctions regime in the future (the "Review"). The Review's first phase started in 2011 and concluded on October 31, 2013. It consisted of a stock-taking exercise of the Bank's sanctions regime, which sought feedback from stakeholders both internal (*e.g.*, INT, the OSD and the Sanction Board Secretariat) and external (*e.g.*, contractors and consultants regularly participating in World Bank projects, country officials involved in the implementation of such projects, academics, defense counsel etc.). The World Bank collected and organized the feedback obtained in a "feedback summary" table, which is publicly available on the World Bank's website. Recurring comments by participants centered on the importance of respondents' due process rights, including with respect to evidentiary issues. Specifically, participants stressed the need for "a high standard of safeguards and due process in order to protect less experienced businesses from mistakes or from pressure from investigation and debarment proceedings."

According to the Review's consultation plan, the second phase of the Review will use the feedback collected to address "the larger, first-principle issues of the overall efficiency and effectiveness of the system." To that effect, on October 27, 2014, Frank Fariello, INT's Lead Counsel, who is in charge of coordinating the Review, submitted his report containing recommended changes of the sanctions regime to the World Bank's Audit Committee. However, to date, the Bank has not yet announced any concrete changes to its sanctions regime.

B. African Development Bank Sanctions Regime

The AfDB's sanctions system is currently laid out in the November 2014 version of the AfDB sanctions procedures. Like the World Bank, the AfDB has jurisdiction to investigate and sanction five types of sanctionable practices, *i.e.*, fraud, corruption, collusion, obstruction and/or coercion committed during the procurement or implementation of a project financed by the AfDB. Similarly, the AfDB's core proceedings are centered on one investigative body (Integrity and Anti-Corruption Department (IACD)) and a two-tiered adjudicatory system with two distinct adjudicators (Sanctions Commissioner and Sanctions Appeals Board, respectively). Overall, the AfDB's procedures largely mirror the World Bank's sanctions regime, in part due to the MDBs' efforts to harmonize their respective anti-corruption enforcement frameworks.

Variations worth pointing out include the difference in standard for the granting of early temporary suspensions/ETSs. The AfDB procedures specify that a request for suspension prior to the conclusion of an investigation can only be granted if the "continuous eligibility of the subject of the investigations would cause *imminent financial or reputational harm*" to the AfDB (emphasis added). This requirement of

imminent harm brings the AfDB's procedures in line with generally accepted standards for issuing retraining-type orders, unlike the World Bank sanctions procedures (discussed *supra*). Another difference relates to the availability of hearings. Under the World Bank sanctions regime, respondents may request a hearing which will be granted as a matter of course. By contrast, the AfDB procedures indicate that the parties "have no right to an oral hearing," and any request to hold a hearing by the parties shall be granted by the Sanctions Appeals Board on a discretionary basis. This limitation does not have a considerable practical impact, however, as the AfDB's Sanctions Appeals Board has—to date—not yet reviewed any cases.

Indeed, most of the AfDB's sanctioning activity has so far been limited to the honoring of cross-debarment and the investigation of matters, which are then resolved by settlement. The AfDB concluded its first set of negotiated settlement agreements in early 2014 and has continued to settle with companies in 2015. Specifically, on October 1, 2015, the AfDB settled with Canadian engineering company SNC-Lavalin related to allegations of unlawful payments to public officials with respect to two AfDB-financed projects in Uganda and Mozambique. SNC-Lavalin agreed to (i) pay CAD $1.5 million to the AfDB, (ii) cooperate with IACD in the future and (iii) pledge to maintain an effective group-wide compliance program, subject to review by the AfDB. In exchange, SNC-Lavalin's subsidiary which allegedly made the payments is subject to a two-year and 10 months conditional non-debarment. As discussed *infra*, the AfDB settlement represents just one of multiple, high-stake proceedings implicating SNC-Lavalin as well as several of its former executives.

More recently, in December 2015, the AfDB reached another settlement with Tokyo-based multinational conglomerate Hitachi, ending the AfDB's three year investigation into allegations of sanctionable practices by certain Hitachi subsidiaries on a power station contract in South Africa. The settlement included the subsidiaries' debarment for one year in exchange for an undisclosed but—according to the press release—"substantial" financial contribution by Hitachi to the AfDB. Interestingly, this case is another illustration of cooperation between MDBs and national enforcement authorities: Indeed, the AfDB had shared information obtained in the course of its three-year investigation to the U.S. SEC, which, in turn, had launched its own investigation into the matter. The SEC's investigation was settled in September 2015, with Hitachi agreeing to pay $19 million in civil penalties.

C. Other MDB Sanctions Regimes: Highlights of Recent Changes

A number of MDBs have undertaken recent changes to their respective sanctions regimes to bring them more in line with the World Bank' regime. Select highlights of such changes are presented below.

European Bank for Reconstruction and Development: Sanctions procedures at the EBRD are governed by the "Enforcement Policy and Procedures." The most recent version of these procedures took effect in November 2015 and brought with it a number of significant changes. Perhaps most importantly, while the old Procedures only foresaw one level of adjudicative review by the so-called "Enforcement Committee", the new Procedures create a two-tiered adjudicatory process by adding the initial review of the "Enforcement Commissioner." The new Procedures also increase the independence of the Enforcement Committee: while its five members were previously internal to the Bank, the new Procedures dictate that three out of the five members must be external to the Bank. Moreover, decisions of the Enforcement Committee are now final and no longer subject (as before) to the referral to the Bank's President or Executive Committee. Another important change relates to the new ability of the EBRD's

investigative body (the "Office of the Chief Compliance Officer") to enter into negotiated resolution agreements with the parties: previously, even when the parties agreed, settlements were not foreseen by the previous version of the Procedures. Finally, in a greater push for transparency, the EBRD has decided that going forward, it would publish on the Bank's website any enforcement actions leading to debarments or debarments with conditional release (decisions where the EBRD issues other types of sanctions will not be published but may be disclosed as the Bank deems appropriate).

Inter-American Development Bank: The IDB's sanctions process underwent a major revision in 2011, which brought it mostly in line with the sanction processes of other MDBs. Specifically, the 2011 revision created a two-tier adjudicative system composed of the so-called "Case Officer" and the "Sanctions Committee", charged with resolving cases brought by the Bank's investigative body, called the "Office of Institutional Integrity." The IDB's sanctions regime was revised once more and the newest version of the sanctions procedures came into effect on June 9, 2015. Aside from select terminological changes (e.g. the "Case Officer" is now called the "Sanctions Officer"), the latest amendments have introduced the concept of negotiated settlements into the IDB's sanction process (*see* new Article 15.4) and now provide respondents with the opportunity to contest the case prior to the decision by the Sanctions Officer (the previous version of the procedures allowed only appeals to the Sanctions Committee). Moreover, under the new sanctions process, the IDB must publish on its website all sanctions imposed by the Sanctions Officer and the Sanctions Committee but continues to maintain discretion as to whether or not to disclose the identity of the sanctioned party or the details about the underlying misconduct.

Asian Development Bank: Updates to the Asian Development Bank's Integrity Principles and Guidelines ("Guidelines") were approved in 2014 and became effective on January 1, 2015. Like the World Bank's Sanctions Procedures, the Guidelines are built around an investigative body—the Office of Anticorruption and Integrity ("OAI")—and two adjudicative bodies (the "Integrity Oversight Committee" and the "Sanction Appeals Committee"). Under the previous version of the Guidelines, the Head of the OAI also acted as the Secretariat to the Sanctions Appeals Committee. In order to ensure greater independence from the investigation process, the new Guidelines mandate that the Sanctions Appeals Committee's Head be picked from senior ADB staff, external to the OAI. Unlike the EBRD and the IBD, the ADB has—in this latest round of revisions—decided not to move towards a full publication of its sanctions decisions. Instead, the ADB will continue to publish high-level (and anonymous) summaries of its sanction cases and maintains its rule that the identity of first time offenders is not publicized, unless limited exceptions apply (e.g. failure to respond to notice of proceedings, failure to acknowledge debarment decision etc.). The revisions clarify the language of these exceptions.

IV. Mitigation of Potential Sanctions: Useful Lessons from the World Bank Sanctions Board's Decisions

The World Bank has historically been the only MDB to publish the decisions of its final adjudicative body in full text. The growing body of World Bank Sanctions Board decision is of particular value as the decisions set out in detail the Board's sanctioning analysis, including with respect to the initiatives and remedial actions that it expects from companies and individuals to receive mitigating credit.

An analysis of published Sanctions Board decisions shows that the mitigation accorded by the Sanctions Board can indeed be meaningful. For example, in one decision, the proposed sanction of a three-year debarment with conditional release (which corresponds to the Bank's "baseline" sanction) was

reduced to a six months retroactive, non-conditional debarment in large part due to a multitude of mitigating factors (Decision No. 63 ¶¶ 106-107, ¶¶ 109-110, ¶ 112 (January 2014).) The significance of mitigation credit is also evident from the increased sanctions levied when such factors are absent. (*See*, *e.g.*, Decision No. 69 ¶¶ 39, 41, 45 (June 2014).)

Below is a description of mitigating factors, regularly invoked by respondents and/or used by the Sanctions Board to reduce the sanctions initially proposed. Many of these findings are consistent with decisions of regulatory agencies inside and outside the United States that have insisted on similar criteria for crediting corporate investigations of potential misconduct.

A. Cooperation with INT

The Sanctions Board will give companies and individuals mitigating credit if they cooperate during the course of the investigation conducted by INT. Interestingly, such mitigation credit can be obtained even when the company does not give in to *all* of INT's requests (Decision No. 79 ¶ 48 (August 2015), mentioning "gaps" in the company's responses to INT's queries). More noteworthy still are instances where the concerned companies were accused of initially obstructing INT's investigation. For instance, in Decision No. 60, the Sanctions Board found select respondents culpable of obstruction for having ordered the deletion of emails before INT's audit. Ultimately, however, these respondents were awarded "significant" mitigating credit for having (i) met with INT and admitted misconduct; (ii) provided inculpatory evidence and (iii) made efforts to retrieve previously deleted emails. (Decision No. 60, ¶ 133 (September 2013).) Similarly, in Case No. 63, the Sanctions Board found that attempts by a respondent entity's employees to interfere with INT's investigation warranted aggravation, while also applying mitigation for subsequent efforts by respondent entity's management to correct the employees actions. (Decision No. 63, ¶¶ 102 and 110 (January 2014).)

Moreover, in another decision, the Sanctions Board made it clear that it will not necessarily link the mitigating credit accorded to a cooperating company to the success of the investigation conducted by INT. In this particular decision, the Sanctions Board granted mitigation to a Respondent Director who participated in two interviews with INT, despite the fact that these interviews did not shed light on an area of particular relevance to the case. Indeed, the Sanctions Board noted the lack, in the record, of any indication that INT had asked questions pertaining to these relevant areas. It would therefore appear that the responsibility for successful cooperation lies not only with the respondents but also with INT. (Decision No. 73 ¶ 48 (October 2014).)

B. Internal Investigations

Beyond cooperating with INT's investigation, companies will also be given mitigation credit when they take the initiative to conduct their own internal investigation into the alleged misconduct. Here, it is important to note that the Sanctions Board expects (and will only give mitigating credit if) such internal investigations are undertaken by persons with sufficient independence, expertise, and experience. (Decision No. 50 ¶ 67 (May 2012).) The Sanctions Board has clarified that the burden to prove the independence of internal investigators lies with the respondents: in Decision No. 68, the Board refused to apply mitigation where a respondent had claimed that its "Board of Management" had conducted an internal investigation without specifying the composition of the Board nor speaking to the independence of its members. (Decision No. 68, ¶ 43 (June 2014).)

The Sanctions Board also expects internal investigations to be adequately documented and credibly performed and that such investigations lead to concrete and targeted follow-up actions, when appropriate (for denial of mitigation on these grounds, *see* Decision No. 71, ¶¶ 98-100 (July 2014) and (Decision No. 77 ¶ 56 (June 2015).) Importantly, the Sanctions Board notes positively and accords mitigating credit when the results of an internal investigation are shared with INT and/or relevant national authorities. (Decision No. 63 ¶112 (January 2014).) However, companies sharing such information should be cognizant of the potential implications, and, in particular, of the possibility of parallel proceedings, discussed *infra*.

C. Disciplining Responsible Employees

The Sanctions Board places emphasis on disciplining responsible employees, but will only provide mitigating credit if such disciplining is the result of an adequate enquiry into the matter (rather than provoked by a desire to find a convenient scapegoat). Accordingly, the Sanctions Board has declined to provide mitigation credit to companies that (i) disciplined a responsible employee without thoroughly investigating the underlying conduct to allow the company to "assess and address its own responsibility or that of other employees" (Decision No. 55 ¶ 77 (March 2013)) or (ii) did not provide any "proof of a demonstrable nexus" between the relevant employee's departure/disciplining and the sanctionable conduct at issue. (Decision No. 56 ¶ 67 (June 2013).)

Similarly, in two decisions arising out of the same World Bank–funded project, the Sanctions Board denied mitigating credit to respondents on the basis that the claimed corrective actions did not adequately target the staff actually involved in the misconduct. In one of the decisions, the respondent claimed mitigating credit for having filed a police report and terminating its relationship with the agent who had issued allegedly forged bid securities; neither of which—the Sanctions Board found—addressed misconduct arising "within the Respondent's own staff or operations." (Decision No. 67, ¶ 39 (June 2014).) In the other decision, respondent claimed mitigating credit for having issued a warning letter against its finance and deputy finance director. The Sanctions Board again denied mitigating credit on the basis that no disciplinary measures were taken against the marketing staff, which had allegedly processed the tender as well as (lower-echelon) finance staff, which had processed the bid securities. (Decision No. 68 ¶ 39 (June 2014).)

D. Compliance Programs

The Sanctions Board recognizes an effective compliance program defense to vicarious corporate liability. Amidst the ongoing debate over whether there should be an "effective compliance program" defense in the context of U.S. FCPA violations, the Sanctions Board's decisions emphasize the Board's recognition of such a defense to the imposition of corporate liability for the acts of employees, under certain conditions. If an employer can demonstrate to the Sanctions Board's satisfaction that it had implemented, prior to the conduct at issue, controls reasonably sufficient to prevent or detect the conduct, the employer would appear to have a defense against liability for its employees' actions. For companies that have or may seek World Bank Group–financed contracts, these decisions create a substantial incentive to review and, as necessary, recalibrate existing compliance programs to both anticipate likely compliance risks and generally meet the World Bank's expectations for compliance programs.

The Sanctions Board also gives credit for compliance program modifications implemented in response to alleged misconduct. Even if a pre-existing compliance program had not been reasonably

designed to prevent or detect the conduct at issue, the Sanctions Board has indicated that it will also provide mitigation credit for post-conduct compliance modifications designed to prevent or detect the recurrence of the alleged misconduct. (Decision No. 51 ¶¶ 51-52 (May 2012); No. 53 ¶¶ 60-61 (September 2012), No. 60 ¶¶ 129-30 (September 2013).) In such cases, the Sanctions Board positively notes where the modifications have been made prior to the issuance of the Notice of Sanctions Proceedings to respondents. (Decision No. 63, ¶ 107 (January 2014), No. 71, ¶ 94 (July 2014), No. 79, ¶¶ 46 (August 2015).)

In applying mitigation credit for the respondent's compliance program, the Board will likely examine the program's individual components, such as the company's tone at the top, the existence of a code of ethics and/or written policies on the firm's tendering guidelines, mandatory staff training and the establishment of a comprehensive company risk assessment. (Decision No. 63 ¶ 107 (January 2014), No. 68 ¶ 40 (June 2014).) The Sanctions Board has also emphasized the importance of compliance materials and policies related to third-party due diligence. (Decision No. 78 ¶¶ 80-81 (June 2015) and Decision No. 83 ¶ 93 (September 2015).)

Limited compliance enhancements, on the other hand, could garner limited credit. In one decision, the Sanctions Board agreed to provide "some mitigating credit, limited by the lack of more evidence" for the adoption of a company-wide prohibition against misconduct with approval and support of senior management. (Decision No. 56 ¶¶ 68-69 (June 2013).) Unit-or department-level improvements can also result in some mitigation credit. (Decision No. 55 ¶ 78 (March 2013).)

V. A Growing Trend of International Cooperation and Referrals

Companies and individuals participating in MDB-financed projects should be aware that sanctions proceedings before an MDB do not occur in a vacuum. Instead, there has been a growing trend for increased cooperation and information sharing among MDBs and between MDBs and international and national anti-corruption enforcement authorities, which can lead to parallel proceedings. Such increased cooperation is made possible through various tools. The World Bank, for instance, has signed over 40 cooperation agreements with national and international enforcement authorities (including with theU.K. Serious Fraud Office, the European Anti-Fraud Office, the UN Office for Internal Oversight and the International Criminal Police Organization (INTERPOL)) in support of parallel investigations, information sharing and asset recovery.

Moreover, most MDB sanctions procedures contain so-called referral clauses, which allow the MDBs in question to share information about potential sanctionable practices with other MDBs and/or international and national prosecuting authorities. In fiscal year 2015 alone, the World Bank made a total of 22 high-level referrals. Notably, referrals made in 2015 and previous years have led to the prosecution and conviction of at least 35 individuals and to criminal charges brought against an additional 29 individuals.

As discussed below, the effects of such increased cooperation are wide-reaching and the two-way information sharing leads to national procedures "spilling over" into MDB sanctions procedures and vice versa.

A. Referrals from National Authorities to MDBs

Information shared by national authorities can help MDBs substantiate allegations of sanctionable practices while an investigation is still ongoing. For instance, according to official data, in the course of 2015, the World Bank's INT received information from national authorities in two countries which ended up being critical to substantiating allegations of corruption that INT had been investigating.

National authorities can also refer information after an investigation has been closed and the sanctions proceedings are underway. This was poignantly (and dramatically) illustrated by Sanctions Board Decision No. 72. The case underlying this 2014 decision arose in connection with two World Bank-funded projects in Iraq, for which respondents submitted successful bids with the assistance of a local agent. Among other things, INT alleged that respondents engaged in corrupt practices by offering and/or paying the agent a commission with the expectation that these funds would be used to influence procurement officials working on the projects. Respondents rejected the allegations. However, two days before the scheduled hearing before the Sanctions Board, INT obtained its evidentiary *pièce de résistance* through a referral by Iraqi national authorities, who shared with INT email correspondence in which the agent clearly stated that part of the commission would be used to make payments to a project manager. Largely based on this evidence, the Sanctions Board proceeded to debar the concerned respondents for four years, up from the one-year debarment with conditional release proposed by the OSD.

B. Referrals from MDBs to National Authorities: SNC-Lavalin

The matter of Canadian engineering firm SNC-Lavalin, which INT's Vice President Leonard McCarthy called "a testimony to collective action against global corruption," has become the most emblematic case illustrating the potentially wide-reaching effects caused by MDB referrals to national authorities. What began in 2010, with an investigation by INT into a World Bank-financed project in Bangladesh was referred to national authorities and grew to encompass several investigations and proceedings in multiple jurisdictions and fora, some of which are still ongoing to date. The matter even reached the Canadian Supreme Court in the context of a high-profile case regarding the Bank's institutional immunity and privileges, which had the potential to significantly impact the Bank's referral program.

1. Overview

In 2010, based on information from "tipsters" (as they came to be called in the proceedings that followed), the Bank began an investigation into allegations of corruption surrounding SNC-Lavalin's bid for the multimillion-dollar Padma Bridge construction project in Bangladesh. In 2011, a few months into the investigation, INT found that there was sufficient credible evidence to refer the matter to the Royal Canadian Mounted Police ("RCMP"). Based on this referral, the RCMP, in turn, started its own investigation into potential violations by SNC-Lavalin under the Canadian Corruption of Foreign Public Officials Act. The RCMP investigation was marked by several raids of SNC-Lavalin offices, further collaboration between the RCMP with the Bank and with enforcement authorities in other jurisdictions, including Switzerland. Beyond SNC-Lavalin's conduct in Bangladesh, Canadian and Swiss authorities investigated allegations of money laundering and/or bribery relating to SNC-Lavalin contracts in multiple countries, including Canada, Algeria and Libya, where—as was later revealed—an SNC-Lavalin

executive was alleged to have arranged more than $160 million in bribes to the son of former Libyan leader Moammar Gadhafi.

In March 2012, while a number of these external investigations were still ongoing, SNC-Lavalin's CEO, Pierre Duhaime, resigned from his position, after an internal company probe concluded that he had approved U.S.$56 million of questionable payments in violation of SNC-Lavalin's code of ethics. Mr. Duhaime's resignation was followed by the arrests of—and criminal charges being brought against—multiple former SNC-Lavalin executives, including Mr. Duhaime himself, in 2012 and 2013. As discussed immediately below, some of the proceedings against former SNC-Lavalin senior officials are still ongoing and, as recently as January 2015, charges under Canada's Corruption of Foreign Public Officials Act were extended to select SNC-Lavalin subsidiaries.

As for the World Bank, the multi-jurisdictional investigation efforts which followed the Bank's referral prompted it to suspend payment of the Padma Bridge Project in October 2011. In April 2013, the Bank reached a settlement with SNC-Lavalin, imposing a ten-year debarment on the company and on over 100 of its affiliates for the company's conduct in Bangladesh as well as conduct in Cambodia (of which the Bank had learned while the investigations were ongoing). The ten-year period represented the longest debarment period that had ever been agreed to in a settlement with the Bank.

2. Threat to MDBs' Immunity and Privileges

Amidst the plethora of proceedings and investigations that have plagued SNC-Lavalin over the past years, the case brought by Canada against Kevin Wallace, Ramesh Shah and Mohammed Ismail (three former SNC-Lavalin executives), as well as Zulfiquar Bhuiyan, (a former agent of SNC-Lavalin in Bangladesh) received the most scrutiny from the compliance community. Indeed, these proceedings almost led to a precedent limiting the institutional immunity and privileges enjoyed by MDBs in the context of international cooperation, which, in turn, would have significantly impacted MDB referral practices.

The proceedings began in early 2012 when Canada brought criminal charges against Messrs. Ismail and Shah under Canada's Corruption of Foreign Public Officials Act; Messrs. Wallace and Bhuiyan were charged in September 2013. During the ensuing trial, Canada intended to use evidence that the RCMP had obtained through wire-tapping SNC-Lavalin's offices. The authorization for the wiretaps had in turn been authorized in part on the basis of information which INT had shared with the RCMP.

Kevin Wallace and the others accused fought the charges brought against them by questioning whether the wiretaps used by the RCMP and authorized based on INT's investigative findings were legally obtained. As part of this challenge, lawyers for the accused sought an order requiring production of INT's investigative file and the validation of subpoenas issued to two INT investigators. The World Bank refused to turn over the file and to comply with the subpoenas, invoking the immunity of its archives and the immunity and privileges of its officers and employees (embedded in Articles VII and VIII of the World Bank's Articles of Agreement).

The challenge was first brought before the Ontario Superior Court Judge Ian Nordheimer, who, in December 2014, issued a decision siding with the accused. While recognizing that the Bank enjoyed institutional immunity from the jurisdiction of the Ontario Superior Court *prima facie*, Judge Nordheimer determined that the immunity had been "impliedly" waived by the Bank as a result of its extensive cooperation with Canadian authorities. Judge Nordheimer thus ordered the Bank to produce its records.

The Bank appealed the Ontario Superior Court's decision to the Supreme Court of Canada, who granted the Bank's application for leave (equivalent of a *writ of certiorari*) in July 2015. Prior to the hearing, a number of other MDBs and international institutions, including Transparency International, submitted *amicus curiae* briefs warning of the "chilling effect" a failure to uphold institutional immunity would have on MDB cooperation with national enforcement authorities. In fact, pending the resolution of this matter, the Bank and other MDBs reportedly either halted or drastically reduced referrals to national authorities.

On April 29, 2016, Canada's Supreme Court issued its decision in *World Bank Group v. Wallace* and, much to the relief of the Bank and other MDBs, ruled in favor of the Bank. Specifically, the Supreme Court held that there had been no implied waiver of the immunities and privileges applicable to the Bank's archives and personnel and that, consequently, INT could not be obligated to make its staff and investigative file available. Underscoring the importance of the concept of immunity, and in particular the inviolability of archives as "integral to the independent functioning of international organizations," the Supreme Court recognized that limiting such immunity would thwart the global fight against corruption because "[MDBs] including the World Bank Group are particularly well placed to investigate corruption and to serve at the frontlines of international anti-corruption efforts."

Through the *World Bank Group v. Wallace* decision, the Bank and other MDBs now have new wind in their sails: respondents should therefore expect that referrals from MDBs to national authorities will not only continue, but substantially increase in the coming months and years.

C. Coordinated Relief

Against the backdrop of the above, it should nevertheless be noted that collaboration between the MDBs and national authorities can, in certain cases, have a simplifying effect for companies already involved in debarment or sanctions proceedings. In the case of Alstom SA, the U.S. Department of Justice declined to impose a corporate monitorship in its 2014 plea agreement with the company, so long as the company satisfied the World Bank ICO monitoring requirements. Under the terms of its Deferred Prosecution Agreement, which credited the compliance enhancements the company had already made under its World Bank resolution, Alstom was allowed to self-report as to the status of the implementation of its compliance program and internal controls so long as the ICO's requirements, which included a "Corporate Compliance Program that complies with the World Bank's integrity compliance policies and practices, particularly those reflected in the World Bank's Integrity Compliance Guidelines," were satisfied. As of February 21, 2015, the ICO concluded that Alstom had satisfied all the requirements and conditions of its 2012 settlement with the World Bank.

CHAPTER 6: ENFORCEMENT UPDATES IN SELECT COUNTRIES

For a number of years, observers could be forgiven for concluding that anti-corruption enforcement was primarily an American activity, and that the FCPA enforcement was the primary—if not only—anti-corruption risk faced by companies. The world is different today.

Journalist and author Fareed Zakaria popularized the term *The Rise of the Rest* to refer to the developing world's economies catching up with the developed world's economies, but the concept of the "rise of the rest" could also be applied to anti-corruption enforcement agencies around the world and the trend, particularly in the twenty-teens, of increasing enforcement action in countries where few enforcement actions have been seen historically. Below we explore enforcement actions from Canada (Cryptometrics and Griffiths Energy), France (Safran Group), Italy (Shell & Eni, Finmeccanica), Sweden & Switzerland (TeliaSonera AB), and Brazil & The Netherlands (SBM Offshore). Note that two other significant examples of Dutch enforcement (Vimplecom and Heerema Marine Contractors) are already discussed elsewhere in this book.

I. Enforcement Actions In Canada

A. Former Cryptometrics Executives Robert Barra, Dario Bernini, and Nazir Karigar and Former E.M.G Employee Shailesh Govindia

On June 4, 2014, the Royal Canadian Mounted Police charged three individuals with violations under Canada's Corruption of Foreign Public Officials Act ("CFPOA"): U.S. citizens Robert Barra and Dario Bernini and U.K. citizen Shailesh Govindia. All three individuals were connected to Cryptometrics Canada ("Cryptometrics"): Barra and Bernini previously served as the company's CEO and COO, respectively, and Govindia worked at the London-based Emerging Markets Group, serving as an agent for Cryptometrics in connection with its operations in India.

A month earlier, on May 23, 2014, former Cryptometerics India Executive Director Nazir Karigar was sentenced to a three-year prison term for violations of Section 3(1)(b) of the CFPOA. Karigar had been convicted in August 2013 of offering over $450,000 in bribes to Indian public officials in the form of cash and shares of stock. Karigar had been the first individual prosecuted under the CFPOA.

According to the opinion of Judge Charles Hackland of the Ontario Superior Court of Justice, the alleged misconduct began in June 2005 when Karigar contacted Robert Bell, the Vice President for Business Development at Cryptometrics. Karigar indicated that he had contacts at Air India and was aware that the airline was seeking biometrics technology to improve security at the airline. In September 2005, Karigar arranged meetings for Bell in India with prominent Air India officials. Karigar later provided Cryptometrics with information regarding the expected requirements of Air India and confidential information regarding competitors and proposed tender terms.

In January 2006, Cryptometrics appointed Karigar as Executive Director of the newly established Cryptometrics India. Shortly thereafter, Air India issued an RFP for a biometric facial recognition system and Cryptometrics Canada began to prepare a response. Bell testified in court that Karigar first proposed paying bribes to Indian public officials at a meeting in an Indian hotel to discuss the RFP submission. Karigar then sent Bell spreadsheets listing the Air India official who should receive bribes, as well as the amount of money and Cryptometrics stock that each should receive. One listing, for example, provided

that the Air India Deputy Director of Security—who co-chaired the selection committee for the facial recognition project and who was referred to internally as "the Captain"—should receive company stock and up-front cash.

In June 2006, Karigar sent several emails to Cryptometrics employees, stating that he needed to obtain $200,000 to pay "the Captain" and that "the Captain" and another individual identified as MMD "need to see the money." Cryptometrics subsequently transferred $200,000 to Karigar's Mumbai bank account, which was intended to ensure that only two companies were technically qualified for the project.

Karigar, however, also developed the second bid, which he presented under the name of his other company IPCON. In IPCON's bid, Karigar bid the same technology at a higher price in order to create the illusion of a competitive bidding process. In August 2006, IPCON and Cryptometrics were short-listed as the only two qualified bidders. Karigar subsequently explained that Cryptometrics would win the project because its bid price was lower than IPCON's, so long as it could pay the Minister of Civil Aviation, Praful Patel, an additional $250,000 to "bless" the system. In March 2007, Cryptometrics entered into a Letter of Agreement with Karigar to provide him with the needed $250,000.

At some point thereafter, however, it appears that Karigar had a falling out with Barra and Berini, as well as Karigar's principal points of contact in connection with the scheme. Beginning in August 2007, Karigar sent multiple anonymous emails to the DOJ's Fraud Section under the username "Buddy," stating that he had information about U.S. citizens paying bribes to foreign officials and seeking immunity. The DOJ, however, shared Karigar's information with its Canadian counterparts, and the evidence that Karigar himself provided, together with the testimony provided by Bell (who was granted immunity), was used to convict him.

Importantly, Judge Hackland conceded that there was no evidence that Karigar actually paid or offered bribes to Indian public officials. Nevertheless, he ruled that the liability for conspiracy under the CFPOA did not require "proof of the offer of or receipt of a bribe . . . [which] would require evidence from a foreign jurisdiction, possibly putting foreign nationals at risk and would make the legislation difficult if not impossible to enforce and possibly offend international comity." Rather, Judge Hackland stated that it was sufficient that Karigar believed "that bribes needed to be paid as a cost of doing business in India and he agreed with Berini and others to pay such bribes." The Judge also noted that Karigar had told U.S. authorities that he believed that bribes had in fact been paid.

The opinion also states that Barra and Berini continued to seek means to finalize the Air India contract after their dispute with Karigar, and that the two executives subsequently hired Govindia of Emerging Markets Group, to pay an initial $2 million to Minister Patel. According to press reports, Patel has claimed that the allegations are baseless and preposterous.

B. Griffiths Energy and Chadian Diplomats Mahamoud Bechir and Youssouf Takane and their Wives

1. Overview

On January 22, 2013, Griffiths Energy International Inc. ("Griffiths Energy"), a Canadian oil and gas company now known as Caracal Energy, pleaded guilty to making an illegal payment of $2 million to the wife of the Chadian ambassador to Canada in violation of Canada's Corruption of Foreign Public

Officials Act ("CFPOA"). On January 25, 2013, the Court of Queens' Bench in Calgary accepted a settlement in which Griffiths Energy agreed to pay a fine of CAD $10.35 million.

According to the Agreed Statement of Facts, Griffiths Energy is a privately held Canadian company that Brad Griffiths, Naeem Tyab, and Tyab's brother founded in August 2009 in order to purchase various oil blocks in the Republic of Chad. Shortly after the company was founded, Griffiths Energy entered into a consultancy agreement with the Maryland-based Ambassade du Tchad LLC, a company that was wholly owned by Mahamoud Adam Bechir, then-Chadian ambassador to Canada as well as the United States, Brazil, Argentina, and Cuba. The consultancy agreement stated that Ambassade du Tchad would provide various consulting services in connection with Griffiths Energy's oil and gas projects, and that it would receive a fee of USD 2 million if Griffiths Energy were awarded certain oil blocks by December 31, 2009.

In early September 2009, however, Griffiths Energy's external legal counsel advised Tyab that Griffiths Energy could not offer to make a payment to Ambassade du Tchad because it was owned by Ambassador Bechir, a government official. Griffiths Energy terminated that consultancy agreement, but several weeks later executed an identical agreement with Chad Oil Consulting LLC, which was wholly owned by Ambassador Bechir's wife and had been incorporated in Nevada only days prior. Separately, Bechir's wife and her associates were permitted to purchase 4 million founders shares of Griffiths Energy for a total of CAD $4,000.

Following a string of MOUs, negotiations, and intensive study of the oil blocks in question between September 2009 and December 2010, Griffiths Energy and the Chadian Ministry of Petroleum and Energy entered into a production sharing agreement on January 19, 2011. On February 8, 2011, Griffiths Energy transferred payment of $2 million to Chad Oil Consulting's Washington, DC bank account through an escrow agreement with Griffith Energy's external law firm.

Griffiths Energy hired an entirely new management team and appointed six new independent directors to its board by September 2011. The new board and management discovered the consultancy agreements while conducting due diligence in anticipation of its Initial Public Offering (which it subsequently withdrew), and it promptly conducted an internal investigation. In November 2011, Griffiths Energy informed Canadian enforcement authorities of the ongoing investigation and also self-disclosed the underlying conduct to U.S. enforcement authorities. Crown prosecutor Robert Sigurdson reportedly told journalists that he expected that the DOJ would not pursue charges given the Canadian prosecution.

The Accepted Statement of Facts praised Griffith Energy's investigation as being "full and extensive." Pursuant to the settlement agreement, the company committed to continue to cooperate with the Canadian government, pay a fine of CAD $10,350,000, and adopt a robust anti-corruption compliance program and strengthen its internal controls.

2. Forfeiture Actions Against Bechir and Wife

According Canadian newspaper *The Globe and Mail*, Bechir left his post as ambassador to Canada at the end of 2012 and became the Chadian ambassador to South Africa, but he was subsequently dismissed as a result of the bribery scandal. In various interviews and a letter to the newspaper, Bechir asserted that his Maryland-based wife—from whom Canadian authorities are seeking to recover the USD 2 million payment she received as well as her founders shares (now valued at over

$20 million)—had not done anything wrong. To the contrary, Bechir stated that she "deserves her millions" because she legitimately "opened the doors" and convinced the Chadian government to sign the production sharing agreement with Griffiths Energy. Bechir further argued that it was possible that the payment to his wife would not benefit him, noting: "It depends. Not necessarily. I might benefit because she is my wife, but I might not. Maybe she'll get richer and she'll be on her own."

In 2013, Canadian prosecutors filed a forfeiture case against Bechir's wife and the wife of Youssouf Hamid Takane who was the Deputy Chief of Mission for Chad in the U.S. However, the Chief Federal Prosecutor dropped the charges without explanation in 2014, and the Canadian courts released the freeze order that had been placed on the funds.

In 2014, the DOJ filed a complaint in the U.S. District Court for the District of Columbia to seek the civil forfeiture of nearly $1.5 million in funds under the U.S. Kleptocracy Recovery Initiative. The DOJ also issued a mutual legal assistance request to the SFO to freeze assets in the U.K. bank account that was linked to the sale of Griffiths Energy stock. The account was frozen and in July 2015, the U.K. High Court upheld a forfeiture order against $6.8 million, but noted that the judgment was not binding on other jurisdictions because the Canadian courts had not considered the merits of the case.

In June 2015, the DOJ filed a second complaint in the U.S. District Court for the District of Columbia seeking forfeiture of around $34 million, which is roughly the value of the four million shares in Griffiths Energy that were issued to the wives of Bechir and Takane as well as one other associate. As of April 18, 2016, the case was still pending.

II. Enforcement Actions in France

A. Safran Group

On January 7, 2015, the Court of Appeals of Paris overturned a September 5, 2012 decision by the Paris Criminal Court to fine the French Safran Group €500,000 for allegedly bribing public officials in Nigeria. The decision came after the Public Prosecutor took the unusual position on appeal that Safran be acquitted and the two Safran executives acquitted at trial be convicted. The Court of Appeals decided that, despite evidence that a payment was made to a Nigerian official and that Safran Group won the public contract in question, there was insufficient evidence of an improper *quid pro quo* connection between the payment and the award. The Court of Appeals also upheld the acquittal of the Safran executives.

The Paris-headquartered Safran Group, which also trades ADRs on the U.S. OTC, is a multinational corporation that provides services in the aeronautics, defense, and securities industries. The current company, in which the French government holds a 30% stake, was formed in 2005 through the merger of two other French companies: Société d'Applications Générales de l'Électricité et de la Mécanique ("SAGEM") (a security and telecommunications company) and Snecma S.A. (an aerospace and defense company). Today, the company has over 60,000 global employees and €11.5 billion in annual revenue.

The Paris Criminal Court had found that, between 2000 and 2003, SAGEM had endorsed payments of bribes ranging from €22,000 and €36,000 to Nigerian public officials through local agents to win a €170 million contract to produce 70 million national identity cards. The initial allegations appear to

have arisen following the merger of SAGEM and Snecma in 2005, when then-Nigerian President Olusegun Obasanjo alleged at a public conference that SAGEM had made improper payments to government officials. President Obasanjo alleged that SAGEM had made over €380,000 in illicit payments, together with gifts of Rolex watches, to win the national identity card project. President Obasanjo also alleged that SAGEM had made other gifts and bribes through local intermediaries to various high-ranking Nigerian officials, including former Minister of Internal Affairs Sunday Afolabi, that together exceeded $4 million. Based on these allegations, and at the subsequent urging of Nigeria, the United Kingdom, and the United States, France opened its investigation into Safran in January 2006.

The French press had previously noted that, prior to being overturned on appeal, the conviction and fine represented a rare bribery-based prosecution in France, which has been criticized in the past by the OECD for its lack of enforcement actions. Indeed, the Safran case had marked the first-ever French conviction of a company for bribery, although individuals have been convicted on previous occasions.

The two former SAGEM employees prosecuted in parallel with the company were Jean-Pierre Delarue, a sales manager in Nigeria at the relevant time, and François Perrachon, the company's director for identification systems. Prosecutors had sought a suspended sentence of up to 18 months and a €15,000 fine for each. The investigating judge, however, acquitted both former employees on the basis that the evidence only proved that their superiors, rather than the defendants themselves, had personal knowledge of the corrupt acts.

III. Enforcement Actions in Italy

A. Eni & Royal Dutch Shell

1. Overview

On February 17, 2016, Dutch and Italian authorities raided the headquarters of Royal Dutch Shell ("Shell") in The Hague as Italian prosecutors expanded their investigation of the 2011 $1.3 billion purchase by Shell and Italian oil conglomerate Eni SpA ("Eni") of a license to a vast Nigerian offshore oil field known as OPL 245. Meanwhile, in January a committee overseen by the Nigerian Director of Public Prosecution, Mohammed Diri, recommended that Nigeria cancel Shell and Eni's oil field rights and fine the companies over $6.5 billion in light of evidence that both companies knew that the vast majority of the funds paid to purchase the license would be diverted to an entity controlled by former Nigerian Oil Minister Chief Dauzia Loyal "Dan" Etete. The committee also recommended that the Nigerian government cooperate with foreign authorities investigating the deal to facilitate the prosecution of any culpable parties.

Eni and several of its current and former executives had previously been under investigation in connection with the transaction. On July 24, 2013, Reuters had reported that the U.K. Crown Prosecution Service's Proceeds of Crime Unit was investigating the deal. Eni confirmed on September 11, 2014 that Italian Prosecutors in Milan had opened a separate "preliminary investigation" targeting its current CEO Claudi Descalzi and Chief Development, Operations, and Technology Officer Roberto Casula in connection with their role in the transaction. Eni's former CEO Paolo Scaroni has also been investigated by Italian authorities in connection with his role.

Eni could face allegations of bribery and money laundering charges in connection with the transaction because most of the proceeds that the companies paid for the block were subsequently transferred to Malabu Oil and Gas ("Malabu"). Malabu is linked to Etete and had been assigned rights to OPL 245 in 1998, during Etete's tenure as Oil Minister, only five days after the entity had been registered. (Global Witness Report – "Shell and Eni's Misadventures in Nigeria" at 4.) According to Reuters, the Italian prosecutors have claimed that $533 million of the purchase price was used to bribe local politicians and intermediaries, who used the money to purchase aircraft and armored cars.

Eni and Shell have both denied any wrongdoing. Eni denied knowledge of "any possible agreements" between Malabu and the government at the time of the sale, and it added in September 2014 that the entire payment "was made uniquely to the Nigerian government" and continued to deny any illegal contact. Shell issued a press statement that it had purchased the oil block directly from the Nigerian government, made no improper payments to Malabu, and "acted at all times in accordance with" Nigerian law. However, in December 2015, leaked internal emails between senior managers at Eni and Shell indicated that the companies were aware Malabu was the destined recipient of the $1.1 billion to be paid to the Nigerian government and sought to restructure the deal to obscure that fact, agreeing on the new structure at an April 2011 meeting attended by representatives of Eni, Shell, Malabu and the Nigerian government.

The on-going investigation is important in that it demonstrates how companies could be investigated and potentially held liable for payments made directly to a foreign government (rather than to a government official), particularly in instances where the government itself allegedly served as a type of "third-party intermediary" in passing a potentially improper payment on to another entity.

2. Background

OPL 245 is an off-shore block that industry analysts estimate may contain as much as 9.2 billion barrels of crude oil, equivalent to a third of Shell's proven global oil reserves and two thirds of Eni's. According to various filings and orders in two civil litigation cases in the New York Supreme Court and the Commercial Court of the Queen's Bench Division, the Nigerian Government initially sold the block in 1998 for $2 million to Malabu, a company registered five days before the sale and initially owned by then-Nigerian Oil Minister Chief Dauzia Loyal "Dan" Etete and the son of then-Military Dictator Sani Abacha. Four months after the sale of OPL 245, Abacha died.

Malabu and Shell Nigeria Ultra Deep Limited ("Shell Nigeria") entered into agreements relating to the oil block in March 2001, but the subsequent Nigerian government revoked the block several months later. Following a competitive bid, the Nigerian National Petroleum Corporation then entered into a production sharing contract with Shell Nigeria, awarding the international oil company with the exclusive right to operate OPL 245 as a contractor for a term of thirty years.

The revocations and transfers set off a string of litigation between Shell Nigeria, Malabu, and the Nigerian government. In November 2006, the Nigerian government agreed to re-allocate OPL 245 to Malabu in exchange for payment of $208 million within twelve months. The court filings state that Malabu subsequently sought to find an investor to help break the deadlock with Shell Nigeria and pay the required $208 million to the Nigerian government, and it sought the assistance of Ednan Agaev, a Russian consultant who owned a company named International Legal Consulting Limited ("ILC"), and Zubelum Chukwuemeka "Emeka" Obi, a Nigerian national who owned another company named Energy

Venture Partners Limited ("EVP"), for this purpose. (As discussed below, both ILC and EVP later pursued civil claims against Malabu, which first brought information regarding the April 2011 sale to light.) The Queen's Bench Division order states that Obi was involved in some capacity in negotiations with Eni and its subsidiary, Nigerian Agip Exploration Limited ("Nigerian Agip"), between December 2009 and March 2011. In particular, Obi testified that he had approached Eni on behalf of Malabu and introduced Etete to Eni representatives initially to discuss the deal. Other documents filed in the case included an e-mail from a Shell employee stating that he met with Etete over "lots of iced champagne."

In April 2011, Shell Nigeria and Eni agreed to purchase OPL 245 from the Nigerian government for $1.09 billion. In a separate contract, the companies agreed to pay the government an additional $208 million as a "signature bonus"—the same amount that Malabu previously agreed to pay for the transfer of the assets. The Nigerian government then executed an agreement with Malabu on April 29, 2011—the day before the new Nigerian minister of finance assumed office—pursuant to which the Nigerian government agreed to pay Malubu the $1.09 billion in sale proceeds. The Government subsequently made the transfer and retained only the amount of the "signature bonus." Agaev has described this structure, in which the Nigerian government served as a buffer between Shell, Eni and Malabu as a "safe-sex transaction." In an order entered in the New York Supreme Court, Justice Bernard Fried stated that "it does appear that the [Nigerian Government] was indeed the proverbial 'straw man' holding $1.1 billion for ultimate payment to Malabu."

The allegations first came to light following the court filings by ILC and EVP. ILC filed a motion to freeze assets in connection with its arbitration claim against Malabu for "failure to pay ILC a 'Success Fee' in the approximate amount of $65.5 million as a result of ILC's services for the transfer of Malabu's rights to an oil prospecting license over oil block OPL 245." Separately, EVP brought suit in the United Kingdom against Malabu for $200 million in unpaid fees for brokering the 2011 sale of OPL 245 to Shell and Eni. On July 17, 2013 the High Court ruled that EVP was entitled to $110.5 million for its role in brokering the sale, and the funds were subsequently transferred to bank accounts in Switzerland.

At the request of Italian prosecutors, the Swiss authorities froze those funds. Later, the U.K. authorities also agreed to freeze an additional $80 million of Malabu funds that remained in the United Kingdom.

Etete was convicted in 2007 in France in absentia on charges of money-laundering related to bribes that he had allegedly taken while an Oil Minister. Etete was sentenced to three years in prison and a criminal fine of €300,000. A French appellate court initially denied Etete's appeal of the conviction in March 2009, but his prison sentence was changed to a fine of €8 million. Ultimately, however, the French government pardoned Etete of all charges in March 2014.

B. Giuseppe Orsi and Bruno Spagnolini (Finmeccanica SpA)

Finmeccanica SpA, a multinational defense and aerospace contractor, has been implicated in a series of corruption allegations and probes that culminated in the resignation of two consecutive CEOs, Pier Francesco Guarguaglini in 2011 and Giuseppe Orsi in 2013. For the most part, these investigations have focused on alleged improper connections between the company and the Italian government (which owns 30.2% of its shares) or allegations of domestic misconduct, such as a 2003 bribery case involving state-controlled energy company Enelpower.

In addition to these more domestic Italian matters, Italian authorities have also scrutinized Finmeccanica's operations abroad, and accused the company of having engaged in corruption with respect to multiple projects in Latin America and Asia. For instance, in 2011, former sales manager Paolo Pozzessere was arrested over allegations of bribery in connection with contracts for the supply of helicopters and other technology in Panama and Brazil.

Another scandal gained international attention in February 2013, when then-CEO Giuseppe Orsi was arrested in Italy under suspicion of having orchestrated a vast corruption scheme to secure a €560 million contract in 2010 with the Indian government for the supply of twelve luxury "VVIP" helicopters typically used for heads of state. The Italian authorities also placed Bruno Spagnolini, then-CEO of Finmeccanica's helicopter division AgustaWestland, and two other AgustaWestland executives under house arrest relating to the same underlying conduct. Orsi and Spagnolini resigned from their positions at Finmeccanica shortly after their arrests, although the former has explicitly denied any wrongdoing and stated that the tender had been carried out regularly under the law.

According to the allegations, Orsi and Spagnolini "presid[ed] over a system of bribery and corruption that was part of the company philosophy." Specifically, the two individuals allegedly conspired with a former Indian Air Force Chief, S.P. Tyagi, to alter the terms of the tender for the sale of the helicopters in favor of Finmeccanica, and to increase the number of helicopters purchased by the Indian government from eight to twelve. AgustaWestland allegedly paid over €51 million to third-party consultants connected to Christian Michel, Guido Haschke, and Carlos Gerosa, who (i) funneled €15 million to Indian officials through companies they owned in Tunisia (Gordian Services Sarl and IDS Tunisia) and India (Aeromatrix and IDS India), routing the money through Tunisia and Mauritius, (ii) paid €100,000 in cash to three of Tyagi's cousins (Julie Tyagi, Docsa Tyagi, and Sandeep Tyagi), and (iii) redirected at least €10 million to Italian politicians who supported Orsi's appointment as Finmeccanica CEO in 2011.

Haschke was arrested in October 2012. In April 2014, he entered into a plea agreement to provide testimony against Orsi and Spagnolini. Under the terms of the agreement, Haschke was sentenced to 22 months in prison.

Despite Haschke's testimony, Orsi and Spagnolini were acquitted of all corruption-related charges on October 9, 2014, although both men were convicted on false bookkeeping charges and sentenced to two years imprisonment.

On April 7, 2016, however, an Italian appeals court overturned the lower court's ruling regarding the corruption-related charges and sentenced Orsi to four and a half years in prison and Spagnolini to four years in prison. The appeals court also ordered Orsi and Spagnolini to pay €7.5 million, the amount allegedly paid in bribes to secure the helicopters contact. Orsi's lawyer has indicated that both Orsi and Spagnolini plan to appeal to Italy's Supreme Court. In the meantime, AgustaWestland and New Delhi are arbitrating India's cancellation of the helicopters contract in the International Court of Justice in Paris. India has also prohibited Finmeccanica and its related entities from working on any new Defence Ministry programs.

IV. Enforcement Actions in Sweden and Switzerland: TeliaSonera AB

In March 2014, Dutch authorities raided the offices of TeliaSonera AB ("TeliaSonera") and VimpelCom Ltd. ("VimpelCom")—two rival telecommunication services companies that face bribery and money laundering allegations in connection with their business operations in Uzbekistan. Enforcement agencies in the Netherlands, Sweden, Switzerland, Norway and the United States launched related investigations that have thus far resulted in VimpelCom agreeing a February 2016 global resolution with U.S. and Dutch authorities involving the payment of $795 million in fines. The VimpelCom settlement is discussed in detail in 2016 U.S. enforcement actions section of this book.

The Swedish and Finnish governments both have ownership interests in Swedish-headquartered TeliaSonera (37.3% and 10.1% respectively). TeliaSonera competes with VimpelCom for market share not only in Scandinavia, but also in the regions of Central and Eastern Europe and the Russian Commonwealth.

As with VimpelCom, the investigation of TeliaSonera has focused on its involvement with a Gibraltar-based company called Takilant Ltd. ("Takilant"), which was closely connected to Gulnara Karimova, the eldest daughter of Uzbek President Islam Karimov.

A. Initial Allegations Regarding TeliaSonera

In September 19, 2012, the Swedish television show Uppdrag Granskning (translation: "Mission: Investigate") alleged that TeliaSonera had paid $300 million to Takilant to purchase its 3G operating license in Uzbekistan in 2007. Uppdrag Granskning revealed, however, that the $300 million payment was not recorded in Takilant's financial records. Takilant was owned by a 24-year-old Armenian who worked for Karimova as an assistant at her fashion company House of Style.

In a press release also issued on September 19, 2012, TeliaSonera stated that it had purchased its 3G license from Takilant in exchange for payment of $30 million and a 26% interest in TeliaSonera's Uzbek subsidiary (valued at more than $280 million), which it claimed was a prerequisite for establishing its operations in the country. TeliaSonera stated that it conducted a background check on the company to ensure that it had the necessary permits, but noted it "has no insights into how Takilant has used the proceeds, or whether there are any connections to other persons in Uzbekistan." TeliaSonera paid Takilant an additional $217 million in February 2010 to purchase back 20% of the shares that it had previously given the company.

B. Swedish & Swiss Authorities Target TeliaSonera

Following the TV broadcast and press report, Sweden's National Anti-Corruption Unit launched an investigation of TeliaSonera to review the allegations, removed documents from the company's offices, and froze several accounts connected to Takilant. In December 2012, TeliaSonera disclosed that two of its employees had been served with indictments, but maintained that the "corruption allegations directed at TeliaSonera are unfounded."

The account holder of the frozen Takilant bank account in Sweden was listed as Uzbek national Alisher Ergashev, who also served as the director of French property firms owned by Karimova. According to a detailed report by the Organized Crime and Corruption Reporting Project, Ergashev and

his associate had been arrested in Switzerland in July 2012 while trying to access Takilant accounts there that held hundreds of millions of dollars that "may have been TeliaSonera funds routed by Takilant to Hong Kong and then back to Switzerland."

Swiss prosecutors launched their own investigation and arrested Ergashev and his associate. In March 2014, the Swiss Attorney General's Office announced that it was targeting Karimova as part of the widening money laundering investigation. By August 2015, the Attorney General's Office stated that it had also frozen more than $826 million of cash and assets as part of the investigation.

C. Internal Review and Change of Management at TeliaSonera

TeliaSonera hired external counsel to undertake its own internal investigation of the allegations. On February 1, 2013, the company reported that although the internal review "has not found any substance to the allegations that TeliaSonera committed bribery or participated in money laundering in connection with its investments in Uzbekistan," it nevertheless noted serious shortcomings in its due diligence process, which it admitted "was not sufficient to pick up warning signs that there were ethical risks." The company announced that it needed "a new start in many respects" and replaced six of its eight board members, including CEO Lars Nyberg.

The new board has taken a more aggressive approach. TeliaSonera dismissed four senior executives in October and November 2013, including CFO Per-Arne Blomquist. By December 9, 2014, the new board stated that it was "leav[ing] open the possibility of suing for damages against earlier officials based on what may be detected in ongoing investigations." In September 2015, TeliaSonera's new CEO Johan Dinnelind announced plans to withdraw from all business operations in Central Asian countries altogether, including ending operations in Uzbekistan and Azerbaijan. TeliaSonera later acknowledged in a public statement that its current board and management would not have chosen the commercial partnerships it inherited and that they still were not sure as to the identity of the ultimate beneficial owners of its minority shareholders in Azerbaijan and Uzbekistan.

D. Dutch and U.S. Authorities Target TeliaSonera and VimpelCom

After VimpelCom's $795 million February 2016 global settlement with U.S. and Dutch authorities, pursuant to which it was fined $795 million for bribery violations in connection with its business in Uzbekistan, TeliaSonera remains the subject of a DOJ investigation into its Uzbekistan operations. According to a November 2015 Swedish newspaper report, the investigation into TeliaSonera is set to expand to include TeliaSonera's operations in other Central Asian countries, including Kazakhstan and Azerbaijan, in the wake of a report that TeliaSonera provided assets and dividends worth over $1 billion to local partners linked to the family of the President of Azerbaijan, Ilham Aliyev, in exchange for operating licenses and regulatory approval. Throughout 2015, the DOJ also moved to seize roughly $1 billion in assets traceable to the bribery scheme held in bank accounts in Sweden, Ireland, Belgium, Luxembourg and Switzerland.

Gulnara Karimova, alleged to have been the ultimate beneficiary of the TeliaSonera and VimpelCom payments, was once viewed as one of Uzbekistan's untouchable elite with high aspirations. A WikiLeaks cable from 2005, for example, noted that local press articles had focused "on her selfless giving, charity work, and business acumen" as part of a media campaign in preparation for a potential presidential run. She had previously served as a diplomat to the United Nations and worked as a

professor. As a pop music star using the name "Googoosha," she had recorded duets with Julio Iglesias and Gérard Depardieu.

Since then, she has had a "spectacular fall from grace." According to Radio Free Europe, five Uzbek dissidents broke into Karimova's $20-million Swiss mansion in December 2013 and "uncovered a treasure trove of 20th-century paintings pilfered from Uzbekistan's state art museums." By August 2014, Karimova had been placed under house arrest in Uzbekistan, and her House of Style fashion business had been shuttered. The following month, the Uzbek Prosecutor's Office stated that "Karimova G." was a suspect in a corruption case. By January 2015, up to sixty of Karimova's business associates had been jailed by Uzbek authorities for embezzlement and other financial crimes. Another nine individuals connected to Karimova were arrested in August and Karimova reportedly remains under house arrest to date. In 2016, the U.S. DOJ filed a complaint in the U.S. District Court for the Southern District of New York, followed by a request for default judgment, alleging that Karimova as well as an associate and a former boyfriend, control a Swiss bank account with $550 million USD in bribes received, and requesting that the funds be forfeited.

V. Enforcement Actions in The Netherlands & Brazil: SBM Offshore

In April 2012, SBM Offshore Group ("SBM"), a Dutch manufacturer of floating production systems for the oil and gas industry, publicly disclosed that it had "become aware of certain sales practices involving third parties and which may have been improper." The company provided updates on its own internal investigation in March 2013, indicating that improper payments had been made "involving sales intermediaries in certain African countries," but that the company was also reviewing allegations of improper payments "in countries outside Africa." These disclosures foreshadowed a multi-faceted investigation into SBM conduct by several jurisdictions that has resulted (as of the time of publication of this Alert) in agreements being reached with the Dutch and Brazilian authorities.

A. February 2014 Wikipedia Modification

Despite the earlier disclosures, the investigation attracted widespread international attention in early February 2014, after the Wikipedia entry on SBM was modified—apparently by a disgruntled, former SBM employee—to include detailed allegations of improper behavior by SBM in various jurisdictions. (A similar modification that had been made in October 2013 had been quickly deleted and went largely unnoticed.) Various media outlets, including Reuters and *The Wall Street Journal*, reported on the lengthy allegations that included names, dates, and telephone recordings, as well as a chronology of events purporting to confirm the corrupt activity and an internal cover-up by SBM executives.

On February 7, 2014, following two days in which SBM's stock lost 15% of its value, the company issued another press release to address the situation. SBM stated that the modified Wikipedia entry "shows great similarity to an e-mail attachment the Company received from a former employee shortly before the publication was [first] posted online" in October 2013. The company stated that the former employee attempted to extort SBM by threatening to disclose the information unless the company paid him €3 million—which SBM refused to do. The company clarified that its investigation centered on potentially improper payments in two countries in Africa (later identified as Angola and Equatorial Guinea) and one country outside of Africa (later identified as Brazil).

On November 12, 2014, SBM agreed to pay $240 million in fines and disgorgement to the Dutch Public Prosecutor's Office ("Openbaar Ministerie") to resolve allegations that it had made improper payments to public officials through third-party sales agents in Equatorial Guinea, Angola, and Brazil, which are described below.

B. Equatorial Guinea and Angola

According to the Openbaar Ministerie press release, SBM's sales agents funneled payments to government officials in Equatorial Guinea and Angola. Between 2007 and 2011, SBM had paid its sales agent in Equatorial Guinea approximately $18.8 million. The Equatorial Guinea sales agent provided that money to other third parties who paid it to one or more government officials. The Dutch enforcement agency stated that other payments were made for education and health insurance expenses, and it noted initial allegations that the agent had purchased cars and a building for government officials as well. The Openbaar Ministerie found that a number of then-SBM employees—including one member of the SBM Management Board—had knowledge of these payments at the time that they were made.

During the same time period, SBM paid approximately $22.7 million to several sales agents in Angola. These sales agents funneled portions of this money directly to Angolan government officials or their associates and used other portions to pay for travel and educational expenses for government officials and their relatives. The Openbaar Ministerie found that several SBM employees had knowledge of these payments at the time they were made.

C. Brazil

SBM paid approximately $139.1 million in commissions to several Brazilian sales agents between 2007 and 2011. During its internal investigation, SBM discovered several red flags regarding its main Brazilian sales agent, including that: (i) high amounts of commissions had been paid to the sales agent, (ii) separate payments had been made to the sales agent's Brazilian and off-shore entities, and (iii) documents suggested that the Brazilian agent possessed confidential information about a Brazilian client.

In detailing the results of its internal investigation in April 2014, however, SBM stated that "it did not find any credible evidence that payments had been made directly or indirectly to government officials." Similarly, Petrobras had launched its own internal investigation in response to the allegations in the modified Wikipedia entry and reported in March 2014 that it had found no evidence of bribery in SBM contracts.

The Dutch Fiscal Intelligence and Investigation Service ("FIOD"), however, obtained evidence through an MLAT request that established that the sales agent had made payments to Brazilian government officials from its offshore entities. Following the revelations of the Dutch investigation, Petrobras forbid SBM from bidding on future contracts.

D. Settlement: The Dutch Perspective

Although Dutch authorities do not appear to have ever formally charged SBM, the Openbaar Ministerie stated that the improper payments constituted indictable offenses.

The enforcement agency explained, however, that it had offered SBM an out-of-court settlement in lieu of prosecution primarily because of SBM's extensive self-reporting and remediation efforts.

The Openbaar Ministerie specifically noted that:

- SBM self-reported to the Openbaar Ministerie, investigated the matter itself, and fully cooperated with investigations by the FIOD and Openbaar Ministerie.
- In 2012, after discovering the illegal payments, the SBM Supervisory Board entirely replaced the existing SBM Management Board.
- The new SBM Management Board has, of its own initiative, improved SBM's anti-corruption compliance program and related internal controls by appointing a Chief Governance and Compliance Officer to the Management Board, hiring a Compliance Director, increasing training for all employees in compliance-sensitive positions, disciplining employees who were involved with or had knowledge of improper payments, enhancing reporting procedures, reviewing all active sales agents for possible improprieties, and completely overhauling SBM's sales agent policies so that sales agents must contractually commit to SBM's compliance policies and are no longer hired in countries where SBM has a substantial presence.
- The Supervisory Board and current Management Board have publicly expressed their regret for the failure of SBM's previous control mechanisms.
- SBM agreed to give the Openbaar Ministerie access to its continued remediation efforts.

The Openbaar Ministerie also noted that, while it lacked the jurisdiction to prosecute certain non-Dutch individuals who had committed criminal offenses outside of the territory of the Netherlands, it would cooperate fully with the authorities in the countries that do have jurisdiction over those individuals.

E. The Brazil Settlements

1. January 2016 Settlement with SBM Executives

On January 25, 2016, Bruno Chabas, SBM Offshore's CEO, and board member Sietze Hepkema entered into separate settlement agreements with Brazilian prosecutors, pending confirmation from a Brazilian judge. Each executive agreed to pay R$250,000 ($60,000) to settle claims related to their possible involvement with the Petrobras scandal. SBM Offshore is set to pay the fine on behalf of both executives.

The settlements come after the Office of the Federal Prosecutor charged twelve people, including Mr. Chabas and Mr. Hepkema, for bribery and price-fixing that allegedly involved SBM and Petrobras. "Operation Black Blood," an investigation conducted in parallel to Operation Car Wash," had focused on contracts between Petrobras and SBM that allegedly resulted in illegally diverted funds, and the involvement of certain SBM executives in the transfer of $46 million in "undue payments" to Swiss bank accounts between 1998 and 2012 for contracts for oil production and offloading ships.

Mr. Chabas served as a Member of the Management Board in May 2011 before transitioning to CEO in January 2012. Mr. Hepkema, a former partner at a U.S. law firm and head of its Amsterdam office, joined SBM Offshore in May 2012 as the chief governance and compliance officer. Upon retiring in April 2015, he became a member of its supervisory board.

In response to the Brazilian prosecutor's allegations, on December 17, 2015 SBM Offshore stated, "The Company will seek clarification on this news with the relevant authorities. The Company believes that allegations are without merit, based on what it heard so far."

Upon holding a hearing for the corruption charges on January 15 2016, a Brazilian judge ordered that the charges against Messrs. Chabas and Hepkema be sent back to the Brazilian prosecutors in order for the parties to reach an out-of-court settlement. On January 22, 2016, a settlement was reached between Messrs. Chabas and Hepkema and the Brazilian prosecutors. On January 25, 2016, SBM Offshore released a statement indicating that, " [t]he Company emphasizes that this settlement does not involve an admission of guilt and remains of the opinion that the accusations are without merit. However, SBM Offshore also believes that accepting the settlement offers a pragmatic opportunity to expeditiously resolve this matter. . . ." On Wednesday, April 4, 2016, a Brazilian federal judge confirmed and approved the out-of-court settlement involving Messrs. Chabas and Hepkema.

2. July 2016 Leniency Agreement with SBM Offshore

On July 15, 2016, SBM Offshore agreed to pay a total of $162.8 million in a leniency agreement ("Leniency Agreement") with the Brazilian Ministry of Transparency, Oversight and Controls ("the Ministry"), the Office of the Federal Prosecutor, the Federal Attorney-General, and Petrobras, thereby concluding the official investigations into allegations that SBM Offshore was involved in a "pay-to-play scheme" with Petrobras employees. The Leniency Agreement followed the Memorandum of Understanding ("MoU") executed between the Ministry and SBM Offshore in March 2015, which temporarily suspended the initial investigation. At the time of publication, the prosecutors had yet to submit the Leniency Agreement for approval to the Fifth Chamber for Coordination and Review and Anti-Corruption of the Federal Prosecutor Service.

The Leniency Agreement granted SBM Offshore full exemption from legal proceedings related to or arising from any acts by its Brazilian agents and companies during the period of 1996 – 2012. In addition, SBM Offshore was granted full exemption from legal actions connected to investigations conducted by Petrobras, the prosecutors, and the Ministry. Finally, the Leniency Agreement authorized the continuation of business relationships between Petrobras and SBM Offshore.

SBM Offshore's $162.8 million settlement will be divided among Petrobras ($149.2 million), the Office of the Federal Prosecutor ($6.8 million), and the Department of Treasury's Council of Control of Financial Activities ($6.8 million). The payments will be used to strengthen the Office of the Prosecutor and the Department of Treasury's anticorruption efforts. SBM Offshore also agreed to reduce future performance payments related to the lease and operation contracts of their FPSOs Cidade de Anchieta and Capixaba by 95%. This reduction would provide Petrobras with an additional $179 million through the "nominal value [deducted] from future payments owed by Petrobras to SBM." SBM Offshore is obligated to cooperate with all future proceedings commenced by the Ministry and the prosecutors against third parties. In addition, SBM is required to implement an improved internal compliance program in Brazil, to be created with consultation and reporting to the Ministry for three years.

F. Involvement of Other Authorities

On February 10, 2016—soon after the settlements with Chabas and Hepkema were announced—SBM Offshore released its Full Year Report and confirmed the re-opening of the DOJ investigation. SBM Offshore indicated that although the DOJ has made inquiries into information concerning a possible investigation, the company is still seeking further clarification of the potential scope.

CHAPTER 7: OTHER INTERNATIONAL DEVELOPMENTS

There have been a number of significant international anti-corruption developments with respect to intenational organizations. For example, reports and resources have been published by the OECD and Global Justice. The European Court of Justice, . Certain of these developments are discussed herein.

I. International Organizations

A. OECD Reports

The Organisation for Economic Co-operation and Development ("OECD") has recently taken several steps aimed at increasing the anti-corruption enforcement efforts of member countries and signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").

The Working Group's Annual Report 2014, released in September 2014, showed that 117 individuals and 21 companies had been criminally sanctioned under provisions prohibiting foreign bribery during 2013. The Report noted that there were an estimated 390 investigations underway in 24 countries, and that 142 additional individuals and companies were facing criminal charges in 11 countries for charges under the convention.

The data provided with the Report, however, indicates that only 17 of the 40 signatory parties had actually issued sanctions, and less than half of all parties to the convention had begun any investigations. This data appears to weigh heavily on the OECD. As the Phase 3 reports discussed below show, the Working Group has criticized those countries who have failed to launch sufficient anti-corruption enforcement actions to date.

Additionally, the OECD released its first Foreign Bribery Report on December 2, 2014, summarizing and analyzing trends from all foreign bribery enforcement actions that have been concluded since the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") entered into force. The Report was prepared with the goal of assisting the OECD Working Group on Bribery in International Transactions and the G20 Working Group in efforts to combat bribery.

Details are provided below regarding this report and the country-specific working group reports that the OECD has issued in 2013 and 2014.

1. OECD Foreign Bribery Report

The OECD's Foreign Bribery Report analyzed sanctions for foreign bribery and related preparatory or participatory offenses against 427 individuals and corporate defendants between February 15, 1999, and June 1, 2014, to provide a fact-based illustration of the crime of foreign bribery. The Report provided key finding and detailed enforcement trends in enforcement, together with its recommendations for the OECD. Although the findings are instructive, it is important to remember that they reflect statistics of successfully prosecuted cases, and therefore do not include instances of bribery that were not prosecuted or which went undiscovered.

a. Key Findings

The Report found that a majority of sanctions took place in specific industries rather than specific countries. For example, 59% of the cases examined occurred in the extractive (19%), construction (15%), transportation and storage (15%) and information and communication (10%) industries. Additionally, challenging the notion that the vast majority of bribery occurs in developing nations, the Report found that 43% of cases involved public officials from countries with either high (22%) or very high (21%) levels of human development based on the UN Human Development Index.

The Report also listed categories of public officials that had been more likely to receive bribes. In a majority of the cases reviewed, the public officials involved were employees of state-owned enterprises (27%), customs officials (11%), health officials (7%), or defense officials (6%). Employees of state-owned enterprises received 80% of the total amount paid as bribes. Heads of state and ministers received bribes less frequently, but the bribes that they did accept tended to be much larger in value—although they received only 5% of the number of bribes paid, these together accounted for 11% of the total value of bribes paid. By contrast, customs officials received 11% of the total number of bribes paid, these only accounted for 1.14% of the total value of bribes paid.

The parties that had paid the bribes also fit a certain profile. The Report found that 60% of the sanctioned companies had more than 250 employees and that in 53% of the cases examined a corporate-management level employee or the CEO was either involved or knew of the bribes being paid. The Report cited these statistics to disprove the theory that bribery is usually the result of a rogue employee's actions, and to demonstrate the need for top-level management to set a clear tone to prevent bribery.

Another key finding of the Report confirmed what many already suspected: bribes were usually paid through an intermediary. In 41% of cases reviewed, bribes were paid through local sales, marketing, or distribution agents, and in another 35% of cases, bribes were paid through corporate vehicles such as subsidiaries, local consulting firms, and offshore companies.

More often than not, the reviewed cases involved improper payments to obtain public procurement contracts (57%). Other popular motivations including passing customs regulations (12%) or receiving favorable tax treatment (6%) or a special license or authorization (6%).

b. Enforcement Trends

The Report also identified certain current trends in enforcement. According to the Report, a third of all investigations were initiated by self-reporting. Among these cases, more than half were discovered through internal audits or through due diligence related to mergers and acquisitions, and nearly one-sixth started with internal whistleblowers. Approximately 13% of the cases had been initiated directly by enforcement agencies, and only 2% stemmed from whistleblower reports to government authorities. The Report also found that most cases (69%) ended in settlement rather than a conviction (31%).

The Report showed that investigations and prosecutions typically took several years to conclude, and the time necessary has only increased over the years. Whereas it took an average of 2 years to progress from a criminal act to a sanction in 1999, it took over 7 years for cases concluded in 2013.

c. Recommendations

The Report makes a number of preliminary conclusions based on its review of the data, including with respect to the need for (i) increased availability of information, (ii) increased whistleblower mechanisms, (iii) due diligence, and (iv) integrity in public procurement. First, the Report noted that there were significant gaps in the data set due to the lack of publicly available information related to many concluded foreign bribery cases, and it recommended that enforcement agencies provide more detailed and transparent information regarding the individuals involved and the relevant conduct. Second, the Report recommended that companies should seek to introduce and implement whistleblowing mechanisms, noting that while 17% of all self-reporting cases originated from an internal whistleblower, only one of those cases involved a company had an established whistleblower hotline or procedure at the time. Third, the Report stressed the importance of an effective due diligence process to any compliance program giving the large percentage of improper payments that had been made through intermediaries. Fourth, in referencing the high number of cases in which bribes were paid in public procurement, the Report noted a need for greater awareness on both sides of the procurement process of the apparent risks and temptations involved.

2. Phase 1 Working Group Reports

Latvia: On May 30, 2014, Latvia became the 41st Party to the OECD Convention, joining Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa as non-OECD member countries that are nonetheless Parties to the Convention. Latvia's domestic implementing legislation came into force on March 21, 2014, and the OECD Working Group on Bribery conducted a Phase 1 review to evaluate its implementation of the Convention.

The Working Group found that "Latvia's legislation largely conforms to the standards of the Convention," subject to a number of issues to be analyzed further during the Phase 2 review. Those issues include whether Latvian law adequately distinguishes between an "offer" and a "promise" of a bribe; the extent to which a "foreign country's administrative unit" includes "all levels and subdivisions of government […]" for the purposes of the definition of "foreign public official;" and the difference in penalty when the bribe is made through an intermediary, which carries a shorter maximum incarceration period than the penalty for a bribe paid directly. The report also recommended that Latvia amend its legislation to caliber the scope of Latvia's territorial jurisdiction so that foreign bribery can effectively be prosecuted. Regarding enforcement mechanisms, the report noted that Latvian law provides "no legal obligation to record a detailed decision not to initiate proceedings because an investigator will decide not to initiate proceedings only when it is clear that a criminal offence has not been committed." The report pointed out that "Latvia cannot commence criminal proceedings based on anonymous information or unsourced information […]." These issues will be monitored during Phase 2.

3. Phase 2 Working Group Reports

Russia: In October 2013, the OECD Working Group released its Phase 2 Report on Russia's implementation of the OECD Convention. At the outset, the report noted that "[w]hile Russia has undertaken efforts to implement the Convention, the Working Group remains concerned that Russia has not responded to key Phase 1 recommendations." The report noted that "[t]he Working Group is particularly concerned by the deficiencies in Russian law on the foreign bribery offence and urges Russia to adopt appropriate legislation as a matter of high priority." Notably, the report called on Russia to

eliminate the defense of "effective regret." The report also recommended that Russia take measures to ensure that the "false accounting offences cover all of the activities described in the Convention and are subject to effective, proportionate and dissuasive sanctions."

According to the Working Group, as of October 2013, no cases of foreign bribery had been "detected, investigated or prosecuted." The report found that this "inadequacy could be addressed if Russia devoted sufficient resources specifically to the enforcement of foreign bribery and adopted a more proactive approach to its detection and investigation." Finally, the report noted a number of positive developments, including (i) a new obligation for diplomatic personnel stationed abroad to report suspected foreign bribery; (ii) a statutory obligation for companies operating in Russia to implement anti-corruption programs; and (iii) Russia's assistance to other parties of the Convention in their investigations of foreign bribery allegations.

4. Phase 3 and Follow-Up Reports

In 2013 and 2014, the OECD Working Group on Bribery completed a number of Phase 3 monitoring reports, which focus on a country's enforcement of the OECD Convention, the 2009 Anti-Bribery Recommendations, and any outstanding recommendations from the Phase 2 reviews. In a number of instances, the Working Group identified "serious concerns" with the ongoing implementation of the Convention—mostly in connection with the failure of member states to sufficiently investigate or prosecute violations of their anti-corruption laws.

Argentina: The OECD Working Group released its Phase 3 report on Argentina in December 2014. As with many other countries under review, the Working Group stated that it was "gravely concerned about Argentina's commitment to fight foreign bribery" in light of its failure to implement previous recommendations issued in 2001. The Working Group criticized the country not only for failing to make substantial progress with open investigations, but for also not seeking the cooperation of foreign authorities in connection with those investigations. While acknowledging some limited efforts made by the country (such as a court-established panel of experts to support corruption cases), the Working Group also expressed concerns about judicial independence, the country's ability to detect foreign bribery, and a lack of whistleblower protections.

Belgium: The OECD Working Group released its Phase 3 report on Belgium in October 2013, following a Phase 2 evaluation that had been conducted in 2005. Generally, the Working Group noted that it was "disappointed by the lack of priority Belgium gives to the fight against bribery of foreign public officials by Belgian individuals and companies." Stressing that "not a single Belgian national or company has ever been prosecuted in a foreign bribery case," the Working Group stated that it was "seriously concerned by the flagrant lack of resources" devoted to investigations and prosecutions of foreign bribery cases, which "leads to investigations not being opened, cases being closed and the expiry of the statute of limitations."

The Working Group stated that it was "concerned that the Belgian authorities take into account factors such as exceeding a 'reasonable time limit,' which is shorter than the statutory limitation period, in decisions to open investigations or at sentencing stage in foreign bribery cases." The Working Group expressed its disappointment that Belgium had not acted to correct a number of problems with its national implementing legislation identified in the Phase 2 Report. The Working Group also noted that recently-

adopted whistleblower protections do not extend to public and private sector employees who report "suspected acts of foreign bribery to the competent authorities."

Brazil: The OECD Working Group released its Phase 3 report on Brazil on October 16, 2014. The report commended Brazil on the enactment of its new anti-corruption law and for the recent indictments of individuals for corruption-related offenses as part of Operation Car Wash (*see* p.17). Nevertheless, the report noted that the Working Group remained concern about the relatively low enforcement levels, as well as the country's "proactivity in detecting, investigating, and prosecuting foreign bribery." As noted in the Focus Issue section above, the Working Group recommended that Brazil issue its announced Presidential Decree to implement the new anti-corruption law and allow for proper enforcement.

Chile: The OECD Working Group released its Phase 3 report on Chile in March 2013. The report stated that the Working Group was "concerned that Chile has not sufficiently investigated several foreign bribery allegations." Additionally, the Working Group suggested that Chile "raise awareness of Article 5 of the Convention [which states that foreign bribery investigations must not be influenced by economic interest, international relations, or personal identity] among Chilean judges, prosecutors, investigators and relevant government officials." The report also recommended that Chile clarify existing law and provide "provide additional guidance on what constitutes an effective model for preventing foreign bribery, particularly in light of "the pace at which companies in Chile are seeking certifications."

Czech Republic: The OECD Working Group released its Phase 3 report on the Czech Republic in March 2013. While the Working Group praised the Czech Republic's adoption of "a comprehensive corporate liability regime," it also stated that "effective enforcement could be much enhanced" by raising awareness of foreign bribery risks with key actors including private companies, auditors, and accountants. In this respect, the report found a "serious deficiency in the engagement between the Czech government and the Czech private sector." The Working Group recommended that more should be done to increase awareness of reporting obligations and the importance of developing and administering compliance programs.

Denmark: The OECD Working Group released its Phase 3 report on Denmark in March 2013. The report noted positively that efforts that Denmark has recently undertaken to implement the Convention, and praised Denmark's mechanisms for obtaining tax and bank information, noting an increase in suspicious money laundering transaction reports and sanctions for failure to report. The Working Group nonetheless expressed concern regarding the lack of enforcement and the lack of implementation of certain Phase 2 recommendations. It noted that "foreign bribery cases should be investigated and prosecuted even in the absence of parallel investigations in foreign jurisdictions." The Working Group recommended, among of other things, that Denmark "enhance the usage of, and train law enforcement authorities on, corporate liability provisions in foreign bribery cases."

Estonia: The OECD Working Group released its Phase 3 report on Estonia in June 2014. The Working Group commended certain Estonian efforts to implement the Convention, including multiple amendments to its Penal Code and Code of Criminal Procedure and the passage of the Anti-Corruption Act of 2012, which included whistleblower protections for public sector employees.

At the same time, however, the Working Group stressed its concern that a general "lack of awareness of foreign bribery risks prevails among Estonian public officials and the private sector alike,"

which in part explained why, “since becoming a Party to the Convention in 2005, Estonia has not investigated or prosecuted any foreign bribery cases, despite available information of allegations of bribery of foreign public officials committed by Estonian individuals or companies.” The Working Group added that some of its concerns regarding insufficient enforcement would be alleviated if the “amendments in the law currently still before Parliament are adopted and the offense streamlined.” The report also recommended that the corporate liability regime be improved and that enforcement officers be trained.

France: The OECD Working Group issued a Follow-Up to its Phase 3 Report on December 19, 2014. The Working Group commended France on making significant reforms to its anti-corruption legislative framework, noting in particular that private anti-corruption organizations could now file civil party claims. At the same time, however, the Working Group found that France’s enforcement efforts “still falls far short.” Additionally, the Working Group criticized the current legal framework that only permitted the Public Prosecutor’s Office to launch an enforcement action with respect to offenses committed outside France if the victim filed a complaint or the foreign authority made an official accusation. The OECD also criticized France for failing to enact any amendments to ensure that the country’s “blocking statute” does not raise obstacles to investigations conducted by other regulators.

Hungary: The OECD Working Group issued a Follow-Up to its Phase 3 Report on July 31, 2014. The Working Group noted that the Magyar Telekom case was ongoing, but added that Hungarian enforcement authorities have not opened any new bribery investigations in the previous two years. The Working Group also expressed concerns about the potentially broad immunities from investigations and prosecutions permitted under Hungarian law. The Working Group also noted several positive developments, including (i) increased resources for the public prosecution service, (ii) the provision of training to police with respect to violations of the anti-corruption laws, (iii) legislative enhancements to Hungary’s anti-corruption laws, and (iv) new whistleblower protections.

Ireland: The OECD Working Group released its Phase 3 report on Ireland in December 2013. As with other countries discussed above, the report noted that the Working Group had “serious concerns that Ireland has not prosecuted a foreign bribery case in the twelve years since its foreign bribery offence came into force.” The Working Group recommended that Ireland “urgently reorganize law enforcement resources in a manner that credible allegations of foreign bribery will be investigated and prosecuted in a timely and effective manner.” The report noted that Irish rules on corporate liability remain inadequate. It highlighted that Irish law maintains two foreign bribery offences in separate and inconsistent statutes, including disparate levels of sanctions, and stated that these two statutes “still not been consolidated and harmonized” in accordance with Article 1 of the Convention. The report notes that general awareness of bribery issues and reporting mechanisms in both the public and the private sectors should be strengthened.

Japan: The Follow-Up to Japan’s Phase 3 Report was issued on February 5, 2014. Echoing its common theme, the Working Group stated that it had “significant concerns about the low level of foreign bribery enforcement in Japan,” particularly in light of numerous published allegations involving Japanese companies. At the same time, the Working Group noted several areas of encouragement, including steps taken to share information other enforcement agencies on foreign bribery cases, the provision of targeted training to Japan’s overseas missions with respect to bribery, and various efforts to raise awareness in the private sector.

New Zealand: The OECD Working Group released its Phase 3 report on New Zealand in October 2013. The report praised certain positive developments in New Zealand, including the adoption of a whistleblower protection law, a new anti-money laundering regime, and certain legislative steps to address weaknesses in its foreign bribery offence legislation.

The Working Group also stressed, however, that it had "serious concerns about the lack of enforcement of the foreign bribery offence," noting that "[s]ince 2001, New Zealand has not prosecuted any foreign bribery case," and that New Zealand opened its first foreign bribery investigation only in July 2013. The report cited the low number of foreign bribery allegations involving New Zealand as an indication of a lack of awareness of the problem combined with inaccurate and "outdated perceptions that New Zealand individuals and companies do not engage in bribery," which in turn "undermine detection efforts." The Working Group called on New Zealand to train law enforcement officials and take measures to increase enforcement while developing awareness campaigns to ensure that "suspicions of foreign bribery are reported to competent authorities, including by auditors and tax examiners."

Poland: The Working Group conducted its Phase 3 review of Poland in 2013, following its Phase 2 evaluation in 2007. The report highlighted the Working Group's regrets that "Poland has not successfully prosecuted a foreign bribery case in the twelve and a half years since its foreign bribery offence came into force." The report noted that "due to increasing international business activities by Polish companies, the risk of foreign bribery could increase in the medium to long term."

Among the Phase 2 recommendations that Poland still has not implemented include recommendations on (i) the "impunity provision in the foreign bribery offence, which "allows perpetrators of bribery to automatically escape punishment by notifying the law enforcement authorities of the offence before the authorities learn about it from other sources"; (ii) the effectiveness of the liability of legal persons; and (iii) the tax treatment of bribe payments.

The report recommended that Poland set forth an "investigation and prosecution strategy for foreign bribery cases to address concerns about whether adequate resources and expertise are available to effectively investigate and prosecute highly complex cases, and the extraordinary length of proceedings for corruption cases in Poland." Additionally, the report called upon Poland to take measures to increase the general awareness of foreign bribery risks, including within the accounting and auditing professions. The report recommended that Poland revise its whistleblower law, and that public procurement and export credit agencies should check whether applicants have been listed on international financial institutions' debarment lists to decide whether to conduct enhanced due diligence. The Working Group also recommended that the Polish tax law contain a clear statement that bribes to foreign officials are not tax-deductible.

Portugal: The OECD Working Group released its Phase 3 report on Portugal in June 2013. Once again, the report noted that the Working Group was "seriously concerned that Portugal's enforcement of the foreign bribery offence has been extremely low." The Working Group highlighted that "[d]espite Portugal's strong economic links to countries plagued by severe corruption, only 15 foreign bribery allegations have surfaced since 2001, [which] have not resulted in a single prosecution to date."

The Working Group recommended that Portugal "review its overall approach to enforcing its foreign bribery laws," including by investigating more pro-actively and by seeking assistance from foreign authorities where appropriate. The report noted that factors prohibited under Article 5 of the Convention

may influence the risk that foreign bribery exacerbated concerns about low enforcement. The Group also suggested that Portugal should further raise awareness and promote corporate compliance programs to prevent foreign bribery; make efforts to detect, prevent and prosecute money laundering by politically exposed persons, strengthen whistleblower protection in the private and private sector; and that "corporate liability for foreign bribery should be extended to state-owned or controlled enterprises."

Slovak Republic: The OECD Working Group released a Follow-Up to its Phase 3 Report on November 28, 2014, noting that the country had "implemented the majority of [its] Phase 3 recommendations." The Working Group added, however, that certain key recommendations had not been implemented, including with respect to establishing an offense of corporate liability (covered in a draft law that had not yet been adopted) and amending the law to ensure that the offense of foreign bribery covers the bribery of officials from public international organizations. The Follow-Up Report also noted that the country "has still not prosecuted a case of the bribery of foreign public officials."

Slovenia: The OECD Working Group released its Phase 3 report on Slovenia in June 2014. The Working Group expressed "serious concerns about the lack of enforcement of, and priority given to, the foreign bribery offence." In a similar vein, the report noted that "prosecutions of this offence may be obstructed by political and economic considerations." The report highlighted a number of areas for improvement; it recommended, for instance, that Slovenia ensure that the penalties imposed are commensurate with the standards contained in the Convention. In addition to stressing the need for reform of the legal framework controlling anti-corruption enforcement, the report emphasized the importance of developing a better awareness of foreign bribery issues.

South Africa: The OECD Working Group released its Phase 3 report on South Africa in June 2014. The report noted serious concerns "with the lack of foreign bribery enforcement actions," explaining that ten foreign bribery allegations have surfaced since South Africa became a Party to the Convention in 2007, of which four have progressed to ongoing investigations, while none have resulted in prosecutions.

The Working Group expressed concerned that political and economic factors could influence the investigation and prosecution of foreign bribery cases, and indicated that the "lack of corporate liability for foreign bribery is especially troubling in an economic environment where there has been a major growth in corporate activity, and where state-owned enterprises operating in sensitive sectors are allegedly involved in foreign bribery cases." To mitigate that problem, the Working Group recommended that South Africa "increase the financial resources available to prosecutors and ensure enhanced cooperation and coordination between the police and prosecutors from the outset of foreign bribery investigations." The report also emphasized the need to strengthen and improve awareness of whistleblower protections.

Sweden: The Working Group issued a Follow-Up to tits Phase 3 Report on Sweden on August 8, 2014. The findings were largely positive, noting that Sweden had "made significant progress on enforcing its offence of bribing a foreign public official." In particular, the Working Group praised Sweden's investigation of potential territorial links with respect to allegations of bribery of Swedish subsidiaries and intermediaries outside the country.

Turkey: Turkey's Phase 3 Report was issued on October 17, 2014. As with its report on France, the Working Group commended Turkey on its "efforts to enhance its foreign bribery legislation," but noted that it remained "seriously concerned about Turkey's low level of enforcement"—including specifically the

absence of any foreign bribery convictions in the eleven years since Turkey ratified the treaty. The Working Group specifically criticized the country for claiming to be unaware of certain bribery allegations even though "these were publicized in both Turkish and foreign news."

B. OECD, World Bank, and UNDOC Anti-Corruption Handbook

On November 26, 2013, the World Bank, the OECD, and the United Nations Office on Drugs and Crime ("UNDOC") released their Anti-Corruption Ethics and Compliance Handbook for Business ("the handbook"). Although facilitated by the World Bank, OECD, and UNDOC, the handbook was "written by private companies, for private companies," with the goal of consolidating major business guidance instruments into a useful and practical "tool for companies seeking compliance advice in one, easy-to-reference publication." While the handbook is designed to help businesses and G20 member governments implement the 2010 G20 Anti-Corruption Action plan, it does not set forth new legal standards or requirements. Instead, it offers guidance on how to build more effective compliance programs.

The Handbook is structured in three main parts. First, the handbook presents the international legal framework for combating corruption. Part two focuses on designing and using adequate risk assessment methods. Part three sets forth practical advice on how to structure an effective compliance program, with a focus on twelve interwoven elements: (i) support and commitment from senior management for the prevention of corruption; (ii) developing an anti-corruption program; (iii) oversight of the anti-corruption program; (iv) clear, visible, and accessible policy prohibiting corruption; (v) detailed policies for particular risk areas; (vi) application of the anti-corruption program to business partners; (vii) internal controls and record keeping; (viii) communication and training; (ix) promoting and incentivizing ethics and compliance; (x) seeking guidance—detecting and reporting violations; (xi) addressing violations; and (xii) periodic reviews and evaluations of the anti-corruption program). In the annex, the handbook provides a quick-reference table that cross-references the twelve business principles with the major sources of business guidance.

C. OECD Good Practice Guidance

The OECD previously released the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions ("Recommendation"). Perhaps the most notable aspect of the Recommendation is Annex II, Good Practice Guidance on Internal Controls, Ethics and Compliance (the "Good Practice Guidance") released on February 18, 2010.

The Good Practice Guidance sets forth a list of suggested actions to ensure effective internal controls for the prevention and detection of bribery. The OECD recognized that there could be no one-size-fits-all approach to compliance programs, and that small and medium sized enterprises in particular would need to adjust the guidance to fit their particular circumstances. The Good Practice Guidance is significant, however, in that it signals the endorsement of a risk-based approach to compliance. As the guidance states, "[e]ffective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as geographical and industrial sector of operation)." The twelve themes that the OECD recommends be incorporated into a compliance program are the following:

- Strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics, and compliance programs or measures for preventing and detecting bribery;

- A clearly articulated and visible corporate policy prohibiting foreign bribery;

- Individual responsibility for compliance at all levels of the company;

- Senior corporate officers with adequate levels of autonomy from management, resources, and authority have oversight responsibility over ethics and compliance programs, including the authority to report to independent monitoring bodies;

- Ethics and compliance programs designed to prevent and detect foreign bribery, applicable to all entities over which the company has effective control that address gifts, hospitality and entertainment, customer travel, political contributions, charitable donations and sponsorships, facilitation payments, and solicitation and extortion;

- Ethics and compliance programs designed to prevent and detect foreign bribery, applicable to third parties and including three essential elements: (i) properly documented risk-based due diligence and oversight; (ii) informing third-parties of the company's commitment to legal prohibitions on bribery as well as the company's code of ethics and compliance program; and (iii) a reciprocal commitment from the third party;

- A system of financial and accounting procedures, including internal controls, reasonably designed to ensure accurate books, records and accounts so as to ensure that they cannot be used for bribery or to hide bribery;

- Measures designed to ensure periodic communication and documented training on the company's ethics and compliance program;

- Measures to encourage and provide positive support for the observance of ethics and compliance programs at all levels of the company;

- Disciplinary procedures to address violations of anti-bribery prohibitions;

- Effective measures for: (i) providing guidance to directors, officers, employees, and, where appropriate, business partners on complying with the company's ethics and compliance program, including in urgent situations in foreign jurisdictions; (ii) internal and, where possible, confidential reporting by, and protection of, directors, officers, employees and, where appropriate, business partners, who are either unwilling to violate ethics rules under instructions or pressure from superiors or are willing to report breaches of the law or ethics rules in good faith and on reasonable grounds; and (iii) undertaking appropriate action in response to such reports;

- Periodic reviews of the ethics and compliance programs designed to evaluate and improve their effectiveness in preventing and detecting bribery.

The Recommendation itself, applicable to OECD member countries and other countries that are party to the OECD Convention, recommends that member countries "take concrete and meaningful steps" in several areas to deter, prevent and combat foreign bribery. Among the steps recommended are the following:

- *Facilitation Payments*: The Recommendation urges member countries to undertake periodic reviews of policies regarding facilitation payments and encourages companies to prohibit or discourage the use of such payments. Member countries should also remind companies that when facilitation payments are made, they must be accurately accounted for in books and financial records. The Recommendation also urges member countries to raise awareness of public officials regarding domestic bribery laws and regulations in order to reduce facilitation payments.

- *Tax Measures*: The Recommendation urges member countries to implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends that member countries disallow tax deductibility of bribes. The Recommendation also suggests that independent monitoring be carried out by the Committee on Fiscal Affairs.

- *Reporting Foreign Bribery*: Member countries are encouraged to ensure that accessible channels and appropriate measures are in place for reporting suspected acts of bribery of foreign officials to law enforcement authorities, including reporting by government officials posted abroad. The member countries are further encouraged to take steps to protect public and private sector employees who report suspected acts of bribery in good faith.

- *Accounting Requirements*: Member countries are encouraged to prohibit the establishment of off-the-books accounts and the making of inadequately identified transactions, recording of non-existent expenditures, entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign officials or hiding such bribery and provide criminal penalties for such activities. They are also urged to require companies to disclose contingent liabilities and to consider requiring companies to submit to an external audit and maintain standards to ensure independence of those audits. More notably, the Recommendation contemplates member countries requiring auditors who find indications of bribery to report their findings to a monitoring body and potentially to law enforcement authorities.

- *Internal Controls*: Member countries are encouraged to develop and adopt internal controls, ethics and compliance programs and to encourage government agencies to consider compliance programs as factors in decisions to grant public funds or contracts. They are also asked to encourage company management to make statements disclosing their internal controls, including those that contribute to the prevention and detection of bribery and provide channels for the reporting of suspected breaches of the law. Additionally, member countries are to encourage companies to create independent monitoring bodies such as audit committees.

- *Public Advantages*: The Recommendation suggests that member countries allow authorities to suspend from pubic contracts or other public advantages companies that have been found

to have bribed foreign public officials. It also asks that member countries require anti-corruption provisions in bilateral aid-funded procurement, promote proper implementation of anti-corruption provisions in international development institutions, and work with development partners to combat corruption in all development efforts.

- *International Cooperation*: The Recommendation encourages member countries to cooperate with authorities in other countries in investigations and legal proceedings, including by sharing information, providing evidence, extradition, and the identification, freezing, seizure, confiscation, and recovery of the proceeds of bribery. It also encourages countries to investigate credible allegations of bribery referred by other countries and consider ways of facilitating mutual legal assistance between member and non-member countries and international organizations and financial institutions that are active in the fight against bribery.

Also released in conjunction with the Recommendation was Annex I, Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Annex I"). Annex I sets forth in more detail some of the general suggestions presented in the main Recommendation. Among other things, Annex I: (i) suggests that member countries should not provide a defense or exception for situations where the public official solicits a bribe; (ii) suggests that member countries provide training to officials posted abroad so they can provide information to their country's corporations when such companies are confronted with bribe solicitations; (iii) encourages countries not to restrict the liability of legal persons (*i.e.*, corporations) to instances where natural persons are prosecuted or convicted; (iv) recommends that countries ensure that legal persons cannot avoid responsibility for conduct by using intermediaries to offer, promise or pay a bribe; and (v) encourages countries to be vigilant in investigating and prosecuting violations. In this respect, Annex I states that countries should seriously investigate complaints and credible allegations and not be influenced by external factors such as economic interest, foreign relations or the identity of persons or companies involved.

The Recommendation comes as the OECD continues its Phase 3 review process of Convention signatories, which examines, among other things, the enforcement efforts and results of such countries. In releasing the guidance, the OECD is likely drawing attention to those areas on which it will particularly focus, such as the liability of legal persons, the use of intermediaries, and increased international cooperation. The release of the Good Practice Guidance is also significant because it provides helpful guidance to companies looking to better structure their internal compliance efforts to address their industry and company specific risks.

D. International Chamber of Commerce Guidelines

On November 19, 2010, the Anti-Corruption Commission of the International Chamber of Commerce ("ICC") released guidelines on the vetting of agents, intermediaries and other third parties (the "ICC Guidelines"). The ICC, founded in 1909, today has hundreds of thousands of member enterprises in over 120 countries. The ICC Guidelines, intended for voluntary self-application, describe the use of third parties as "the weak link in the chain" of an entity's anti-corruption practices. The ICC recommends that due diligence be applied to third parties acting on behalf of principles in both the private and public sectors.

Under Article 2 of the ICC Rules, member enterprises must implement an anti-corruption policy that ensures that (i) payment amounts to third parties are appropriate and for legitimate services, (ii) no payments are inappropriately passed on by third parties as bribes, (iii) agents explicitly agree not to pay bribes and can have their contracts terminated if they do so, and (iv) the enterprise maintains appropriate records pertaining to all third parties engaged for transactions with state, private, or public bodies. Importantly, the ICC Guidelines note that corruption risks are not limited to third parties who deal with the public sector, as a growing list of countries criminalize commercial bribery. The ICC Guidelines therefore suggest conducting appropriate due diligence on intermediaries operating in both the private and public sector. The ICC Guidelines are notable for the level of detail they provide on the potential content of an FCPA due diligence process, and are worthy of review by any company seeking to create or update its due diligence procedures.

The ICC makes clear that the objective of the due diligence process should be to confirm that the proposed transaction with the third party is legal under applicable law and to "provide a reasonable record supporting the presumption that the third party will not use its influence with the government, public entities or the private sector in order to corruptly obtain or retain business, other authorizations or permits or other improper advantage in the conduct of business." Consistent with other due diligence guidance, the ICC recommends that a business should select a due diligence process "that is appropriate to its unique circumstances, including its size, resources, and risk profile." The ICC Guidelines suggest that companies may find tiered due diligence procedures—where certain categories of intermediaries undergo more significant review—a more efficient and effective use of resources.

The ICC Guidance stresses the importance of a "collaborative" due diligence process involving various parts of the organization. The ICC contemplates the use of outside due diligence service providers, however it cautions that "the final decision to retain or not the candidate [t]hird party should be taken by the enterprise and not outsourced."

The ICC Guidance contemplates four main sources of information as part of such a process: (i) the sponsoring department of the enterprise; (ii) the third-party candidate; (iii) non-sponsoring departments or business units; and (iv) outside sources.

1. Sponsoring Department

The ICC Guidance proposes requiring the Sponsoring Department to complete an application form. Because the employee proposing the engagement may have an interest in the hiring of the candidate or the success of the deal, that employee alone should not be allowed to make the final decision on the engagement of the third-party candidate. The entity can independently assess the candidate by requiring a form that sets forth such information as the business need for employing a third party, the business justification for the proposed compensation, an evaluation of the commercial and technical competence of the candidate, specific information regarding the candidate's reputation for integrity, details on how the candidate was identified, whether any other third parties were considered, and why the candidate was proposed.

2. The Candidate

The ICC recommends that an entity may also obtain information from the candidate directly by requiring the candidate to complete a questionnaire and provide supporting documentation. The topics

covered by such questionnaires could include the candidate's basic information and qualifications; ownership and other business interest; status as a public official (including whether any of the candidate's owners, directors or employees are or previously were public officials, or have any relationship with public officials); financial data; information about current and previous litigation; information about current and previous criminal investigations, sanctions, debarment and convictions; and references. The ICC points out that, in doing so, an entity must be aware of possible legal restrictions on the process such as data privacy protections for the candidate's employees.

The ICC also suggests interviewing the candidate in person if feasible. "Although not practical for all retentions, interviews conducted in person are generally more effective in assessing the responses to these inquiries, and provide a better setting to ask the often delicate questions necessary." The ICC also notes that interviews can also be used to train the candidate regarding enterprise policies and procedures, and to communicate a commitment to complying with applicable anti-bribery laws and policies. The ICC suggests memorializing the interview in a memorandum to be kept with the due diligence file.

3. Non-Sponsoring Departments or Business Units

As a third source of information, the ICC suggests gathering information regarding the candidate from internal sources *other* than the person who has proposed to engage the candidate. Internal sources can provide information on the candidate's past dealings with the enterprise, including the candidate's background and reputation. The ICC also suggests comparing the proposed compensation to internally prepared compensation guidelines and external benchmarks.

4. Outside Sources

Finally, the ICC guidelines suggest numerous outside sources that can be used to obtain information regarding the candidate, including (i) commercial and bank references; (ii) news sources; (iii) reports from independent enterprises that compile financial and other information about commercial entities; (iv) government databases of parties subject to sanctions; (v) embassy staff or other government sources; and (vi) due diligence service providers. The ICC also recommends seeking a local law opinion where there is an issue of whether the arrangement is permissible under local law.

Once a candidate has been approved, the ICC recommends that detailed contractual clauses describe the third party's compliance with anti-corruption policies. After the initial approval, the guidelines suggest ongoing monitoring of transactions with the third party, along with periodic auditing and reevaluation of the party's risk. Businesses should consider requiring employees of the third party to undergo anti-corruption training. Each payment to the third party should be independently reviewed and checked for red flags. The ICC recommends extra attention be given to third parties whose compensation is linked to their success. When such compensation is determined to be appropriate, "careful documentation of the legitimate business case for the engagement" is a recommended practice.

E. Global Witness Report - British Banks and Nigerian Corruption

On October 11, 2010, the prominent U.K. NGO Global Witness released a report titled "International Thief - How British Banks Are Complicit In Nigerian Corruption," identifying four British banks (Barclays, HSBC, RBS, NatWest) and the U.K. branch of a fifth (UBS) that held accounts for two

Nigerian state governors accused of funneling corruptly acquired money through the banks to sustain their luxurious lifestyles. The report was based on documents related to civil asset recovery cases brought by the Nigerian government at the High Court in London against the governors to recover the illicit assets. It focuses on the histories of two Nigerian Governors, Diepreye Alamieyeseigha and Joshua Dariye.

By British law, banks are required to carry out due diligence on their customers, which consists of two stages. First, the banks must know the identity of their customer and assess the money laundering risk posed by the customer. Senior foreign politicians, known as "politically exposed persons," are deemed to be higher risk because their control over state revenues and contracts gives them greater opportunity for corruption. Current regulations require banks to be aware when their customers become politically exposed persons and carry out enhanced due diligence on such customers. Although no regulation requires banks to know whether a foreign country bans its senior politicians from holding international accounts, industry guidance published by the U.K. Joint Money Laundering Steering Group required banks to know which countries were placed on the Non-Cooperative Countries and Territories ("NCCT") list by the Financial Action Task Force, an inter-governmental group that sets global anti-money laundering standards, and to carry out extra due diligence on transactions from those countries. Nigeria was on the NCCT list from 2001 to 2006. This industry guidance has quasi-legal status in the United Kingdom.

Second, banks must monitor their customers' accounts for suspicious activity. If the bank suspects a customer is engaged in money laundering, it must file a "suspicious activity report" ("SAR") with the Serious Organised Crime Agency and wait a set period for consent to proceed with the transaction. SARs are confidential, so it is usually not possible to confirm whether one has been filed. The Steering Group's guidance suggested that banks take "reasonable measures to establish the source of wealth (including the economic activity that created the wealth) as well as the source of funds to be used in the relationship." Since 2007, the regulations have required banks to "take adequate measures to establish the source of wealth and source of funds" of politically exposed persons. The guidance suggested that "ongoing scrutiny should be applied to any unexplained sources of wealth, *e.g.* value of property owned by the client that does not match the income or initial wealth profile." It also states that "a suspicious transaction will often be one that is inconsistent with a customer's known, legitimate activities." The guidance recommends that banks ask the following questions: (i) is the size of the transaction consistent with the normal activities of the customer; and (ii) is the transaction rational in the context of the customer's business or personal activities?

The guidance also recommends that banks develop benchmarks of normal activity for different types of customers. It warned banks that large volumes of cash deposits, especially from non-U.K. customers, posed a high risk of money laundering. At the time of the activities discussed in the Global Witness report, the guidance suggested that banks also subject close associates of politically exposed persons to additional scrutiny. This additional scrutiny is now required by regulation in the United Kingdom. As part of their ongoing monitoring of their customers, banks must check for patterns that indicate a customer is an associate of a politically exposed person or is receiving significant and unusual payments from a politically exposed person.

1. Alamieyeseigha

According to Global Witness, Diepreye Alamieyeseigha, governor of Bayelsa State in Nigeria's oil-rich Delta region, was arrested in September 2005 in London on money laundering charges following investigations by the Nigerian Economic and Financial Crimes Commission ("EFCC") and the U.K. Metropolitan Police's Proceeds of Corruption Unit. In December 2005, he was impeached by the Bayelsa State Assembly and stripped of immunity from prosecution. In July 2007, he was convicted by a Nigerian Court of 33 counts of money laundering, corruption, and false declaration of assets. Alamieyeseigha amassed a personal fortune by soliciting bribes and receiving payments from government contractors. He controlled accounts with RBS, HSBC, Barclays and NatWest, despite statements in asset disclosures to the Nigerian government that he held no foreign bank accounts. Both the receipt of payments from contractors and the maintenance of foreign bank accounts by a public official violated the Nigerian Constitution.

RBS, HSBC, and UBS allowed him to receive payments and property from contractors working for Bayelsa State. The High Court ruled that a number of the RBS and HSBC transactions were bribes and ordered that all of Alamieyeseigha's assets at the banks be returned to Nigeria. His UBS assets were returned to Nigeria following an out-of-court settlement between Nigeria and UBS. In 2003, the Nigerian Independent Corrupt Practices and Other Related Offences Commission began investigating Alamieyeseigha for corruption, which was prominently reported and easily could have been discovered by a bank conducting due diligence. At least one of the banks, UBS, was aware of the allegations in 2003 and continued to do business with Alamieyeseigha. Additionally, the amount of money moving through his accounts with the banks significantly exceeded the assets and income claimed on the disclosures he filed with the Nigerian government.

Despite the constitutional prohibition on foreign bank accounts, Alamieyeseigha had opened an account with UBS in England just three months after taking office as Governor in 1999. Shortly after opening the account, he told UBS staff that he anticipated a sharp increase in deposits from $35,000 to $1.5 million. UBS filled out an "Approval Form" for "Public Functionaries" in late 1999 indicating that the bank knew Alamieyeseigha was an elected official and stating that his wealth was unrelated to his political activities. Although it carried out at least a cursory investigation into Alamieyeseigha's source of wealth, Global Witness concluded that UBS never saw any of his asset declarations to the Nigerian government or knew that he was required to submit such declarations. A thorough investigation of the financial requirements for a Nigerian governor likely would have revealed both the requirement to submit asset declarations and the ban on accounts outside of Nigeria. A review of his asset declarations would have revealed a discrepancy between his reported income and assets and the $1.5 million planned for deposit into the UBS account.

In late April 2001, a Bayelsa State contractor deposited $1 million into the UBS account and, a week later, made an additional $500,000 deposit to the same account. By this time, UBS was a signatory to the Wolfsberg Principles, which state that banks should accept only clients whose wealth could reasonably be established as legitimate and would subject politicians and other individuals with positions of public trust to heightened scrutiny. A UBS employee "politely" inquired as to the source of these funds and was told by Alamieyeseigha that the money came from the sale of a palace to the contractor. No such property or other properties of such value were listed on his asset declarations. The UBS employee

apparently accepted Alamieyeseigha's statements and, rather than investigate further, convinced Alamieyeseigha to invest the money in a trust account with UBS.

As noted above, UBS was aware of the 2003 corruption investigation of Alamieyeseigha by May of that year. That same month, Alamieyeseigha attempted to use the trust account to buy a luxury apartment in London. This time, UBS categorically insisted on specific documentation regarding the source of the funds in the account. Alamieyeseigha never provided an explanation but found a different way to buy the apartment. Despite his failure to respond to inquiries regarding the funds in the account, UBS kept the trust account open. By December 2005, Alamieyeseigha's personal account with UBS contained over $500,000 and the trust account contained $1.8 million, considerably above his declared assets.

Around the same time the UBS account was opened in 2001, the same contractor who opened that account paid £1.4 million through HSBC for a London residence on behalf of Alamieyeseigha with the assistance of an HSBC banker. Documents indicate that the HSBC banker was aware that the contractor planned to purchase the house for Alamieyeseigha through a British Virgin Islands shell company. It is unclear whether the HSBC banker knew the shell company was wholly owned by Alamieyeseigha. The contractor also referred to Alamieyeseigha as "Chief" in communications with the banker, which likely should have prompted HSBC to investigate whether Alamieyeseigha was a public official. While it is unclear whether HSBC raised any concerns about this transaction or conducted any due diligence, the High Court later described it as a bribe.

Later in 2001, the same contractor opened an account at HSBC for Alamieyeseigha with a £420,000 deposit. Both the contractor and the contractor's lawyer already banked at HSBC and served as Alamieyeseigha's "referees" for the bank. Alamieyeseigha and the contractor later gave conflicting accounts as to whether the money in this account was related to the contractor's business with Bayelsa State. HSBC informed Global Witness that it was aware that the Nigerian Constitution prohibited governors from holding bank accounts outside of Nigeria and from receiving gifts from government contractors, but did not confirm whether it was aware of these prohibitions at the time of these transactions. HSBC refused to comment on the case in particular, but stated that it has had policies relating to anti-money laundering controls since 1994 and specific policies related to "politically exposed persons" since 2000.

In 2004, Alamieyeseigha opened an account at RBS using a second offshore shell company based in the Seychelles. Although he claimed that he expected the annual turnover for the account to be £250,000, approximately £2.7 million was deposited in 26 separate deposits in the fourteen months after he opened the account. Of those deposits, about £1.6 million came through a Nigeria-based bank from a company that contracted with Bayelsa State. Although Alamieyeseigha claimed the deposits were unspent campaign funds, the High Court stated that the evidence showed that the deposits were bribes. It is unclear whether RBS identified Alamieyeseigha as a senior foreign official with a higher risk of money laundering activities and whether RBS investigated the source of his funds. Even if RBS did not know Alamieyeseigha's status as a governor (easily obtainable from an Internet search) or that the funds came from a contractor in the state he governed, the transaction should have undergone heightened scrutiny because the funds came through a bank based in Nigeria, which was on the NCCT list at the time. Additionally, RBS should have scrutinized this shell company account because, other than one property purchase, money was only deposited into the account and never withdrawn, which a judge later observed

was not characteristic of a functioning business. RBS cooperated with authorities investigating Alamieyeseigha, but declined to answer specific questions from Global Witness.

2. Dariye

Joshua Dariye, governor of Plateau State from 1999 to 2007, was arrested in London in September 2004 on money laundering and corruption charges but subsequently fled to Nigeria. The U.K. Metropolitan Police began their investigation of Dariye in July 2003. According to documents obtained by Global Witness, Dariye transferred approximately £2.85 million into the United Kingdom through multiple accounts with Barclays and NatWest. Following successful civil asset recovery proceedings by Nigeria, the assets in these banks were returned to Nigeria. Although he was immune from prosecution in Nigeria during his governorship, at the time of the report Dariye was awaiting trial on fourteen money laundering and corruption charges.

Between July 2003 and March 2004, about £1.17 million of the funds was routed through the NatWest account of a Dariye associate. That associate, a housing tenancy manager in a London suburb, was later jailed for three years for money laundering in connection with those deposits. The associate, who was made the guardian of Dariye's children, claimed the money was used to pay the costs of educating the children at a private school in England. It is unknown whether NatWest knew of the association with Dariye or conducted due diligence on these transfers. However, such large deposits were likely inconsistent with the normal banking activity and salary of a housing tenancy manager, which under the Steering Group guidance should have led to additional scrutiny of the transactions.

Between September 1999 and January 2004, £1.69 million was transferred through Barclays and NatWest accounts held by either Dariye or his wife. A large portion of these transfers was deposits of tens of thousands of pounds of cash. Under the Steering Group's guidance, such large cash transfers should have triggered additional scrutiny. Like Alamieyeseigha, Dariye claimed to have no accounts outside Nigeria on his asset declarations to the Nigerian government.

3. Responses

Four of the five banks (Barclays, HSBC, NatWest, and UBS) also reportedly took money from former Nigerian dictator Sani Abacha during the 1990s. As a result of the revelation of this activity in 2001, the banks purportedly tightened their internal procedures to prevent corruption. Although some of the banks replied to inquiries by Global Witness with general statements about their approaches to fighting financial crimes, none of the banks answered specific questions about their role in Alamieyeseigha's or Dariye's activities.

As of the date of the Global Witness report, the U.K. regulator, the Financial Services Authority ("FSA"), had never publicly fined or named any British bank for handling corrupt funds, either willingly or negligently, although it claims to have demanded changes to the banks' procedures following the Abacha allegations. In the past two years, the FSA has imposed fines on banks on several occasions for inadequate anti-money-laundering procedures, unrelated to corruption. In addition, the FSA fined RBS £5.6 million in 2010 for failing to properly implement U.K. financial sanctions. The FSA refused to confirm or deny that enforcement action was taken against the banks discussed in the Global Witness report and has made no public statement on whether it investigated the allegations concerning Alamieyeseigha, Dariye, and the five banks. The British coalition government promised to break up the FSA, moving its

functions to the Bank of England and two new entities, a Consumer Protection and Markets Authority and an Economic Crime Agency. The entity to be tasked with responsibility for enforcing anti-money laundering laws has not been identified.

4. Recommendations

The Global Witness report makes a number of recommendations stemming from the above-described cases, certain of which may be more likely to be implemented than others:

- Banks should keep lists of countries that ban specific politically exposed persons from holding accounts abroad and should not accept such persons as customers. Regulators should ensure that this happens and provide information on which countries impose such bans.

- Regulations should require that banks only accept funds from politically exposed persons, or their family members and associates, if the bank has strong evidence that the source of funds is not corrupt.

- To address the lack of transparency regarding shell companies, every country should publish an open list of the beneficial owner/controller of all companies and trusts, and subject institutions that register them to due diligence requirements.

- The international community and national regulators must provide more information to banks on corruption-related money laundering to educate their staff on identifying potentially corrupt funds.

- Using proactive techniques, regulators should ensure that banks carry out meaningful customer due diligence, especially for politically exposed persons. Regulators should identify banks that fail to implement their own policies and name and shame banks that take corrupt funds or have inadequate systems in place.

- Countries should deny visas to foreign officials where there is credible evidence they are involved in corruption.

II. <u>Relevant Developments in European Law</u>

A. The European Court of Justice & In-House Counsel Legal Privilege

In a landmark ruling issued September 14, 2010 in *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*, the European Court of Justice ("ECJ") rejected calls to broaden the scope of the attorney-client privilege in European Union ("EU") competition law investigations carried out by the European Commission ("EC"). In such investigations, the attorney-client privilege is subject to two cumulative conditions, as originally established in a 1982 ECJ ruling in *AM & S Europe v. Commission*: (i) the exchange with the lawyer must be connected to "the client's rights of defense" and (ii) the exchange must emanate from "independent lawyers," *i.e.*, "lawyers who are not bound to the client by a relationship of employment." The ECJ confirmed that the attorney-client privilege in EU competition law matters extends only to communications between the client and an external lawyer admitted to the Bar of a

Member State of the European Economic Area ("EEA"). Crucially, the attorney-client privilege *does not* protect from discovery and disclosure in an EU competition law case internal communications between company management and an in-house lawyer, even if that lawyer is admitted to and a member of the Bar, nor does it protect communications between the company and external lawyers who are not admitted to the Bar of an EEA Member State.

1. Case Background

On February 12 and 13, 2003, EC officials, assisted by representatives of the U.K. Office of Fair Trading ("OFT"), carried out a surprise investigation on the premises of Akcros Chemicals Ltd. ("Akcros") in Manchester, England, and seized copies of a number of documents. Akcros representatives informed the EC officials that certain seized documents were covered by the attorney-client privilege. The EC officials and Akcros representatives disagreed on the applicability of the attorney-client privilege to several documents, in particular two emails between the managing director of Akcros and the in-house coordinator for competition law at Ackros' then-parent, Akzo Nobel ("Akzo"). The in-house lawyer, who was also an Advocaat of the Netherlands Bar, had signed an agreement with Akcros that specifically acknowledged his independence and professional obligations to the Netherlands Bar, which would have permitted the company to assert privilege under Dutch law. The EC rejected the claim of privilege in a 2003 decision. Akzo and Akcros challenged the EC's decision before the Court of First Instance (now the General Court), which dismissed the challenge in 2007. Akzo and Akcros appealed that dismissal to the ECJ. The United Kingdom, the Netherlands, Ireland, and a number of professional associations intervened in support of extending the attorney-client privilege to in-house counsel.

2. The ECJ's Decision

Akzo, Akcros, and a number of the interveners argued that the criterion that the lawyer must be "independent" should not be interpreted to exclude in-house lawyers. They argued that in-house lawyers enrolled in a bar or law society are as independent as external lawyers due to their obligations of professional conduct and discipline. The ECJ reiterated that the requirement that the lawyer be independent was based on "a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs." The ECJ held that "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that attorney-client privilege does not cover exchanges within a company or group with in-house lawyers." It stated that, due to their economic dependence and close ties with their employers, in-house lawyers do not have the same degree of independence from their employers as lawyers working in external law firms with respect to their clients, despite their professional ethical obligations and any membership in a bar or law society. In-house lawyers may also be required to carry out tasks that have an effect on the commercial policy of the company. The ECJ held that an in-house lawyer cannot be treated in the same manner as an external lawyer because he is an employee, "which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."

The ECJ further held that, although recognition of the attorney-client privilege for communications with in-house lawyers has become more common at the national level than at the time of the original *AM & S Europe* case, it was not possible to identify tendencies in the national laws of EU Member States that were uniform or had clear majority support. Many Member States do not extend the attorney-client

privilege to communications with in-house lawyers and a number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society. The ECJ held that the legal situation of EU Member States and EU law had not evolved to such an extent as to justify recognition of attorney-client privilege for in-house lawyers.

Akzo and Akcros similarly argued that attorney-client privilege should be extended to in-house lawyers in the interest of legal certainty. They argued that, because EU competition law is often applied in parallel with corresponding national laws and many EU Member States recognize attorney-client privilege for in-house lawyers, the application of attorney-client privilege should not depend on which authority carries out the investigation. The ECJ, however, determined that limiting the scope of attorney-client privilege in EU competition law investigations carried out by the EC did not create any legal uncertainty as companies can determine their rights, obligations, and position based on which authority conducts the investigation.

The ECJ rejected the argument that the need for confidential in-house legal advice to prevent infringements of competition law had increased due to the modernization of procedural rules and the desirability of the establishment of compliance programs. It also rejected the argument that the principle of national procedural autonomy, which allows EU Member States to designate procedural rules for their domestic legal systems governing actions based on rights derived from EU law, meant that Member States could define the limits of attorney-client privilege. The ECJ held that the principle of national procedural autonomy did not affect the scope of the attorney-client privilege in EC investigations under EU law. Rather, the ECJ held that the interpretation and application of EU law cannot depend on the national law relevant to the inspected company.

3. Impact

In *Akzo*, the ECJ reaffirmed that the attorney-client privilege in EU competition law investigations before the EC does not apply to in-house attorneys. Companies with operations in the EU therefore must be cautious with respect to communications containing legal advice from in-house counsel. This rule extends only to EU competition law investigations before the EC; national law covering privilege will govern in other situations, likely covering most investigations. However, materials produced in EU/EC investigations may become accessible to plaintiffs or regulators in other countries, including non-EU countries, even if those materials would have been privileged originally in those countries. Similarly, as occurred in *Akzo*, the EC may ask officials of a national competition authority to assist in an investigation, and in such a situation, the *Akzo* rule would apply and privilege would not be available for communications with in-house attorneys. Companies should be aware of the different privilege rules potentially applicable to them depending on jurisdiction and select appropriate counsel accordingly.

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