

## The Increased Prosecution of Individuals Under the FCPA: Trends and Implications

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### *Introduction*

In this article we analyze the recent increase in the prosecution of individuals in Foreign Corrupt Practices Act ("FCPA") cases, identifying trends among these cases and examining the fact patterns in the most recent individual cases.

#### *Increased FCPA Prosecutions of Individuals*

During the last two years, there has been a spike in the number of FCPA cases brought against individuals. In 2007 and 2008, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") brought cases against over 30 individuals, substantially more than in prior years. That trend has continued in 2009.

This increase in enforcement against individuals has not been unintentional. Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ noted in 2008 that the number of individuals prosecuted "has risen — and that's not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games."<sup>1</sup> The increase in prosecutions of individuals also follows a more general uptick in foreign bribery prosecutions, driven by a number of factors, including the increased focus on corporate internal controls caused by Sarbanes-Oxley, globalization, and increased enforcement efforts by DOJ and the SEC.<sup>2</sup> The recent announcement by Robert Khuzami, Director of the SEC's Division of Enforcement, that the SEC is creating a specialized FCPA unit to "focus on new and proactive approaches to identifying [FCPA] violations" means that the general trend of stepped-up FCPA enforcement — and presumably the increased attention paid to individuals — will continue.<sup>3</sup>

The increase in charges against individuals may in part be a result of evolving views about prosecutions of corporations. Recently, there has been debate about whether prosecutors ought to resolve so many criminal cases against companies through deferred and non-prosecution agreements instead of through criminal prosecutions — and there has been a decline in the number of cases resolved through deferred and non-prosecution agreements.<sup>4</sup> Some have suggested that the Bush Administration relied too heavily on such agreements instead of pursuing criminal charges.<sup>5</sup> Bringing charges against individuals may be an appealing supplement to deferred and non-prosecution agreements because it allows the government to aggressively pursue wrongdoing while avoiding the undesirable effects of indicting corporations — the so-called "Arthur Andersen" effect, "in which innocent employees unconnected to the wrongdoing lose their jobs and investments in the firm."<sup>6</sup>

Whatever the reasons, there is no question that both the DOJ and SEC are focusing on bringing cases against individuals, and that is further reason why individuals who engage in international business transactions, particularly in high-risk countries and high-risk industries, are well advised to be aware of these risks and to take appropriate steps to address them.

#### *Government Charging Decisions in Cases Against Individuals*

Although there is a general trend toward increased prosecution of individuals, there has been very little in the public statements of the enforcement authorities about which cases the government is likely to pursue and which it is not. A close review of the recent cases yields some helpful indications. While it is always difficult to categorize cases with precision, it is fair to say that FCPA cases against individuals historically have mainly involved managers of American companies, as well as some public figures, who have had personal involvement in improper activity. Such cases have been brought more recently, and we assume will continue to be brought in the future.

Recent cases against individuals do not follow neat patterns, but it seems, perhaps unsurprisingly, that these cases have followed some of the trends in enforcement activity against companies.<sup>7</sup> For example, the government continues its efforts to extend the reach of the FCPA statute and is pursuing expansive jurisdictional theories in those efforts against both corporations and individuals. The government also continues to pursue cases involving third parties and intermediaries, and recent cases have involved charges against such individuals. Relatedly, the government is increasingly holding accountable individuals who may not have had direct knowledge or involvement in bribery but have turned a "blind eye" on bribery or who, in their role as corporate officers, may have been in a position to detect and stop the bad conduct. Recent cases also reflect the government's willingness to pursue not only government bribery but also commercial bribery.

These various cases against individuals have produced (and will continue to produce) new legal and investigatory developments that will prove interesting and informative.

#### *Public Officials and American Senior Executives*

Cases against individuals historically have involved American business managers or public figures involved personally in significant wrongdoing.

For example, in 2003, James Giffen and J. Bryan Williams were indicted in connection with a complex bribery scheme that involved the payment of more than \$78 million in unlawful payments to Kazakh government officials in connection with an energy deal that yielded profits to Mobil of more than \$50 million.<sup>8</sup> Giffen was chairman of Mercator, a small merchant bank that represented Kazakhstan in connection with the sale of the country's oil and gas fields and exploration rights.<sup>9</sup> Williams was an attorney and former Exxon-Mobil executive who received a \$2 million kickback, allegedly from Giffen, for negotiating a deal where Mobil acquired an interest in a Kazakh oil field.<sup>10</sup> Williams pleaded guilty to tax evasion,<sup>11</sup> but Giffen has not yet come to trial.<sup>12</sup> Similarly, in 2004, David Kay and Douglas Murphy, two American officers of American Rice, Inc., were convicted on FCPA-related charges for

their role in paying and authorizing the payment of bribes to Haitian officials in order to avoid paying customs duties and sales taxes on rice the company was importing to Haiti.<sup>13</sup> Other cases have had similar characteristics.<sup>14</sup>

Consistent with these cases, Albert "Jack" Stanley, an American citizen and former CEO of the American company Kellogg, Brown and Root ("KBR"), pleaded guilty in September 2008 to conspiring to violate the FCPA, among other things.<sup>15</sup> Stanley was involved in a decade-long scheme to obtain \$6 billion dollars' worth of engineering, procurement, and construction contracts by paying millions of dollars in bribes to Nigerian government officials.<sup>16</sup> Stanley admitted that he knew that at least some of the more than \$180 million paid to Nigerian consulting firms would be used to pay bribes to local government officials.<sup>17</sup> Stanley's position as the CEO of an American company, coupled with the staggering amount of the bribes paid and the value of the contracts at issue, is squarely within federal prosecutors' traditional scope for individual prosecutions.

Cases involving public or quasi-public figures or organizations also have traditionally drawn individual prosecutions. For example, in 2002, DOJ indicted two World Bank officials, Gautam Sengupta and Ramendra Basu, for conspiring to steer World Bank contracts to consultants in exchange for \$127,000 in kickbacks and assisting a contractor in bribing a foreign official in violation of the FCPA.<sup>18</sup> Both Sengupta and Basu pleaded guilty to FCPA violations.<sup>19</sup> Similarly, in 2002, Richard Pitchford, who was the executive vice-president of a special fund created by the U.S. Congress for Central Asian development, pleaded guilty to conspiracy, theft from a government program, and violations of the FCPA.<sup>20</sup> Pitchford received illegal kickbacks totaling approximately \$400,000 from contracts and business enterprises in which the fund invested in Turkmenistan.<sup>21</sup>

The recent conviction of former nine-term U.S. Representative William Jefferson is in line with these earlier individual prosecutions. Jefferson was convicted in August 2009 of eleven of sixteen public corruption charges, including both soliciting bribes and conspiracy to violate the FCPA by conspiring to bribe Nigerian political officials.<sup>22</sup> Jefferson's status as an American elected official — who was found with \$90,000 in his freezer — raises obvious public interest issues that federal prosecutors have traditionally always pursued in court and are likely to continue to do so.<sup>23</sup>

### *Expanding Global Reach*

As with a number of recent corporate cases where the U.S. nexus has been quite minimal, in at least two recent prosecutions, the government has pursued FCPA cases against foreign executives at foreign companies.

On September 23, 2008, Christian Sapsizian, a French citizen and executive of the French telecommunications company Alcatel, was sentenced to 30 months in prison for his involvement in "an elaborate bribery scheme to obtain a mobile telephone contract from the state-owned telecommunications authority in Costa Rica by making more than \$2.5 million in corrupt payments to Costa Rican officials."<sup>24</sup> Alcatel was awarded a \$149 million mobile telephone contract by the Costa Rican telecommunications authority.<sup>25</sup> The jurisdictional hook in the case was that Alcatel traded American Depository Receipts on the New York Stock Exchange; DOJ alleged

that Sapsizian was an employee and agent of Alcatel, an "issuer."<sup>26</sup> Notably, the DOJ did not allege that Sapsizian entered the U.S. or took any actions while physically present in the U.S. Rather, the DOJ only charged that Sapsizian, sitting in his office in France, wired improper payments from banks in Miami to bank accounts in Costa Rica.

Likewise, in December 2008, Misao Hioki, a Japanese citizen and executive of Japanese company Bridgestone, pleaded guilty to conspiracy to violate the FCPA as part of his participation in a larger marine hose bid-rigging scheme.<sup>27</sup> As in the Sapsizian case, the information does not charge Hioki with taking any actions while physically present in the U.S. Instead, the government alleged that, from Tokyo, Hioki supervised the staff of the Bridgestone U.S. subsidiary, "[a]ttended meetings or otherwise engaged in discussions in the [U.S.] by telephone, facsimile and electronic mail" regarding the conspiracy, coordinated corrupt payments through the Houston office of the U.S. subsidiary, and sold millions of dollars worth of marine hose in the U.S.<sup>28</sup>

The Hioki case raises an interesting jurisdictional point. Under the FCPA, in order for a person who is not an agent or employee of an issuer or a domestic concern to be liable under the FCPA, that person must take actions in furtherance of the bribe "while in the territory of the United States."<sup>29</sup> While the Hioki case involved only conspiracy to violate the FCPA and not substantive FCPA violations, the government purported to satisfy this jurisdictional requirement by charging Hioki — who was apparently not present in the U.S. during the conspiracy — based on his role in coordinating, via facsimile, e-mail, and telephone, the actions of co-conspirators who were physically present in the U.S.<sup>30</sup>

In March 2009, the DOJ indicted two U.K. citizens, Wojciech Chodan and Jeffrey Tesler, on ten counts of violating the FCPA, as well as one count of conspiracy to violate the FCPA.<sup>31</sup> According to the indictment, both Chodan and Tesler were citizens of the U.K. who resided within the U.K. The two men conspired to pay bribes to Nigerian government officials, including top-level executive branch officials, on behalf of a joint venture of four companies, including KBR.<sup>32</sup> The indictment does not allege any actions taken by either man while physically present in the U.S., instead alleging only that Chodan and Tesler had "discussions" with personnel who were in the U.S., that Chodan sent a facsimile and an email from London to Houston, that Tesler received an email from Nigeria through Houston, and that wire transfers were made from bank accounts in the Netherlands to bank accounts in Monaco and Switzerland via "correspondent bank accounts" in New York.<sup>33</sup> Indeed, the indictment notes that Chodan and Tesler explicitly discussed "the avoidance of U.S.-owned banks" and that Chodan and Jack Stanley, former CEO of KBR, "discussed not including any U.S. citizens on the board of managers" of one of the joint venture companies, strongly implying that they were aware of and seeking to circumvent the FCPA's jurisdictional reach.<sup>34</sup> Tesler was arrested in March 2009 by the British police at the request of U.S. authorities and later released on bail; the DOJ is seeking the extradition of both Chodan and Tesler from the U.K.<sup>35</sup>

### *Third Parties and Intermediaries*

FCPA charges against companies and their employees routinely involve improper payments made with the assistance of third parties. In 2009, two individual intermediaries themselves were charged.

In July 2009, the DOJ unsealed an indictment (which had been filed in August of 2008) against a Canadian national, Ousama Naaman, who resides in the United Arab Emirates, on FCPA related-charges. Naaman is alleged to have offered and paid kickbacks to the Iraqi government on behalf of a publicly traded chemical company and its subsidiary, in exchange for contracts under the United Nations Oil For Food Program.<sup>36</sup> Naaman also is charged with paying bribes on behalf of the company to Iraqi Ministry of Oil officials "to ensure that a competing product manufactured by a different company failed a field test, keeping the competing product out of the Iraqi market."<sup>37</sup> Naaman was arrested in Germany in July, and the U.S. is currently seeking extradition.<sup>38</sup>

Similarly, in May 2009, Juan Diaz pleaded guilty to bribing foreign government officials and money laundering.<sup>39</sup> Diaz was an intermediary, funneling corrupt payments from three American telecommunications companies to former Haitian government officials in order to help those companies obtain lucrative telecommunications contracts with the Haitian government.<sup>40</sup>

### *Charges Against Individuals with Little or No Personal Involvement in the Corrupt Conduct*

Related to the third-party intermediary cases are cases in which the government has pursued anti-bribery charges using the FCPA's broad knowledge standard. The FCPA prohibits not only payments to foreign officials, but payments to others while "knowing" that all or some of the payment will be passed on to a foreign official.<sup>41</sup> Actual knowledge is not required, and a violation can be proved where the defendant was aware that such a payment was "substantially certain to occur."<sup>42</sup> Moreover, under the Securities Exchange Act of 1934, a "control person" may be held liable for the violations of others, even where the control person had no personal involvement in or knowledge of the improper activity.<sup>43</sup> The DOJ and SEC have used these provisions (for the first time in the case of the control person provision) in recent cases to charge individuals with FCPA violations.

One recent case indicates that the government is willing to indict company executives who turn a blind eye to conduct that they suspect is improper or who fail to reasonably investigate that conduct. The DOJ brought charges against Martin Eric Self, a partial owner and former president of Pacific Consolidated Industries ("PCI"), in connection with FCPA violations by the company. DOJ also charged another individual in the case, Leo Winston Smith, who was the former executive vice-president and director of sales and marketing for PCI.<sup>44</sup> The government alleged that PCI, a company that created equipment for defense departments, created a sham marketing agreement with a relative of a U.K. Ministry of Defence ("UK-MOD") official. Under that agreement, more than \$70,000 in improper payments were made to the official's relative. In return for the payments, PCI received UK-MOD contracts worth over \$11 million. In May 2008, Self pleaded guilty to two counts of violating

the FCPA; in September 2009, Smith pleaded guilty to conspiracy to violate the FCPA and a tax charge.<sup>45</sup>

While Smith appears to have had direct knowledge that the payments to the relative were improper, the DOJ did not allege direct knowledge by Self. Smith's main responsibility at PCI was to obtain business from, and negotiate contracts with, various domestic and international clients, including UK-MOD.<sup>46</sup> Self was the company president. The statement of facts in the Self plea agreement indicates that Self "through" Smith, "understood that PCI had to enter into the Marketing Agreement with the Relative in order to assist in obtaining or retaining the [] contracts" and that Self "was not aware of any genuine services provided by the Relative."<sup>47</sup> The statement of facts also states that starting at the time PCI entered into the marketing agreement and continuing thereafter, Self "was aware of a high probability that the payments to the Relative were made for the purpose of obtaining and retaining the benefits of the UK-MOD contracts" and "failed to make a reasonable investigation of the true facts and deliberately avoided learning the true facts."<sup>48</sup> Self also initiated some of the improper wire transfers to the relative.<sup>49</sup>

Likewise, in the recent trial and conviction of Frederic Bourke, the DOJ indicated that it is willing to pursue not only "willfully blind" corporate officers like Martin Self but also individual investors who invest in enterprises they know or should know are involved in the making of corrupt payments to foreign government officials. Bourke invested \$8 million in a consortium involved in the privatization of the state oil company in the Azerbaijan Republic.<sup>50</sup> The consortium was run primarily by Viktor Kozeny, who allegedly paid bribes to various government officials in Azerbaijan.<sup>51</sup> Some of the bribes at issue were paid before Bourke even became involved in the transaction.<sup>52</sup> The bribes ranged from cash to a shopping spree for an Azeri official's daughter and were allegedly provided to officials ranging from the former president of Azerbaijan to officials at the government agency that was overseeing the privatization.<sup>53</sup> The government did not allege that Bourke was involved in or approved the payment of the bribes, although the government did establish at trial that Bourke helped two of the corrupt Azeri officials obtain medical treatment in New York City and that he knew that the officials' medical bills were being paid by a company controlled by Kozeny.<sup>54</sup> Apparently lacking "smoking gun" evidence that Bourke knew the enterprise was paying bribes, the government argued to the jury that Bourke either knew or "willfully avoided learning" about possible bribery in the enterprise by "sticking his head in the sand."<sup>55</sup> The government introduced several key pieces of evidence supporting that theory.

First, the government was permitted to offer the testimony of an expert witness, a professor of international affairs, who testified generally about corruption in Azerbaijan in order to show that Bourke should have been on notice of a likelihood of bribery in the country.<sup>56</sup> Second, the government called two witnesses who represented an unrelated potential investor in an effort to show that appropriate due diligence would have revealed the serious risks of corruption in the investment. Third, the government established that Bourke ignored significant "red flags" that indicated that there was a risk of improper payments being made in the enterprise. For example, Bourke read and ignored a Fortune magazine article discussing how Kozeny had engaged in a bribery scheme in Czechoslovakia and was a fugitive in connection with that matter.<sup>57</sup> Likewise, the government offered a recorded phone

conversation between Bourke, his attorneys, and his co-investors in which Bourke asked what one should do if one suspects bribes are being paid.<sup>58</sup> Bourke's attorneys mounted a strong defense, including calling former Senator George Mitchell, now the U.S. Mideast envoy, who also invested in the participating companies.<sup>59</sup> Mitchell said during his testimony that he was not aware that bribes were paid as part of the deal.<sup>60</sup>

This evidence was enough for the jury to convict Bourke on the FCPA charges. During their deliberations, jurors reportedly said they drew up a list of at least six "red flags" of which Bourke was aware, including that Azerbaijan was known as the "wild, wild West" at the time Bourke was involved in the deal.<sup>61</sup> According to the jury foreman, the jury believed that Bourke "'knew and he definitely should have known....He's an investor. It's his job to know.'"<sup>62</sup>

Finally, the SEC recently filed an FCPA settled enforcement against two individual officers of a company where there was no allegation that the executives either had personal knowledge of the alleged bribery or turned a blind eye to misconduct.<sup>63</sup> Rather, the complaint was premised solely on the grounds that the two officers failed to supervise senior managers in order to ensure that proper books and records were kept and that proper internal controls were maintained.<sup>64</sup> This kind of "control person" liability has been used before by the SEC — *e.g.*, in the Tyco, WorldCom, and Enron cases — but has never been used before in an FCPA case. The SEC's extension of this theory to the FCPA represents an expansion of potential liability for individual corporate officers.

Nature's Sunshine Products, Inc. is a Utah company that manufactures nutritional and personal care products and has subsidiaries in approximately 21 foreign countries.<sup>65</sup> The improper payments in this case were all made by the company's wholly owned subsidiary in Brazil, which is the company's largest foreign market. After the Brazilian government changed importation restrictions on some of the company's products, the Brazilian subsidiary made more than \$1 million in cash payments to Brazilian customs brokers, some of which in turn were paid to Brazilian customs agents, in order to circumvent the new importation restrictions.<sup>66</sup> During the time when the improper payments were being made, two controllers from company headquarters in Utah visited the offices of the Brazilian subsidiary and were provided with information that indicated that improper payments were likely being made. Less than a year later, the Brazilian subsidiary hired a new controller, who readily discovered accounting entries for which there was no supporting documentation, including the cash payments the subsidiary had made to customs brokers. Nonetheless, Nature's Sunshine accounted for the payments in its 2001 financial statements as if they were legitimate expenses — and, in 2002, the subsidiary purchased fictitious supporting documentation for the cash payments.<sup>67</sup>

The two individuals charged by the SEC, Douglas Faggioli and Craig Huff, were both officers of Nature's Sunshine. Faggioli is chief executive officer of the company and a member of the board of directors and, prior to that, had served as chief financial officer and chief operating officer of the company. Huff was the chief financial officer of the company and a certified public accountant at the time of the improper payments.<sup>68</sup>

The complaint filed by the SEC alleges that Faggioli supervised the senior management and policies for the worldwide manufacture, inventory, and distribution of Nature's Sunshine products, including exports and sales. Faggioli directly supervised the President of Nature's Sunshine International and other senior management "who were directly or indirectly responsible for the management and policies related to the manufacture, inventory and distribution operations" of the company, including the books and records of the Brazilian subsidiary.<sup>69</sup> The SEC charged that Faggioli "failed to adequately supervise" personnel in making and keeping books and records and maintaining a sufficient system of internal controls that would have adequately monitored the Brazilian subsidiary.<sup>70</sup> The SEC complaint likewise alleges that Huff had supervisory responsibilities over senior management and policies.<sup>71</sup>

The facts of the Nature's Sunshine matter may shed light on why the SEC pursued control person liability in that case. Nature's Sunshine is a fairly small company (consisting of 1,000 employees) with a small group of senior managers. The SEC's complaint strongly implied that the controllers, who had access to senior managers, knew of the bribery. In addition, the bribes involved fairly large amounts of money when viewed in the context of the company's overall sales and were paid in the company's largest foreign market. The SEC also alleged that a newly hired finance employee — the Brazilian subsidiary controller — readily detected the improper payments when conducting a routine review. The complaint implies but does not allege that the new controller may have reported the improper payments and that his reports were not appropriately handled. All told, the SEC's complaint seems to strongly suggest that Faggioli and Huff may have been quite lax in attempting to influence corporate policies on bribery, or perhaps that they should have been aware of the FCPA issues. Finally, the company's external auditor, KPMG, had resigned three years before the settlement, alleging that the chief operating officer of the company had made two different misrepresentations to KPMG and had "approved a payment" in violation of the FCPA.<sup>72</sup>

Because the Nature's Sunshine case was settled by the SEC through consent judgments with Faggioli and Huff, the agency's arguments in favor of control person liability were not fully explained or litigated. Nonetheless, the SEC's willingness to use control person liability could be a powerful enforcement tool to pursue senior executives or directors who could have known of bribery or could have stopped it from occurring had they exercised their influence within the company. Although mere negligence does not ordinarily trigger control person liability, exactly who is a control person under Section 20(a) of the Exchange Act is not precisely or uniformly defined in the Act or in case law. The SEC has defined control as the "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person [*i.e.*, a company], whether through the ownership of voting securities, by contract, or otherwise."<sup>73</sup> Some courts have adopted this definition, but many courts have chosen not to defer to the SEC's definition.<sup>74</sup> Furthermore, different jurisdictions apply different tests.<sup>75</sup> Although Faggioli and Huff were charged with control person liability relating to violations of the FCPA's accounting provisions, it would seem that the theory could be equally applied to violations of the statute's anti-bribery provisions.<sup>76</sup>

### *Commercial Bribery*

In a number of recent cases against companies, the DOJ and SEC have pursued allegations of commercial bribery, which cannot be charged under the anti-bribery provisions of the FCPA because of the absence of a foreign official.<sup>77</sup> Such cases can be brought under the accounting provisions of the FCPA, which do not require the presence of a foreign official (and do not even require a corrupt payment), or under the Travel Act, which makes it a federal crime to travel in or use the mail or any facility in interstate or foreign commerce in order to engage in certain unlawful activity, including bribery, that violates state or federal law.<sup>78</sup> Nothing in these statutes limits their application to companies, and, indeed, they have recently been applied in the prosecution of individuals.

In the Schnitzer Steel case, both the company and two executives — Robert W. Philip and Si Chan Wooh — settled FCPA books and records charges with the government relating to the payment of bribes to the managers of government-owned and privately owned steel mills in China. Wooh, who was executive vice president and head of a Schnitzer subsidiary, settled with the SEC and pleaded guilty to conspiring to make corrupt payments totaling over \$200,000 over almost a ten-year period "to officers and employees of nearly all" of Schnitzer's Chinese customers, both private and public.<sup>79</sup> Former Schnitzer chairman and CEO Philip settled with the SEC, which alleged that Philip authorized payment of those bribes as well as an additional \$1.7 million in payments to managers of privately owned steel mills.<sup>80</sup>

More recently, in the Control Components, Inc. ("CCI") case, six individuals have been charged not only with bribing foreign officials in violation of the FCPA but also with bribing foreign and domestic private companies in violation of the Travel Act. The CCI indictments allege that the named individuals engaged in a massive, wide-ranging bribery scheme that involved more than 200 payments in more than 30 countries over nine years.<sup>81</sup> Net profits related to the bribery topped \$46.5 million.<sup>82</sup> In July 2009, the company pleaded guilty to FCPA and Travel Act-related charges involving both official and commercial bribery and agreed to pay an \$18.2 million criminal fine.<sup>83</sup> Two other individual executives of CCI, Richard Morlok and Mario Covino, pleaded guilty to FCPA charges in February and January 2009, respectively.<sup>84</sup>

### *Non-Corporate Prosecutions*

FCPA cases have traditionally almost always involved the investigation and/or prosecution of companies, sometimes with parallel proceedings against the officers who engaged in or authorized the improper payments. A couple of recent cases have deviated somewhat from this traditional model.

Most recently, movie producers Gerald and Patricia Green, who ran their own small, closely held film production company, were found guilty of conspiracy to violate the FCPA and money laundering.<sup>85</sup> The Greens were involved in a scheme to pay approximately \$1.8 million in kickbacks to the former governor of the Tourism Authority of Thailand in exchange for receiving contracts to manage and operate an annual Thai film festival and to provide "an elite tourism 'privilege card' marketed to wealthy foreigners."<sup>86</sup> The payments made to the former governor were paid into the bank accounts of the governor's daughter and a friend and were often disguised as

sales commissions that ranged from between 10 and 20 percent.<sup>87</sup> The contracts the Greens received resulted in more than \$13.5 million to businesses they owned.<sup>88</sup> Although the movie industry has previously come under scrutiny for alleged violations of the FCPA,<sup>89</sup> the Greens were the first entertainment industry figures to be charged under the FCPA, and Hollywood now reportedly anticipates more government scrutiny of its overseas operations.<sup>90</sup>

The government also prosecuted Shu Quan-Sheng, who was the President, Secretary, and Treasurer of AMAC International, on FCPA charges related to Shu's payment of \$189,300 in bribes to Chinese officials at a research institute while trying to obtain a \$4 million contract for a French company whom Shu represented.<sup>91</sup> Like the case involving the Greens, AMAC appears to be a small company largely controlled by Shu. Additionally, Shu is a naturalized U.S. citizen and Ph.D. physicist who, in addition to violating the FCPA, also violated the Arms Export Control Act by willfully exporting a defense service to China without first obtaining the required U.S. approval or export license.

Finally, in the Faheem Mousa Salam case, a civilian translator and former employee of a defense contractor working in Iraq pleaded guilty to violating the FCPA by offering a bribe to a senior Iraqi police official.<sup>92</sup> Salam's employer, Titan Corporation, was not charged because Salam's actions apparently were unrelated to his work as a translator. The prosecution of Salam is a useful reminder that even an attempted bribe that is not effective in obtaining business can violate the FCPA.

Again, these cases show that FCPA cases do not all involve corporate voluntary disclosures and/or corporate cooperation. This phenomenon is consistent with the government's stated intention to rely more on traditional investigative techniques.

### *Conclusions*

The recent trend of prosecuting individuals for FCPA violations is likely to continue and grow over the next several years. The DOJ and SEC have marshaled additional resources for FCPA prosecutions and have made clear that they intend to deploy those resources towards individuals as well as companies. There are likely to be several interesting results of increased FCPA cases against individuals.

First, unlike companies, individuals are more likely not to settle and to go to trial, despite the fact that trials on FCPA charges are a daunting prospect: since 1991, the DOJ has not lost a single FCPA case at trial. Obtaining documents and witnesses from overseas is a major challenge for defendants, as demonstrated in the recent Jefferson and Bourke trials. Current FCPA "law" comes largely from uncontested, settled proceedings. Because prosecuting more individuals will lead to more trials and more litigation, the government's theories of FCPA jurisdiction, culpability, and other issues will be subjected to judicial scrutiny and review. Undoubtedly, this will lead to more published FCPA cases and the body of FCPA law will grow and be refined.

Second, cases may be brought against companies and/or individuals that previously might have been difficult for the government to bring successfully. Because the government has proven that it is willing to indict, try, and incarcerate individuals,

these individuals have a powerful incentive to cooperate with the government. The cooperation of these individuals may provide the government with information and testimony that it may not otherwise have been able to secure.

Finally, because the government is willing to pursue foreign citizens individually now, international businesspeople whose companies are under investigation by the DOJ or the SEC should consider whether they may be detained or arrested while visiting or traveling through the United States. For example, Christian Sapsizian was arrested and charged while traveling through the Miami airport in December 2006.<sup>93</sup> Likewise, Misao Hioki was arrested in Houston in May 2007.<sup>94</sup>

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<sup>1</sup> Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, 22 CORP. CRIME REP. 36(1), September 16, 2008, available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>.

<sup>2</sup> *Id.*

<sup>3</sup> Robert Khuzami, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (August 5, 2009), available at <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

<sup>4</sup> See Dealing with the DOJ, <http://fcpablog.blogspot.com/2009/01/dealing-with-doj.html> (January 28, 2009) (noting that in 2008 there were only 16 deferred and non-prosecution agreements, down from 40 in 2007).

<sup>5</sup> See, e.g., Eric Lichtblau, *Leniency For Big Corporations in the U.S.*, N.Y. TIMES, April 9, 2008.

<sup>6</sup> Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312, 314 (2007), available at <http://www.thepocketpart.org/2007/03/20/henning.html>.

<sup>7</sup> See, e.g., Roger M. Witten and Jay Holtmeier, *A Spiraling Caseload Under the Foreign Corrupt Practices Act*, N.Y.L.J., February 9, 2009.

<sup>8</sup> See Press Release, U.S. Attorney for the Southern District of New York, *American Businessman Charged with \$78 Million in Unlawful Payments to Kazakh Officials in 6 Oil Transactions; Former Mobil Corp. Executive Indicted for Tax Evasion in Kickback Scheme* (April 2, 2003), <http://www.justice.gov/usao/nys/pressreleases/April03/giffenwilliams.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Kenneth N. Gilpin, *Former Mobil Oil Executive Pleads Guilty to Tax Evasion*, N.Y. TIMES, June 13, 2003.

<sup>12</sup> See James Giffen and America's Secrets, <http://fcpablog.blogspot.com/2009/07/james-giffen-and-americas-secrets.html> (July 16, 2009).

<sup>13</sup> See *U.S. v. David Kay and Douglas Murphy*, No. H-01-914 (S.D. Tex. 2001).

<sup>14</sup> See e.g., Press Release, U.S. Department of Justice, *Former HealthSouth Officers Indicted in Connection with Bribery Involving Saudi Hospital* (July 1, 2004), [http://www.usdoj.gov/opa/pr/2004/July/04\\_crm\\_463.htm](http://www.usdoj.gov/opa/pr/2004/July/04_crm_463.htm) (indictment of former divisional President and Chief Operating Officer and former Vice President of Legal Services in case involving payment of \$2.5 million in bribes on \$50 million contract); *U.S. v. Lockheed Corp., Allen R. Love, and Suleiman A. Nassar*, No. 1:94-cr-00226 (N.D. Ga. 1994) (indictment of regional vice-president of Lockheed International and sales director for Lockheed subsidiary in case involving scheme to pay more than \$1 million in bribes on \$79 million contract); *U.S. v. Harry G. Carpenter and W.S. Kirkpatrick & Co.*, No. 85-353 (D.N.J. 1985) (indictment of chief executive officer and chairman of Board of Directors in case involving payment of \$1.7 million in bribes on contract worth more than \$10 million).

<sup>15</sup> See Press Release, U.S. Department of Justice, *Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges* (Sept. 3, 2008), [http://www.usdoj.gov/criminal/pr/press\\_releases/2008/09/09-03-08stanley-guilty.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2008/09/09-03-08stanley-guilty.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Press Release, U.S. Department of Justice, *Former World Bank Employee Sentenced for Taking Kickbacks and Assisting in the Bribery of a Foreign Official* (April 25, 2008), [http://www.usdoj.gov/criminal/pr/press\\_releases/2008/04/04-25-08\\_world-bank-emp-sent.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2008/04/04-25-08_world-bank-emp-sent.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> See Press Release, U.S. Agency for International Development, *Investigation of International Fraudulent Conspiracy Results in Incarceration for Two Co-conspirators* (November 27, 2002), [http://www.usaid.gov/oig/press/pressrelease\\_1127\\_02\\_132.pdf](http://www.usaid.gov/oig/press/pressrelease_1127_02_132.pdf).

<sup>21</sup> *Id.*

<sup>22</sup> See Tim Morris, *William Jefferson Verdict: Guilty On 11 of 16 Counts*, NEW ORLEANS TIMES-PICAYUNE, August 5, 2009.

<sup>23</sup> *Id.*

<sup>24</sup> See Press Release, U.S. Department of Justice, *Former Alcatel CIT Executive Sentenced for Paying \$2.5 Million in Bribes to Senior Costa Rican Officials* (September 23, 2008), <http://www.usdoj.gov/opa/pr/2008/September/08-crm-848.html>.

<sup>25</sup> See Press Release, U.S. Department of Justice, *Former Alcatel Executive Pleads Guilty to Participation in Payment of \$2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract* (June 7, 2007), <http://miami.fbi.gov/dojpressrl/pressrel08/mm20080923.htm>.

<sup>26</sup> *Id.*

<sup>27</sup> See Press Release, U.S. Department of Justice, *Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products* (December 10, 2008), <http://www.usdoj.gov/opa/pr/2008/December/08-at-1084.html>; see also *Bridgestone Exec In U.S. Cartel Bust*, JAPAN TIMES, May 5, 2007.

<sup>28</sup> *Id.*; see also *U.S. v. Hioki*, No. 4:08-cr-00795 (S.D. Tex. 2008).

<sup>29</sup> 15 U.S.C. § 78dd-3(a).

<sup>30</sup> See *U.S. v. Hioki*, No. 4:08-cr-00795 (S.D. Tex. 2008).

<sup>31</sup> See Press Release, U.S. Department of Justice, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (March 5, 2009), <http://www.usdoj.gov/opa/pr/2009/March/09-crm-192.html>.

<sup>32</sup> See *U.S. v. Jeffrey Tesler and Wojciech J. Chodan*, No. H-09-098 (S.D. Tex. 2009).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Press Release, U.S. Department of Justice, *supra* note 31.

<sup>36</sup> See Press Release, U.S. Department of Justice, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil for Food Program (July 31, 2009), <http://www.usdoj.gov/opa/pr/2009/July/09-crm-757.html>.

<sup>37</sup> *Id.*

<sup>38</sup> See *US Seeks UAE Resident on Conspiracy Charge*, THE NATIONAL (UAE), August 1, 2009, available at <http://www.thenational.ae/apps/pbcs.dll/article?AID=/20090801/FOREIGN/708019990/0/SPO RT.>

<sup>39</sup> See Press Release, U.S. Department of Justice, Two Florida Businessmen Plead Guilty to Participating in a Conspiracy to Bribe Foreign Government Officials and Money Laundering (May 15, 2009), <http://www.usdoj.gov/opa/pr/2009/May/09-crm-476.html>.

<sup>40</sup> *Id.*

<sup>41</sup> 15 U.S.C. § 78dd-1(a)(3).

<sup>42</sup> 15 U.S.C. §§ 78dd-1(f)(2)(A)(i), 78dd-2(h)(3)(A)(i), 78dd-3(f)(3)(A)(i).

<sup>43</sup> See 15 U.S.C. § 78t(a).

<sup>44</sup> See Press Release, U.S. Department of Justice, Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection With Bribes Paid to U.K. Ministry of Defense Official (September 3, 2009), [http://www.usdoj.gov/criminal/pr/press\\_releases/2009/09/09-03-09smith-guilty.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2009/09/09-03-09smith-guilty.pdf).

<sup>45</sup> *Id.*; see also Press Release, U.S. Department of Justice, Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection With Bribes Paid to U.K. Ministry of Defence Official (May 8, 2008), [http://www.usdoj.gov/criminal/pr/press\\_releases/2008/05/05-08-08self-pleads.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2008/05/05-08-08self-pleads.pdf).

<sup>46</sup> See *U.S. v. Martin Eric Self*, No. 8:08-cr-00110 (C.D. Cal. 2008).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Press Release, U.S. Attorney for the Southern District of New York, Connecticut Investor Found Guilty in Scheme to Bribe Government Officials in Azerbaijan (July 10, 2009), <http://www.usdoj.gov/usao/nys/pressreleases/July09/bourkefrederickverdictpr.pdf>; see also David Glovin, *Aliyev Bribery Scheme Hatched in Deputy's Office, Witness Says*, BLOOMBERG, June 4, 2009.

<sup>51</sup> Kozeny also was indicted on FCPA and other charges. He is reportedly in the Bahamas, where he is fighting extradition attempts by U.S. and Czech authorities.

<sup>52</sup> See *U.S. v. Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton*, No. 05-cr-518 (S.D.N.Y. 2005)

<sup>53</sup> *Id.*; see also Tony Allen-Mills, *Pirate of Prague Faces Extradition*, THE SUNDAY TIMES (LONDON), October 9, 2005.

<sup>54</sup> See *supra* note 50.

<sup>55</sup> Mark Hamblett, *Defendant Was Aware of Bribes, Jury Told*, N.Y.L.J., July 7, 2009.

<sup>56</sup> See *U.S. v. Kozeny*, \_\_\_ F.Supp.2d \_\_\_, 2009 WL 1514369 (S.D.N.Y. May 29, 2009).

<sup>57</sup> Adam Klasfeld, *Azeri Oil Bribery Trial Wrapping Up Today*, COURTHOUSE NEWS SERVICE, July 7, 2009.

<sup>58</sup> David Glovin, *Bourke Tape Will Play Central Role in Bribery Trial*, BLOOMBERG, June 2, 2009.

<sup>59</sup> See Adam Klasfeld, *Jurors Feel for Bourke But Convict Him*, COURTHOUSE NEWS SERVICE, July 10, 2009; see also David Glovin, *Mitchell, Obama Envoy, Says He Didn't Know of Oil-Deal Bribes*, BLOOMBERG, June 20, 2009.

<sup>60</sup> Glovin, *supra* note 59.

<sup>61</sup> Klasfeld, *supra* note 59.

<sup>62</sup> Mark Hamblett, *Entrepreneur is Found Guilty of Conspiracy in Azerbaijan Case*, N.Y.L.J., July 13, 2009.

<sup>63</sup> See Press Release, Securities and Exchange Commission, SEC Charges Nature's Sunshine Products, Inc. with Making Illegal Foreign Payments (July 31, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr21162.htm>.

<sup>64</sup> *Id.*

<sup>65</sup> See *SEC v. Nature's Sunshine Products, Inc.*, Douglas Faggioli, and Craig D. Huff, No. 2:09CV0672 (D. Utah 2009).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *In the Matter of Nature's Sunshine Products, Inc.*, Exchange Act Release No. 59268 (January 21, 2009), available at <http://www.sec.gov/litigation/opinions/2009/34-59268.pdf>.

<sup>73</sup> 17 CFR § 230.405.

<sup>74</sup> See Erin L. Massey, *Control Person Liability Under Section 20(a): Striking a Balance of Interest for Plaintiffs and Defendants*, 5 HOUS. BUS. & TAX L.J. 109, 114 (2005).

<sup>75</sup> *Id.* The majority test, known as the "potential control" test, focuses on "whether the defendant had the potential to, or actually did, control the primary violator," — i.e., the person who violated the Act. *Id.* at 118. Some circuits applying this test require that it be proved that (1) the defendant actually participated in the operations of the corporation or person, in the general sense, and (2) the defendant had the power to control the specific transaction that is the subject of the primary violation. *Id.* The minority test, known as the "culpable participation" test, which is applied in New York, requires that a person (1) have exercised control over the primary violator and (b) have been meaningfully involved in the fraud forming the primary violation. *Id.* at 115. A third view, which is not generally widely applied today, looks only at a person's position within a company and his or her relationship to the primary violator, which could lead to a nearly "strict liability" view of control person liability. See Laura Greco, *The Buck Stops Where? Defining Controlling Person Liability*, 73 S. CAL. L. REV., Vol. 169, 173–174 (1999).

<sup>76</sup> See 15 U.S.C. § 78t(a) ("Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable...").

<sup>77</sup> See, e.g., Press Release, U.S. Department of Justice, Control Components, Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$18.2 Million Criminal Fine (July 31, 2009), <http://www.justice.gov/opa/pr/2009/July/09-crm-754.html>; Press Release, U.S. Securities and Exchange Commission, SEC Files Settled Foreign Corrupt Practices Act Charges Against York International Corporation for Improper Payments to UAE Officials, to Iraq Under the U.N. Oil for Food Program, and to Others — Company Agrees to Pay Over \$12 Million and to Retain an Independent Compliance Monitor (October 1, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20319.htm>; Press Release, U.S. Department of Justice, Schnitzer Steel Industries, Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a \$7.5 Million Criminal Fine (October 16, 2006), [http://www.usdoj.gov/criminal/pr/press\\_releases/2006/10/2006\\_4809\\_10-16-06schnitzerfraud.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006_4809_10-16-06schnitzerfraud.pdf).

<sup>78</sup> 18 U.S.C. § 1952.

<sup>79</sup> See Press Release, U.S. Department of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007),

[http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_474.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_474.html); see also Press Release, U.S. Securities and Exchange Commission, SEC Settles Charges Against Former Portland Steel Executive for Anti-Bribery Statute Violations (June 29, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20174.htm>.

<sup>80</sup> See Press Release, U.S. Securities and Exchange Commission, SEC Charges Former Chairman/CEO of Schnitzer Steel for Authorizing Cash Bribes to Foreign Officials (December 13, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20397.htm>.

<sup>81</sup> See, e.g., *U.S. v. Control Components, Inc.*, No. 09-162 (C.D. Cal. 2009).

<sup>82</sup> See *Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay*, REUTERS, July 31, 2009.

<sup>83</sup> *Id.*

<sup>84</sup> See Press Release, U.S. Department of Justice, Former Finance Director of California Valve Company Pleads Guilty to Bribing Foreign Government Officials (February 3, 2009), <http://www.usdoj.gov/opa/pr/2009/February/09-crm-089.html>; see also Press Release, U.S. Department of Justice, Former Executive at California Valve Company Pleads Guilty to Bribing Foreign Government Officials (January 8, 2009), <http://www.usdoj.gov/opa/pr/2009/January/09-crm-016.html>.

<sup>85</sup> See Press Release, U.S. Department of Justice, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009), <http://www.usdoj.gov/opa/pr/2009/September/09-crm-952.html>.

<sup>86</sup> *Id.*

<sup>87</sup> See Greg Risling, *LA Trial in Thai Film Festival Bribery Case Begins*, ASSOCIATED PRESS, August 26, 2009.

<sup>88</sup> See *supra* note 85.

<sup>89</sup> See Glenn F. Bunting, *\$78 million of red ink?*, L.A. TIMES, April 15, 2007 (describing line items for "local bribes" and "political/mayoral support" in budget for movie *Sahara*).

<sup>90</sup> See Ben Fritz, *Hollywood producers are guilty of bribing Thai official*, L.A. TIMES, September 15, 2009.

<sup>91</sup> See Press Release, U.S. Department of Justice, Virginia Physicist Sentenced to 51 Months in Prison for Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials (April 7, 2009), [http://www.usdoj.gov/criminal/pr/press\\_releases/2009/04/04-07-09\\_sheng-sent.pdf](http://www.usdoj.gov/criminal/pr/press_releases/2009/04/04-07-09_sheng-sent.pdf).

<sup>92</sup> See Press Release, U.S. Department of Justice, U.S. Civilian Translator Pleads Guilty to Offering Bribe to Iraqi Police Official (August 4, 2006), [http://www.usdoj.gov/opa/pr/2006/August/06\\_crm\\_500.html](http://www.usdoj.gov/opa/pr/2006/August/06_crm_500.html).

<sup>93</sup> See Emma Schwartz, *Hiking the Cost of Bribery*, U.S. NEWS AND WORLD REPORT, August 5, 2007.

<sup>94</sup> See Press Release, U.S. Department of Justice, *supra* note 27.