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Perspectives on Recent Anti-Corruption Developments

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The authors discuss recent significant financial fraud settlements reached by the Securities and Exchange Commission and the Department of Justice, and provide an overview of other recent anti-corruption developments.

A federal district court recently approved the SEC's settlements with Pfizer and Wyeth in a long-running FCPA investigation; weeks earlier, one of Pfizer's subsidiaries settled parallel FCPA charges with the DOJ. The settlements are noteworthy among FCPA settlements given their unique charges, jurisdictional hook, and settlement terms. Accordingly, this article provides perspectives on the significance of these settlements. The article also provides an overview of other recent anti-corruption developments, namely Transparency International's report on global enforcement of the OECD Anti-Bribery Convention and the SEC's final rule requiring that resource extraction issuers disclose in SEC filings certain payments to US or foreign governments.

PFIZER SETTLEMENT

The DOJ and SEC recently settled a trilogy of FCPA cases with Pfizer Inc. (which is a publicly traded "issuer"), Pfizer H.C.P. Corporation (one of

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Pfizer's US subsidiaries), and Wyeth LLC (an issuer which Pfizer acquired in 2009).[1] Collectively, the cases settled for $60 million: the DOJ settlement involved a $15 million DOJ criminal fine against Pfizer H.C.P., and the SEC settlements involved $45.2 million in disgorgement of ill-gotten gains and prejudgment interest against Pfizer Inc. and Wyeth LLC.[2] The collective sum places the settlement as the largest in 2012 (as of December 10).

The DOJ's charges against Pfizer H.C.P. alleged bribes in Bulgaria, Croatia, Kazakhstan, and Russia that were of two varieties: (1) payments to physicians and other healthcare practitioners at government-owned hospitals to improperly influence prescription practices, and (2) payments to officials of government healthcare committees to improperly secure drug-related approvals or placement on hospital formularies. The DOJ alleged that the bribes spanned nine years; totaled approximately $2 million; were made directly or via third-party intermediaries; and took the form of cash, gifts, entertainment, and support for domestic and international travel. Many of the bribes involved relatively small sums, with the more sizeable payment centered on an exclusive distribution contract, valued at $500,000, that Pfizer H.C.P. allegedly entered while knowing that all or part of the contract's value would be provided to a high-level Kazakh official involved in granting product registrations to Pfizer. Based on all the alleged bribes, the DOJ charged Pfizer H.C.P. with conspiracy to violate the FCPA's accounting and anti-bribery provisions and a substantive violation of the anti-bribery provisions.[3]

The SEC, whose jurisdiction generally is limited to issuers, charged Pfizer Inc. as the issuer/parent of Pfizer H.C.P. The SEC's charges against Pfizer Inc. were narrower than the DOJ's charges in that the SEC civilly alleged violations only of the FCPA's accounting provisions. Absent from the SEC's charges were alleged violations of the anti-bribery provisions, likely because, as the SEC's charging papers state, there was no evidence that anyone at Pfizer Inc. knew of the alleged bribes (to bring anti-bribery charges, the SEC must allege the issuer had knowledge of the corrupt payments, whereas no knowledge requirement exists for civil charges under the accounting provisions). In another respect the SEC's charging papers were more expansive than the DOJ's papers in that the SEC explicitly discussed the conduct in the countries cited in the DOJ's charges, as well as bribes in China, the Czech Republic, Italy, and Serbia. The SEC also brought charges for inadequate internal

controls.[4] As for Wyeth, the SEC alleged that its corporate books and records misrecorded bribes in China, India, Pakistan, and Saudi Arabia, and that Wyeth maintained inadequate internal controls.[5]

In sum, the DOJ and SEC settlements were based on a range of payments in 11 countries that have been perennial FCPA hotspots.[6] The charges against Pfizer, therefore, serve as a reminder of the FCPA risks confronted by companies operating in reputedly corrupt countries. The Pfizer settlement also involved the following notable developments:

1. *Books & Records-Related Charge Against Subsidiary of an Issuer:* As a general principle, the FCPA's accounting provisions impose criminal and civil liability only against issuers that fail to maintain accurate books and records and/or adequate internal controls.[7] In the criminal settlement, however, the DOJ bootstrapped a conspiracy charge to allege that Pfizer H.C.P. (a non-issuer) conspired to violate the books and records requirement.[8] The DOJ's theory was that Pfizer H.C.P. conspired with its employees and agents to knowingly misrecord bribes on its corporate books, which, when consolidated with Pfizer Inc.'s books, caused misrecordings on the books of Pfizer Inc.[9] The DOJ's charge parallels the SEC's efforts where the SEC has civilly charged non-issuers (e.g., Panalpina, KBR, and Snamprogetti) for aiding-and-abetting and causing violations of the FCPA's books and records provision.[10] The Pfizer DOJ settlement, coupled with those SEC settlements in other contexts, demonstrates the creeping ways that the DOJ and SEC may pursue a non-issuer in connection with violations of the FCPA books and records provision.
2. *The DOJ's Use of Alternative Jurisdiction:* The Pfizer settlement marks what appears to be the first instance where the DOJ invoked the alternative jurisdiction provision against a US company.[11] The provision, which was added to the FCPA anti-bribery section in 1998, expands the DOJ's jurisdiction over US companies and individuals by imposing potential liability absent any US territorial nexus; in other words, jurisdiction can be premised merely on a company's or individual's status as a US national. For Pfizer H.C.P., the DOJ's charging papers allege no corrupt conduct within the United States, and accordingly the DOJ explicitly invoked its alternative jurisdiction authority. The Pfizer settlement is the

rare instance where a US company was prosecuted under the FCPA's anti-bribery provisions for a bribe to a foreign official that lacked any territorial connection to the United States.

3. *Implications of Representative Office Status:* The charges against Pfizer H.C.P. demonstrate how corporate structure and form can impact liability under the anti-bribery provisions. Specifically, the DOJ charged Pfizer H.C.P. because the bribes were paid by its representative offices in Bulgaria, Croatia, and Kazakhstan.[12] In contrast, had the representative offices been organized as freestanding foreign subsidiaries, Pfizer H.C.P. would have been deemed a corporate body independent of those subsidiaries and therefore may well have avoided FCPA charges altogether. In addition, the alternative jurisdiction provision just discussed extends only to US companies; thus, foreign subsidiaries can be prosecuted only if the bribery of a foreign official has a nexus with the United States. No such nexus existed, at least based on the facts alleged in the DOJ's charging documents. As such, the DOJ would seemingly have faced significant jurisdictional hurdles if confronted with a different corporate structure and form.

4. *M&A Liability:* In public remarks, FCPA enforcement officials have for some time touted the importance of conducting FCPA due diligence for transnational mergers and acquisitions as a means of identifying potential FCPA issues and thereby potentially avoiding attendant liability. The Pfizer settlement reflects two sides of the M&A coin. On one side, the bulk of Pfizer's settlement involved an array of charges for bribes paid pre- and post-closing by entities that Pfizer acquired in 2003 via its acquisition of Pharmacia Corporation. On the other side of the M&A coin, Pfizer appears to have contained its liability for the improper conduct that arose at Wyeth due to an extensive post-close FCPA due diligence program. When Pfizer acquired Wyeth in 2009 and established it as a wholly owned subsidiary, the SEC's papers explain that "Pfizer's post-acquisition review identified potential improper payments, and it diligently and thoroughly undertook a global internal investigation of Wyeth's operations…. Following the acquisition, Pfizer diligently and promptly integrated Wyeth's legacy operations into its compliance program."[13] Apparently, owing in part to Pfizer's compliance efforts, no charges were

brought against Pfizer itself for the Wyeth-related payments, even though books and records charges were particularly plausible for those bribes that the SEC alleged continued after Pfizer acquired Wyeth. The divergent manner in which FCPA regulators appear to have treated the Pharmacia and Wyeth bribes illustrates the potential FCPA risks and rewards related to a company's approach to mergers and acquisitions.

5. *Definition of Foreign Officials:* The Pfizer settlement reaffirms the DOJ's and SEC's view that the term "foreign official" extends beyond card-carrying government officials to also envelop employees of government-owned or -controlled entities. Many of the bribes at issue in the Pfizer settlement were paid to those at public hospitals who were doctors, pharmacologists, and—perhaps breathing new life into the term "foreign officials"—even midwives. In addition, part of the SEC's charges for violations of the accounting provisions involved bribes paid to employees of a private company that the Russian government had licensed to perform customs inspections. Violations of the accounting provisions can accrue if either public or private sector bribes are misrecorded on a company's books; thus, the SEC's charges under the accounting provisions for bribes to employees of a private company operating under a government contract are not dispositive of whether the SEC would deem such payments as violations of the FCPA's anti-bribery provisions. Nonetheless, the SEC's inclusion of such payments in the context of its complaint against Pfizer might foretell the SEC's position that bribes to private-sector employees operating under a government contract are deemed as payments to "foreign officials." Companies, therefore, should continue to provide sufficiently broad guidance to employees as to the range of interactions that might implicate the FCPA. Of relevance on this topic, the first-ever decision from a federal appellate court on the DOJ's and SEC's efforts to broadly construe the term "foreign official" is expected in the near future.[14]

6. *Benefits of Disclosure & Cooperation:* The Pfizer settlement illustrates the ways in which the DOJ and SEC will extend credit to companies that voluntarily disclose FCPA issues and that cooperate with the regulators' respective investigations. The DOJ's and SEC's charging papers lauded Pfizer for its voluntary disclosure, thorough cooperation, and extensive

remedial efforts, which included innovative proactive anti-corruption reviews of higher-risk markets. In large part due to those measures, the DOJ monetary fine was 34 percent below the low range of the US Sentencing Guidelines, the SEC did not seek civil penalties against Pfizer or Wyeth, and neither agency required Pfizer to retain an independent compliance monitor (the trend over the last several years is to permit voluntarily disclosing companies to self-monitor and self-report on their compliance remediation efforts in lieu of imposing independent monitors). Finally, Pfizer H.C.P.'s settlement with the DOJ took the form of a deferred prosecution agreement, which reduces the risks of debarment and other collateral consequences.

7. *Unique Reporting Mechanism:* The deferred prosecution agreement contains a novel mechanism that establishes periodic communications between Pfizer and the DOJ, the first of which "shall take place within 60 days" after the deferred prosecution agreement was finalized. The stated purpose of these periodic communications, according to the deferred prosecution agreement, is for Pfizer to report on any newly discovered FCPA issues. This is a rare instance where the DOJ required such periodic reporting, and it may be the DOJ's attempt to strike a new balance between forgoing imposition of an independent compliance monitor and allowing settling companies discretion to altogether self-monitor and self-report FCPA issues arising during the term of the settlement agreement.

8. *Parent's Agreement to Fulfill DOJ Compliance & Reporting Obligations:* By means of a one-sentence rider to the deferred prosecution agreement with the DOJ, Pfizer Inc. agreed that it would implement FCPA compliance enhancements at all its subsidiaries and likewise would report any new FCPA violations at any subsidiary, even though the DOJ's deferred prosecution agreement technically was with Pfizer H.C.P. Such a concession by a parent company is somewhat unique among FCPA settlements. Here, the uniqueness might be explained by the fact that no greater burden is placed on Pfizer Inc. because the concession largely mirrors Pfizer Inc.'s obligations under the SEC civil settlement. Notably, however, the concession carries risk because the DOJ deferred prosecution agreement provides that any programmatic compliance misstep at any Pfizer Inc.

subsidiary anywhere in the world will be deemed a breach of the DOJ agreement with Pfizer H.C.P.

9. *Implications of SEC's New No Admit/Deny Policy:* Until recently, the SEC's "neither admit nor deny" approach permitted a defendant to settle SEC charges without admitting or denying the allegations, even where a defendant had made admissions of wrongdoing in a parallel criminal proceeding. The SEC modified its approach in early 2012 by requiring the "neither admit nor deny" language be stripped from SEC settlement agreements "for cases involving criminal convictions where a defendant has admitted violations of the criminal law."[15] Notably, Pfizer Inc. was not a defendant in the criminal proceeding (rather, its subsidiary Pfizer H.C.P. settled the criminal charges), yet it was not permitted to settle the SEC's allegations on a no admit/deny basis. (In contrast, Wyeth was permitted to settle the SEC's allegations on a no admit/deny basis.) While the SEC's papers are not entirely clear on the issue, the SEC may have invoked its new no admit/deny policy as to Pfizer Inc. because the SEC's civil settlement with Pfizer Inc. was significantly intertwined with the admissions made by one of Pfizer Inc.'s subsidiaries in the parallel criminal proceeding. It will be worth watching subsequent settlements to assess whether Pfizer proves to be an outlier, or whether under the SEC's new policy a parent company is not permitted to settle SEC civil charges without admitting liability when a subsidiary makes an admission in an overlapping criminal proceeding.
10. *Enhanced Compliance Obligations:* Standard DOJ and SEC settlement agreements include a set of compliance obligations mandating that settling companies adopt and/or maintain an FCPA compliance program; failure to do so could be deemed a breach of the settlement agreement. Those compliance obligations have provided useful benchmarking guidance to companies evaluating their programs against the expectations of regulators. In the Pfizer settlement, the DOJ announced a set of "enhanced compliance obligations" that, while substantially mirroring past settlements, impose more detailed requirements on Pfizer. Similarly, the settlement with Johnson & Johnson in 2011 contained a set of enhanced compliance obligations, although other settlements between the time of the Johnson & Johnson and Pfizer settlements lacked the enhanced obligations. The DOJ, therefore, may be more finely stratifying the terms

of settlements by imposing the enhanced compliance obligations when it deems them appropriate, based on the underlying conduct. Companies would be advised to consider the relevance of the enhanced obligations of the Pfizer settlement for their operations, although each company, of course, retains some degree of discretion on how to specifically structure its own compliance program. The key features of the enhanced compliance obligations as set forth in the Pfizer settlement are:

- Delegation of FCPA compliance responsibilities to a *high-level compliance officer* (Pfizer appointed a chief compliance and risk officer) with significant FCPA experience reporting directly to the CEO and the Audit Committee of the Board of Directors;
- Appointment of *heads of compliance for each business unit* who report to the high-level compliance officer or to the general counsel;
- Establishment of an *Executive Compliance Committee* consisting of the CEO, CFO, General Counsel, high-level compliance officer, and others within compliance, finance, audit, human resources, and various business units that will oversee the company's corporate compliance responsibilities;
- Establishment of a group or groups to handle *international investigations, anti-corruption compliance, and mergers and acquisitions compliance*;
- *Tailored FCPA procedures* for the review and approval of risks specific to the company (for Pfizer, those risks were identified as gifts, hospitality, international travel and site visits, meeting support, educational grants, charitable donations, consulting fees, speaker fees, and honoraria to foreign officials);
- *Risk-based annual reviews* that will entail on-site visits by qualified compliance staff; participation by qualified auditors where appropriate; a review of a representative sample of contracts and payments to foreign officials; and where feasible, an audit of higher-risk distributors (Pfizer committed to conducting reviews of five higher-risk markets per year). In discussing these reviews, the DOJ settlement agreement provides useful guidance on risk factors to evaluate for

purposes of determining which markets to include in a risk review; which include whether there is a high-degree of interaction with foreign officials; the existence of internal reports of potential corruption risk; whether there is a high corruption risk based on corruption indexes; and financial audit results;

- FCPA risk-based *due diligence for mergers and acquisitions* and, where such diligence is not practicable before closing, the performance of due diligence soon thereafter;
- FCPA risk-based *due diligence of third parties*, including sales intermediaries, agents, consultants, representatives, distributors, and joint venture partners, and updates of such diligence (Pfizer committed to perform the updates no less than once every three years);
- Biennial *FCPA training* to directors, officers, executives, and employees posing potential FCPA risks, enhanced FCPA training for internal audit, financial, compliance, and legal personnel involved in the FCPA compliance program (unless they are already qualified and experienced), and anti-corruption training of third-party intermediaries posing potential FCPA risks at least once every three years. The references to biennial training of employees and training of agents once every three years is notable because past settlements tended to generically refer to "periodic" trainings without the DOJ or SEC imposing specific temporal stamps; and
- A system of *annual certifications from senior managers* in each business unit and operational functions confirming they maintain adequate FCPA policies and procedures and that they are unaware of any corruption issue other than those already properly reported to appropriate compliance and legal personnel.

TRANSPARENCY INTERNATIONAL REPORT ON THE OECD ANTI-BRIBERY CONVENTION

Transparency International ("TI"), the non-governmental anti-corruption watchdog, recently released its annual progress report on enforcement of the OECD Anti-Bribery Convention.[16] Thirty-nine countries are signatories to the

Convention, and thus are obliged to actively enforce their prohibitions on foreign governmental bribery. While the OECD itself monitors the signatories' adherence to the Convention, TI has annually issued its own report for the past eight years to independently assess enforcement of the Convention. To track enforcement, the TI report calculates foreign bribery cases brought by OECD countries whether the misconduct is charged under laws addressing corruption, fraud, money laundering, tax evasion, or accounting requirements.

The recent TI report identified an uptick since the 2011 report in the number of new cases brought by the United States (48 new cases) and Germany (41 new cases)—both of which are countries TI already had classified in past years as active enforcers of the Convention. Since November 1998—when the Convention entered into force in the United States—the United States has brought 275 cases. Since February 1999, Germany has brought 176 cases. It appears that the pace of enforcement will remain steady in both countries for some time because the TI report determined that the United States has 113 active investigations, and Germany has an active docket of 43 investigations.[17]

The report also highlighted that a string of other countries—namely, Australia, Austria, Canada, Italy, Switzerland, and the United Kingdom—are witnessing enforcement upticks.[18] The TI report highlighted that eight OECD signatories have yet to bring any enforcement actions, but noted that two such countries—Israel and New Zealand—are showing emerging signs of enforcement.[19] Since adoption of the Convention, all the signatories collectively have brought a total of 708 cases as of December 31, 2011, up from 564 in 2010.[20]

Finally, the TI report amounted to more than a tally of global enforcement actions. TI offered recommendations to various Convention signatories on ways to enhance enforcement. Of note to the FCPA compliance and defense communities, TI joined the chorus recommending that the DOJ and SEC clarify the incentives for companies to voluntarily disclose possible foreign bribery violations and the ways in which companies are rewarded for maintaining strong compliance programs. TI also recommended that FCPA regulators more widely publicize the reasons why they choose to settle cases via a particular type of settlement (i.e., a deferred prosecution agreement or non-prosecution agreement), as well as the basis for a settlement's terms and duration.[21] The TI recommendations mirror recommendations that OECD

evaluators themselves recently made to the United States, and thus further fuel calls for greater transparency as to how the FCPA is policed.

SEC FINAL RULE REGARDING GOVERNMENT PAYMENTS BY RESOURCE EXTRACTION ISSUERS

The SEC recently adopted a final rule requiring resource extraction issuers to disclose in SEC filings certain payments made to the US federal government and foreign governments.[22] The rule was adopted by a 2-1 vote, with two commissioners recusing themselves due to industry ties and one Commissioner opposing the rule on the grounds that the SEC could have made the final rule less onerous. The final rule requires disclosure of payments to the US federal government and foreign governments by a limited type of company (i.e., resource extraction issuers, as defined below); in contrast, the FCPA prohibits any company from making *corrupt* payments to non-US government *officials*. Thus, while the SEC's final rule—which spans 230 pages—is not, per se, part of the FCPA, it has attracted interest throughout the industry, given the potentially significant modifications that resource extraction issuers may be required to make to their financial reporting systems.

Why Was the Rule Adopted?

The rule was mandated by provisions of the Dodd-Frank Act that required resource extraction issuers to disclose certain governmental payments. Dodd-Frank's legislative history indicates that Congress enacted the disclosure regime as a means to provide US support for international efforts to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of developing a country's natural resources. A primary purpose of such transparency, according to the legislative history, is to help empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by natural resources.

To Whom Does the Rule Apply?

The rule applies to resource extraction issuers, defined under the rule as companies that (1) are required to file an annual report with the SEC, and

(2) engage in the commercial development of oil, natural gas, or minerals.[23] The term "commercial development" is defined to encompass exploration, extraction, processing, and export, or the acquisition of a license for any such activity.[24] The rule lacks any exemptions: it extends equally to domestic and foreign issuers even if the foreign issuer is subject to similar reporting requirements under home country laws; it lacks any carve-out for smaller-sized issuers; and it requires disclosure even if foreign law or a contract confidentiality provision prohibits the disclosure.[25]

What Does the Rule Require?

The rule requires that covered resource extraction issuers disclose payments made by the issuer, its subsidiaries, or any entity controlled by the issuer to the US federal government and a foreign government (including national and subnational governments) that:

- Are "not *de-minimis*," meaning any payment, whether a single payment or related series of payments, that equals or exceeds $100,000 during the most recent fiscal year;[26] and
- Are made to further the commercial development of oil, natural gas, or minerals and that fall into the following enumerated categories: taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends, and infrastructure improvements.[27]

The rule extends to payments to government-owned companies, but creates a bright-line requirement that disclosure of the payment is mandated only when the company is at least majority-owned by the government.[28] In addition, the final rule requires disclosure if a resource extraction issuer makes a payment to a third party to be paid to a government on the issuer's behalf.[29]

In the event that disclosure is required, the rule designates with particularity the type of information that must be provided by the disclosing issuer, which includes:

- The type and total amount of payment made for each project;[30]
- Type and total amount of payments made to each government;

- Total amounts of the payments, by category;
- Currency used to make the payments;
- Financial period in which the payments were made;
- Business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[31]

What are the Mechanics of Disclosure?

A resource extraction issuer will be required to annually disclose relevant payments by filing a new form with the SEC (Form SD).[32] Issuers must file a Form SD beginning with fiscal years ending after September 30, 2013; the form must be filed with the SEC no later than 150 days after the end of the fiscal year. For the first report, resource extraction issuers with fiscal years that began before September 30, 2013, may provide a partial report disclosing only those payments made after September 30, 2013.[33]

NOTES

[1] *See United States v. Pfizer H.C.P. Corp.*, No. 12-CR-169 (D.D.C. Aug. 7, 2012) (Information); *SEC v. Pfizer Inc.*, No. 12-CV-1303 (D.D.C. Aug. 7, 2012) (Complaint); *SEC v. Wyeth LLC*, No. 12-CV-1304 (D.D.C. Aug. 7, 2012) (Complaint).

[2] *See* Press Release, Department of Justice, Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), *available at* http://www.justice.gov/opa/pr/2012/August/12-crm-980.html; Press Release, Securities and Exchange Commission, SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012), *available at* http://www.sec.gov/news/press/2012/2012-152.htm.

[3] *See United States v. Pfizer H.C.P. Corp.*, No. 12-CR-169 (D.D.C. Aug. 7, 2012) (Information ¶¶ 14-35).

[4] *See SEC v. Pfizer Inc.*, No. 12-CV-1303 (D.D.C. Aug. 7, 2012) (Complaint ¶¶ 14-88).

[5] *See SEC v. Wyeth LLC*, No. 12-CV-1304 (D.D.C. Aug. 7, 2012) (Complaint ¶¶ 13-37).

[6] The countries at issue and their current rankings on Transparency International's Corruption Perceptions Index ("TI Index") are: Czech Republic (4.4 on the TI Index); Saudi Arabia (4.4); Croatia (4.0); Italy (3.9); China (3.6); Serbia (3.3); Bulgaria (3.3); Indonesia (3.0); Kazakhstan (2.7); Pakistan (2.5); and Russia (2.4).

[7] *See* 15 U.S.C. § 78m(b)(4)-(5) (imposing criminal liability for violations of FCPA accounting provisions when any issuer "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account").

[8] In previous cases, the DOJ has brought conspiracy-based books-and-records charges against non-issuers but typically (and unlike Pfizer) those cases involved parallel DOJ settlements with the issuer/parent. *See, e.g., United States v. Alcatel-Lucent France, S.A.*, No. 10-CR-20906 (S.D. Fla. Dec. 27, 2010); *United States v. Pride Forasol S.A.S.*, No. 10-CR-771 (S.D. Tex. Nov. 4, 2010).

[9] *See United States v. Pfizer H.C.P. Corp.*, No. 12-CR-169 (D.D.C. Aug. 7, 2012) (Information ¶ 16-c).

[10] *See SEC v. Panalpina, Inc.* (S.D. Tex. Nov. 4, 2010) (Complaint ¶¶ 57-60); *SEC v. ENI, S.p.A. and Snamprogetti Netherlands B.V.*, No. 10-CV-2414 (S.D. Tex. July 7, 2010) (Complaint ¶¶ 39-41); *SEC v. Halliburton Co. and KBR, Inc.,* No. 09-CV-399 (S.D. Tex. Feb. 11, 2009) (Complaint ¶¶ 46-52).

[11] *See* 15 U.S.C. § 78dd-2(i) ("It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of [a bribe to a foreign official]…irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce."). In 2006, the DOJ for the first time invoked the alternative jurisdiction provision to charge a US individual (*see United States v. Salam*, No. 06-CR-157 (D.D.C. June 7, 2006) (Information ¶¶ 2,7)), but before the Pfizer settlement has not appeared to have done so for a US company. In *United States v. Willbros Group, Inc.*, No. H-08-287 (S.D. Tex. May 14, 2008) (Information ¶ 44), the DOJ included a citation to the alternative jurisdiction provision, 15 U.S.C. § 78dd-2(i), but the criminal information included a reference to interstate commerce and did not appear to rely on the provision as a basis for the charges.

[12] The DOJ's charges also involved conduct by a Russian entity that was a representative office of Pfizer H.C.P.'s parent company. The DOJ appears to have nonetheless brought charges against Pfizer H.C.P. for those payments because Pfizer

H.C.P. had "contracts with Russian distributors and employees of [the Russian] representative office" that paid or authorized the relevant bribes. *See United States v. Pfizer H.C.P. Corp.*, No. 12-CR-169 (D.D.C. Aug. 7, 2012) (Information ¶ 2).

[13] *See SEC v. Wyeth LLC*, No. 12-CV-1304 (D.D.C. Aug. 7, 2012) (Complaint ¶ 5).

[14] *See United States v. Esquenazi*, No. 11-C-15331 (11th Cir. 2011).

[15] *See* Robert Khuzami, Director of SEC's Division of Enforcement, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), *available at* http://www.sec.gov/news/speech/2012/spch010712rsk.htm.

[16] *See* Transparency International, *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention*, Progress Report 2012 [hereinafter, "TI Report"], *available at* http://www.transparency.org/whatwedo/pub/.

[17] *See* TI Report at 9, 21, 37.

[18] *See* TI Report at 4, 9.

[19] *See* TI Report at 11.

[20] *See* TI Report at 9.

[21] *See* TI Report at 38.

[22] *See* Securities and Exchange Commission, Final Rule on Disclosure of Payments by Resource Extraction Issuers, Release No. 34-67717 (Aug. 22, 2012) [hereinafter, "Final Rule"], *available at* http://www.sec.gov/rules/final/2012/34-67717.pdf. An SEC fact sheet on the rule is *available at* http://www.sec.gov/news/press/2012/2012-164.htm.

[23] *See* 17 C.F.R. § 240.13q-1(b).

[24] *See* Final Rule at 41.

[25] *See id.* at 13.

[26] *See id.* at 74-75.

[27] *See id.* at 58.

[28] *See id.* at 15, 101.

[29] *See id.* at 94, fn.336.

[30] The new rule purposefully left the term "project" undefined to allow disclosing issuers some flexibility in how to apply the term based on the relevant industry or the issuer's size. Nonetheless, the rule made clear that the term "project" is not synonymous with "country," thereby indicating the rule requires more than a country-level disclosure. *See id.* at 85-88.

[31] *See id.* at 120-21.

[32] *See* 17 C.F.R. § 249b.400.

[33] *See* Final Rule at 133-34.