

Foreign Corrupt Practices Act Alert

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LITIGATION/CONTROVERSY

Global Anti-Bribery Year-in-Review: 2013 Developments and Predictions for 2014

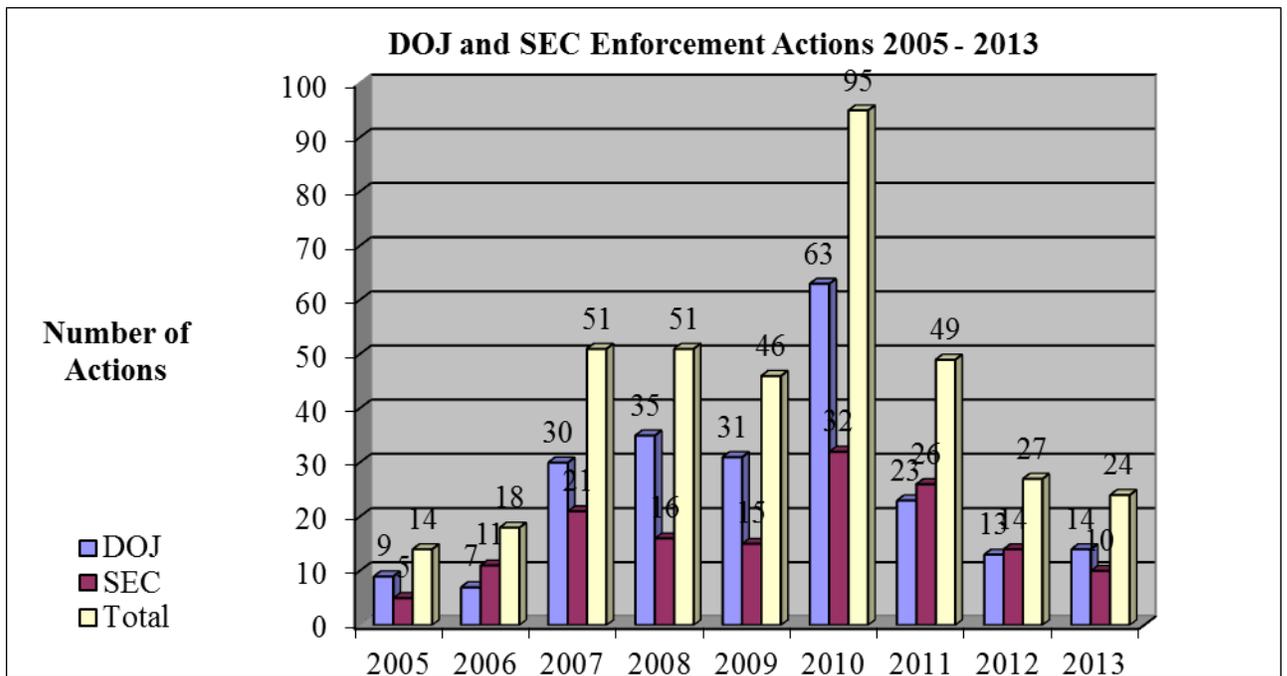
The year 2013 witnessed several interesting trends in the enforcement of the Foreign Corrupt Practices Act (FCPA) by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). As was the case over the past two years, the number of corporate settlements was down year-over-year, and SEC enforcement actions dropped significantly. Nonetheless, two of the corporate settlements announced were among the largest settlements in FCPA history (with a third large settlement following in the first weeks of 2014)—and prosecutions of individuals were up year-over-year compared with 2012. The year 2013 also saw an increased number of publicly announced declinations. This Review discusses notable trends and developments in 2013 corporate settlements and individual prosecutions, key FCPA legal developments, notable collateral litigation developments, and significant developments in international anti-corruption law. We also look ahead to possible trends in 2014.

1) Enforcement Trends and Priorities

In 2013, DOJ brought 14 enforcement actions against companies and individuals, and the SEC brought ten such actions.¹ Although these numbers are collectively lower than 2012 comparables, prosecutors have said they are busier than in the past and are focused on significant enforcement actions.² In remarks made at an FCPA conference in November 2013, Charles Duross, then Deputy Chief of DOJ's Fraud Section and head of its FCPA Unit, noted that two-thirds of the top 20 largest FCPA corporate penalties have occurred in the last three-and-a-half years.³ Indeed, two of the ten largest FCPA settlements in history were announced in 2013—Total S.A. and Weatherford International Ltd., both of which are discussed in more detail later in this Review.⁴ Both Duross and Kara Brockmeyer, Chief of the SEC's FCPA Unit, have noted that there is a "substantial pipeline of matters" including both "standard" and "grand corruption" cases.⁵

In January 2014, Duross left DOJ for private practice, and Patrick Stokes replaced him as head of DOJ's FCPA Unit.⁶ Recent media reports have noted that there is also significant turnover among the line prosecutors in the FCPA Unit at DOJ.⁷ Notwithstanding these changes, DOJ and the SEC stated in September that collectively they have approximately 56 full-time prosecutors, staff attorneys and support staff devoted to the FCPA, a significant increase from just a few years ago.⁸

Both DOJ and the SEC continued in 2013 to focus on high-profile ongoing investigations, such as Walmart Stores, Inc.'s business practices in Mexico, India, and elsewhere; Avon Products, Inc.'s compliance with the FCPA and foreign laws in China; and Alcoa Inc.'s dealings with a majority state-owned company in Bahrain (which was resolved on January 9, 2014)⁹; as well as new investigations, including recent inquiries into the hiring practices in Asia of various Wall Street financial institutions.¹⁰ The prosecution of individuals for FCPA violations remained an enforcement priority for both DOJ and the SEC in 2013, as did cooperation with international law enforcement agencies, both of which are described in more detail later in this Review.



a) Decline in Resolved SEC Enforcement Matters

Although SEC FCPA Chief Brockmeyer has emphasized the SEC’s continuing enforcement work and pipeline of ongoing cases, the number of FCPA enforcement actions brought by the SEC across the past three fiscal years dropped substantially.¹¹ During the calendar year 2013, the SEC brought a total of nine FCPA enforcement actions against companies Keyuan Petrochemicals, Koninklijke Philips Electronics, Parker Drilling Company, Ralph Lauren Corporation, Total, Diebold, Stryker, Weatherford, and Archer Daniels Midland Company (ADM), as well as one enforcement action against an individual.¹²

The SEC’s enforcement action against Keyuan Petrochemicals was FCPA-related, and we have included the action in our yearly statistics; however, the SEC does not list it among its 2013 FCPA enforcement actions.¹³ The SEC’s complaint against Keyuan Petrochemicals and its former CFO, described in further detail below, primarily focused on allegations pertaining to the failure to disclose various related-party transactions but also contained an allegation that the company maintained an off-balance sheet account that was used, in part, to fund cash and other gifts for Chinese government officials.¹⁴

The decrease in the number of resolved enforcement actions overall is interesting but may simply be a matter of timing. The SEC has not given any indications of backing away from FCPA enforcement and has many significant ongoing investigations.

b) Increased Use of Out-of-Court Settlements by the SEC

Interestingly, four of the nine FCPA actions brought by the SEC in 2013 were resolved without federal court approval. The SEC resolved three actions—Stryker, Total, and Philips—through administrative proceedings¹⁵ and the fourth—Ralph Lauren Corporation—through a non-prosecution agreement (NPA).¹⁶ This higher-than-typical proportion of non-federal court resolutions may have been a result of increased scrutiny of SEC settlements by the federal judiciary over the past few years.¹⁷ For example, in 2013, U.S. District Court Judge Richard Leon imposed additional conditions beyond what the SEC had required in settlements involving IBM and Tyco International. Both companies had previously settled FCPA claims with the SEC and, in those settlements, dating back to 2000 for IBM and 2006 for Tyco, agreed never to violate the FCPA again.¹⁸ Judge Leon required the parties, over the period of two years, to make various reports to the SEC and to the court, including reporting of instances where it is “reasonably likely” that they violated the FCPA by means of either an improper payment or fraudulent books and records entries.¹⁹ The court also required the companies to report becoming aware of being

the subject of any federal criminal investigations or enforcement proceedings, as well as becoming a party to any major administrative proceedings or civil litigation.²⁰ This increased scrutiny of SEC settlements has occurred in other high-profile matters that did not involve the FCPA.²¹

c) Further Changes to the SEC's "Neither Admit nor Deny" Policy

After ending in early 2012 its use of the "neither admit nor deny" approach in settlements where the defendant has admitted violations of criminal law,²² in 2013, the SEC announced a further change to its "neither admit nor deny" policy. In September 2013, SEC Chairman Mary Jo White announced that the SEC may seek admissions in cases "where there is a special need for public accountability and acceptance of responsibility."²³ The SEC explained that it will consider seeking an admission in the following circumstances:

- where a large number of investors have been harmed or the conduct was otherwise egregious;
- where the conduct posed a significant risk to the market or investors;
- where admissions would aid investors deciding whether to deal with a particular party in the future; or
- where reciting unambiguous facts would send an important message to the market about a particular case.²⁴

Since that announcement, the SEC has sought admissions in a number of cases. For example, the SEC required three brokerage subsidiaries to admit that a scheme that caused many of their customers to pay substantially higher amounts for securities transactions violated securities laws, and the SEC also required Philip Falcone and Harbinger Capital to admit multiple counts of wrongdoing in August 2013.²⁵ Likewise, in the SEC's September 2013 settlement with JP Morgan related to the "London Whale" trading losses, the company admitted certain allegations in the SEC's charging document.²⁶ The Falcone/Harbinger and JP Morgan settlements appear to be the first time the SEC has implemented its policy of seeking an admission even where no parallel criminal charges are brought against the company.

Among the SEC's 2013 FCPA settlements, the Koninklijke Philips Electronics, Ralph Lauren, Stryker, and Keyuan Petrochemicals actions settled on a "neither admit or deny" basis.²⁷ The publicly available documents pertaining to Total were silent on this issue, which is surprising because Total admitted as true allegations set forth in parallel criminal proceedings.²⁸ In contrast, the Parker, Diebold, Weatherford, and ADM settlement papers referenced the companies' acknowledgements of responsibility and/or acknowledgements of the accuracy of facts set forth in related criminal proceedings.²⁹ It will be interesting to see in 2014 and beyond how the SEC implements its new policy on admissions and whether the factors leading to a requirement of an admission by the SEC become more clear.

d) Continued Focus on Industry Sweeps

As in the past several years, enforcement authorities have continued to focus their efforts on industry "sweeps," most notably in the SEC's investigation into the hiring practices of Wall Street financial institutions in Asia, which followed publicity about JPMorgan Chase's purported hiring of relatives of Chinese government officials.

In August 2013, the *New York Times* reported that U.S. authorities were investigating whether JPMorgan Chase hired the children of Chinese government officials to help obtain business contracts in that country. News reports have said that JPMorgan paid \$1.8 million from 2006 to 2008 to a consulting firm run by Lily Chang, a name used by the daughter of the former Chinese premier, while the premier was overseeing financial regulations in the country.³⁰ According to media reports, JPMorgan operated a program known as "Sons and Daughters," which was supposed to ensure that JPMorgan hired qualified children of Chinese officials.³¹ The press reports say that, through this program, JPMorgan hired the son of the chairman of China Everbright Group, a state-controlled financial conglomerate, and the daughter of an official of the Chinese Railway Group, a state-controlled construction company that builds railways for the Chinese government.³² Press reports allege that JPMorgan won multiple assignments from the Everbright Group and helped China Railway raise more than \$5 billion when it went public in 2007.³³

Beginning in November, the SEC staff reportedly asked several other financial institutions, including, according to media reports, Credit Suisse, Citigroup, Deutsche Bank, Goldman Sachs, and Morgan Stanley, to voluntarily disclose whether they have a referral hiring program for relatives of government officials in the Asia-Pacific region.³⁴

These investigations (as well as others that we are aware of that are not publicly reported) are noteworthy as they signal that DOJ and the SEC are focused on hiring practices—including unpaid internships—as a potential area for FCPA violations. At the same time, there has been emerging public debate about whether the SEC's focus on employment of the children of foreign officials is fair or wise; as Former SEC Chairman Arthur Levitt noted in a recent op-ed in the *New York Times*: “It is hypocritical of financial regulators to criticize—even penalize—practices abroad that are commonplace in Washington, New York and other seats of political and economic power.”³⁵

These investigations also reflect an emerging pattern of industry sweeps, as issues discovered in one company lead investigators to explore similar issues in other companies. As we reported for [2011](#) and [2012](#), DOJ and the SEC have previously pursued such sweeps in relation to the financial industry's sovereign wealth funds practices, the oil and gas industry's practices in Libya, movie studios' business in China, and the practices of various players in the pharmaceutical and medical device industries.³⁶ Some of the investigations stemming from these sweeps are ongoing.

e) Continued Focus on China

China continues to be a major focus of FCPA enforcement. In October 2013, DOJ and the SEC announced that Diebold, Inc. had agreed to pay over \$48 million to resolve allegations it had bribed government officials in China and other foreign countries to obtain and retain contracts to provide ATMs to state-owned banks.³⁷ Diebold was alleged to have provided approximately \$1.8 million worth of payments, gifts, and non-business travel for employees of Chinese state banks.³⁸ Diebold agreed in its resolutions with DOJ and the SEC to implement stricter internal controls, cooperate with the government, and retain a compliance monitor for at least 18 months.³⁹

In October 2013, Avon Products, Inc. disclosed that the SEC proposed a settlement based largely on conduct in China “of a magnitude significantly greater” than the company's June 2013 \$12 million settlement offer to DOJ and the SEC.⁴⁰ Avon expressed its disagreement with the SEC's assumptions and methodologies of calculation and its belief that “monetary penalties at the level proposed by the SEC staff [were] not warranted.” The company also noted its expectation that DOJ would propose a settlement, although it had not yet done so.⁴¹ The settlement offers stem from allegations of improper travel, entertainment, and gifts in China, for which the company initiated an internal investigation in 2008 and voluntarily disclosed to DOJ and the SEC.⁴²

In 2013, DOJ also announced the indictment of an individual—former Maxwell Technologies executive Alain Riedo—related to his involvement in the payment of bribes to Chinese officials, as described in detail later in this Review. In addition, as discussed below, the Chinese government has aggressively pursued alleged corruption issues in 2013, most notably involving pharmaceutical companies.

Aside from these publicly disclosed matters involving China, there are a number of other corporate investigations involving conduct in China of which we are aware that have not yet been publicly disclosed.

2) Notable Features of Recent Settlements

a) Hybrid Monitors

As we reported [last year](#), there has been a trend away from the imposition of external compliance monitors in FCPA settlements over the past several years and a movement towards self-reporting by companies. In 2013, there was a rise in the number of “hybrid” monitorships, in which a company is required to retain an independent monitor to evaluate the company's compliance program, but then is permitted to engage in self-monitoring—filing its own reports with the government describing its compliance efforts—for the rest of the term. In the hybrid monitorships to-date, the length of the monitorship has been for “not less than” 18 months—approximately half of the full term of the

monitorships typically included in standard three-year deferred prosecution agreements (DPAs). The hybrid monitor approach can significantly lessen the burden and cost of complying with the rigorous terms of DPAs.⁴³

Hybrid monitors were imposed in three major settlements in 2013. In Bilfinger SE, which was announced by DOJ in December 2013, DOJ imposed a hybrid monitor as a part of a \$32 million criminal penalty and three-year DPA.⁴⁴ As a part of the DPA, Bilfinger agreed with DOJ to retain an independent corporate compliance monitor for not less than 18 months. While DOJ's press release announcing the resolution did not provide a specific reason for the shortened term of the monitorship, it did "acknowledge[] Bilfinger's cooperation . . . and its remediation efforts."⁴⁵

In November 2013, Weatherford International Ltd. agreed to pay \$153 million in penalties and fines to settle a long-standing investigation by DOJ and the SEC into violations of the FCPA.⁴⁶ As part of the agreements with DOJ and the SEC, Weatherford agreed to retain an independent compliance monitor for 18 months to assist with continued government monitoring.⁴⁷ The government may have agreed to a reduced term of compliance monitoring for Weatherford for the same reasons the government cited in agreeing to a reduced criminal penalty—namely the significant steps taken by Weatherford to improve its compliance systems, which are discussed in further detail later in this Review.⁴⁸

Finally, in the Diebold settlement discussed above, the DOJ resolution included a requirement that, among other things, Diebold retain a compliance monitor for not less than 18 months, while the DPA term would run for three years. Diebold's agreement "acknowledge[d] Diebold's voluntary disclosure and extensive internal investigation and cooperation."⁴⁹ In settlement of the SEC's charges, Diebold consented to a parallel monitoring term.⁵⁰

Under the terms of these agreements, the monitor will typically issue an initial report, a follow-up report, and a "Certification Report" over the 18 months of the monitorship. The company must then report at six-month intervals, resulting in three additional reports over the remaining 18 month period.⁵¹ The DPAs that have incorporated this concept contemplate the potential extension of the monitorship beyond the remaining 18 months if DOJ concludes that a company has not successfully satisfied its compliance obligations under the DPA (by a year or even by the full term of the DPA based on the results of follow-up reviews).⁵² Although, as of yet, there are not many examples of these types of agreements, it appears that settlement of SEC charges usually involves a monitoring agreement that mirrors the criminal DPA, as has been the case in other matters in the past where monitors were imposed.⁵³

Then DOJ FCPA Chief Duross explained that DOJ had previously taken an "all or nothing approach" with respect to corporate monitors but found that using the "hybrid" approach of reducing the length of a monitorship gave DOJ "a bit more flexibility."⁵⁴ In other public remarks, Duross indicated that DOJ will continue to implement the hybrid approach.⁵⁵

We note that while the use of such hybrid monitorships is less burdensome than a full monitorship, there has been a trend in recent years, as discussed above, of imposing no monitor at all in most cases.⁵⁶ It will therefore be interesting to see how the enforcement authorities implement monitorships in future cases, in terms both of the length of the monitorships and the factors the government focuses on in imposing monitorships at all.

b) SEC's Use of Non-Prosecution Agreements

In 2013, the SEC for the first time used an NPA to settle an FCPA case. In its April 2013 agreement with the Ralph Lauren Corporation, the company entered into an NPA and agreed to disgorgement of \$700,000 in order to resolve allegations that Ralph Lauren's Argentine subsidiary used a customs broker to facilitate bribes of customs officials.⁵⁷ Ralph Lauren also entered into an NPA with DOJ to resolve similar charges and paid a monetary penalty of \$882,000.⁵⁸ The SEC has previously used NPAs to settle non-FCPA cases.⁵⁹ The SEC also previously used a DPA in an FCPA case⁶⁰ and in 2013 announced its first DPA with an individual in a non-FCPA case, where a hedge fund administrator voluntarily cooperated with the SEC and assisted the agency in building a case against another employee.⁶¹

According to the settlement papers, over a four-year period, Ralph Lauren's Argentine subsidiary made payments valued at approximately \$568,000 through a customs broker to improperly secure importation

of Ralph Lauren products into Argentina.⁶² The broker described the bribes on invoices as “Loading and Delivery Expenses” and “Stamp/Label Tax.”⁶³ In addition to the customs broker’s bribes, the subsidiary’s general manager directly provided or authorized gifts to Argentine government officials to improperly secure importation of products. At the times the bribes were paid, Ralph Lauren did not have an anti-corruption program and did not provide any anti-corruption training. Additionally, the company had very little oversight over its Argentine subsidiary. According to the SEC, the company discovered the bribes “after it put in place an enhanced compliance program and began training its employees.”⁶⁴ The company promptly reported its discovery of the bribes to the government within two weeks.

In its press release, the SEC explained that it decided not to charge Ralph Lauren due to the company’s speedy reporting, its voluntary and expeditious production of documents (and translations of those documents) to the SEC, its provision of witness interview summaries, and its willingness to bring overseas witnesses to the United States so that they could be available to the SEC. The SEC praised these efforts, which it said “saved the agency substantial time and resources ordinarily consumed in investigations of comparable conduct.”⁶⁵

In addition, the SEC took into account the “significant remedial measures” undertaken by the company, including the creation of an enhanced compliance program that included training, strengthening its internal controls, and strengthening its due diligence process, as well as the termination of all employees and other parties involved in the misconduct.⁶⁶ The SEC also noted that the company “conducted a risk assessment of its major operations worldwide to identify any other compliance programs” and had stopped doing business entirely in Argentina.⁶⁷

c) Critical Importance of Third-Party Due Diligence

As always, many of the settlements announced in 2013 involved improper payments made through third parties—including the two largest settlements, Total and Weatherford, among others. SEC FCPA Chief Brockmeyer stated recently that more than half of the SEC’s cases have involved third-party intermediaries.⁶⁸ These settlements underscore the critical importance of companies conducting thorough due diligence on third parties prior to initiating a relationship with them, as well as continuing to monitor those third parties after they are retained.

The largest FCPA settlement in 2013 occurred in May when Total S.A., a French oil company, agreed to pay \$398 million in penalties and profit disgorgement to settle DOJ and SEC charges relating to payment of an Iranian official to gain access to Iran-controlled oil and gas fields.⁶⁹ According to the DOJ charging papers, Total paid approximately \$60 million in bribes between 1995 and 2004, and as a result won development contracts with the National Iranian Oil Company that led to about \$150 million in profits. Of the eight discrete payments that supported DOJ’s conspiracy charge, four were paid by Total itself, all out of bank accounts in Zurich or Paris.⁷⁰ Three additional payments were made by Total’s wholly-owned Bermudian subsidiary, Total International Ltd., from its Zurich accounts, but one payment was made from Total International’s New York-based account and Total itself allegedly “submitted for processing” a request for this payment.⁷¹ Total paid these bribes through a third-party designated by the Iranian official and used phony consulting agreements to disguise the real purpose of the payments. It does not appear that Total conducted any meaningful due diligence on the third party, and it is unclear what legitimate services, if any, the third party provided. Total described the payments to the third party vaguely in its financial records as “business development expenses” without additional explanation, and falsely characterized the consulting agreements as legitimate.⁷² DOJ also identified ten specific shortcomings in Total’s internal controls, including the lack of adequate anti-bribery compliance policies and an adequate system for selecting and approving third-party consultants.⁷³

Although Total is a French corporation, DOJ and the SEC asserted jurisdiction based on American Depositary Receipts (ADRs) registered with the SEC and traded on the New York Stock Exchange, making Total an “issuer” under the FCPA. Aside from the monetary penalties, which made it one of the largest FCPA cases ever, the government subjected Total to a full three-year independent monitorship, in contrast with the hybrid monitorship approach described earlier in this Review.

In November, Weatherford International Ltd. agreed to pay \$153 million in penalties and fines to settle a long-standing investigation by DOJ and the SEC into violations of the FCPA.⁷⁴ Weatherford entered into a

three-year DPA with DOJ—and one of its subsidiaries agreed to plead guilty to anti-bribery violations—to settle an internal controls charge related to two bribery schemes in Angola, another in the Middle East, and corrupt conduct related to the UN Oil-for-Food-Program in Iraq. Criminal internal control charges are relatively rare; in this case, DOJ based the criminal internal controls charge on the company’s “knowing failure to implement internal accounting controls.”⁷⁵ The two bribery schemes in Angola both involved the use of third parties. In the first, the Weatherford subsidiary entered into a joint venture with two entities controlled by high-level officials of Sonangol, the Angola national oil company, and their relatives.⁷⁶ The subsidiary did not conduct any meaningful due diligence, and the two entities who were part of the JV provided no personnel, expertise, or capital contributions to the JV. The JV was subsequently awarded valuable Sonangol contracts. In the second Angola scheme, the Weatherford subsidiary paid a bribe to an Angolan official through a Swiss freight forwarder.⁷⁷ Notably, the Swiss freight forwarder had rejected the insertion of an FCPA compliance clause in its agreement with the Weatherford subsidiary, and the Weatherford subsidiary acquiesced in this request. Finally, in the Middle East bribery scheme, another Weatherford subsidiary paid bribes to officials at a national oil company by providing improper “volume discounts” to a distributor who supplied Weatherford products to that national oil company.⁷⁸ No due diligence was done on the distributor despite the fact that (1) the national oil company had directed the subsidiary to use that distributor and (2) executives at the subsidiary knew that a member of the country’s royal family had an ownership interest in the distributor.

The 2013 Parker Drilling enforcement action also underscores the importance of conducting adequate due diligence on third parties. When Nigerian customs authorities fined Parker Drilling, a drilling-services company headquartered in Houston, Texas, \$3.8 million for submitting false paperwork, Parker’s U.S. counsel advised the company to retain a specific third-party agent to resolve the customs issues. The agent’s resumé indicated that the agent had no experience in Nigeria or with customs issues, and Parker failed to conduct any due diligence on the agent. The agent was paid \$1.25 million to resolve the customs issues, much of which was used by the agent to procure goods and services for Nigerian government officials. Communications indicated that Parker executives were aware that the funds paid to the agent were being used, at least in part, to entertain government officials. As a result of the improper payments, Nigerian customs authorities reduced Parker’s fine to \$750,000. In entering into a DPA with DOJ in April 2013, Parker agreed to a criminal penalty of \$11.76 million. Parker also entered into a civil settlement with the SEC in which Parker agreed to pay \$4.09 million in disgorgement and pre-judgment interest and consented to the entry of a final judgment permanently enjoining it from future FCPA violations. It is noteworthy that this settlement stemmed from DOJ’s Panalpina-related investigations, which also resulted in separate resolutions with Panalpina World Transport (Holding) Ltd.; Panalpina Inc.; Shell Nigeria Exploration and Production Company Ltd.; Transocean, Inc.; Tidewater Marine International, Inc.; Pride International, Inc.; Pride Forasol S.A.S.; and Noble Corporation.

In December, a subsidiary of ADM pleaded guilty to charges that it made payments to Ukrainian government officials through two vendors to obtain value-added tax (VAT) refunds, and ADM itself entered into an NPA with DOJ related to the company’s failure to implement adequate controls in the Ukraine and Venezuela.⁷⁹ ADM agreed to pay \$17.8 million in criminal fines and, in a consent judgment with the SEC, agreed to pay roughly \$36.5 million in disgorgement and prejudgment interest.⁸⁰ The SEC complaint states that “ADM did not implement controls that required pre-clearance or monitoring of [ADM’s subsidiary’s] relationship with third-party agents in the Ukraine or transactions involving the Ukraine government.”⁸¹

3) Public Declinations

As we predicted in [2012](#), the year 2013 saw the continued release of public information about DOJ and SEC investigations that closed without any enforcement actions. An increased willingness on the part of companies to publicly disclose these matters, particularly after the underlying investigations have been publicly disclosed in SEC filings, as well as an increase in cases where the enforcement authorities have sent official notices to companies that investigations are closed, appears to be driving this trend. Unfortunately, most of the announcements do not fully explain the reasons for the government’s decision not to charge and do not provide the kind of detailed analysis the government provided in the Morgan Stanley declination in 2012. Indeed, while these corporate disclosures are frequently referred to generically as “declinations,” that term seems to encompass not only genuine declinations where the government exercises discretion to decline prosecution of an otherwise chargeable offense, but also

cases where the government decides not to prosecute because it has found insufficient evidence of FCPA violations or faces insurmountable legal hurdles in bringing a case.⁸² In securities filings stating that DOJ had decided not to pursue FCPA enforcement action, both 3M Company and DynCorp International disclosed the reasons DOJ had cited for those decisions.⁸³ The reasons cited were largely identical in both cases: the company's voluntary disclosure, thorough investigation, and efforts to enhance its anti-corruption compliance program. Additionally, several other companies that had previously voluntarily disclosed potential FCPA issues—Allied Defense, Deere and Company, IDT Corp, Nabors Industries, Owens-Illinois Group, Raytheon, and Wynn Resorts—also announced that the investigations had been concluded without enforcement action.⁸⁴

Two different industry sweeps initiated over the past several years yielded several declinations in 2013. First, in connection with DOJ's and SEC's five-year-old probe into the medical device industry, both Zimmer Holdings and Medtronic, Inc. announced that DOJ and the SEC had closed their respective FCPA investigations without pursuing any enforcement actions.⁸⁵ Second, six of the oil and gas companies targeted by the SEC's probe into oil and gas companies' transactions in Libya publicly confirmed that the SEC decided not to pursue enforcement actions.⁸⁶

4) Notable Aspects of 2013 Enforcement Actions Against Individuals

In 2013, there was a significant uptick in enforcement actions against individuals, and enforcement officials have indicated that this trend will continue in 2014. In a September 2013 speech, SEC Chairman Mary Jo White noted that the SEC is shifting its enforcement focus from entities to employees.⁸⁷ Andrew Ceresney, Director of the SEC Division of Enforcement, echoed these comments, noting that the SEC is focused on bringing FCPA cases against individuals in order to better root out corruption.⁸⁸

As in the past, because individuals, unlike companies, often litigate the charges against them, cases involving individuals in 2013 continued to contribute to the growing body of FCPA case law. Judicial decisions in two of these 2013 individual prosecutions provided some clarity on the FCPA's extraterritorial reach over non-U.S. offenders and the tolling of the FCPA's statute of limitations when foreign defendants are not found within the United States.

In addition, although the circumstances of FCPA cases against individuals vary, a review of the 2013 cases reveals several key trends, including: (1) an increasing number of successful enforcement actions brought against non-U.S. citizens; (2) the inclusion of accounting provisions violations in charges against individuals; (3) significant benefits for individuals who cooperate with law enforcement officials; and (4) the government's willingness to continue using traditional law enforcement techniques in FCPA-related cases.

a) Key Judicial Decisions

Two February 2013 decisions in the District Court for the Southern District of New York indicated that while there are some limits to the extraterritorial reach of the FCPA, "there is ample (and growing) support in case law for the exercise of jurisdiction over individuals who played a role in falsifying or manipulating financial statements relied upon by U.S. investors in order to cover up illegal actions directed entirely at a foreign jurisdiction."⁸⁹ In October 2012, three former executives of the Hungarian telecommunications firm Magyar Telekom filed a motion to dismiss FCPA-related civil charges arguing that the court lacked personal jurisdiction over the defendants and that the SEC's claim was time-barred.⁹⁰ The defendants were charged by the SEC with allegedly orchestrating, approving and executing a plan to bribe Macedonian officials through the use of sham contracts in 2005 and 2006 in exchange for blocking the entry of competitors.⁹¹ The SEC's complaint also alleged that the three defendants caused the fees for the sham contracts to be falsely recorded in Magyar Telekom's books and records as consulting and marketing services, when no such services had been provided under the contracts.⁹² In addition, the SEC alleged that the defendants had sent two emails in furtherance of the scheme; although those emails were sent from outside the United States, they were routed through and/or stored on network servers located within the United States.⁹³

On February 8, 2013, Judge Richard Sullivan denied the former Magyar executives' motion to dismiss.⁹⁴ As to the jurisdictional issues, Judge Sullivan found that use of e-mails routed through and/or stored on network servers located within the United States was sufficient to plead the jurisdictional element of an

FCPA anti-bribery violation even if the defendant did not personally know where his emails would be routed and/or stored.

Less than two weeks later, on February 19, 2013, Judge Shira Scheindlin granted former Siemens Argentina CEO and German citizen Herbert Steffen's motion to dismiss the SEC's complaint, finding that Steffen's actions were far too attenuated from the resulting harm to establish the requisite minimum contacts for personal jurisdiction.⁹⁵ The SEC's complaint alleged that Steffen's role involved urging another Siemens executive to make bribes⁹⁶ but noted that the Siemens executive did not agree to Steffen's request until after communicating with several higher-level employees.⁹⁷ Judge Scheindlin found Steffen's alleged role to be tangential. She distinguished the Steffen case from the Magyar executives' case, reasoning that in contrast to Magyar, Steffen did not direct, order, have knowledge of, and was not in a position to be aware of, the concealment of the bribes or the falsification of SEC filings.⁹⁸

In addition to addressing the FCPA's extraterritorial reach, the Magyar executives' decision also made it more difficult for non-U.S. citizens residing outside the United States to argue that an FCPA case is barred by the statute of limitations. The defendants in that case argued that the SEC's FCPA claims were time barred because the conduct occurred more than five years before the SEC claims were filed. Judge Sullivan concluded, however, that the plain reading of the statute of limitations provision applicable to FCPA violations does not begin to run until the offender is physically present in the United States.⁹⁹

b) Charges Against Non-U.S. Citizens

As is clear from the Magyar and Steffen cases, a significant number of actions against individuals involved criminal charges against non-U.S. citizens and employees of non-U.S. based issuers. One additional such case is DOJ's October 2013 indictment of former Maxwell Technologies executive Alain Riedo, a Swiss citizen, for his involvement in an alleged scheme to pay bribes to Chinese officials through an agent.¹⁰⁰ Riedo's former employer, Maxwell Technologies, paid approximately \$13.65 million in January 2011 to settle SEC and DOJ charges for the same conduct at issue in the Riedo case.¹⁰¹

The DOJ also signaled in 2013 that foreign officials are not beyond the reach of FCPA enforcement.¹⁰² In May 2013, DOJ charged Thomas Alberto Clarke Bethancourt and Jose Alejandro Hurtado, employees of Miami-based broker-dealer Direct Access Partners (DAP), and Maria de los Angeles Gonzalez de Hernandez, a senior official at Venezuela's state economic development bank (Banco de Desarrollo Económico y Social de Venezuela or BANDES), with conspiring to pay bribes to Gonzalez in exchange for her directing BANDES's financial trading business to the broker-dealer.¹⁰³

According to DOJ, from April 2009 through June 2010, the three co-conspirators participated in a bribery scheme in which Gonzalez directed trading business she controlled at BANDES to DAP, and in return, agents and employees of DAP split the revenue DAP generated from this trading business with Gonzalez.¹⁰⁴ During this time period, DAP allegedly generated over \$60 million in mark-ups and mark-downs from trades with BANDES. Agents and employees of DAP, including Clarke and Hurtado, devised a split with Gonzalez of the commissions paid by BANDES to the DAP.¹⁰⁵ DOJ alleged that to conceal the scheme, the kickbacks to Gonzalez were often paid using intermediary corporations and offshore accounts that she held in Switzerland, among other places.¹⁰⁶

In a separate action, the SEC announced civil charges against Clarke, Hurtado, and two other individuals.¹⁰⁷ Interestingly, the charges initially arose out of a periodic SEC examination of DAP and its Global Markets Group (DAP Global).¹⁰⁸

The year 2013 also saw several non-U.S. citizens enter guilty pleas or agree to settle charges filed in prior years. Frederic Pierucci, a French citizen who headed global sales for the France-based Alstom, was among four Alstom executives criminally charged for allegedly participating in a scheme to bribe Indonesian officials through the use of consultants to win a \$118 million contract from the Indonesian state-owned and state-controlled electricity company.¹⁰⁹ In July 2013, Pierucci pleaded guilty to one count of conspiring to violate the FCPA and one count of violating the FCPA.¹¹⁰

In an example of a civil settlement involving a non-U.S. citizen, Ariel Sharef, a German and Israeli citizen and former executive of the German-based Siemens Aktiengesellschaft, agreed to pay a \$275,000 civil penalty to settle FCPA-related charges with the SEC.¹¹¹ Sharef was one of seven former Siemens

executives, all non-U.S. citizens, civilly charged in Dec. 2011 for their role in a bribery scheme that took place from 1996 to early 2007 to win a \$1 billion Argentine government contract. The SEC alleged that Sharef, the most senior of the defendants, met with “payment intermediaries” in the United States and agreed to pay \$27 million in bribes to Argentina officials in connection with the contract.¹¹² Sharef and seven other individuals, including some of the same individuals charged along with Sharef in the SEC case, also were charged criminally by DOJ in 2011.¹¹³ The DOJ case against Sharef is still pending.

c) Accounting Provisions Violations

Another notable trend in 2013 was the inclusion of violations of the FCPA's accounting provisions in both SEC and DOJ enforcement actions against individuals. In the SEC's first FCPA enforcement action of the year, the SEC charged Aichun Li, the former Chief Financial Officer of China-based Keyuan Petrochemicals with violating several securities laws, including the books and records and internal controls provisions of the FCPA.¹¹⁴ Li was not charged, however, with any violations of the FCPA's anti-bribery provisions. The SEC complaint stated that from 2008 to 2011, Keyuan maintained an off-balance sheet cash account that was used to fund, among other things, cash and in-kind gifts for Chinese government officials.¹¹⁵ According to the SEC, the total amounts disbursed from the account were approximately \$1 million.¹¹⁶ The complaint alleged that Li knowingly failed to implement a system of internal accounting controls and aided and abetted the failure to make or keep books, records, and accounts that accurately reflected the company's transactions and disposition of its assets.¹¹⁷ In February 2013, the SEC announced that Li and Keyuan Petrochemicals agreed to pay \$25,000 and \$1 million respectively to settle charges of disclosure and accounting violations, including violations of the books and records and internal controls provisions of the FCPA.¹¹⁸

DOJ alleged violations of the FCPA accounting provisions, as well as violation of the FCPA's anti-bribery provision, in its indictment of former Maxwell Technologies executive Alain Riedo. As discussed above, former Maxwell Technologies executive Alain Riedo was indicted for conspiring to bribe Chinese officials through agents.¹¹⁹ According to DOJ, the Chinese agents were selling Maxwell Technologies' products with a 20% increase above what the end user should have been charged.¹²⁰ The agent would then bill Maxwell for the additional 20%, and Riedo paid or directed payment of the extra 20% to the agent, from the United States, who then used the extra 20% to pay bribes to Chinese officials in return for securing the contracts.¹²¹ The DOJ indictment alleged that Riedo and his co-conspirators knowingly and willfully circumvented internal controls and caused Maxwell Technologies' books and records to falsely record inflated fees charged by the company's agents as “extra amounts,” “special arrangements,” or “consulting” fees.¹²²

d) Benefits of Cooperation

In 2013, there were several signals that individual defendants benefit from cooperating with government investigations. For example, as noted above in this Review, in November 2013, the SEC entered into its first ever DPA with an individual because of the individual's substantial cooperation efforts (the case was not an FCPA case).¹²³

Several individuals charged by DOJ also received reduced sentencing in exchange for their cooperation. In April 2013, DOJ announced the unsealing of criminal charges against four former executives in the aircraft maintenance industry, alleging that they conspired to bribe government officials to secure contracts in Brazil, Mexico and Panama.¹²⁴ Two of the defendants, Peter DuBois and Neal Uhl, pleaded guilty to their charges in January 2012, and both received reduced sentences for cooperation.¹²⁵ DuBois faced a statutory maximum of ten years in jail for his role in the bribery scheme but received a sentence of eight months' home incarceration and 60 months' probation.¹²⁶ Uhl faced a maximum of five years in jail but was sentenced only to 60 months' probation.¹²⁷ In each case, DOJ recommended a substantial reduction from the Sentencing Guidelines range, pursuant to a 5K1.1 motion, and the court then imposed a sentence even lower than what had been recommended by the government.¹²⁸

Likewise, Clayton Lewis, a former hedge fund executive who pleaded guilty in 2004 to a conspiracy to bribe Azeri officials, in April 2013 received a substantially lighter sentence because of his cooperation with the prosecution of the architect of the corrupt scheme, Viktor Kozeny.¹²⁹ After his guilty plea, Lewis faced a statutory maximum of five years in jail but was only sentenced to time served – the six days he had spent in jail following his arrest in 2003 – and ordered to pay \$100 in court fees. During the

sentencing hearing, U.S. District Court Judge Naomi Reice Buchwald stated that the sentence of time served was appropriate due in part to the length (about ten years), depth, and diligence of Lewis's cooperation with the government's investigation.¹³⁰

The May 2013 sentencing of Paul Novak, a former consultant for Willbros International, also took into account Novak's cooperation with government authorities. Novak, a Nigerian national, was charged along with three former Willbros executives for conspiring to pay \$6 million in bribes to Nigerian officials to obtain and retain a natural gas project for Willbros.¹³¹ The indictment also alleged that Novak and Willbros, employees based in South America, agreed to make approximately \$300,000 in corrupt payments to officials of state-owned PetroEcuador and its subsidiary, PetroComercial, in exchange for the award of a \$3 million gas pipeline project.¹³² Novak initially faced a sentence of up to 35 years in prison and fines of \$250,000 or twice the pecuniary gain or loss from the offense, whichever was greater, for the FCPA and FCPA-related conspiracy violations; and \$500,000 or twice the value of the funds involved in the transfer for the money laundering conspiracy violations, whichever was greater.¹³³ In November 2009, Novak pleaded guilty to one count of conspiracy to violate the FCPA and one substantive count of violating the FCPA.¹³⁴ On May 3, 2013, U.S. District Court Judge Simeon T. Lake III sentenced Novak to 15 months in prison, followed by two years of supervised release, and a \$1 million dollar fine.¹³⁵ Likewise, two of Novak's co-conspirators, former Willbros executives Jim Bob Brown and Jason Steph, pleaded guilty in 2006 and 2007 respectively,¹³⁶ and both faced up to five years in prison.¹³⁷ The court acknowledged at the sentencing hearings for Steph and Brown the assistance they provided in the government's ongoing investigation.¹³⁸ Brown was sentenced to a prison term of 12 months and one day, two years of supervised release, and a fine of \$1,000 per month while Brown was on supervised release.¹³⁹ Steph was sentenced to 15 months in prison, two years of supervised release, and a fine of \$2,000.¹⁴⁰ The fourth co-conspirator, James Tillery, remains a fugitive.

e) Continued Use of Traditional Law Enforcement Techniques

In April 2013, the U.S. Attorney for the Southern District of New York announced the arrest of Frederic Cilins, a French citizen, for obstructing an FCPA and money laundering investigation.¹⁴¹ According to the U.S. Attorney's office, Cilins made repeated attempts to obstruct the grand jury investigation in conversations and meetings with a cooperating witness, the former wife of a now deceased high-ranking official in Guinea.¹⁴² At least one of those conversations was taped through a hidden wire the cooperating witness agreed to wear. Cilins allegedly offered to pay the cooperating witness as much as \$5 million if she would (1) provide him with certain documents the FBI had requested so that Cilins could destroy them and (2) sign an affidavit containing numerous false statements regarding matters within the scope of the grand jury investigation.¹⁴³ In addition to making clear that DOJ will pursue individuals who obstruct FCPA investigations, the Cilins case also signaled that U.S. law enforcement officials are not shying away from the use of traditional law enforcement techniques, such as hidden wires, in FCPA investigations.

5) Key FCPA Legal Developments

a) Jurisdiction

In December 2013, DOJ announced that Bilfinger SE, a German-based international engineering and services company, agreed to pay a \$32 million criminal penalty and enter into a three-year DPA to resolve FCPA charges.¹⁴⁴ A three-count information charged Bilfinger SE, a foreign company that was neither an issuer nor a domestic concern, with conspiracy to violate the FCPA's anti-bribery provisions and two substantive FCPA anti-bribery charges stemming from a scheme to pay more than \$6 million to Nigerian government officials to obtain and retain contracts related to the Eastern Gas Gathering System (EGGS) natural gas pipeline system project.¹⁴⁵

According to the information, in late 2003, Bilfinger's majority-owned subsidiary in Nigeria executed a "consortium agreement" with Willbros West Africa, Inc. (WWA) and Willbros Nigeria Ltd. (WNL), both subsidiaries of Willbros International Ltd. (a Panamanian corporation and domestic concern that had its principal place of business in the United States and through which Willbros Group Inc.—an issuer—conducted its international work), to formalize Bilfinger's agreement to create a joint venture in connection with the EGGS project. According to the information, the Bilfinger/Willbros Nigerian joint venture inflated its bid on the EGGS project by 3% to account for corrupt payments to Nigerian officials. As part of the

conspiracy, Bilfinger reportedly paid Nigerian officials cash that had been shipped from Germany to Nigeria. Prosecutors also said that Bilfinger loaned Willbros employees \$1 million when they had trouble funding their bribes due to Willbros Group Inc.'s internal FCPA investigation.

To establish a jurisdictional basis for the FCPA enforcement action, the information alleged the following overt acts in furtherance of the conspiracy charge: the opening of a U.S. bank account by WWA on behalf of the EGGG Consortium, a telephone call to a Bilfinger employee who was in the United States regarding payments promised to officials, and a flight taken by a Bilfinger employee from Houston, Texas to Boston, Massachusetts for a meeting about outstanding corrupt payments.¹⁴⁶

Interestingly, for the two substantive counts, Bilfinger SE was charged under §§ 78dd-1 and 78dd-2, which are applicable to issuers and domestic concerns, not under § 78dd-3 which is applicable to acts within the territory of the United States. It appears with respect to these two counts that DOJ used an aiding and abetting theory. While the information did not mention “aiding and abetting” within the text, the substantive counts specifically reference 18 U.S.C. § 2, the federal aiding and abetting statute, and the text names Willbros Group Inc., an issuer, and Willbros International Inc., a domestic concern, as other parties engaged in the corrupt conduct. Nonetheless, to maintain the two substantive charges the government needed to establish the use of “means and instrumentalities of interstate and international commerce” in connection with the bribery scheme. The information identified two such “means and instrumentalit[ies]”: (1) the flight from Houston, Texas, to Boston, Massachusetts to discuss promised bribe payments, and (2) a 2005 “wire transfer of \$2,804,496 from Houston, Texas to Frankfurt, Germany in connection with the EGGG contract.”¹⁴⁷

b) Definition of Government Instrumentality

On October 11, 2013, the Eleventh Circuit heard oral argument in *United States v. Esquenazi*—the first opportunity for a federal appellate court to address squarely the government’s broad interpretation of the term “foreign official” under the FCPA.¹⁴⁸ The key issue on appeal was the definition of an “instrumentality” of a foreign government.¹⁴⁹ DOJ and the SEC have long contended that the term “instrumentality” includes state-owned and state-controlled entities.¹⁵⁰ Several district courts have held that the determination of whether a particular entity is an instrumentality under the FCPA should be based on a fact-driven analysis of the entity’s ownership, control, status, and function.¹⁵¹

The appeal brought by defendants Joel Esquenazi and Carlos Rodriguez, convicted of FCPA violations for bribing employees of Haiti state-owned telecommunications company Teleco, seeks to limit that fact-driven analysis.¹⁵² The Haitian government owned 97% of Teleco through the national bank and had appointed key directors to Teleco’s board. But on appeal, Esquenazi’s lawyers argued that state-owned entities must also perform a traditional government function to be an instrumentality.¹⁵³ Rodriguez’s counsel went further and asserted that only official parts or units of government—excluding all state-owned entities—could be instrumentalities.¹⁵⁴ The government responded that an instrumentality is “an entity through which the foreign government carries out one of its objectives or functions,” but the government avoided defining such governmental functions, except to note that they may include the mere sale of commercial services to the public and that such functions may vary from nation to nation.¹⁵⁵

During oral argument, the Eleventh Circuit panel expressed skepticism about adding an additional requirement that state-owned entities perform traditional government functions, noting that juries may have difficulty with that standard. On the other hand, the panel seemed sensitive to concerns about the term’s lack of clarity. While pressing the government about the degree of ownership or control necessary to meet the definition, the panel observed that the circuit court, unlike the government, did not have the luxury of avoiding a specific definition when writing an opinion that may control future cases.¹⁵⁶

The appeal remains under consideration. Given the substantial amount of government ownership and involvement in the case at issue, a ruling for the government may not greatly expand the definitions of foreign officials and instrumentalities articulated by the government in prior cases but might embolden enforcement authorities to bring cases involving state-owned entities. Regardless of the outcome, the Eleventh Circuit’s decision will very likely serve as a bellwether for future FCPA cases and investigations.

c) Parent/Subsidiary Liability

The FCPA enforcement action against Ralph Lauren Corporation is an example of the government's growing practice of holding parent corporations responsible for the anti-bribery violations of their subsidiaries without any allegation that the parent authorized, directed, or controlled the subsidiary's corrupt conduct.¹⁵⁷ As previously discussed, in April 2013, Ralph Lauren entered into NPAs with DOJ and the SEC to resolve FCPA allegations that Ralph Lauren's Argentine subsidiary used a customs broker to facilitate bribes of customs officials.¹⁵⁸ The subsidiary's general manager also authorized gifts to Argentine government officials to improperly secure importation of products.¹⁵⁹ Neither DOJ nor the SEC alleged that Ralph Lauren Corporation, the issuer, authorized, directed, or controlled its Argentine subsidiary's corrupt conduct. However, the manager that approved the bribes at the subsidiary was a dual U.S./Argentine citizen and was hired by Ralph Lauren to manage the business of the subsidiary; thus, DOJ and the SEC considered him an "employee" and "agent" of the issuer.¹⁶⁰ Because the government authorities entered into NPAs and did not file charges, it is difficult to discern the precise analysis, but it appears that the government's theory is that the parent is liable for the acts of the subsidiary because the subsidiary was acting as the parent's agent.

d) DOJ Opinion Procedure Release

On December 19, 2013, DOJ released its only FCPA Opinion Procedure Release of the year.¹⁶¹ The requestor, a partner in a U.S. law firm doing business with a foreign country, wished to pay the medical expenses of the daughter of an official with whom he had grown friendly because the official lacked the means to pay for his daughter's treatment. The requestor represented, among other things, that: his law firm had billed fees to the foreign country of over \$2 million in the prior 18 months, and he anticipated similar fees in 2014; the foreign official had no role, and would not have in the future any role, in the selection of the requestor or his law firm as counsel for the foreign country; the treatment of the official's daughter would be paid for by the requestor and not the law firm, and would be paid directly to the institution providing treatment; and the employers of both the requestor and the official had no objection to the proposed payment.

Concluding that the facts and circumstances set forth by the requestor did not show any indicia of corrupt intent, DOJ stated that it did not intend to take enforcement action with regard to the payment proposed in the request. DOJ focused in particular on the express statement from the foreign official's employer that the proposed gift would not affect the decision to award work to the requestor's law firm. Although the facts underlying the request are unique and unlikely to be repeated on a large scale, DOJ's analysis in this release reaffirms that indicia of corrupt intent and a gift's impact on present or future business are touchstones in DOJ's enforcement calculus.

6) Collateral Litigation Developments

An FCPA investigation may not only be damaging in and of itself, but may also spur potentially harmful collateral civil litigation, as described in our [2011 Year-in-Review](#). In 2013, several different types of civil litigation ensued in connection with FCPA matters, including lawsuits involving Dodd-Frank whistleblower litigation, shareholder lawsuits, and an employee defamation case.

a) Dodd-Frank Whistleblower Litigation

There were a number of interesting developments in the area of whistleblower protection in 2013, including an emerging circuit split regarding interpretation of Dodd-Frank's retaliation protections. Under Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), whistleblowers who provide "original information" to the SEC that leads to a successful prosecution under the securities laws (including the FCPA) are entitled to an award and to various protections, including the ability to bring suit to recover for retaliatory employment actions.

In FY 2013, the SEC received 3,238 tips, complaints, or referrals,¹⁶² on its new whistleblower hotline, of which 149, or 4.6 percent, were FCPA-related (up from 3.8 percent the prior year).¹⁶³ Four whistleblowers received awards in 2013,¹⁶⁴ including the largest-ever Dodd-Frank whistleblower award (over \$14 million).¹⁶⁵ To date, there have been no FCPA whistleblower awards.¹⁶⁶ Enforcement officials have noted

the increase in the amount of whistleblower reports.¹⁶⁷ SEC Enforcement Chief Ceresney indicated that whistleblower tips have come from 70 different countries and predicted that “[g]iven the high-dollar value of FCPA monetary relief—often in the tens or hundreds of millions of dollars—we expect FCPA violations to become an increasingly fertile ground for Dodd-Frank whistleblowing.”¹⁶⁸ Dodd-Frank whistleblowing has become fertile ground for plaintiffs’ lawyers, who have begun actively seeking out putative whistleblowers—both in the United States and abroad—and drafting whistleblower notices for the SEC.¹⁶⁹

The 2013 court decisions relating to Section 922 focused on Dodd-Frank’s anti-retaliation provision. That provision prohibits employers from discharging or otherwise discriminating against a whistleblower who (1) “provid[es] information to the [SEC]”; (2) “initiat[es], testif[ies] in, or assist[s] in any investigation or judicial or administrative action of the [SEC] based upon or related to such information”; or (3) “mak[es] disclosures that are required or protected under ... any ... law, rule, or regulation subject to the jurisdiction of the [SEC],” including the Sarbanes-Oxley Act of 2002.¹⁷⁰ The provision further entitles a whistleblower who is discriminated against to a private cause of action in federal district court, as well as the right to seek reinstatement to the whistleblower’s previous position at the company, double back-pay, and fees and costs incurred during the litigation.¹⁷¹ Recent decisions involving this provision addressed the questions of whether the protection against retaliation extends to: (1) employees located outside the United States, and (2) employees who do not report potential violations directly to the SEC.

In *Liu v. Siemens AG*, the U.S. District Court for the Southern District of New York held that the Dodd-Frank anti-retaliation provision cannot be exercised by an employee outside the United States who was allegedly terminated for raising FCPA-related concerns.¹⁷² In that case, the plaintiff, a resident of Taiwan employed by Siemens China (a subsidiary of Siemens AG, a foreign issuer), was terminated three months prior to the expiration of his employment contract after he raised bribery concerns involving the sale of equipment to public hospitals in China and North Korea.¹⁷³ He then reported the possible violations to the SEC and brought suit against Siemens under Dodd-Frank’s anti-retaliation provision. Siemens moved to dismiss the case, arguing that the anti-retaliation provision is inapplicable to conduct occurring wholly outside the United States. The court granted its motion, noting that the provision is silent with respect to whether it applies extraterritorially, which invokes a strong presumption against extraterritorial application, as recently affirmed by the Supreme Court in *Morrison v. National Australia Bank*.¹⁷⁴ In so doing, the court acknowledged, but was not persuaded by the fact, that foreign nationals are eligible to receive whistleblower awards under Dodd-Frank.¹⁷⁵ Thus, *Liu* suggests that overseas employees are not eligible for Dodd-Frank anti-retaliation protections, though the decision does not affect their eligibility to receive whistleblower awards.

The court in *Liu* also relied on an alternative basis for dismissing the case: it held that the plaintiff’s disclosure of potential FCPA violations was not “required or protected” under a law, rule, or regulation subject to the jurisdiction of the SEC.¹⁷⁶ Notably, the plaintiff had disclosed only allegedly improper payments, and not any recordkeeping violations or violations of other SEC laws, rules, or regulations. Thus, *Liu* implies that the latter are necessary—and pure allegations of corruption are insufficient—to establish an individual as a whistleblower under the third category set forth in Dodd-Frank’s anti-retaliation provision.

The U.S. Court of Appeals for the Fifth Circuit reached a similar result, though with different reasoning, in *Asadi v. G.E. Energy (USA) L.L.C.*, which also involved a foreign whistleblower who raised possible FCPA violations.¹⁷⁷ This case was brought by an individual based in Jordan who was terminated from his employment at G.E. Energy (USA) L.L.C. (GE Energy) in Iraq within a year after reporting (according to the allegations in the complaint which are not admitted) potential anti-bribery compliance concerns to his supervisor and to GE Energy’s ombudsperson. The Fifth Circuit affirmed dismissal of the employee’s anti-retaliation claims on the grounds that he had failed to report the FCPA allegations to the SEC, and for that reason did not qualify as a Dodd-Frank whistleblower able to avail himself of the statute’s anti-retaliation protections.¹⁷⁸ Notably, the Fifth Circuit declined to review the reasoning of the lower court, which, like the court in *Liu*, had concluded that the plaintiff was not protected by Dodd-Frank’s anti-retaliation provision because that provision does not apply extraterritorially.¹⁷⁹

Asadi has been followed by one district court,¹⁸⁰ but is contrary to the decisions of several others (which have concluded that individuals who have not made disclosures to the SEC may still be considered “whistleblowers” for purposes of the anti-retaliation provision).¹⁸¹ *Asadi* is also arguably contrary to a rule

promulgated by the SEC¹⁸² which purports to clarify the definition of “whistleblower” set forth in Section 922.¹⁸³ The regulation requires simply that, for purposes of the anti-retaliation provision, the purported whistleblower must “possess a reasonable belief that the information [the whistleblower is] providing relates to a possible securities law violation” and must undertake an activity protected under the anti-retaliation provision; it contains no explicit requirement that the purported whistleblower report any information to the SEC.¹⁸⁴ By contrast, the same regulation also expressly imposes the requirement that whistleblowers “submit original information to the [SEC]” in order to be eligible for an award under Dodd-Frank.¹⁸⁵ The court in *Asadi* rejected the SEC’s definition of “whistleblower” set forth in this regulation, finding that it conflicts with the plain language of Section 922 by improperly expanding the statutory definition of the term.¹⁸⁶

The effects of these decisions have the potential to be relatively dramatic, particularly for companies subject to the FCPA. Although *Liu* is binding only in the Southern District of New York (and could be reversed on appeal), it may have a chilling effect on foreign whistleblowers given that there is now precedent that such individuals may not receive anti-retaliation protection under Dodd-Frank. Similarly, although *Asadi* is binding only in the Fifth Circuit, it may have the effect of encouraging more employees to report possible violations directly to the SEC, rather than, or in addition to, through a company’s internal channels. We can expect that additional case law in this area will help clarify when and how whistleblowers may recover from companies that are perceived to have retaliated against them.

b) Shareholder Lawsuits

In 2013, courts terminated a number of shareholder derivative suits that had followed the disclosure of FCPA investigations. The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of a shareholder suit against directors of Parker Drilling Co. alleging breach of fiduciary duty, abuse of control, gross mismanagement, and corporate waste related to compliance issues in Kazakhstan and Nigeria.¹⁸⁷ The lower court had dismissed the case because the plaintiff had failed to make a pre-suit demand on the Board of Directors or establish that such a demand would have been futile.¹⁸⁸ For the same reasons, the U.S. District Court for the District of Louisiana dismissed a derivative suit against directors of Tidewater, Inc. for alleged breach of fiduciary duties, abuse of control, gross mismanagement, and corporate waste related to bribes paid to officials in Nigeria and Azerbaijan.¹⁸⁹ In addition, the U.S. District Court for the District of Northern California dismissed a shareholder suit against directors of Hewlett-Packard Co. for alleged breach of fiduciary duties and corporate waste related to bribes paid to Russian officials, finding that the directors were reasonable in refusing the plaintiff’s demand after having conducted an internal investigation with the assistance of outside counsel.¹⁹⁰

Several new suits were also filed by shareholders in 2013. Within a month of disclosing an FCPA investigation by DOJ and SEC, Juniper Networks Inc. was sued by shareholders both in a class action alleging that the company had made false and misleading statements regarding revenues derived from bribes and inadequate internal controls, as well as in a derivative suit for breach of fiduciary duty, corporate waste, and abuse based on the same allegations.¹⁹¹ A derivative suit was filed against Avon Products, Inc., alleging the same theories of liability, related to allegedly improper payments to government officials in numerous foreign countries and purported inadequate internal controls that failed to prevent or detect those payments.¹⁹² Additionally, Net 1 Technologies, Inc. and three top executives were sued in a class action for allegedly false statements and material omissions related to corrupt payments and inadequate internal controls in connection with a contract awarded by the South African Social Security Agency.¹⁹³

c) Employee Defamation

A former employee has sued Shell Oil Co. for defamation in connection with bribes allegedly paid to Nigerian officials.¹⁹⁴ He alleged that the company had falsely stated, in a report requested by (and submitted to) DOJ as part of an investigation into Panalpina Group, that he had recommended that the company reimburse contractors for bribes. The trial court held that Shell was immune from suit for defamation under an “absolute privilege” for the statements it made to DOJ, but the appellate court disagreed. That court held that Shell had only a conditional privilege—pursuant to which the company was not immune if its actions were shown to have been motivated by malice—because it was not party to

an ongoing or proposed judicial or quasi-judicial proceeding at the time that it issued its report.¹⁹⁵ The case has been remanded for further proceedings.

7) Key International Law Developments

In 2013, the growing trend of cooperation between U.S. and foreign enforcement authorities continued. SEC Enforcement Chief Ceresney noted that the SEC has had “greater success working with the international community to receive documents and other types of foreign assistance” including by “expanding the availability and use of Memoranda of Understanding with international financial regulators to obtain bank records, other documents, and testimony; using border watches and other methods of obtaining information from foreign nationals; subpoenaing U.S.-based affiliates of foreign companies; and more aggressively seeking videotaped depositions that we can use at trial if we cannot secure live testimony.”¹⁹⁶

This cooperation was perhaps best illustrated in the settlement of the Total case, discussed above, which was the first collaboration on a major foreign bribery case by French and U.S. law enforcement agencies. On the same day as the U.S. settlement was announced, a French prosecutor in Paris recommended that Total and its CEO be referred to the French criminal courts on corruption and embezzlement charges.¹⁹⁷

The cooperation trend is also evident in the creation in 2013 of the International Foreign Bribery Taskforce, in which major international law enforcement agencies have banded together in order to allow police experts to share knowledge and skills about anti-corruption enforcement. The Taskforce members include the U.S. Federal Bureau of Investigation, the City of London Police’s Overseas Anti-Corruption Unit, the Royal Canadian Mounted Police, and the Australian Federal Police.¹⁹⁸

a) Brazil

In August 2013, Brazil enacted a new anti-corruption law that took effect in January 2014 and likely will be an enforcement priority in advance of the 2014 World Cup and 2016 Olympics that will be held in Brazil.¹⁹⁹ The law extends beyond the FCPA in several key ways, including: (1) imposing strict liability on corporations except in limited situations; (2) prohibiting bribes to local non-foreign officials; and (3) not creating an exception for facilitation payments, bringing Brazil in line with the UK and Canada in abandoning or rejecting this exception. Nearly all companies doing business in Brazil are covered by the law, regardless of whether they are foreign or domestic or whether the act is committed within Brazilian territory or abroad.²⁰⁰ Penalties include fines, damages, asset forfeiture, suspension of business activities, and compulsory dissolution of the legal entity. The greatest harm from a violation may arise in the form of reputational damage: fines can be publicly disclosed, which increases the potential for reputational harm, and reputational damage may be aggravated by the slow judicial process in Brazil. The law contemplates leniency for companies that institute internal compliance programs and companies that self-disclose and cooperate with government investigations.²⁰¹

The law appears to impose a strict liability standard on corporations that omits any intent element and effectively shifts the burden of proof from the prosecutor to the defendant: it appears that a company will be held liable if prosecutors can establish that a violation occurred and that the company benefited as a result. For instance, if questions are raised about a payment from a company to a government official around the time that the company receives a government contract, it appears that under the new law, the company will have the burden of proving that the payment was legal and did not relate to the contract award.

b) China

In 2013, the Chinese government launched active and aggressive anti-corruption investigations, focusing in particular on foreign medical device and pharmaceutical companies doing business in China. Numerous pharmaceutical companies are reportedly under investigation by the Chinese, including Sanofi S.A., AstraZeneca, and Novo Nordisk, among others. Several other companies, including Eli Lilly, Baxter International, and Agilent Technologies, among others, have reportedly launched internal investigations.²⁰² While it remains to be seen whether U.S. and Chinese enforcement authorities will cooperate on parallel investigations, we anticipate that the institution of enforcement proceedings in

China will be a continuing trend as Chinese authorities continue to focus on addressing corruption and continue to react to investigations launched by other governments.

Additionally, companies in other industries are also assessing their China operations. In March, the *Wall Street Journal* reported a DOJ and SEC investigation of Microsoft regarding allegations made by a former Microsoft representative in China.²⁰³ BHP Billiton Ltd., a mining company, also disclosed that it had been cooperating with DOJ and Australian Federal Police investigations regarding allegedly improper hospitality provided by BHP as part of its sponsorship of the 2008 Beijing Olympics.²⁰⁴ In its May 2013 10-Q filing, product and systems development company Parametric (now known as PTC Inc.) disclosed that it had been cooperating with DOJ and the SEC in providing information regarding payments and expenses of business partners and employees of a Chinese subsidiary that raised compliance concerns.²⁰⁵

c) United Kingdom

Despite the introduction of a comprehensive new anti-corruption regime in 2011 (the UK Bribery Act 2010), the UK's leading anti-corruption enforcement agency, the Serious Fraud Office (SFO), has yet to secure a conviction under the new legislation.²⁰⁶ In his speech at the Cambridge International Symposium on Economic Crime in September, the Director of the SFO, David Green, announced that 68 cases were under consideration, including eight involving possible offenses under the Bribery Act (the remainder presumably involve potential violations of the UK's prior laws criminalizing bribery).²⁰⁷ The SFO announced in August 2013 that it had charged three individuals under the Bribery Act in relation to its investigation into Sustainable AgroEnergy Plc.²⁰⁸ A major setback for the SFO in 2013 came in December, when its six-year investigation into alleged bribery of Aluminium Bahrain (Alba) officials culminated in the collapse of Victor Dahdaleh's trial. The SFO abandoned its case against Dahdaleh after a key witness significantly changed his evidence from that of his witness statement and two prosecution witnesses based in the United States refused to attend court, forcing the SFO to conclude that there was no longer a realistic prospect of conviction against Dahdaleh.²⁰⁹

In April, the SFO announced that it had opened a criminal investigation into ENRC and its subsidiaries in Africa and Kazakhstan over allegations of bribery in the Democratic Republic of Congo.²¹⁰ The SFO confirmed on December 23, 2013 that it opened a criminal investigation into allegations of bribery and corruption at Rolls Royce.²¹¹

SFO Director Green continues to set forth an uncompromising and combative approach to future investigations by the SFO.²¹² Green has used speaking opportunities to make clear that the SFO will focus on major international corporations (rather than individuals) with a particular focus on the construction and oil and gas sectors, which are the sectors considered most "vulnerable" by the SFO.²¹³

A key legislative development in 2013 has been the steps taken towards the introduction of DPAs in the UK. SFO Director Green has welcomed this move, noting that "DPAs represent a very useful addition to the prosecutors' toolbox for use in appropriate circumstances. They avoid the collateral damage caused by a full blown prosecution of a corporate entity."²¹⁴ DPAs are expected to be available to UK prosecutors in late February 2014.²¹⁵

In order to convict a corporate entity in the UK, prosecutors must still meet high legal standards. While a corporate entity will be liable for bribery offenses committed by associated persons if it failed to have in place adequate procedures to prevent such conduct under the Bribery Act 2010, no such model of vicarious corporate liability applies to other similar offenses such as fraud and money-laundering offenses. Here the prosecution still has to work with the "identification principle," that is, proving that a "controlling mind" within the entity was personally guilty of the offence. In his Cambridge speech, Green raised the current difficulties the SFO faces in tackling corporate offenses, noting that "the email trail has a strange habit of drying up at middle management level."²¹⁶ Green proposed extending the strict liability-style offense under Section 7 of the Bribery Act (the failure of organizations to prevent bribery) in order to create a corporate offense for failing to prevent fraud.²¹⁷

d) Canada

Canada's equivalent of the FCPA, the Corruption of Foreign Public Officials Act (CFPOA), was significantly strengthened in 2013.²¹⁸ The CFPOA, which was enacted in 1999, originally applied only where bribery had a "real and substantial" connection to Canada and did not contain internal controls and accounting requirements or a voluntary reporting clause.²¹⁹ For the first thirteen years of its existence, the CFPOA was rarely enforced.²²⁰ However, Bill S-14,²²¹ which passed through the Canadian Senate and House of Commons without amendment and became law on June 19, 2013 upon Royal Assent, dramatically increased the scope of the CFPOA's prohibitions and enhanced the ability of Canadian authorities to prosecute and penalize offenders. In particular, Bill S-14 amended the CFPOA in the following respects:

- *Jurisdiction*: The revised CFPOA applies to all Canadian companies and individuals (both citizens and permanent residents of Canada²²²) who are involved in bribery of foreign public officials, regardless of where the bribery took place. This nationality jurisdiction expands the scope of the CFPOA, which originally only included territorial jurisdiction.
- *Definition of "business"*: The amendment of the CFPOA removes the words "for profit" from the definition of business, thereby making the statute applicable to both for-profit and non-profit entities alike.
- *"Books and records" offense*: Under the CFPOA, companies and their directors, officers, and employees now face a criminal "books and records" offense for misrepresenting or concealing bribery of foreign public officials in their record-keeping. Although similar to the FCPA's books and records offense, the CFPOA's provision imposes exclusively criminal penalties, whereas the FCPA allows for both civil and criminal penalties (depending on the level of scienter).
- *Maximum penalty*: The maximum term of imprisonment for individuals convicted under the CFPOA has been increased from five years to fourteen years, for both bribery and accounting violations.²²³ This new penalty is more severe than the penalty under the FCPA for bribery violations (which have a maximum of five years imprisonment per offense) but is less severe than the penalty under the FCPA for books and records violations (which have a maximum of twenty years imprisonment). In addition to this penalty under the CFPOA, both individuals and corporations will continue to be subject to monetary fines at the discretion of a judge, with no prescribed maximum.²²⁴
- *Facilitation payments*: The revised CFPOA eliminates the statute's original exception for facilitation payments, which were defined as an "act of a routine nature" that is part of the foreign public official's duties or functions."²²⁵ In this regard, the CFPOA now more closely parallels the UK Bribery Act than the FCPA.
- *Ability to bring charges*: The CFPOA now gives the Royal Canadian Mounted Police (RCMP), Canada's national police force, the exclusive authority to bring charges under the CFPOA. Charges under the statute could previously be brought by a variety of agencies, including municipal, provincial, or federal police. The amendments thus reduce the uncertainty frequently associated with parallel enforcement by different levels of government.

In addition to strengthening the substance of the CFPOA, Canada has also recently stepped up its enforcement of the statute. The RCMP has approximately 35 active and ongoing CFPOA investigations. Among those, according to media reports, is an investigation of SNC Lavalin Group Inc., a Canadian engineering and construction company which is alleged to have paid approximately \$50.2 million to non-existent agents in order to obtain construction contracts.²²⁶ A former executive and a businessman with connections to the company were charged under the CFPOA for bribing Bangladeshi officials to win a \$3 billion bridge development project.²²⁷ Five individuals have now been charged by Canadian prosecutors in connection with this matter. In a separate matter, Canadian officials are investigating SNC Lavalin's former head of construction, who was arrested in Switzerland in 2012, for allegedly paying \$160 million in bribes to the son of former Libyan dictator Muammar Gaddafi in exchange for contracts in that country.²²⁸ Although investigation of the company is still ongoing, SNC Lavalin subsidiaries were debarred by the World Bank in April 2013 for a period of ten years, as described below.

Other notable CFPOA cases from 2013 involved Griffiths Energy International Inc. (a privately held Canadian company), which self-reported allegations from an internal investigation suggesting that the

company had used sham consulting agreements to pay \$2 million to two entities owned by Chad's ambassador to Canada and his spouse to secure oil contracts in Chad. The company pleaded guilty and agreed to pay a fine of approximately \$9.3 million.²²⁹

The first conviction of an individual for violating the CFPOA also occurred in 2013. Nazir Karigar, who worked as a consultant for Cryptometrics Canada, a technology company, was convicted at trial for having agreed to offer bribes totalling more than \$450,000 in order to obtain a \$100 million contract with Air India. No sentence has yet been imposed. A judicial opinion in the case also represents the first case law on the CFPOA. The opinion establishes that Air India employees constitute "foreign public officials" under the statute and that an agreement to pay a bribe is sufficient to sustain a violation, regardless of whether the bribe was actually paid.

e) World Bank

The World Bank's Integrity Vice Presidency (INT), which investigates allegations of fraud and corruption in World Bank Group-financed activities, continued to increase its enforcement activities, opening 89 investigations in fiscal year 2013, compared to 81 in fiscal year 2012 and 73 in fiscal year 2011.²³⁰ Of the investigations it closed in fiscal year 2013, 67 percent were deemed substantiated (and thus sanctionable), compared to just 52 percent in fiscal year 2012 and 46 percent in fiscal year 2011.²³¹ In addition, there was a sharp increase in the number of debarments in 2013, with 280 firms debarred in the first eleven months of 2013, compared to 117 in all of 2012.²³² However, much of the statistical increase is the result of an increase in the number of companies affiliated with the same corporate entity being debarred. Noteworthy sanctions in 2013 ranged from a ten-year debarment for Canadian engineering giant SNC Lavalin for bribery violations on a World Bank-funded bridge project in Bangladesh²³³ to a conditional, two-and-a-half year non-debarment for Sinclair Knight Merz Pty and related entities.²³⁴

However, although INT has seen an increased number of enforcement actions, the group was dealt a setback in June 2013 when the World Bank Sanctions Board reversed a debarment decision, finding that INT had not met its burden of proof—"more likely than not"—in a case involving a Colombian contractor.²³⁵ The Board's decision was harshly worded and likely will require INT to more closely examine and investigate its debarment decisions in the future. Despite the Board's decision in this case, however, World Bank enforcement activities do not appear likely to slow down anytime soon.

8) Predictions for 2014

Looking ahead, based on these developments and on things we are seeing in our own practice, we may see the following developments potentially unfolding in 2014 and beyond:

- While the number of enforcement actions may decrease or hold steady, we can expect some "blockbuster" settlements in 2014 of matters that have long been under investigation.
- We expect a continuation in the trend of public declinations, announced both by government entities and by the companies involved.
- In 2014 and beyond, we expect the emerging body of FCPA-related case law to continue to grow, including a pending decision by the Eleventh Circuit on the definition of "instrumentality" and an increase in litigation surrounding Dodd-Frank whistleblower regulations.
- While litigation by individuals will continue, numerous cases continue to be settled by organizational defendants, and we believe the government will continue to take aggressive positions regarding the boundaries of the statute, particularly with regard to jurisdiction, parent/subsidiary liability, "knowledge," the nature of books and records violations, and the nature of the items of value that may be viewed as corruptly offered or given.
- As noted in this Review, DOJ and SEC cooperation with international law enforcement authorities has increased in recent years. We believe this trend will continue, both in terms of the number of overall cases and the number of countries with which the U.S. authorities will cooperate.
- Relatedly, we expect continued strengthening of anti-corruption legislation and enforcement overseas and continued activity by the World Bank.
- Finally, in light of the increasing size of FCPA penalties, as well as increasing burdens on companies from voluminous document requests, requests for interviews and testimony of employees, and greater overall involvement in company investigations by DOJ and the SEC, we

expect companies to consider carefully whether the “credit” for voluntary disclosure is sufficient to outweigh the costs, and we expect the number of voluntary disclosures likely to decrease.

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¹ Initiated cases reflected in the chart below include indictments, criminal informations, complaints or other charges (including those that are simultaneously settled) filed by DOJ and the SEC. Although 2010 was undeniably a significant year for the initiation of FCPA enforcement actions, it bears mention that 22 of the enforcement actions commenced in 2010 were individuals indicted in connection with the Africa Sting Case.

² In November 2013, DOJ's then FCPA Unit Chief Charles Duross said at the American Conference Institute's Conference on the FCPA: "We have more resources than we've ever had before . . . and are busier today than in the past." Duross said that prosecution statistics will fluctuate and aren't important. See Amy Conway-Hatcher, *et. al.*, *The Government Speaks: FCPA Enforcement Is Here to Stay*, JUST ANTI-CORRUPTION (Nov. 24, 2013 8:28 PM), <http://www.mainjustice.com/justanticorruption/2013/11/24/the-government-speaks-fcpa-enforcement-is-here-to-stay/> (Summary of the American Conference Institute's Conference on the FCPA). In the SEC's December 2013 press release on enforcement statistics for fiscal year 2013, Andrew J. Ceresney, co-director of the SEC's Division of Enforcement, said: "Numbers tell only a part of the story as we look to bring high-quality enforcement actions that make an impact across the market. We are proud of the terrific results achieved by our hardworking and committed staff and pleased with the strong and robust pipeline of investigations they've developed for the year ahead." The SEC's press release is available here:

<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrT19fSUFx4>.

³ See Amy Conway-Hatcher, *et. al.*, *The Government Speaks: FCPA Enforcement Is Here to Stay*, JUST ANTI-CORRUPTION (Nov. 24, 2013 8:28 PM), <http://www.mainjustice.com/justanticorruption/2013/11/24/the-government-speaks-fcpa-enforcement-is-here-to-stay/> (Summary of the American Conference Institute's Conference on the FCPA).

⁴ Richard L. Cassin, *Weatherford Lands on Our Top Ten List*, FCPABLOG.COM (Nov. 27, 2013, 7:29 AM), <http://www.fcpablog.com/blog/2013/11/27/weatherford-lands-on-our-top-10-list.html>. In December, the SEC announced that it had obtained a record total of \$3.4 billion in disgorgement and penalties from enforcement actions in its fiscal year 2013, which ended on September 30th. The SEC stated that the \$3.4 billion in monetary penalties is an increase from the \$3.1 billion levied the year before, which is 10% higher than the monetary penalties in fiscal year 2012 and 22% higher than in fiscal year 2011, a year in which the SEC filed the most actions in the agency's history. The SEC's press release is available here:

<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540503617#.UrCvdvRDvk>. The SEC's year-by-year enforcement action statistics for fiscal year 2004 to fiscal year 2013 are available here:

<http://www.sec.gov/news/newsroom/images/enfstats.pdf>. The SEC's statistics are overall numbers and are not limited to FCPA cases.

⁵ Mary Jacoby, *Remarks of Charles Duross at Annual Conference on the U.S. Foreign Corrupt Practices Act*, JUST ANTI-CORRUPTION (Nov. 22, 2013, 6:08 PM), <http://www.mainjustice.com/justanticorruption/2013/11/22/remarks-of-charles-duross-at-annual-conference-on-the-u-s-foreign-corrupt-practices-act/print/> (Remarks by then DOJ FCPA Unit Chief Charles Duross at the International Conference on the U.S. Foreign Corrupt Practices Act on Nov. 19, 2013); see also Jeffrey Benzing, *FCPA Unit Chiefs Say 'Significant Enforcement' Is in the Pipeline*, JUST ANTI-CORRUPTION (Mar. 20, 2013, 4:23 PM), <http://www.mainjustice.com/justanticorruption/2013/03/20/fcpa-unit-chiefs-say-significant-enforcement-is-in-the-pipeline/> (Remarks by Kara Brockmeyer, SEC FCPA Unit Chief, at a panel for corporate compliance attorneys in Washington, D.C.).

⁶ Mary Jacoby, *Patrick Stokes Is New FCPA Unit Chief as Duross Departs Justice Department*, JUST ANTI-CORRUPTION (Jan. 27, 2014 12:32 PM), <http://www.mainjustice.com/justanticorruption/2014/01/27/patrick-stokes-is-new-fcpa-unit-chief-as-duross-departs-justice-department/>.

⁷ See Mary Jacoby, *Exodus at Justice Department's FCPA Unit as Duross, Others Depart*, JUST ANTI-CORRUPTION (Jan. 10, 2014 6:36 PM), <http://www.mainjustice.com/justanticorruption/2014/01/10/exodus-at-justice-departments-fcpa-unit-as-duross-others-depart/>.

⁸ In September 2013, then FCPA Unit Chief Charles Duross stated at the American Bar Association's International Conference on the FCPA in Washington, D.C. that DOJ has "20 full-time prosecutors" focused on the FCPA, which he called an "embarrassment of riches" in terms of resources compared to DOJ's past resources. FCPA PROFESSOR, *Friday Roundup* (Sept. 20, 2013), <http://www.fcpaprofessor.com/friday-roundup-93>. At the same conference, the SEC's FCPA Unit Chief Kara Brockmeyer stated that the SEC FCPA Unit has "about three dozen" staff dedicated full-time to the FCPA. FCPA PROFESSOR, *Friday Roundup* (Sept. 20, 2013), <http://www.fcpaprofessor.com/friday-roundup-93>.

⁹ In February 2008, Alcoa Inc. (Alcoa) said it had received notice on February 27, 2008, that Aluminium Bahrain B.S.C. (Alba), a majority state-owned smelter in Bahrain, filed suit against Alcoa, Alcoa World Alumina LLC (AWA), William Rice, and Victor Phillip Dahdaleh, alleging that certain Alcoa entities and their agents, including Dahdaleh, engaged in a 15-year conspiracy to defraud Alba. After a four-year stay, concurrent government investigations, Alba's filing of an amended complaint, and a series of filings and hearings throughout 2012, Alcoa and Alba settled the civil lawsuit, and, without admitting any liability, Alcoa agreed to make a cash payment to Alba of \$85 million payable in

two installments. The settlement only resolved Alba's claims against Alcoa, AWA, and Rice; Alba's lawsuit against Dahdaleh remained. In a separate criminal case brought by the U.K. Serious Fraud Office (SFO), in December 2013, Dahdaleh was acquitted of all eight charges against him after two witnesses involved in the investigation refused to testify and another witness changed his evidence. As a result, Southwark Crown Court Judge Nicholas Loraine-Smith instructed the jury to return verdicts of not guilty on all eight charges, and the SFO concluded that there was no longer a realistic prospect of conviction against Dahdaleh. The U.K. SFO's statement regarding Dahdaleh's case is available here: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/statement-r-v-dahdaleh.aspx>. Alcoa ultimately resolved the investigations with the DOJ and SEC on January 9, 2014, when AWA entered into a guilty plea and agreed to a criminal fine of \$223 million (including a criminal forfeiture of \$14 million), and Alcoa entered into a cease and desist order with the SEC and agreed to disgorgement of \$175 million (\$14 million of which was deemed satisfied by the forfeiture payment of \$14 million in the DOJ case). See U.S. Department of Justice Press Release No. 14-019: Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture (Jan. 9, 2014); U.S. Securities and Exchange Commission Press Release No. 2014-3: SEC Charges Alcoa With FCPA Violations (Jan. 9, 2014).

¹⁰ As of October 2013, the SEC and DOJ were investigating 94 publicly-known FCPA investigations. See Richard L. Cassin, *The Corporate Investigations List (October 2013)*, FCPABLOG.COM (Oct. 2, 2013, 2:08 AM), <http://www.fcpablog.com/blog/2013/10/2/the-corporate-investigations-list-october-2013.html>.

¹¹ The SEC fiscal year runs from September 30 to September 30.

¹² According to the SEC, in fiscal year 2011, the SEC brought twenty enforcement actions; in fiscal year 2012, it brought 15, and in fiscal year 2013, only five. See Year-by-Year SEC Enforcement Statistics, <http://www.sec.gov/news/newsroom/images/enfstats.pdf>. Note that, because the SEC calculates its statistics from fiscal year to fiscal year, not by calendar year, its numbers do not directly match the calendar year statistics we provide in our enforcement statistics chart.

¹³ See Year-by-Year SEC Enforcement Statistics, <http://www.sec.gov/news/newsroom/images/enfstats.pdf> (not listing Keyuan Petrochemicals as among the SEC's FCPA enforcement actions); U.S. Securities and Exchange Commission Press Release No. 2013-30, China-Based Company and Former CFO to Pay Penalties for Disclosure and Accounting Violations (Feb. 28, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171513008> (reporting on the filing of a complaint that referenced cash and other gifts provided to Chinese government officials).

¹⁴ The SEC charged Keyuan Petrochemicals with fraud in the offer or sale of securities, as well as reporting, recordkeeping, and internal controls violations. Complaint, *SEC v. Keyuan Petrochemicals Inc.*, No. 13-cv-00263, at 14-16 (D.D.C. Feb. 28, 2013), available at <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-30.pdf>. Alongside the company, the SEC also charged its former CFO, Aichun Li, but the allegations specific to Ms. Li pertained only to the undisclosed related-party transactions. Complaint, *SEC v. Keyuan Petrochemicals Inc.*, No. 13-cv-00263, at 1-2, 10-12 (D.D.C. Feb. 28, 2013), available at <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-30.pdf>.

¹⁵ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Stryker Corp.*, Rel. No. 70751, File No. 3-15587 (Oct. 24, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-70751.pdf>; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Total, S.A.*, Rel. No. 69654, File No. 3-15338 (May 29, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69654.pdf>; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Koninklijke Philips Electronics N.V.* (Apr. 5, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69327.pdf>.

¹⁶ Non-Prosecution Agreement between SEC and Ralph Lauren Corporation (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

¹⁷ Robert Khuzami, Director of the SEC's Enforcement Division, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), available at <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171489600>.

¹⁸ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Int'l Business Machines*, Rel. No. 43761, File No. 3-10397 (Dec. 21, 2000), available at <http://www.sec.gov/litigation/admin/34-43761.htm>; SEC Litigation Release No. 19657, *SEC v. Tyco Int'l Ltd.* (Apr. 17, 2006), available at <http://www.sec.gov/litigation/lit/releases/2006/lr19657.htm>.

¹⁹ Final Judgment, *SEC v. Int'l Business Machines Corp.*, No. 11-cv-0563, at 3-4 (D.D.C. July 25, 2013); Final Judgment, *SEC v. Tyco Int'l*, No. 12-cv-01583, at 5-6 (D.D.C. June 17, 2013).

²⁰ Final Judgment, *SEC v. Int'l Business Machines Corp.*, No. 11-cv-0563, at 3-4 (D.D.C. July 25, 2013); Final Judgment, *SEC v. Tyco Int'l*, No. 12-cv-01583, at 5-6 (D.D.C. June 17, 2013).

²¹ See, *SEC v. Citigroup Global Markets Inc.*, 11 Civ. 7387, 2011 WL 5903733 (S.D.N.Y. Nov. 28 2011) and Decision and Order, *SEC v. S.A.C. Capital Advisors, et al.*, No. 12-CIV-08466 (S.D.N.Y. Apr. 16, 2013).

²² Robert Khuzami, Director of the SEC's Enforcement Division, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), available at <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1365171489600>.

²³ Mary Jo White, Chairman of the SEC, Speeches, Deploying the Full Enforcement Arsenal (Sept. 26, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202>.

²⁴ Mary Jo White, Chairman of the SEC, Speeches, Deploying the Full Enforcement Arsenal (Sept. 26, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202>.

²⁵ U.S. Securities and Exchange Commission Press Release No. 2013-266: SEC Charges ConvergEx Subsidiaries With Fraud for Deceiving Customers About Commissions (Dec. 18, 2013); U.S. Securities and Exchange Commission Press Release No. 203-159: Philip Falcone and Harbinger Capital Agree to Settlement (Aug. 19, 2013).

²⁶ U.S. Securities and Exchange Commission Press Release No. 2013-187: JPMorgan Chase Agrees to Pay \$200 Million and Admits Wrongdoing to Settle SEC Charges (Sept. 19, 2013).

²⁷ Order Instituting Cease-and-Desist Proceedings, *In the Matter of Koninklijke Philips Electronics*, at 1 (Apr. 5, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69327.pdf>; U.S. Securities and Exchange Commission Press Release No. 2013-229: SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013); Non-Prosecution Agreement between SEC and Ralph Lauren Corporation (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>; Consent of Keyuan Petrochemicals Inc., *SEC v. Keyuan Petrochemicals Inc.*, No. 1:13-cv-00263, ¶ 2, (D.D.C. Feb. 28, 2013); Consent of Defendant Aichun Li, *SEC v. Keyuan Petrochemicals Inc.*, No. 1:13-cv-00263, ¶ 2 (D.D.C. Feb. 28, 2013).

²⁸ Compare Order Instituting Cease-and-Desist Proceedings, *In the Matter of Total, S.A.*, Rel. No. 69654, File No. 3-15338 (May 29, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69654.pdf>, with Deferred Prosecution Agreement, *United States v. Total*, No. 1:13-CR-239, ¶ 2 (E.D. Va. May 29, 2013).

²⁹ Consent of Defendant Parker Drilling Company, *SEC v. Parker Drilling Co.*, No. 1:13-cv-00461, ¶ 2 (E.D. Va. Apr. 16, 2013) (“Defendant has entered into a deferred-prosecution agreement that acknowledges responsibility for criminal conduct relating to certain matters alleged in the complaint in this action. Specifically, [in a related criminal proceeding], Defendant acknowledged responsibility for violations of the Anti-Bribery Provisions of the [FCPA and] acknowledged the facts set out in the deferred-prosecution agreement that is attached as Exhibit A to this Consent”); Consent of Defendant Diebold, Inc., *SEC v. Diebold, Inc.*, No. 1:13-cv-01609, ¶ 2 (D.D.C. Oct. 22, 2013) (“Defendant has entered into a deferred prosecution agreement that acknowledges responsibility for criminal conduct relating to certain matters alleged in the complaint in this action. Specifically, [in a related criminal proceeding], Defendant acknowledged responsibility for [conspiracy and FCPA violations and] admitted the facts set out in the Statement of Facts attached to the deferred prosecution agreement which is attached as Exhibit A to this Consent”); Consent of Defendant Weatherford International Limited, *SEC v. Weatherford Int’l Ltd.*, No. 13 CR 007333, ¶ 2 (S.D. Tex. Nov. 26, 2013) (“Weatherford has entered into [DPAs with DOJ and the U.S. Attorney’s Office for the Southern District of Texas], in which it admits, accepts, and acknowledges responsibility for criminal conduct relating to certain matters alleged in the Complaint in this action”); Consent of Defendant Archer-Daniels-Midland Company, *SEC v. Archer-Daniels-Midland Co.*, No. 2:13-cv-02279, ¶ 2 (C.D. Ill. Dec. 20, 2013) (“Defendant acknowledges as true and accurate the facts set forth in the attached Statement of Facts, entered into in connection with its [NPA with DOJ], which is attached as Exhibit A to this Consent.”).

³⁰ David Barboza, Jessica Silver-Greenberg, & Ben Protess, *JPMorgan’s Fruitful Ties to a Member of China’s Elite*, N.Y. TIMES, Nov. 13, 2013.

³¹ Jessica Silver-Greenberg & Ben Protess, *JPMorgan Hiring Put China’s Elite on an Easy Track*, N.Y. TIMES, Aug. 29, 2013.

³² Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, Aug. 18, 2013.

³³ Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES, Aug. 18, 2013.

³⁴ Jessica Silver-Greenberg & Ben Protess, *JP Morgan Tracked Business Linked to China Hiring*, N.Y. TIMES, Dec. 8, 2013; see also Justin Baer & Christopher Matthews, *Morgan Stanley and Citi Got SEC Inquiries on Foreign Hiring*, WALL ST. J., Nov. 26, 2013.

³⁵ Arthur Levitt, “Influence Peddling” Makes the World Go Round, N.Y. TIMES, Dec. 25, 2013. See also, Michael J. Moore, *Blankfein Says Goldman Has Controls for Hiring of Connected Kids*, BLOOMBERG, Jan. 24, 2014.

³⁶ WilmerHale, *FCPA Year-in-Review: Developments of 2012 and Predictions for 2013*, at 4-7, http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/FCPA_Year_End_Letter_2012.pdf; WilmerHale, *Anti-Corruption Enforcement Developments: 2011 Year-in-Review and 2012 Preview*, at 3, 26 (Jan. 18, 2012), available at

http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Anti-Corruption%20Enforcement%20Developments_2011%20Year-in-Review%20and%202012%20Preview.pdf.

³⁷ U.S. Department of Justice Press Release No. 13-1118: Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty (Oct. 22, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-225: SEC Charges Diebold with FCPA Violations (Oct. 22, 2013).

³⁸ U.S. Securities and Exchange Commission Press Release No. 2013-225: SEC Charges Diebold With FCPA Violations (Oct. 22, 2013).

³⁹ U.S. Department of Justice Press Release No. 13-1118: Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty (Oct. 22, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-225: SEC Charges Diebold with FCPA Violations (Oct. 22, 2013).

⁴⁰ Avon Products, Inc., Form 10-Q filed with the U.S. Securities and Exchange Commission on October 31, 2013, at 14.

⁴¹ Avon Products, Inc., Form 10-Q filed with the U.S. Securities and Exchange Commission on October 31, 2013, at 14.

⁴² Max Stendahl, *Avon Says Proposed FCPA Settlement Too Steep*, LAW360 (Oct. 31, 2013), <http://www.law360.com/articles/485176/avon-says-proposed-fcpa-settlement-too-steep>.

⁴³ Brandon M. Santos, *DPAs, NPAs and the Hybrid Corporate Monitor*, SUBJECT TO INQUIRY (Dec. 17, 2013), <http://www.subjecttoinquiry.com/anti-corruption/dpas-npas-and-the-hybrid-corporate-monitor/>.

⁴⁴ U.S. Department of Justice Press Release No. 13-1297: German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty (Dec. 11, 2013).

⁴⁵ U.S. Department of Justice Press Release No. 13-1297: German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty (Dec. 11, 2013).

⁴⁶ U.S. Department of Justice Press Release No. 13-1260: Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-252: SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013).

⁴⁷ See, e.g., Deferred Prosecution Agreement, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, Att. D (S.D. Tex. Nov. 26, 2013); Joint Motion for Final Judgment, *SEC v. Weatherford Int'l Ltd.*, 13-CV-3500, Exh. A (S.D. Tex. Nov. 26, 2013).

⁴⁸ A federal judge approved both the civil and criminal portions of the settlement in early 2014. Jeffrey Benzing, *Judge Approves Weatherford Criminal Settlements*, JUST ANTI-CORRUPTION (Jan. 23, 2014, 3:17 PM), <http://www.mainjustice.com/justanticorruption/2014/01/23/judge-approves-weatherford-criminal-settlements/>; Jeffrey Benzing, *Weatherford International Civil Settlement Approved*, JUST ANTI-CORRUPTION (Jan. 2, 2014, 6:09 PM), <http://www.mainjustice.com/justanticorruption/2014/01/02/weatherford-international-civil-settlement-approved/>.

⁴⁹ U.S. Department of Justice Press Release No. 13-1118: Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty (Oct. 22, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-225: SEC Charges Diebold with FCPA Violations (Oct. 22, 2013).

⁵⁰ Complaint, *SEC v. Diebold, Inc.*, No. 13-CV-1609, Exh. A (D.D.C. Oct. 22, 2013).

⁵¹ See, e.g., Deferred Prosecution Agreement, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, Att. D (S.D. Tex. Nov. 26, 2013).

⁵² See, e.g., Deferred Prosecution Agreement, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, Att. D (S.D. Tex. Nov. 26, 2013).

⁵³ Compare Complaint, *SEC v. Diebold, Inc.*, No. 13-CV-1609, Exh. 1 (D.D.C. Oct. 22, 2013), with Deferred Prosecution Agreement, *United States v. Diebold, Inc.*, No. 13-CR-4647, Att. D (N.D. Ohio Oct. 22, 2013).

⁵⁴ Jeffrey Benzing, *Self-Monitoring and Hybrids More Common as U.S. Credits FCPA Compliance*, JUST ANTI-CORRUPTION (May 10, 2013, 1:58 PM), <http://www.mainjustice.com/justanticorruption/2013/05/10/self-monitoring-and-hybrids-more-common-as-u-s-credits-fcpa-compliance/> (Remarks by Fraud Section Deputy Chief Charles Duross, the head of DOJ's FCPA Unit, at the American Bar Association's 27th Annual National Institute on White Collar Crime on March 7, 2013).

⁵⁵ Brandon M. Santos, *DPAs, NPAs and the Hybrid Corporate Monitor*, SUBJECT TO INQUIRY (Dec. 17, 2013), <http://www.subjecttoinquiry.com/anti-corruption/dpas-npas-and-the-hybrid-corporate-monitor/> (Remarks by then DOJ FCPA Unit Chief Charles Duross, the head of DOJ's FCPA Unit, at the American Conference Institute's 30th Annual Foreign Corrupt Practices Act Conference at National Harbor, MD).

⁵⁶ Jeffrey Benzing, *Self-Monitoring and Hybrids More Common as U.S. Credits FCPA Compliance*, JUST ANTI-CORRUPTION (May 10, 2013, 1:58 PM), <http://www.mainjustice.com/justanticorruption/2013/05/10/self-monitoring-and-hybrids-more-common-as-u-s-credits-fcpa-compliance/> (noting that "in the recent years, companies that self-disclosed conduct have avoided monitors").

⁵⁷ U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

⁵⁸ U.S. Department of Justice Press Release No. 13-456: Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty (Apr. 22, 2013).

⁵⁹ See, e.g., U.S. Securities and Exchange Commission Press Release No. 2011-267: SEC Charges Former Fannie Mae and Freddie Mac Executives with Securities Fraud (Dec. 16, 2011); U.S. Securities and Exchange Commission Press Release No. 2010-252: SEC Charges Former Carter's Executive with Fraud and Insider Trading (Dec. 20, 2010).

⁶⁰ See U.S. Securities and Exchange Commission Press Release No. 2011-112: Tenaris to Pay \$5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011).

⁶¹ See U.S. Securities and Exchange Commission Press Release No. 2013-241: SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013).

⁶² Non-Prosecution Agreement between SEC and Ralph Lauren Corporation, Exh. A ¶ 7 (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

⁶³ Non-Prosecution Agreement between SEC and Ralph Lauren Corporation, Exh. A ¶ 6 (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

⁶⁴ U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

⁶⁵ U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

⁶⁶ U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

⁶⁷ U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

⁶⁸ Mary Jacoby, *Remarks of Kara Brockmeyer at Annual Conference on the U.S. Foreign Corrupt Practices Act*, JUST ANTI-CORRUPTION (Nov. 22, 2013, 3:47 PM), <http://www.mainjustice.com/justanticorruption/2013/11/22/remarks-of-kara-brockmeyer-at-annual-conference-on-the-u-s-foreign-corrupt-practices-act/> (Remarks by Kara Brockmeyer, SEC FCPA Unit Chief).

⁶⁹ U.S. Department of Justice Press Release No. 13-613: French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-94: SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013).

⁷⁰ Deferred Prosecution Agreement, *United States v. Total, S.A.*, No. 1:13-CR-239, Exh. A ¶ 18 (E.D. Va. May 29, 2013).

⁷¹ Information, *United States v. Total, S.A.*, No. 1:13-CR-239, ¶ 14 (E.D. Va. May 29, 2013).

⁷² Information, *United States v. Total, S.A.*, No. 1:13-CR-239, ¶ 14 (E.D. Va. May 29, 2013).

⁷³ Information, *United States v. Total, S.A.*, No. 1:13-CR-239, ¶ 14 (E.D. Va. May 29, 2013).

⁷⁴ U.S. Department of Justice Press Release No. 13-1260: Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-252: SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013).

⁷⁵ Information, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, ¶ 1 (S.D. Tex. Nov. 26, 2013).

⁷⁶ Complaint, *SEC v. Weatherford Int'l Ltd.*, No. 13-CV-3500, ¶¶ 17-24 (S.D. Tex. Nov. 26, 2013); Information, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, ¶¶ 15-20 (S.D. Tex. Nov. 26, 2013).

⁷⁷ Complaint, *SEC v. Weatherford Int'l Ltd.*, No. 13-CV-3500, ¶¶ 11-16 (S.D. Tex. Nov. 26, 2013); Information, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, ¶¶ 21-23 (S.D. Tex. Nov. 26, 2013).

⁷⁸ Complaint, *SEC v. Weatherford Int'l Ltd.*, No. 13-CV-3500, ¶¶ 28-35 (S.D. Tex. Nov. 26, 2013); Information, *United States v. Weatherford Int'l Ltd.*, No. 13-CR-733, ¶¶ 24-28 (S.D. Tex. Nov. 26, 2013).

⁷⁹ U.S. Department of Justice Press Release No. 13-1356: ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013).

⁸⁰ SEC Press Release No. 2013-271: SEC Charges Archer-Daniels-Midland Company with FCPA Violations (Dec. 20, 2013).

⁸¹ Complaint, *SEC v. Archer-Daniels-Midland Co.*, No. 2:13-cv-2279, ¶ 4 (C.D. Ill. Dec. 20, 2013).

⁸² Standard DOJ policy, applicable to FCPA investigations, dictates that DOJ neither confirm nor deny the existence or status of an investigation. DOJ, U.S. ATTORNEYS' MANUAL § 1-7.531 (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

⁸³ In November 2009, 3M voluntarily disclosed to DOJ and the SEC that it was investigating its Turkish subsidiary for alleged bid rigging and bribery. The company also cooperated with Turkish authorities, but the Turkish authorities found insufficient evidence of violations of Turkish competition laws. After 3M assessed its overall FCPA compliance and practices in other countries, the company disclosed to DOJ and the SEC issues in other countries. In January 2013, both DOJ and the SEC closed their investigations without taking action. DOJ cited several reasons for its decision including 3M's "voluntary disclosure and cooperation, the Company's thorough investigation, and the steps the Company has taken to enhance its anti-corruption compliance program." 3M Company, Annual Report (Form 10-K), at 107-08 (Feb. 14, 2013). Government contractor DynCorp International, Inc. self-disclosed in 2009 subcontractors' payments totaling approximately \$300,000 to expedite visas and licenses. In February 2013, DOJ notified DynCorp that it had closed its inquiry because of a number of factors, including "voluntary disclosure by the company, the thorough investigation undertaken by the company, and the steps taken to enhance the company's anti-corruption compliance program." Delta Tucker Holdings, Inc., Annual Report (Form 10-K), at 94 (Mar. 27, 2013) (Delta Tucker Holdings acquired DynCorp in 2010).

⁸⁴ Raytheon disclosed to DOJ and the SEC the results of an internal FCPA compliance review, which identified some concerns in a foreign jurisdiction. In its annual report for 2012, the company announced that DOJ and the SEC completed their review without recommending enforcement action. Raytheon Company, Annual Report (Form 10-K), at 22 (Feb. 13, 2013). Owens-Illinois had also self-reported to DOJ and the SEC in October 2012 potential violations of the FCPA's anti-bribery provisions, the FCPA's books and records and internal controls provisions, the company's internal policies, and local laws. On July 18, 2013, Owens-Illinois received a letter from DOJ indicating that DOJ was closing its inquiry without taking further action. The SEC's investigation continues. Owens-Illinois Group Inc., Quarterly Report (Form 10-Q), at 19 (July 25, 2013). Nabors Industries, a Panalpina customer, disclosed that DOJ and the SEC had concluded their inquiries without recommending enforcement action. Nabors Industries, Ltd., Current Report (Form 8-K), at 1 (Feb. 20, 2013). DOJ had indicted an employee of Allied Defense, a munitions manufacturer, in the government's unsuccessful prosecution of multiple individuals in the defense and law enforcement supply industry, and had also opened an investigation of Allied Defense itself. In an August 15, 2013 letter to shareholders, the company's board announced that DOJ had notified the company that DOJ was closing its inquiry without charges or penalties. This investigation had been the last obstacle to the company's intended dissolution and distribution of assets to shareholders. Allied Defense Group, Inc., Quarterly Report (Form 10-Q), at Part II, Item 1 (Aug. 14, 2013). Deere & Company, News Release, Deere Notified of Conclusion to Foreign Business Practices Investigation (Jan. 10, 2013), available at http://www.deere.com/wps/dcom/en_US/corporate/our_company/news_and_media/press_releases/2013/corporate/2

[013jan10_corporaterelease.page](#); IDT Corp., Quarterly Report (Form 10-Q), at 15 (June 10, 2013); and Wynn Resorts, Ltd., Current Report (Form 8-K), at 1 (July 8, 2013).

⁸⁵ Zimmer Holdings, Inc., Annual Report (Form 10-K), at 64 (Feb. 27, 2013); Medtronic, Inc., Annual Report (Form 10-K), at 114 (June 24, 2013).

⁸⁶ These companies included ConocoPhillips, Eni S.p.A., Exxon Mobil Corp., Marathon Oil Corp., Occidental Petroleum Corp., and Total SA. Douglas Gillison, *6 Oil Companies Say SEC Has Closed Libya Bribery Probe Without Action*, JUST ANTI-CORRUPTION (Aug. 5, 2013, 8:44 AM), available at <http://www.mainjustice.com/justanticorruption/2013/08/05/5-oil-companies-say-sec-has-closed-libya-bribery-probe-without-action/>; see also Eni S.p.A., Report of Foreign Issuer (Form 6-K), at 113 (Aug. 31, 2013).

⁸⁷ Mary Jo White, SEC Chairman, Speech Given at the Council of Institutional Investors Fall Conference in Chicago, IL, "Deploying the Full Enforcement Arsenal," (Sept. 26, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202>.

⁸⁸ Andrew Ceresney, Co-Director of the SEC Division of Enforcement, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

⁸⁹ Memorandum and Order, *SEC v. Straub*, No. 11-CIV-9645, at 4 (S.D.N.Y. Aug. 5, 2013) (quoting Opinion and Order, *SEC v. Sharef*, No. 11-CIV-9073, at 17 (S.D.N.Y. Feb. 18, 2013)).

⁹⁰ Motion to Dismiss, *SEC v. Straub*, No. 11-CIV-9645 (S.D.N.Y. Oct. 29, 2012).

⁹¹ Complaint, *SEC v. Straub*, No. 11-CIV-9645, ¶¶ 2-5 (S.D.N.Y. Dec. 29, 2011).

⁹² Complaint, *SEC v. Straub*, No. 11-CIV-9645, ¶ 6 (S.D.N.Y. Dec. 29, 2011).

⁹³ Complaint, *SEC v. Straub*, No. 11-CIV-9645, ¶ 39 (S.D.N.Y. Dec. 29, 2011).

⁹⁴ In Dec. 2011 Magyar Telekom and its parent Deutsche Telekom, agreed to pay nearly \$63 million in combined criminal penalties to resolve SEC and DOJ charges involving the same alleged conduct. See U.S. Department of Justice Press Release No. 11-1714: Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2011).

⁹⁵ Opinion and Order, *SEC v. Sharef*, No. 11-CIV-9073, at 15 (S.D.N.Y. Feb. 19, 2013).

⁹⁶ Complaint, *SEC v. Sharef*, No. 11-CIV-9073, ¶ 12 (S.D.N.Y. Dec. 13, 2011).

⁹⁷ Opinion and Order, *SEC v. Sharef*, No. 11-CIV-9073, at 16 (S.D.N.Y. Feb. 19, 2013).

⁹⁸ Opinion and Order, *SEC v. Sharef*, No. 11-CIV-9073, at 16 (S.D.N.Y. Feb. 19, 2013).

⁹⁹ Memorandum and Order, *SEC v. Straub*, No. 11-CIV-9645, at 14 (S.D.N.Y. Feb. 8, 2013).

¹⁰⁰ Indictment, *United States v. Riedo*, No. 13-CR-3789, ¶¶ 16-18 (S.D.C.A. Oct. 15, 2013).

¹⁰¹ U.S. Department of Justice Press Release No. 11-129: Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$8 Million Criminal Penalty (Jan. 31, 2011).

¹⁰² DOJ had previously criminally charged three foreign officials in the Haiti Telco case. See, *U.S. v. Esquenazi, et al.*, 1:09-CR-21010 (S.D. Fla. 2009).

¹⁰³ U.S. Department of Justice Press Release No. 13-515: Two U.S. Broker-Dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013).

¹⁰⁴ U.S. Department of Justice Press Release No. 13-515: Two U.S. Broker-Dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013).

¹⁰⁵ U.S. Department of Justice Press Release No. 13-515: Two U.S. Broker-Dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013).

¹⁰⁶ U.S. Department of Justice Press Release No. 13-515: Two U.S. Broker-Dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013).

¹⁰⁷ U.S. Securities and Exchange Commission Press Release No. 2013-84: SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official (May 7, 2013).

¹⁰⁸ U.S. Securities and Exchange Commission Press Release No. 2013-84: SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official (May 7, 2013).

¹⁰⁹ U.S. Department of Justice Press Release No. 13-863: Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013).

¹¹⁰ U.S. Department of Justice Press Release No. 13-863: Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013).

¹¹¹ U.S. Securities and Exchange Commission Litigation Release No. 22676: Former Siemens Executive Uriel Sharef Settles Bribery Charges (Apr. 16, 2013).

¹¹² U.S. Securities and Exchange Commission Litigation Release No. 22676: Former Siemens Executive Uriel Sharef Settles Bribery Charges (Apr. 16, 2013).

¹¹³ Indictment, *United States v. Sharef*, No. 11-CR-01056 (S.D.N.Y. Dec. 12, 2011); see also U.S. Department of Justice Press Release No. 11-1626; Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme (Dec. 13, 2011).

¹¹⁴ U.S. Securities and Exchange Commission Litigation Release No. 22627: Securities and Exchange Commission v. Keyuan Petrochemicals, Inc. and Aichun Li, Civil Action No. 13-cv-00263 (D.D.C.) (Feb. 28, 2013).

¹¹⁵ Complaint, *SEC v. Keyuan Petrochemicals, Inc. & Li*, No. 1:13-CV-00263, ¶ 4 (D.D.C. Feb. 28, 2013).

¹¹⁶ Complaint, *SEC v. Keyuan Petrochemicals, Inc. & Li*, No. 1:13-CV-00263, ¶ 40 (D.D.C. Feb. 28, 2013).

¹¹⁷ Complaint, *SEC v. Keyuan Petrochemicals, Inc. & Li*, No. 1:13-CV-00263, ¶¶ 53-54, 58-59 (D.D.C. Feb. 28, 2013).

¹¹⁸ U.S. Securities and Exchange Commission Litigation Release No. 22627 (Feb. 28, 2013).

- ¹¹⁹ Indictment, *United States v. Riedo*, No. 13-CR-3789, ¶¶ 16-18 (C.D. Cal. Oct. 14, 2013).
- ¹²⁰ Indictment, *United States v. Riedo*, No. 13-CR-3789, ¶¶ 16-18 (C.D. Cal. Oct. 14, 2013).
- ¹²¹ Indictment, *United States v. Riedo*, No. 13-CR-3789, ¶¶ 16-18 (C.D. Cal. Oct. 14, 2013).
- ¹²² Indictment, *United States v. Riedo*, No. 13-CR-3789, ¶¶ 15-18 (C.D. Cal. Oct. 14, 2013).
- ¹²³ U.S. Securities and Exchange Commission Press Release No. 2013-241: SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013); Andrew Ceresney, Co-Director of the Division of Enforcement, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.
- ¹²⁴ U.S. Department of Justice Press Release No. 13-388: Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013).
- ¹²⁵ U.S. Department of Justice Press Release No. 13-388: Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013).
- ¹²⁶ Plea Agreement, *United States v. DuBois*, No. 11-CR-183 (N.D. Okla. Jan. 5, 2012).
- ¹²⁷ Plea Agreement, *United States v. Uhl*, No. 11-CR-184 (N.D. Okla. Jan. 5, 2012).
- ¹²⁸ Government's Memorandum in Support of Motion for Downward Departure, *United States v. Uhl*, No. 11-CR-184 (N.D. Okla. Mar. 22, 2013); Government's Memorandum in Support of Motion for Downward Departure, *United States v. DuBois*, No. 11-CR-183 (N.D. Okla. Mar. 22, 2013).
- ¹²⁹ Judgment, *United States v. Lewis*, No. 03-CR-00930 (S.D.N.Y. Apr. 12, 2013).
- ¹³⁰ Sentencing Tr., *United States v. Lewis*, No. 03-CR-00930, at 14 (S.D.N.Y. June 6, 2013).
- ¹³¹ U.S. Department of Justice Press Release No. 13-505: Former Consultant for Willbros International Sentenced in Connection with Foreign Bribery Scheme (May 3, 2013).
- ¹³² U.S. Department of Justice Press Release No. 08-1137: Former Willbros International Executive and Consultant Charged in \$6 Million Foreign Bribery Conspiracy (Dec. 19, 2008).
- ¹³³ U.S. Department of Justice Press Release No. 08-1137: Former Willbros International Executive and Consultant Charged in \$6 Million Foreign Bribery Conspiracy (Dec. 19, 2008).
- ¹³⁴ U.S. Department of Justice Press Release No. 09-1220: Willbros International Consultant Pleads Guilty to \$6 Million Foreign Bribery Scheme (Nov. 12, 2009).
- ¹³⁵ U.S. Department of Justice Press Release No. 13-505: Former Consultant for Willbros International Sentenced in Connection with Foreign Bribery Scheme (May 3, 2013).
- ¹³⁶ U.S. Department of Justice Press Release No. 09-1220: Willbros International Consultant Pleads Guilty to \$6 Million Foreign Bribery Scheme (Nov. 12, 2009).
- ¹³⁷ U.S. Department of Justice Press Release No. 07-885: Former Executive of Willbros Subsidiary Pleads Guilty to Conspiring to Bribe Nigerian Government Officials (Nov. 5, 2007); and U.S. Department of Justice Press Release No. 06-621: Former Executive of Willbros Subsidiary Pleads Guilty to Conspiring to Bribe Foreign Officials in Nigeria and Ecuador (Sept. 14, 2006).
- ¹³⁸ U.S. Department of Justice Press Release No. 10-102: Former Willbros International Executives Sentenced to Prison for Their Roles in \$6 Million Foreign Bribery Scheme (Jan. 28, 2010).
- ¹³⁹ Judgment, *United States v. Brown*, No. 06-CR-00316, at 2-3 (S.D. Tex. Jan. 29, 2010).
- ¹⁴⁰ U.S. Department of Justice Press Release No. 10-102: Former Willbros International Executives Sentenced to Prison for Their Roles in \$6 Million Foreign Bribery Scheme (Jan. 28, 2010).
- ¹⁴¹ U.S. Attorney's Office, Southern District of New York Press Release: Manhattan U.S. Attorney Announces Arrest Of French Citizen For Obstructing Foreign Bribery And Money Laundering Investigation (April 15, 2013).
- ¹⁴² U.S. Attorney's Office, Southern District of New York Press Release: Manhattan U.S. Attorney Announces Arrest Of French Citizen For Obstructing Foreign Bribery And Money Laundering Investigation (April 15, 2013).
- ¹⁴³ U.S. Attorney's Office, Southern District of New York Press Release: Manhattan U.S. Attorney Announces Arrest Of French Citizen For Obstructing Foreign Bribery And Money Laundering Investigation (April 15, 2013).
- ¹⁴⁴ U.S. Department of Justice Press Release No. 13-1297: German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay \$32 Million Criminal Penalty (Dec. 11, 2013).
- ¹⁴⁵ Information, *United States v. Bilfinger SE*, No. 13-CR-745 (S.D. Tex. Dec. 9, 2013).
- ¹⁴⁶ Information, *United States v. Bilfinger SE*, No. 13-CR-745, ¶ 22 (S.D. Tex. Dec. 9, 2013).
- ¹⁴⁷ Information, *United States v. Bilfinger SE*, No. 13-CR-745, ¶ 25 (S.D. Tex. Dec. 9, 2013).
- ¹⁴⁸ *United States v. Esquenazi*, No. 11-15331-C (11th Cir. 2012).
- ¹⁴⁹ The FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof" or "any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality." 15 U.S.C. §§ 78dd-2(h)(2)(A).
- ¹⁵⁰ U.S. Department of Justice & U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 20-21 (2012).
- ¹⁵¹ U.S. Department of Justice & U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, at 20-21 (2012).
- ¹⁵² After a jury trial, Joel Esquenazi and Carlos Rodriguez, executives and owners of Terra Communications, a Miami telecommunications company, were found guilty of FCPA violations, money-laundering, and conspiracy, and were sentenced to fifteen and seven years, respectively, in October 2011. Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C, at 2-3 (11th Cir. Aug. 21, 2012). The district court instructed the jury that an instrumentality is a "means or agency through which a function of the foreign government is accomplished. State-

owned or state-controlled companies that provide service to the public may meet this definition.” Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C, at 28 (11th Cir. Aug. 21, 2012). The district court gave the jury several factors to determine whether Teleco was an instrumentality of the Haitian government, including: (1) whether the company provides services to the Haiti citizens; (2) whether its key officers and directors are government officials or are appointed by government officials; (3) the extent of Haiti’s ownership of the company; (4) the company’s obligations and privileges under Haitian law; and (5) whether the company is widely perceived to be performing official or governmental functions. Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C, at 28 (11th Cir. Aug. 21, 2012).

¹⁵³ Corrected Brief of Appellant, *United States v. Esquenazi*, No. 11-15331-C, at 25-48 (11th Cir. May 31, 2012).

¹⁵⁴ Brief of Appellant, *United States v. Rodriguez*, No. 11-15331-C, at 39-46 (11th Cir. May 9, 2012) (relying on *Edison v. Doublerly*, 604 F.3d 1307, 1310 (11th Cir. 2010), which analyzed whether a private prison management corporation was an “instrumentality of a State . . . or local government” under the Americans with Disabilities Act and concluded the term referred to “governmental units or units created by them”).

¹⁵⁵ Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C, at 29-32 (11th Cir. Aug. 21, 2012).

¹⁵⁶ Oral Argument, *United States v. Esquenazi*, No. 11-15331-C (11th Cir. Oct. 11, 2013).

¹⁵⁷ Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, BLOOMBERG LAW, available at <http://about.bloomberglaw.com/practitioner-contributions/the-ralph-lauren-fcpa-case-are-there-any-limits-to-parent-corporation-liability/>.

¹⁵⁸ U.S. Department of Justice Press Release No. 13-456: Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty (Apr. 22, 2013); U.S. Securities and Exchange Commission Press Release No. 2013-65: SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

¹⁵⁹ Non-Prosecution Agreement between SEC and Ralph Lauren Corporation, Exh. A ¶ 8 (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

¹⁶⁰ Non-Prosecution Agreement between DOJ and Ralph Lauren Corporation, Att. A ¶ 3 (Apr. 22, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf>; Non-Prosecution Agreement between SEC and Ralph Lauren Corporation, Exh. A ¶ 3 (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-npa.pdf>.

¹⁶¹ See U.S. Department of Justice, FCPA Opinion Procedure 13-01 (Dec. 19, 2013).

¹⁶² U.S. Securities and Exchange Commission, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at 8, 20 (App. B), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

¹⁶³ U.S. Securities and Exchange Commission, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at 20 (App. B), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

¹⁶⁴ U.S. Securities and Exchange Commission, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at 14 (App. B), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

¹⁶⁵ U.S. Securities and Exchange Commission, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, at 15 (App. B), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

¹⁶⁶ Richard L. Cassin, *SEC Whistleblower Awarded \$14 Million*, FCPA BLOG (Oct. 2, 2013, 2:08 AM), <http://www.fcpablog.com/blog/2013/10/2/sec-whistleblower-awarded-14-million.html>.

¹⁶⁷ See Main Justice Staff, *Remarks of Charles Duross and Kara Brockmeyer at the ABA’s 2013 FCPA Conference*, JUST ANTI-CORRUPTION (Oct. 2, 2013, 9:44 AM), <http://www.mainjustice.com/justanticorruption/2013/10/02/remarks-of-charles-duross-and-kara-brockmeyer-at-the-abas-2013-fcpa-conference/>.

¹⁶⁸ Andrew Ceresney, Co-Director of the Division of Enforcement, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

¹⁶⁹ See Deloitte, *CFO Insights: Whistleblowing After Dodd-Frank: New Risks, New Responses*, at 1 (2011), available at http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/USEng/Documents/Audit%20Committee/Antifraud%20Programs%20and%20Controls/cfo_whistleblowers_022211.pdf.

¹⁷⁰ 15 U.S.C. § 78u-6(h)(1)(A).

¹⁷¹ 15 U.S.C. § 78u-6(h)(1)(B)(C).

¹⁷² No. 13 Civ. 317, 2013 WL 5692504, at *4 (S.D.N.Y. Oct. 21, 2013). This case is currently pending before the U.S. Court of Appeals for the Second Circuit.

¹⁷³ Siemens has run into issues with the FCPA previously. In 2008, it paid a record-breaking \$800 million fine to settle FCPA claims with U.S. authorities. See WilmerHale Publications & News, *Siemens Agrees to Record-Setting \$800 Million in FCPA Penalties*, Dec. 22, 2008.

¹⁷⁴ *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *2-4 (S.D.N.Y. Oct. 21, 2013).

¹⁷⁵ *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *3 (S.D.N.Y. Oct. 21, 2013). The court also deemed the fact that Siemens had American Depository Receipts that traded on the New York Stock Exchange to be irrelevant. *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *3 (S.D.N.Y. Oct. 21, 2013).

¹⁷⁶ *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *4-5 (S.D.N.Y. Oct. 21, 2013).

¹⁷⁷ 720 F.3d 620 (5th Cir. 2013).

¹⁷⁸ *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013).

¹⁷⁹ *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 621 & 630 n.13 (5th Cir. 2013).

¹⁸⁰ See *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4-7 (D. Colo. July 19, 2013).

¹⁸¹ See *Rosenblum v. Thomson Reuters (Mkts.) LLC*, No. 13 Civ. 2219(SAS), 2013 WL 5780775, at *5 (S.D.N.Y. Oct. 25, 2013); *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *6-7 (S.D.N.Y. Oct. 21, 2013) (discussing but not deciding the issue, and citing *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011)); see also *Ellington v. Giacomakis*, No. 13-11791-RGS, 2013 WL 5631046, at *2-3 (D. Mass. Oct. 16, 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105-7 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424(SRU), 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-95 (M.D. Tenn. 2012). The court in *Liu* noted: “The Fifth Circuit’s interpretation [in *Asadi*] is appealing in that it avoids rewriting the statute. However, it rejects the SEC’s interpretation of a statute it is charged with enforcing. Liu points out that this interpretation also creates a ‘strict liability’ anti-retaliation provision whereby employers may unwittingly violate the law for actions taken against employees they do not know qualify for whistleblower protection. However, given the other deficiencies in Liu’s complaint there is no need for this Court to wade into this debate.” *Liu v. Siemens AG*, No. 13 Civ. 317, 2013 WL 5692504, at *6 (S.D.N.Y. Oct. 21, 2013).

¹⁸² 17 C.F.R. § 240.21F-2(b)(1).

¹⁸³ See 15 U.S.C. § 78u-6(a)(6) (“The term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission”).

¹⁸⁴ 17 C.F.R. § 240.21F-2(b)(1) (“For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if: (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and; (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).”).

¹⁸⁵ 17 C.F.R. § 240.21F-2(a)(2). The regulation expressly provides that an individual does not need to be eligible for an award in order to qualify as a whistleblower for purposes of the anti-retaliation provision. 17 C.F.R. § 240.21F-2(b)(1)(iii).

¹⁸⁶ *Asadi v. G.E. Energy (USA) L.L.C.*, 720 F.3d 620, 629 (5th Cir. 2013).

¹⁸⁷ *Freuler ex rel. Parker Drilling Co. v. Parker*, 517 Fed. Appx. 227 (5th Cir. Mar. 11, 2013) (per curiam).

¹⁸⁸ *Freuler ex rel. Parker Drilling Co. v. Parker*, 803 F. Supp. 2d 630, 652 (S.D. Tex. 2011).

¹⁸⁹ *Strong ex rel. Tidewater, Inc. v. Taylor*, No. 11-392, 2013 WL 818893 (E.D. La. Mar. 5, 2013). The plaintiff made a demand on the board over a year after filing suit, and the court refused to stay the case pending the board’s response to that demand.

¹⁹⁰ *Copeland v. Lane*, No. 5:11-cv-01058-EJD, 2013 WL 1899741 (N.D. Cal. May 6, 2013). This case is pending appeal in the Ninth Circuit. See Notice of Appeal, *Copeland v. Lane*, No. 13-16251 (9th Cir. May 31, 2013).

¹⁹¹ Complaint, *Avery v. Juniper Networks, Inc.*, No. 3:13-cv-03733-WHO (N.D. Cal. Aug. 12, 2013); Notice of Removal, *Washtenaw Cty. Employees Retirement Sys. ex rel. Juniper Networks, Inc. v. Kriens*, No. 3:13-cv-04829-WHO (N.D. Cal. Oct. 17, 2013).

¹⁹² Complaint, *Pritika ex rel. Avon Prods., Inc. v. Moore*, No. 1:11-cv-04665-PGG (S.D.N.Y. Nov. 22, 2013). A previous suit based on the same allegations was filed in 2011 but was withdrawn (without prejudice) in 2012 pending Avon’s completion of its internal investigation.

¹⁹³ Complaint, *Elstein v. Net 1 UEPS Technologies Inc.*, No. 1:13-cv-09100-ER (S.D.N.Y. Dec. 26, 2013).

¹⁹⁴ *Writt v. Shell Oil Co.*, 409 S.W.3d 59 (Tex. Ct. App. 2013).

¹⁹⁵ DOJ filed charges against Shell 20 months after the report was submitted. *Writt*, 409 S.W.3d at 62.

¹⁹⁶ Andrew Ceresney, Co-Director of the Division of Enforcement, SEC, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at

<http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

¹⁹⁷ Geraldine Amiel & Joe Palazzolo, *Prosecutor Recommends Corruption Trial for Total, CEO*, WALL ST. J., May 29, 2013.

¹⁹⁸ Royal Canadian Mounted Police Press Release: New International Taskforce Combats Foreign Bribery (June 11, 2013).

¹⁹⁹ Law 12.846 (Aug. 1, 2013), available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm. The law became effective as of January 29, 2014.

²⁰⁰ Law 12.846, Capitulo 1 (Aug. 1, 2013), available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

²⁰¹ Law 12.846, Capitulo 5 (Aug. 1, 2013), available at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

²⁰² Kazunori Takada, *China to Launch Fresh Pharmaceutical Bribery Probe*, REUTERS, Aug. 14, 2013; Colum Murphy et al., *Baxter Found Expense Violations in China*, WALL ST. J., Aug. 2, 2013; Agilent Technologies, Inc., Form 10-Q filed with the U.S. Securities and Exchange Commission on September 6, 2013, at 43.

²⁰³ Christopher Matthews et al., *U.S. Probes Microsoft Bribery Allegations*, WALL ST. J., Mar. 19, 2013.

²⁰⁴ *Update on Continuing Regulatory Investigations*, BHP Billiton Press Release (Aug. 16, 2013), available at <http://www.bhpbilliton.com/home/investors/news/Pages/Articles/Update-on-Continuing-Regulatory-Investigations.aspx>.

- ²⁰⁵ PTC, Inc., Form 10-Q filed with the U.S. Securities and Exchange Commission on May 8, 2013, at 19.
- ²⁰⁶ While the SFO has not yet secured a conviction, the Crown Prosecutorial Service (the agency responsible for prosecuting crimes investigated by the police) has secured a conviction of an individual under the Act.
- ²⁰⁷ David Green, Director of the SFO, Speech to Cambridge Symposium (Sept. 2, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/cambridge-symposium-2013.aspx>.
- ²⁰⁹ SFO Press Release, Statement: R v Dahdaleh (Dec. 10, 2013), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/statement-r-v--dahdaleh.aspx>.
- ²¹⁰ SFO, ENRC Plc (Apr. 25, 2013), *available at* <http://www.sfo.gov.uk/our-work/our-cases/case-progress/enrc-plc.aspx>.
- ²¹¹ SFO, Rolls Royce (Dec. 23, 2013), *available at* <http://www.sfo.gov.uk/our-work/our-cases/case-progress/rolls-royce.aspx>.
- ²¹² David Green, Director of the SFO, Speech to Cambridge Symposium (Sept. 2, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/cambridge-symposium-2013.aspx>.
- ²¹³ David Green, Director of the SFO, Speech at the Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference (Oct. 24, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx>.
- ²¹⁴ David Green, Director of the SFO, Speech at the Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference (Oct. 24, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx>.
- ²¹⁵ SFO, Deferred Prosecution Agreements: Consultation on Draft Code of Practice, *available at* <http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements--consultation-on-draft-code-of-practice.aspx>.
- ²¹⁶ David Green, Director of the SFO, Speech to Cambridge Symposium (Sept. 2, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/cambridge-symposium-2013.aspx>.
- ²¹⁷ David Green, Director of the SFO, Speech to Cambridge Symposium (Sept. 2, 2013), *available at* <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/cambridge-symposium-2013.aspx>.
- ²¹⁸ Corruption of Foreign Public Officials Act, S.C. 1998, c. 34 (June 19, 2013), *available at* <http://laws-lois.justice.gc.ca/PDF/C-45.2.pdf>; News Release, Foreign Affairs, Trade and Development Canada, *Strengthening Canada's Fight Against Foreign Bribery* (Feb. 5, 2013), *available at* <http://www.international.gc.ca/media/aff/news-communiqués/2013/02/05b.aspx?lang=eng>.
- ²¹⁹ *Libman v. The Queen*, [1985] 2 S.C.R. 178.
- ²²⁰ In 2010, Transparency International classified Canada as having “little or no [anti-corruption] enforcement.”
- ²²¹ Robin McKay, Legislative Summary of Bill S-14: An Act to Amend the Corruption of Foreign Public Officials Act (May 28, 2013), *available at* http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_Is.asp?Language=E&ls=s14&Parl=41&Ses=1&source=library_prb.
- ²²² Robin McKay, Legislative Summary of Bill S-14: An Act to Amend the Corruption of Foreign Public Officials Act, ¶ 2.5 (May 28, 2013), *available at* http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_Is.asp?Language=E&ls=s14&Parl=41&Ses=1&source=library_prb.
- ²²³ The 14-year maximum penalty means that CFPOA offenses are not eligible for either a discharge (*Canadian Criminal Code*, § 730) or a conditional sentence (*Canadian Criminal Code*, § 742.1).
- ²²⁴ Robin McKay, Legislative Summary of Bill S-14: An Act to Amend the Corruption of Foreign Public Officials Act, ¶ 2.2 (May 28, 2013), *available at* http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_Is.asp?Language=E&ls=s14&Parl=41&Ses=1&source=library_prb.
- ²²⁵ The facilitation payments exception will be eliminated at a future date to be determined by the Canadian government. Robin McKay, Legislative Summary of Bill S-14: An Act to Amend the Corruption of Foreign Public Officials Act, ¶ 2.3 (May 28, 2013), *available at* http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_Is.asp?Language=E&ls=s14&Parl=41&Ses=1&source=library_prb. The government has indicated that the delay is intended to give companies a grace period during which to review and revise their anti-corruption policies and procedures.
- ²²⁶ See, e.g., Ian Austen, Chief of Canadian Firm Steps Down After Inquiry, N.Y. TIMES, Mar. 26, 2012; REUTERS, *Accused SNC-Lavalin Execs Appear in Toronto Court*, Jun. 26, 2012.
- ²²⁷ Greg McArthur, *Former SNC-Lavalin Executive Charged Under Foreign Bribery Law*, GLOBE & MAIL, Sept. 18, 2013; Greg McArthur, *Businessman charged in SNC-Lavalin Probe Turns Himself in to RCMP*, GLOBE & MAIL, Dec. 3, 2013.
- ²²⁸ Sophie Cousineau & Greg McArthur, *Former SNC-Lavalin Executive Funneled \$160 Million to Gadhafi Son, RCMP Says*, GLOBE & MAIL, Jan. 25, 2013.
- ²²⁹ Trace International, *Compendium Griffiths Energy International*, *available at* <https://www.traceinternational2.org/compendium/view.asp?id=408>.

²³⁰ World Bank Group, *Integrity Vice Presidency FY13 Facts & Figures*, at 3, available at http://siteresources.worldbank.org/INTDOII/Resources/588889-1381352645465/INT_Facts_and_Figures_FY13_WEB.pdf.

²³¹ World Bank Group, *Integrity Vice Presidency FY13 Facts & Figures*, at 3, available at http://siteresources.worldbank.org/INTDOII/Resources/588889-1381352645465/INT_Facts_and_Figures_FY13_WEB.pdf.

²³² World Bank Group, *World Bank Listing of Ineligible Firms & Individuals*, available at http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort_on=DEBAR_FROM_DATE&sort_order=descending&sort_data=text.

²³³ World Bank Group, Press Release, World Bank Debars SNC-Lavalin Inc. and its Affiliates for 10 Years (Apr. 17, 2013), available at <http://www.worldbank.org/en/news/press-release/2013/04/17/world-bank-debars-snc-lavalin-inc-and-its-affiliates-for-ten-years>.

²³⁴ World Bank Group, Press Release, World Bank Group Announces Settlement with Sinclair Knight Merz Management Pty Ltd, Sinclair Knight Merz Holdings Ltd and Sinclair Knight Merz Pty (Jul. 24, 2013), available at <http://www.worldbank.org/en/news/press-release/2013/07/24/world-bank-group-announces-settlement-sinclair-knight-merz>.

²³⁵ World Bank Group, Sanctions Board Decision No. 59 (June 24, 2013), available at <http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.59.pdf>.

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