Foreign Corrupt Practices Act
Briefing Series

WILMERHALE

Anti-Corruption Enforcement Developments: 2010 Year in Review and 2011 Preview

The past year provided clear evidence that law enforcement and other government agencies, both in the United States and around the world, continue to tenaciously pursue anti-corruption enforcement, and they are acquiring ever-increasing resources to support their efforts. This was another record-breaking year for enforcement of the US Foreign Corrupt Practices Act ("FCPA"); the US Department of Justice ("DOJ") charged 17 companies and 33 individuals with FCPA-related violations, and the US Securities and Exchange Commission ("SEC") charged 20 companies and seven individuals with violations. This represents a marked increase from the number of DOJ and SEC FCPA enforcement actions in 2009. While the number of enforcement actions is on the rise, the magnitude of the settlements is also increasing. The past year saw eight of the ten largest FCPA settlements in history, accounting for over $1 billion in criminal penalties alone. A number of these settlements involved cases that were interrelated, either because they stemmed from the same government project or because they involved industry-wide conduct. These cases exemplified the US government's increasingly common approach of expanding FCPA investigations across industries as it collects new information.

In 2010, the SEC launched its FCPA Unit, one of five new specialized units, in part to increase its ability to investigate FCPA violations on an industry-wide basis. The DOJ and Federal Bureau of Investigation ("FBI") increased their FCPA resources as well. Lanny Breuer, Assistant Attorney General for the Criminal Division at the DOJ, characterized this past year in a November 2010 speech when he said, "[a]s our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we are here to stay."[1] The US government is not alone in increasing its anti-corruption efforts. Other countries made significant efforts over the past year both in the enforcement and legislative arenas, not least of which was the United Kingdom in passing the UK Bribery Act, which comes into force in April 2011 and purports to rival the FCPA in scope and jurisdictional reach.

The coming year brings with it a more intense and complex anti-corruption climate than that of just a year ago. In fact, at the outset of the new year, the SEC issued requests to various financial services firms seeking information on their dealings with sovereign wealth funds, signaling the SEC's commitment to continue conducting industry-wide investigations. Below, we look back at the most significant FCPA and bribery-related developments of the past year and look forward to what 2011 portends.

I. Settlement and Enforcement Trends

A. Eight of Top Ten Largest FCPA Settlements Occurred in 2010

It is not surprising that the 2008 Siemens settlements, involving combined DOJ/SEC penalties of $800 million, and the 2009 KBR/Halliburton settlements, involving combined penalties of $579 million, remain, respectively, the first and second largest DOJ/SEC collective FCPA settlements to date. What is remarkable, however, is that the third through tenth largest collective FCPA settlements all occurred in 2010, and that most of the companies in those settlements are headquartered outside the United States. They are: 3) BAE Systems (UK) ($400 million criminal fine); 4) Snamprogetti Netherlands B.V./ENI S.p.A.

(Holland/Italy) ($240 million criminal fine and $125 million in civil penalties); 5) Technip S.A. (France) ($240 million criminal fine and $98 million in civil penalties); 6) Daimler AG (Germany) ($93.6 million criminal fine and $91.4 million in civil penalties); 7) Alcatel-Lucent S.A. (France) ($92 million criminal fine and $45 million in civil penalties); 8) Panalpina (Switzerland) ($70.5 million criminal fine and $11.3 million in civil penalties); 9) ABB (Switzerland) ($19 million criminal fine and $39 million in civil penalties); and 10) Pride International (US) ($32.6 million criminal fine and $23.5 million in civil penalties). A brief summary of the top settlements reached in 2010 follows:

BAE Systems (Number 3)

In a settlement with the DOJ on March 1, 2010, BAE–a British defense, security and aerospace company that is one of the world's largest defense contractors–was sentenced to pay a $400 million criminal fine for conspiring to defraud the United States by impairing and impeding its lawful functions, making false statements about its FCPA compliance program, and violating the US Arms Export Control Act and International Traffic in Arms Regulations. The DOJ alleged that BAE won contracts worth more than $200 million through making false statements and failing to make required disclosures to the US government about BAE's practices and programs when BAE's actual practices involved making corrupt payments with the intention of winning business from foreign governments. (Notably, BAE's FCPA-related charges were not directly based on the company's corrupt payments, but rather on false statements the company made to the US government regarding its practices and programs.) Court documents allege that BAE made payments to shell companies and third-party intermediaries to secure business, and that, specifically, between May and November 2001, the company made payments totaling over $229.9 million to certain marketing advisors and agents through an offshore entity, and that the payments were not subject to the type of scrutiny and review that BAE represented they would be subject to in statements the company made to the US government. The DOJ also alleged that BAE made payments of approximately $25 million to a Swiss bank account controlled by an intermediary when there was a high probability that part of the payments would be transferred to a Saudi Arabian official to secure favorable treatment in connection with contracts related to the purchase and maintenance of military aircraft. BAE also settled separately with the UK Serious Fraud Office ("SFO") for approximately $48 million.

Snamprogetti Netherlands B.V./ENI S.p.A (Number 4) and Technip S.A. (Number 5)

Snamprogetti Netherlands B.V. of Holland and Technip S.A. of France entered into a four-company joint venture, along with KBR (whose involvement led to the second biggest settlement ever) and JGC of Japan (a company which has yet to reach a settlement with US authorities), to win four contracts to design and build liquefied natural gas production plants in Nigeria as part of the Bonny Island project, which was valued at $6 billion. The joint venture–called TSKP–allegedly hired two agents to pay bribes to a range of Nigerian officials, including top-level executive branch officials, to assist the joint venture in winning the contracts. The joint venture made at least $182 million in payments to various consultants.

On June 28, 2010, Technip S.A., a global engineering and construction firm servicing the oil and gas industries, agreed to pay a $240 million criminal fine to resolve the DOJ's charges of conspiracy and violating the FCPA. The company also settled a civil action with the SEC by agreeing to disgorge $98 million.

On July 7, 2010, Snamprogetti Netherlands B.V., an oilfield services company, and its parent company ENI S.p.A. paid a $240 million criminal fine to settle DOJ charges for one count of conspiracy and one count of aiding and abetting violations of the FCPA. The companies also agreed to pay $125 million to settle SEC charges.

These actions bring the amount the US government has collected from companies involved in corruption related to the Bonny Island project to a total of nearly $1.3 billion when the settlements paid by KBR/Halliburton are included.

Daimler (Number 6)

Daimler AG and its subsidiaries agreed on April 1, 2010, to pay criminal fines and penalties totaling $93.6 million upon pleading guilty to conspiracy to violate the FCPA's anti-bribery provisions and to violating those provisions. In connection with the guilty pleas, Daimler admitted that it made improper payments to Russian government purchasing agents for the city of Moscow and officials employed by state-owned customers in order to secure contracts to sell vehicles. As part of the scheme, Daimler would over-invoice the customer purchasing the vehicles and pay the excess to government officials or third parties. In certain instances, Daimler would pay the money to shell companies with the understanding that the money was intended for Russian government officials. The DOJ also alleged a similar scheme by Daimler to sell vehicles in China by making payments to Chinese government officials and employees of state-owned Chinese entities, as well as corrupt schemes by Daimler in Nigeria, Turkmenistan, Vietnam, Ghana, Latvia, Hungary, Turkey, Indonesia, Croatia, and Iraq. The DOJ alleged that the corrupt transactions resulted in over $50 million in pre-tax profits for Daimler. The DOJ stated in its charging documents that since at least the year 2000, Daimler had been aware that certain company practices and systems were not fully transparent and presented a high risk of corruption; yet the company failed to properly follow up on these concerns prior to the DOJ's and SEC's investigations. Daimler also agreed to pay $91.4 million to settle civil charges with the SEC, which alleged that Daimler violated the FCPA's books and records and internal controls provisions.

Alcatel-Lucent (Number 7)

Alcatel-Lucent, a French telecommunications company, and three of its subsidiaries agreed to pay a $92 million penalty to resolve FCPA criminal charges based on the companies having made millions of dollars of improper payments to foreign officials to obtain and retain business in Costa Rica, Honduras, Malaysia, and Taiwan. In one example, the DOJ alleged an Alcatel subsidiary won three contracts in Costa Rica worth more than $300 million as a result of wiring an $18 million payment to two consultants the company retained in Costa Rica, half of which was passed on to Costa Rican government officials. Local senior Alcatel executives in Costa Rica allegedly approved the payments to the consultants, despite indications that they performed little or no work. The DOJ alleged similar schemes in Honduras and Taiwan, and noted that the consultants involved in those countries–each of whom received significant sums of money–had no previous telecommunications experience before being hired as consultants. As part of a Deferred Prosecution Agreement, the DOJ charged Alcatel-Lucent with one count of violating the internal controls provisions of the FCPA and one count of books and records violations. Each of the three subsidiaries was charged with conspiring to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. Alcatel-Lucent agreed to pay $45.4 million in disgorgement to settle SEC charges. Notably, the company had previously agreed to pay $10 million to the Costa Rican government to settle a corruption case arising out of the bribery of Costa Rican officials.

Panalpina (Number 8) and Pride International (Number 10)

On November 4, 2010, Panalpina, a freight forwarding company based in Switzerland, and Pride International, a Houston-based oil and gas service provider, both settled charges with the DOJ and SEC on the same day in matters related to Panalpina's improper payments to government officials in Nigeria, Angola, Brazil, Russia and Kazakhstan. The improper payments were made to obtain preferential customs, duties, and import treatment for Panalpina's customers in connection with international freight shipments. Panalpina admitted that it paid thousands of bribes totaling over $27 million to foreign officials in order to circumvent local rules and regulations relating to import of materials into foreign jurisdictions. Panalpina agreed to pay a $70.56 million penalty and to plead guilty to FCPA anti-bribery charges. Panalpina also paid $11.3 million in disgorgement to settle SEC civil charges. Notably, Panalpina was not an issuer for FCPA purposes, but the SEC asserted jurisdiction over the company on the basis that it had aided issuers in violating the FCPA's accounting provisions and had acted as the agent for issuers violating those provisions. Pride International was a customer of Panalpina's, as were four other companies that settled on the same day. Pride International was charged with violations of the anti-bribery and books and records provisions of the FCPA, and it agreed to pay a $32.6 million criminal

penalty to resolve the charges. Pride International also paid $23.5 million in disgorgement to settle SEC civil charges.

ABB (Number 9)

In September 2010, ABB Ltd., a Swiss corporation and the world's largest builder of power grids, and two of its subsidiaries agreed to pay $19 million in criminal penalties to resolve FCPA charges with the DOJ based on alleged misconduct in Mexico and Jordan. (A federal judge reduced the fine ABB was required to pay by $11.4 million and reportedly chastised the government for characterizing the company as a repeat bribe-maker. The judge noted that, although ABB had admitted to FCPA violations several years earlier, he was reluctant to view the company as recidivist based on the isolated actions of a few individuals.) ABB also agreed to pay more than $39 million to settle parallel charges with the SEC.

The company's US subsidiary pleaded guilty to charges under the FCPA's anti-bribery provisions, admitting that one of its business units in Sugar Land, Texas paid bribes totaling $1.9 million to officials at Comisión Federal de Electricidad, a Mexican state-owned utility company. The bribe payments were made through various intermediaries, including a Mexican company that served as ABB's sales representative in Mexico. In return for the payments, the US subsidiary received contracts worth more than $81 million. ABB voluntarily disclosed the payments to the DOJ. Separately, ABB's Jordanian subsidiary was charged with conspiracy to commit fraud and to violate the books and records provisions of the FCPA. The DOJ alleged that the subsidiary paid more than $300,000 in kickbacks to the former Iraqi government under the United Nations Oil-for-Food Program in order to secure contracts with various Iraqi energy agencies, and that the subsidiary received 11 purchase orders for goods and equipment worth more than $5.9 million.

B. Prosecution of Individuals

The DOJ and SEC have made the prosecution of individuals for FCPA violations an enforcement goal. In January 2010, 22 individuals were indicted the day after they were arrested in an FBI undercover operation at a Las Vegas weapons trade show known as the SHOT Show. As part of the operation, an FBI agent posed as a sales agent for an African minister of defense (in fact, no government official was involved) and requested a 20% commission in return for a portion of a $15 million deal to outfit the African country's presidential guard. The FBI agent represented to the defendants that half of the commission would be passed on to the minister of defense personally. Each individual arrested allegedly agreed to create two price quotes in connection with the deal, with one quote reflecting the commission and one omitting it, as well as to engage in a "test deal" to demonstrate to the fictitious minister of defense that he would personally receive the funds.

In announcing the indictments, Assistant Attorney General Breuer stated, "[t]his ongoing investigation is the first large-scale use of undercover law enforcement techniques to uncover FCPA violations and the largest action ever taken by the Justice Department against individuals for FCPA violations . . . From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent."[2]

In an American Bar Association address the following month, Breuer highlighted the DOJ's targeting of individuals through the sting operation, stating that the operation "vividly illustrates one cornerstone of our FCPA enforcement policy: the aggressive prosecution of individuals."[3] Breuer went on to explain:

> Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations. As we focus on the prosecution of individuals, we will not shy away from tough prosecutions, and we will not shy away from trials. We are ready, willing, and able to try FCPA cases in every district in the country–as we demonstrated with our three FCPA trial victories last year.[4]

While larger FCPA settlements in recent years have had fewer attendant individual prosecutions than one might expect, the DOJ appears committed to increasing the perception that FCPA violations can lead to individual prosecutions and that corporations' settlements for criminal wrongdoing do not foreclose the possibility of individual prosecutions in those same matters.

C. Industry Probes and Settlements

Several developments this year demonstrated the DOJ's and SEC's increasingly common approach of targeting anti-corruption efforts on an industry-wide scale.

As described above, on November 4, 2010, the DOJ and SEC settled charges against Panalpina World Transport (Holding) Ltd. ("PWT") and Panalpina Inc., its US subsidiary, for bribing government officials in Nigeria, Angola, Brazil, Russia, and Kazakhstan to obtain preferential customs treatment in connection with international freight shipments. The bribes, which totaled at least $27 million, were typically paid to local government officials in the various countries through local affiliated Panalpina Group companies in order to avoid legal or regulatory requirements, based on requests from various Panalpina customers. The settlements required PWT and Panalpina to pay criminal fines of $70,560,000 and civil penalties of $11,329,369.

On the same day, a number of Panalpina's customers–including Shell Nigeria Exploration and Production Company Ltd., Transocean Inc., Tidewater Marine International Inc., Pride International, and Noble Corporation–settled criminal charges with the DOJ as well. Each admitted to violating the FCPA through its dealings with Panalpina, and they agreed to civil and criminal sanctions that totaled approximately $220 million.

Notably, one company that was not included in the November 4, 2010 settlement was Global Industries, an oil extraction services company that the DOJ and SEC had investigated in connection with the Panalpina-related investigations. In March, the company announced in a filing that representatives of the DOJ and SEC had informed it that each agency had concluded its investigation, and that "[n]either agency recommended any enforcement action or the imposition of any fines or penalties against the Company."[5] Executive management and the board of directors of Global Industries had reportedly taken immediate action in response to compliance concerns by hiring outside FCPA counsel, conducting a thorough internal investigation of its West African operations, and self-disclosing the results of its internal investigation to the DOJ and SEC. The company's general counsel and director of compliance believed that the company achieved the favorable result based on its prompt and thorough response to compliance concerns, its internal controls that identified the FCPA issues, the historical evidence of the company having a strong FCPA compliance program, and the company's implementation of an enhanced compliance program.[6]

Cheryl Scarboro, Chief of the SEC FCPA Unit formed in early 2010, commented on the Panalpina-related settlements in a statement that said, "[t]his investigation was the culmination of proactive work by the SEC and DOJ after detecting widespread corruption in the oil services industry. The FCPA Unit will continue to focus on industry-wide sweeps, and no industry is immune from investigation."[7] Scarboro has similarly stated at other times that a primary focus and purpose of the new SEC FCPA Unit is to approach FCPA investigations from an industry-wide perspective.

The DOJ and SEC also demonstrated their industry-wide approach to FCPA enforcement by ramping up investigation efforts targeting the pharmaceutical industry. GlaxoSmithKline, Bristol-Myers Squibb, Eli Lilly, and Merck, among others, disclosed that they had been contacted by the DOJ and SEC with regard to their obligations under anti-corruption laws. The investigation appears to focus on various aspects of the pharmaceutical industry's dealings in foreign countries, including the recruitment of physicians for clinical trials. As many countries have state-run medical systems, drug companies conducting business overseas often deal with state officials, as well as health sector employees who have previously been considered government officials for FCPA purposes.

These investigative efforts follow Assistant Attorney General Breuer's comments in 2009 at the annual Pharmaceutical Regulatory and Compliance Congress' forum, where he stated that the DOJ Criminal Division would focus on the pharmaceutical industry for some time, given that a significant portion of the industry's sales are generated in countries with health care systems that involve much more governmental participation than does the US system. Breuer stated that the DOJ's effort would potentially include prosecutions of both companies and senior executives.

The DOJ and SEC contacts with pharmaceutical companies were in addition to letters the SEC apparently sent to several companies in the pharmaceutical and energy industries in 2010. These letters inquired into dealings with countries the US Department of State considers to be state sponsors of terrorism–Cuba, Iran, Sudan and Syria. According to media reports, the SEC inquired about companies' internal controls against bribery when operating in countries designated as state sponsors of terrorism.

Notably, the United Kingdom has followed the United States in focusing attention on the pharmaceutical industry. In a 2010 speech to the UK Association of the British Pharmaceutical Industry at its Legal Day Conference, Richard Alderman, Director of the SFO, pointed out that corruption in the pharmaceutical industry was "receiving a considerable amount of attention from the DOJ," and signaled that the SFO would be looking closely at the industry as well. Alderman warned conference attendees not to "underestimate the amount of information sharing that goes on between us and the DOJ and the SEC about all of these issues."[8]

Perhaps illustrating the current regulatory climate, there were reports in June 2010 that potential FCPA violations may be discouraging foreign investments in health care in China, based on the country's ongoing issues with corruption, the relatively low pay for doctors and purchasing agents, and the fact that only 5% of the country's hospital beds are private.

The SEC has continued its industry sweep approach in the first weeks of 2011. Numerous financial services firms have received letter requests for documents relating to interactions with sovereign wealth funds, as well as documents relating to their FCPA compliance programs. This development is not surprising given that the DOJ noted as early as November 2008 that the financial services industry would be "in focus."[9]

D. New Targets

The US government has in its general anti-corruption enforcement efforts shown willingness in the past year to pursue targets beyond companies that pay bribes. Notably, the DOJ has taken aim at recipients of bribes by seeking to punish the foreign officials and/or to recover bribes (a goal outlined in a speech by Attorney General Eric Holder in late 2009[10]) through use of non-FCPA statutes. While the FCPA punishes those who pay bribes to foreign officials, the law does not apply to foreign officials themselves.

Following the conviction of film executives Gerald and Patricia Green for their involvement in paying bribes to Juthamas Siriwan, the former governor of the Tourism Authority of Thailand, to secure government contracts to manage and operate Thailand's annual Bangkok International Film Festival, the DOJ unsealed an indictment in January 2010 against Siriwan herself and her daughter, Jittisopa Siriwan. The Siriwans are charged with conspiracy and with six counts of transporting funds to promote unlawful activity–here, violation of Thailand's law against bribery of public officials–for having allegedly accepted over $1.8 million in bribes from the Greens. The indictment seeks forfeiture of over $1.7 million in cash, as well as property.

Elsewhere, it appears the SEC is investigating a private equity investor in connection with acts committed by a portfolio company. According to a report in the *Wall Street Journal*, the SEC is investigating Allianz SE, Europe's largest insurer, for potential bribery by manroland, a German printing press company in which it holds a majority stake. The investigation appears to be the result of a voluntary disclosure made by Allianz and manroland. While private equity investors have been identified as an area of FCPA risk, the SEC to date has never charged a private equity firm based on the conduct of a foreign, private company in its portfolio.

II. Increased Resources at the SEC, FBI, and DOJ

Aside from the record-breaking enforcement numbers and settlements, one further development that shows the US government's unprecedented focus on FCPA matters is the expansion in ranks and resources in the anti-corruption groups within the SEC, FBI, and DOJ.

In January 2010, the SEC Enforcement Division created the FCPA Unit, one of five new national specialized investigative groups to be dedicated to high-priority areas of enforcement. The goal of the FCPA Unit is to develop industry experience and skills, and to more efficiently and effectively pursue possible FCPA violations. In addition to housing approximately 30 attorneys, the SEC has other trained investigative and trial attorneys outside the FCPA Unit who pursue additional FCPA cases. The Unit also includes in-house experts, accountants, and other resources such as specialized trainings, state-of-the-art technology and travel budgets to meet with foreign regulators and witnesses. In May 2010, the SEC announced the establishment of a regional FCPA enforcement group in its San Francisco office; the group falls under the organizational umbrella of the FCPA Unit. The national FCPA Unit is headed by Associate Director Cheryl Scarboro, a longtime veteran of the SEC. In a 2010 interview, Scarboro explained that, while the SEC has long investigated FCPA matters, the new unit would allow investigators to focus exclusively on and become more knowledgeable about certain industry practices and perceived problem areas; Scarboro mentioned the pharmaceutical industry as one such area of focus for the new unit. Scarboro said another basic principle underlying the formation of the new department is increased efficiency, commenting:

> The people doing these cases will be focusing exclusively on them. They will really learn this area of the law, the mechanisms used to pay and conceal bribes, [and] the problems and industries around the world. Every time we get smarter on that, we are able to identify the next investigation that much quicker. There are a lot of hurdles in conducting international investigations. Once you've been able to do that once, you'll be able to do it much faster next time.

Scarboro also said that, in contrast to previous, less centralized SEC FCPA enforcement efforts, she would act as the point person on all investigations, and that FCPA investigation approaches, settlements, and resolutions would be more coordinated and consistent as a result of increased collaboration across investigations.[11]

On the criminal side, the FBI expanded its 12-member Anti-Corruption Unit, which investigates FCPA violations, by, among other things, enlarging its complement of Supervisory Special Agents ("SSAs") from three to seven. The SSAs are each responsible for geographical regions and will oversee investigations in the FBI's legal attaché offices around the world. This expansion follows the FBI's extended efforts in the January 2010 trade show sting operation described above (in which, among other things, an undercover FBI agent posed as a sales agent for a supposed foreign official), and highlights the bureau's increasingly proactive approach to exposing FCPA violations. Assistant Attorney General Lanny Breuer has pointed to the trade show sting operation as an example of the DOJ's willingness in FCPA and other white collar cases to employ "undercover investigative techniques that have perhaps been more commonly associated with the investigation of organized and violent crime."[12]

Meanwhile, Attorney General Holder announced in July 2010 the launch of a new DOJ Kleptocracy Asset Recovery Initiative through its Asset Forfeiture and Money Laundering Section ("AFMLS"), designed to target and recover proceeds of foreign official corruption that have been laundered into or through the United States. In announcing the Initiative in a speech in Uganda, Attorney General Holder said, "We're assembling a team of prosecutors who will focus exclusively on this work and build upon efforts already underway to deter corruption, hold offenders accountable, and protect public resources."[13] Already, AFMLS has taken action, filing civil forfeiture complaints to seize US-based assets of the former president of Taiwan, who was convicted of bribery charges in his home country, and who allegedly bought the seized US assets with the proceeds of bribery.

It should also be noted that the DOJ has seen some major personnel changes in the past year, at least as relates to the Department's anti-corruption efforts. Denis McInerney was hired in November 2010 to oversee the Fraud Section at the DOJ, which houses the DOJ's FCPA group. Soon after McInerney's arrival, Charles Duross was appointed as the new Deputy Chief of the Fraud Section, the head of the DOJ's FCPA enforcement efforts. Duross' chief assistants are William Stuckwisch and Nathaniel Edmonds, both longtime members of the Fraud Section. Kathleen Hamann, an existing member of the Fraud Section's FCPA team, has been assigned to a newly created policy role to coordinate the Department's increasing interactions with other government enforcement agencies around the world. As the Fraud Section increases its numbers, it also appears that there is an effort to do so with seasoned trial attorneys, including several lawyers who have transferred from US Attorneys' offices. With these significant leadership changes and resource infusions–transpiring at a time when criticism of aggressive FCPA enforcement efforts is coming from various angles–the DOJ may be taking this time to revisit FCPA enforcement policies and procedures and determine how it should proceed in its anti-corruption efforts.

III. Sentencing Trends

The zeal with which the DOJ has been approaching FCPA matters of late has not necessarily been reflected by the criminal sentences in FCPA cases that were handed down by courts in 2010, with judges imposing sentences in many cases far less severe than what the DOJ has requested.

In August 2010, Gerald and Patricia Green, a movie producer and his wife who were convicted of paying $1.8 million in bribes to a Thai official in exchange for contracts to run the Bangkok International Film Festival, were sentenced to six months in prison for their crimes. Prosecutors had been seeking 10-year prison terms, and initially sought life imprisonment for Gerald Green, who was 78 years old at sentencing and suffered from emphysema. In addition to the six-month sentences, the judge ordered supervised release for three years, restitution of $250,000 and forfeiture of property. After their assets had been seized, the judge determined that they would only be able to pay $50 per month towards restitution. The sentencing judge said at the hearing that he felt the Greens' crimes were "not as serious as other crimes in these types of situations," and said, "I do not feel, given the defendants' lack of criminal conduct, that they pose a danger to the public."[14] The government is appealing these sentences.

In October, three employees of Nexus Technologies, Inc.–An Quoc Nguyen, Kim Anh Nguyen, and Nam Quoc Nguyen–were sentenced for their roles in a conspiracy to bribe Vietnamese officials in exchange for equipment supply and technology contracts, receiving, respectively, nine months in prison, two years probation, and 16 months in prison. The DOJ had requested that An Quoc Nguyen receive 87 to 108 months in prison, Kim Anh Nguyen receive a sentence just below the range of 70 to 87 months in prison, and Nam Quoc Nguyen receive 168- to 210-months in prison. The case involved Travel Act and money laundering charges in addition to FCPA charges. The DOJ stated in its sentencing memo for Nam Quoc Nguyen that he should receive the 168 to 210 month sentence to deter similar conduct, saying, "To the extent that conduct such as defendant's is in fact not unique in the US business community, it will hardly be deterred by sending the message that the consequences of such conduct is at worst several months of imprisonment."[15]

The DOJ was likely more pleased with the 87-month sentence of Charles Jumet for his role in paying bribes to Panamanian government officials to secure maritime contracts to maintain lighthouses and buoys along Panama's waterway. Jumet was convicted of violating the FCPA, as well as making false statements to the US government. Upon announcing the sentence, Assistant Attorney General Breuer said, "Today's sentence–the longest ever imposed for violating the FCPA–is an important milestone in our effort to deter foreign bribery."[16] If Jumet continues to cooperate with the DOJ's investigation, however, the sentence could be reduced under Rule 35 of the Federal Rules of Civil Procedure.[17] The DOJ no doubt will seek similar sentences in the future; indeed, the DOJ cited the Jumet sentence to the court in the Nguyen case to support a request that Nam Quoc Nguyen receive a lengthy sentence, although as described above, the court rejected this argument.

IV. Continued Use of Monitors but Also Alternatives

Compliance monitors continued to feature prominently in FCPA settlements in 2010. Among the companies required to retain monitors in connection with 2010 FCPA settlements were Alcatel-Lucent, Daimler, BAE, Technip S.A., Universal Corporation, and Alliance One International, Inc. In a related trend, the practice of requiring self-assessment and reporting in lieu of compliance monitors gained momentum in 2010. For example, neither Panalpina nor its six customers who entered into FCPA settlements with the DOJ and SEC in 2010 were required to retain an independent compliance monitor. Instead, each consented to conducting a self-assessment of its compliance program and to making periodic reports to the enforcement authorities. Such arrangements are considerably less intrusive–and less expensive–than the hiring of compliance monitors.

V. Legislative Developments

There was a variety of interesting legislative activity relating to anti-corruption in 2010.

A. SEC Whistleblower Program

While many of the provisions of the Dodd-Frank Act passed in July apply primarily to financial institutions, Section 922 of the statute is also relevant for all issuers with FCPA concerns. The Section mandates that the SEC develop regulations under a new Regulation 21F, which provides for an award of between 10% and 30% of all sanctions, including disgorgements, paid by a company in an SEC investigation, where (1) the whistleblower provides "original information" to the SEC, and (2) such information leads to a successful judicial or administrative action or "related action" under the securities laws resulting in sanctions of over $1 million. "Original information" is defined by the Act as, among other things, information derived from the independent knowledge or analysis of a whistleblower and not known to the SEC from any other source.

In the context of FCPA violations where penalties have been in the hundreds of millions of dollars, Section 922 provides very lucrative encouragement for employees to proceed directly to the SEC with their concerns, rather than report them through corporate internal compliance and audit programs. The SEC has released proposed rules that reflect the SEC's understanding that it needs to strike a balance between promoting and protecting whistleblower complaints and supporting internal compliance measures. The SEC has proposed that a whistleblower would only be deemed to provide information "voluntarily" where the information was given to the SEC before the whistleblower received any formal or informal request from the SEC or other governmental agency or a self-regulatory organization. As a way of promoting the internal reporting of potential wrongdoing as well, the SEC has proposed that a whistleblower be given credit for providing information if he or she supplies it to the SEC within 90 days of the date the whistleblower provides it to internal compliance personnel, although there would be no requirement to internally report information.

With regard to the source of original information, the SEC has proposed rules that exclude from the definition of original information such information obtained in connection with legal representation or which is protected by attorney-client privilege; information obtained through the performance of an engagement required under the securities laws by an independent public accountant and relating to a violation by the engagement client or its directors, officers, or other employees; and information obtained under certain circumstances from a person with internal legal, compliance, audit, supervisory, or governance functions, unless the company did not disclose the information to the SEC within a reasonable amount of time or proceeded in bad faith.

The SEC's proposed Section 21F would define "related action"–meaning the types of actions for which whistleblowers could receive compensation based on their provision of information to the SEC–to include a judicial or administrative action brought by: (1) the US Attorney General, (2) an appropriate regulatory agency, (3) a self-regulatory organization, or (4) a state attorney general in a criminal case; and that is based on the same original information that the whistleblower voluntarily provided to the SEC, and that led to monetary sanctions obtained by the SEC of more than $1 million. Thus, in a situation where

perceived FCPA violations might lead to significant DOJ and SEC penalties, a potential whistleblower would be incentivized by the prospect of receiving 10% to 30% of all penalties paid by a defendant to the SEC and the DOJ, in addition to other regulatory and law enforcement organizations. Significantly, Section 922 of the Dodd-Frank Act also prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any manner discriminating against an individual because of lawful whistleblower-related actions, and the Act provides a private right of action in federal court for whistleblowers who allege such misconduct.

B. Extraction Industry Provision of Dodd-Frank

Another provision of the Dodd-Frank Act, Section 1504, requires that the SEC implement rules mandating that energy companies disclose in their annual reports certain payments to foreign governments. President Barack Obama referenced Section 1504 in a September speech to the United Nations Millennium Development Goals Summit in New York, stating:

> We are leading a global effort to combat corruption, which in many places is the single greatest barrier to prosperity, and which is a profound violation of human rights. That's why we now require oil, gas and mining companies that raise capital in the United States to disclose all payments they make to foreign governments. And it's why I urged the G20 to put corruption on its agenda and make it harder for corrupt officials to steal from their own people and stifle their nation's development.[18]

Section 1504 of the Dodd-Frank Act calls for the SEC to issue regulations by April 17, 2011 (270 days after the passage of the Act on June 21, 2010) that require "resource extraction issuers"–meaning those issuers that engage in the commercial development of oil, natural gas, or minerals–to disclose payments such as taxes, royalties, licensing fees, and other material benefits. The Section defines the commercial development of oil, natural gas, or minerals to include the exploration, extraction, processing, export, and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity. Disclosure requirements under Section 1504 will take effect beginning with the issuers' annual reports for the first fiscal year ending on or after the first anniversary of the date on which the SEC issues its final regulations (as stated above, the SEC is statutorily required to issue those regulations by April 17, 2011).

The Section instructs the SEC to put in place regulations requiring that resource extraction issuers disclose:

- the type and total amounts of payments made for each applicable project and to each applicable government;
- the total amounts of the payments, by category;
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the company that made the payments;
- the government that received the payments, and the country in which the government is located;
- the project of the issuer to which the payments relate; and
- any other information the SEC deems necessary or appropriate in the public interest or to protect investors.

De minimis payments will not require disclosure. In defining what constitutes a payment requiring disclosure, the SEC must consider to the extent practicable the guidelines set out by the Extractive

Industries Transparency Initiative, an international organization promoting transparency over payments to governments related to the oil, gas and mining industries.

The SEC issued proposed regulations pertinent to resource extraction issuers in December. Energy companies had been lobbying for exemptions where compliance would harm their competitive position, arguing that increased disclosure requirements would harm them where they would have to compete in bidding processes with companies not subject to such enhanced disclosures. The SEC did not include such exemptions in its proposed rules.

C. Senate Hearings on FCPA Enforcement

The Senate Subcommittee on Crime and Drugs, part of the Senate Judiciary Committee, held hearings on FCPA enforcement in November as part of a Senate review of the DOJ's FCPA enforcement practices. At the hearing, Senator Arlen Specter (D-Penn.) questioned the lack of prosecutions of individuals in high-profile corruption cases, focusing specifically on the Siemens investigation. Greg Andres, Acting Deputy Assistant Attorney General for the Criminal Division, made the point in his testimony that large corporate settlements do not foreclose the possibility of individual prosecutions in those cases and that the Siemens investigation was ongoing. Andres testified that the DOJ has charged over 50 people with FCPA violations since the beginning of 2009, and there are approximately 35 defendants currently awaiting trial on FCPA charges. Andres testified that, "The department has made the prosecution of individuals a critical part of its FCPA enforcement strategy. We understand well that it is an important and effective deterrent. Paying large criminal penalties cannot be viewed [as], and is not, simply the cost of doing business."[19]

Others testified before the committee, voicing concerns regarding the unpredictable manner in which the FCPA is interpreted and enforced by law enforcement agencies. Senator Amy Klobuchar (D-Minn.) appeared sympathetic to the concern that the DOJ has not provided sufficient guidance regarding FCPA compliance. During the question-and-answer portion of the hearing, Senator Klobuchar expressed her concerns regarding the need to balance vigorous enforcement of the FCPA in situations involving blatant incidents of bribery against an interest in permitting US companies to remain competitive in overseas business.

D. Debarment Bill

In another legislative development, the House passed in September, by a unanimous vote, H.R. 5366, or the "Overseas Contractor Reform Act." The brief bill states that any entity found to be in violation of the FCPA's anti-bribery provisions will be proposed for debarment from any contract or grant with the federal government within 30 days of final judgment of such action. The bill was referred to, but stalled in, the Senate. Because the bill was not passed before the end of the last congressional term, it must now be reintroduced to be considered again. It is unclear what effect the debarment bill, even if passed, will have on corporations given that the bill allows a federal agency head to waive the debarment proposal, and given the fact that a number of FCPA investigations which otherwise include harsh penalties do not actually include final judgments involving FCPA violations, such as those investigations that are resolved through non-prosecution agreements.

E. UK Bribery Act

The most talked about anti-corruption legislative development of 2010 was not a US development, but rather the UK Bribery Act ("UK Act"), which comes into force in April 2011. Despite recent speculation that the UK Act or final guidance concerning it may be delayed due to potential government review of the Act, at present it is still expected to become law in April while the final guidance is expected to be issued by February. The UK Ministry of Justice ("MOJ") has reportedly confirmed that the UK Act is under further review. However, this review does not appear to be limited to the UK Act and is part of the government's broader efforts to ease regulatory burdens on businesses and promote economic recovery. Whether the

review delays the implementation of the UK Act or leads to any changes in the legislation remains to be seen.

The UK Act is notable for a number of reasons, including its potential jurisdictional reach to actions taken by non-UK companies outside of UK borders. Any company with an international presence should take note of the UK Act's provisions, as companies that proactively prepare for and respond to the UK Act will be in a favorable position should they eventually be investigated or charged under the UK Act. That said, while certain provisions are notable for their differences from those of the FCPA, the UK Act does not significantly widen the scope of corporate practices that invite criminal prosecution.

1. Background

As a brief background, Section 1 of the UK Act prohibits bribing another person to induce or reward that person to improperly perform a relevant function or activity, while Section 2 prohibits a person from requesting, agreeing to receive, or accepting a bribe to improperly perform a function or activity. Section 6 creates a discrete offense for bribing a foreign public official, similar to the anti-bribery provisions of the FCPA. Section 7 creates a strict liability offense where a commercial organization has failed to prevent bribery. This occurs when a person "associated with" a commercial organization–for example, its employee, agent, or subsidiary–commits bribery intending to obtain or retain business or a business advantage for the organization.

2. Jurisdictional Reach

A significant aspect of Sections 1, 2, 6 and 7 is their jurisdictional reach. As to Sections 1, 2, and 6, British nationals, persons ordinarily resident in the United Kingdom, bodies incorporated in the United Kingdom, and Scottish partnerships are covered by the provisions even if the improper conduct at issue has no connection with the United Kingdom. For all other persons, liability will exist only if any act or omission which forms part of the offense takes place in the United Kingdom. It remains to be seen what level of activity or level of contact within the United Kingdom will bring conduct by non-UK persons and entities within the reach of Sections 1, 2, and 6. By comparison, the DOJ's position regarding the jurisdictional reach of the FCPA appears to be that almost any contact with the United States is sufficient to establish territorial jurisdiction over foreign persons and companies that act while in the United States, as well as foreign issuers. Cases resolved through settlements with the DOJ suggest that as little as a wire transfer that at some point flowed through US banks, or an email sent into the United States containing information on corrupt payments, could satisfy this low jurisdictional threshold.

Section 7 creates liability for a "relevant commercial organisation" that fails to prevent bribery. The extraterritorial reach of Section 7 appears to be very broad. Under this provision, an offense is committed "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere." In addition to having jurisdiction over bodies incorporated or partnerships formed under UK law, UK courts will have jurisdiction over any body corporate or partnership that "carries on a business, or part of a business, in any part of the United Kingdom," irrespective of where it is incorporated or formed. Robert Amaee, then Head of Anti-Corruption, Proceeds of Crime & International Assistance for the SFO, has stated that what this provision means in practice is that "a company registered anywhere in the world and having part of its business in the United Kingdom could be prosecuted for failing to prevent bribery on its behalf wherever in the world that bribe was paid."[20] SFO Director Richard Alderman has emphasized the importance of this provision because, thanks to the UK Act, "[c]orruption by [a] foreign entity abroad will be within [the SFO's] jurisdiction even if it has nothing to do with UK activities."[21]

The Section 7 term "carries on a business, or part of a business" is not defined, and it is unclear what magnitude of activity within the United Kingdom will subject a non-UK corporation to liability under the Section. Its plain reading suggests that some degree of repetition of acts relating to commercial activities would be required. It is also uncertain whether jurisdiction will exist merely as a result of the presence in the United Kingdom of related third parties such as subsidiaries, joint ventures, or distributors. Over time, the limitations on the reach of the UK Act will be determined by the UK courts, which historically have respected corporate form and, more recently, have shown some discomfort with the approach to anti-

corruption issues being taken by the SFO. That said, the SFO clearly has expressed a broad view with respect to the reach of the UK Act, and companies and individuals will necessarily need to take that view into account to avoid investigations and/or prosecutions.

3. Commercial Payments

Sections 1 and 2 of the UK Act prohibit bribery in all contexts, including situations not involving foreign or UK officials. This differs from the FCPA, which is limited to bribery of foreign officials. The DOJ, however, has pursued commercial bribery claims as well, through the use of non-FCPA statutes such as the Travel Act, which prohibits, among other things, use of interstate commerce to promote unlawful activities including state law commercial bribery. The DOJ charged California-based company Control Components Inc. and several employees with both FCPA and Travel Act violations based on their alleged foreign governmental and commercial bribery acts. Similarly, US enforcement authorities have pursued conduct involving commercial bribery through the use of the FCPA's books and records provisions.

4. Failure to Prevent Bribery/Adequate Procedures

An organization can avoid liability under Section 7 (the failure-to-prevent bribery provision of the UK Act) if it can prove that it had adequate procedures in place to prevent bribery. The SFO published proposed guidance in September on what is meant by adequate procedures, and although following such guidance is not an absolute safe harbor from prosecution, it provides a starting point for businesses in either reviewing or establishing for the first time anti-corruption policies and procedures. Notably, the SFO has indicated that UK public contract procurement rules are likely to be amended so that Section 7 offenses do not automatically trigger debarment from all future UK and EU contracts.

The proposed guidance is based on the following six general principles:

- **Risk Assessment.** The commercial organization should regularly and comprehensively assess the nature and extent of the risks relating to bribery to which it is exposed. Relevant risk factors will depend on the business, but might include dealings with jurisdictions with perceived high levels of corruption as well as transactions involving political contributions, licenses, permits or public procurement.

- **Top-Level Commitment.** The top-level management of a commercial organization should be committed to preventing bribery, and steps should be taken to establish a culture within the organization in which bribery is never acceptable. Such steps should include, among other things, a statement of commitment to counter bribery in all parts of the organization's operation and the appointment of a senior manager who takes ultimate responsibility for the anti-corruption program and its communication within the organization.

- **Due Diligence.** Organizations will need to know with whom they are doing business if risk assessment and mitigation are to be effective. Liability for an offense extends beyond employees of an organization to all persons "associated" with it, including, for example, not just employees, but also agents, intermediaries, joint venture partners and contractors. Therefore, it is crucial to have due diligence procedures which cover all new and existing business relationships.

- **Clear, Practical and Accessible Policies and Procedures.** After carrying out a risk assessment and due diligence, organizations will be in a position to have in place a risk assessment policy appropriate for the risks identified. The guidance sets out minimum elements to include within such a policy.

- **Effective Implementation.** If an organization finds itself in the position of having to rely on the "adequate procedures" defense, it will need to be able to show not only that it had an effective policy in place, but also that it implemented it with workable and consistently followed procedures. In practice, this will involve records of training, monitoring, and dealing with incidents of bribery or

suspected bribery.

- **Monitoring and Review.** Effective monitoring and review, and reacting or responding to changes in anti-corruption legislation, or to changes and developments in the business, are part of the effective implementation of an anti-corruption policy.

Overall, these principles are quite consistent with the elements of an effective compliance program under the FCPA. They are a good reminder of these elements, and in particular of the importance of conducting adequate risk assessments and implementing appropriate controls in light of those assessments.

5. No Exception for Facilitation Payments

Unlike the FCPA, the UK Act does not provide any exception for facilitation or expediting payments. The FCPA exempts facilitating or expediting payments intended to "expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." The UK Act's treatment of facilitation payments is consistent with the Organisation for Economic Co-operation and Development's efforts to encourage countries to eliminate solicitation and facilitation payments (and it should be noted that even US officials have emphasized that the facilitation payment exception is a very narrow one).

Although prosecutorial discretion will provide a degree of flexibility, UK officials have made clear that facilitation payments are illegal under the UK Act. The MOJ's proposed guidance states that facilitation payments are likely to trigger Section 1 and Section 6 offenses of bribe-giving and bribery of foreign public officials. The MOJ further noted that the UK Act provides no exemption for these payments, although Amaee has stated that the SFO will consider whether facilitation payments are "significantly serious" so as to warrant prosecution. The SFO staff has noted that a small, one-off payment, particularly in emergency situations, may not be subject to prosecution, but warned that a series of such payments may signal a course of conduct not allowed under the UK Act. The SFO has indicated that the upcoming guidance will address the SFO's planned approach to facilitation payments, as well as the factors the agency intends to consider when deciding whether to pursue a criminal case relating to facilitation payments.

Because *all* facilitation payments are in principle prohibited under the UK Act, commercial organizations that do business in the United Kingdom need to consider whether and how to adjust their existing practices related to facilitation and expediting payments to address the risk of prosecution by UK authorities.

6. No Affirmative Defense for Reasonable Entertainment Expenses

The UK Act does not specifically address hospitality, gifts, travel, or other promotional expenses. Therefore, these expenditures will be subject to the main provisions of the UK Act, including the adequate procedures defense. Reasonable and proportionate expenses are unlikely to be given with the requisite intent—that is, an intent to induce another to act improperly or to influence a foreign public official in his or her official capacity—and are therefore unlikely to violate the UK Act. UK officials have stated that expenses that are both reasonable and proportionate to the nature of the organization's business may not require prosecution. The Attorney General addressed concerns related to these expenses by stating that "[t]he starting point is that these activities are not illegal per se and the UK Act is not intended to clamp down on legitimate expenditure[s] of this type. It is clear, however, that lavish hospitality and similar expenditure[s] can be used as a bribe intended to induce a public official to award business."[22]

In its proposed guidance, the MOJ encourages organizations to consider providing policies that address gift-giving, hospitality, and promotional expenses "to ensure that the purposes of such expenditure are ethically sound and transparent." The proposed guidance acknowledges that reasonable and proportionate business promotion expenditures are an established part of conducting business, and that some expenses, such as costs that would otherwise be borne by the foreign government, may not even amount to an "advantage" under the UK Act. The MOJ noted that surrounding circumstances will inform whether a particular action constitutes a bribe, and that routine or incidental business courtesies of small

value may not violate the UK Act. The MOJ distinguished a five-star holiday from "ordinary" travel for a promotional visit to a company site. The proposed guidance also notes that prosecutorial discretion will allow flexibility for promotional expenses that, on their face, trigger the UK Act. It is expected that the SFO's issuance of final guidance will address its intended approach to travel and entertainment expenses, as well as the factors the SFO will take into account when analyzing such payments under the UK Act.

The extent to which promotional expenses will violate the UK Act remains unclear. Because commercial organizations may use the "adequate procedures" defense to avoid liability, it will be important that corporate policies and guidelines address such expenditures. In formulating these policies, the FCPA can provide useful guidance. The FCPA provides an affirmative defense for "reasonable and bona fide" expenditures directly related to business promotion or contract performance. Generally, reasonable travel expenses for educational or promotional programs are appropriate under the FCPA, such as educational trips to a business facility. Organizations must remain careful, however, to avoid expenses that are lavish or not connected to legitimate business promotion. For example, expensive entertainment or sightseeing excursions with no business purpose have been subject to scrutiny under the FCPA.

VI. DOJ Opinion Procedure Releases

The DOJ released three FCPA Opinion Procedure Releases in 2010. Two of the releases related to the potential hiring by a domestic concern of an individual qualifying as a foreign official, while the third release related to a contribution by a domestic concern to a foreign government-controlled charitable fund.

Opinion Procedure Release 10-01 analyzed a domestic concern's hiring of a foreign country's agent to manage a facility created through a joint partnership between the foreign government, the US government, and the domestic concern. The agent's work for the foreign country did not relate to the work for the facility. The DOJ found that the arrangement did not warrant enforcement action, basing its decision in part on the US government's directive to hire the individual and the unlikelihood that the individual's work with the facility would affect the interests of the domestic concern.

In Opinion Procedure Release 10-03, the DOJ also found that a domestic concern's hiring of a consultant would not violate the FCPA where the consultant was a registered agent of a foreign government and represented foreign governments that play a role in discussions of the domestic concern's business initiatives. The DOJ reached this conclusion based on the safeguards the domestic concern and consultant put in place to avoid a conflict of interest, which included, among other things: the commitment of the owner of the consultant to discontinue lobbying efforts; a wall between the owner's work on behalf of the domestic concern and the work of consultant employees who will continue lobbying efforts; a limitation of the consultant's work on behalf of the foreign government to only work that is currently contracted for; and a confirmation by the consultant that its employees will not serve as foreign officials.

The DOJ found in Opinion Procedure Release 10-02 that there would be no FCPA violation if a foreign subsidiary of a domestic concern, as a condition of transforming itself from a micro-financial institution regulated by a Eurasian country's regulatory agency into a bank licensed by that country's central banking authority, made a large grant to fund a lending institution at the request of the regulatory agency. The DOJ found that the subsidiary had performed sufficient due diligence in selecting a recipient of the grant so as to avoid providing a benefit to any foreign officials, and that sufficient controls were put in place, including ongoing auditing and monitoring, to prevent corrupt activity.

Despite the DOJ's encouragement of the use of the opinion procedure system, it is still used only rarely. As exemplified by the three examples above, when the system is used, it is often for relatively uncontroversial scenarios. Companies still seem to worry about the utility and time-consuming nature of availing themselves of the system, particularly when balanced against the risk of potentially attracting unwanted attention from the DOJ.

VII. Rise in Shareholder Lawsuits

Where the government is active in investigating potential corporate wrongdoing, private plaintiffs are rarely far behind in bringing shareholder lawsuits based on the same alleged underlying conduct. While there is no private right of action under the FCPA, the past year has seen a number of shareholder derivative lawsuits brought against companies alleging losses due to violations of the FCPA. Plaintiffs this year brought derivative lawsuits against, among others: Avon's directors based on alleged FCPA violations in China, and Pride International's directors and Parker Drilling's directors based on their respective companies' involvement in the Panalpina-related cases described above.

In essence, a derivative suit alleges that a company's directors breached their corporate fiduciary duties toward the company, which in the FCPA context would mean the directors failed in their duties to prevent bribery from occurring. The plaintiffs attempt to stand in the shoes of the corporation to recover personally from the directors. Because directors are given deference to run their companies as they see fit, derivative lawsuits have a high pleading standard, and plaintiffs must either give the directors themselves the opportunity to determine whether the claims are worth pursuing or show that the directors are unable to properly assess the claims. It is worth noting that derivative lawsuits are based on the state law of the company's state of incorporation; one state's jurisprudence is not binding on another's, but many state courts often look to Delaware (also the state of incorporation for many US companies) corporate jurisprudence for guidance. Furthermore, because there are few derivative suit judicial decisions in the FCPA context, the few issued decisions will likely be of significance to future courts looking at such factual scenarios.

Thus, the Delaware Chancery Court's dismissal of a derivative suit against Dow Chemical based on allegations of bribery in early January 2010 will likely be influential. Plaintiffs in that suit, filed in 2009, alleged that Dow officers bribed Kuwaiti officials in an attempt to promote Dow's interests in a proposed joint venture between Dow and the Kuwaiti government (these allegations appear to have been based on informal Kuwaiti government allegations rather than US government investigative findings); that the proposed deal fell apart as a result of the alleged bribery; and that the directors thus consciously disregarded their duty to monitor the company by failing to detect and prevent the bribery, making the directors liable for the loss of the deal. The court found that, while the plaintiffs' reference to an "unsubstantiated charge made by a member of the Kuwaiti Parliament" did allow for a reasonable inference that bribery occurred (although commenting that such bribery allegations were "sketchy (at best)"), the plaintiffs failed to allege that the Dow board was put on notice of bribery occurring and failed to prevent it.[23]

The plaintiffs had pointed to a 2007 SEC action in which Dow paid a fine to settle bribery charges related to insecticide sales in India as a "red flag," but the court found that an event so unrelated was insufficient to have heightened the board's suspicion. In an important footnote, the court provided an alternative reason for dismissing the claim, which was that the Dow board had instituted a Code of Ethics prohibiting unethical payments to third parties, which contradicted the plaintiffs' claims that the board had disregarded its duties. Specifically, the court stated, "Plaintiffs cannot simultaneously argue that the Dow Board 'utterly failed' to meet its oversight duties yet had 'corporate governance procedures' in place without alleging that the board deliberately failed to monitor its ethics policy or its internal procedures."[24] This case thus highlights another important reason for directors and companies alike to insist upon and maintain robust and current anti-corruption procedures.

In addition to derivative suits, companies disclosing potential FCPA violations also face potential securities fraud actions. For example, in August 2010, SciClone Pharmaceuticals, Inc.'s stock price fell after it announced that it was under investigation by the DOJ and SEC for potential FCPA violations. Not long after this announcement, two federal securities fraud class actions were filed against the company and its directors, in addition to three state derivative suits. Similarly, UTStarcom, Inc. in 2010 reached a $30 million securities fraud class action settlement with plaintiffs who brought suit after the company disclosed in 2009 that it had settled FCPA charges with the DOJ and SEC.

VIII. Foreign Prosecutions

Non-US national governments have continued to pursue anti-corruption investigations. Below are some examples.

A. Germany–MAN SE

Two subsidiaries of MAN SE, the German truck maker and engineering company, agreed to pay fines totaling €150 million (approximately $221 million) to resolve an investigation by the Munich prosecutor's office into allegations that the subsidiaries engaged in bribery in Germany and overseas to secure sales of trucks and buses. Media reports indicate that the investigation began in May 2009 and was focused on at least 100 suspects including MAN employees and potential customers, who were alleged to have been involved in the bribery. In agreeing to resolve the investigation, German prosecutors noted that the quick resolution of the matter was made possible by MAN SE's "willingness to cooperate." MAN SE did not admit to any wrongdoing as part of the settlement.

German prosecutors stated that they would continue their investigation of individual suspects, including, most notably, Mr. Heinz Jürgen Maus, former Chief Executive of MAN SE's turbine manufacturing unit MAN Turbo AG. According to media accounts, Maus has been indicted on eight counts of bribery. MAN Turbo AG and MAN Nutzfahrzeuge AG were the two MAN subsidiaries allegedly involved in paying bribes to obtain sales orders for trucks and buses.

Interestingly, according to media reports, the Munich prosecutor's office fined MAN Nutzfahrzeuge AG in connection with this matter because its management board did not provide adequate oversight to prevent bribes from taking place — not because there were allegations of direct knowledge or even willful blindness on the part of the board. This type of prosecution may demonstrate that foreign prosecutors are willing to pursue indirect theories of liability in order to hold executives accountable for overseas bribery.

B. Nigeria–Halliburton

In December, the Economic and Financial Crimes Commission ("EFCC"), Nigeria's anti-corruption agency, announced that it was bringing charges against former Vice President Dick Cheney over an alleged bribery scheme in which Halliburton, the firm for which Cheney served as CEO, allegedly paid bribes to secure a contract to build a $6 billion liquefied natural gas plant in the Niger Delta (the "Bonny Island" project described above). On December 15, media outlets reported that the EFCC agreed to drop the bribery charges against Cheney. A newspaper report has stated that Halliburton announced it settled the charges with the EFCC for a $32.5 million fine.[25]

C. United Kingdom–Innospec

In March 2010, the SFO announced that Innospec Inc.'s UK subsidiary had pleaded guilty in connection with corrupt payments made to Indonesian officials and had agreed to pay a criminal penalty of $12.7 million. The SFO coordinated with the DOJ, SEC, and the US Office of Foreign Assets Control in crafting a global settlement with the company, and described it as "the first 'global settlement' reached with a co-operating Company and . . . resolved in cooperation with US government authorities."[26] Later, however, a UK judge rebuked the SFO for entering into the global agreement, stating that UK law prohibits UK enforcement authorities from negotiating with offenders regarding the penalty to be imposed.

D. United Kingdom–Julian Messent

In October 2010, the SFO announced that Julian Messent, an insurance broker for a London-based insurance company, had been sentenced to 21 months in prison for corrupt activity involving government officials in Costa Rica. Messent pleaded guilty following a joint investigation by the SFO and London police, which revealed that Messent had authorized 41 corrupt payments totaling approximately $2 million to Costa Rican government officials, their wives, and associated companies. The payments served as

inducements or rewards for the officials' assistance in the appointment or retention of Messent's company by Costa Rica's state insurance company and national electricity and communications provider.

IX. Transparency International 2010 Global Corruption Barometer

In December, Transparency International released the results of its 2010 Global Corruption Barometer, a world-wide public opinion survey on perceptions of corruption in countries around the world. The survey concluded that perceptions of corruption around the world have increased over the last three years. Specific findings include: (1) one in four respondents reported paying a bribe over the past year in interacting with basic service providers (e.g., customs, education, and/or tax authorities); (2) six out of ten respondents reported that corruption in his or her country had increased over time; (3) political parties were identified as the most corrupt institutions around the world; (4) the police are cited as being the most frequent recipient of bribes, and about 30% of those who had contact with the police reported having paid a bribe; and (5) Sub-Saharan Africa had the highest bribery rate in the world, with more than one in two people reporting having paid a bribe in the past year. The Transparency International index, which ranks 178 countries based on perceptions of corruption within those countries, showed an improvement between 2009 and 2010 for the following countries: Bhutan, Chile, Ecuador, Macedonia, Gambia, Haiti, Jamaica, Kuwait, and Qatar. The following countries showed deterioration between 2009 and 2010: the Czech Republic, Greece, Hungary, Italy, Madagascar, Niger, and the United States.

X. Conclusion and 2011 Preview

By any measure, 2010 was another banner year for international anti-corruption efforts. The DOJ's continued aggressive FCPA activity, the SEC's new FCPA enforcement infrastructure, and increased attention to corruption by authorities in the United Kingdom and elsewhere have made bribery one of the most important compliance issues for global companies. At least in the United States, the emphasis on corruption appears to flourish regardless of who controls the White House or Congress. We therefore expect that the active enforcement environment will continue unabated through 2011, a year that is likely to witness:

- an increased focus on the financial services industry, already evidenced by the SEC sweep of financial institutions' relationships with sovereign wealth funds and the investigation of the European insurer Allianz, discussed above, based on the conduct of one of its portfolio companies;
- further industry sweeps and attention to common business models, likely including the technology industry, which has not yet seen significant numbers of enforcement actions;
- investigations initiated as a result of the whistleblower provisions of the Dodd-Frank Act;
- further developments in the United Kingdom, including the issuance of final MOJ guidance about the new UK Act, the MOJ's pending review of the law, and the first enforcement actions brought under the UK Act (as well as additional prosecutions for conduct occurring under existing UK laws);
- an increase in prolonged and probing investigations as the DOJ and SEC, as well as authorities elsewhere, make use of new law enforcement resources;
- the continued increase in prosecutions of individuals, including prosecutions of senior officers and possibly directors;
- the continued prosecution of activities undertaken on behalf of companies by third parties, such as agents, consultants, finders, distributors and others;
- additional prosecutions involving customs, tax, patents, licenses, permits and other non-sales

related activities, further diminishing the significance of the FCPA's "obtain or retain business" element;

- additional investigations involving commercial bribery, both under the provisions of the UK Act, as well as US laws such as the Travel Act, the mail and wire fraud statutes, and the FCPA's accounting provisions; and

- further judicial interpretations of the FCPA as individuals litigate issues that have often been unchallenged in the context of corporate settlements; this may occur with respect to appeals by Gerald and Patricia Green and trials of individuals such as the former executives of Control Components, Inc. (currently scheduled for 2011) and others.

Given these potential developments, 2011 promises to be yet another pivotal year in anti-corruption enforcement activity.

In light of this dynamic enforcement environment, WilmerHale's FCPA Practice continues to see companies focus on the following areas:

- anti-corruption due diligence related to proposed corporate mergers, acquisitions, and joint ventures, as companies continue to pursue investments in potentially corrupt countries and industries, and as companies increasingly become cognizant of FCPA risks associated with such transactions;

- risk assessments aimed at ensuring that a company's anti-corruption compliance program both comports with best practices and is tailored to the company's greatest risks;

- reviews of policies and procedures, including especially policies on facilitating payments, to ensure compliance with the incoming UK Bribery Act; and

- assessments of third-party intermediary risk, including sales representatives, distributors, resellers, freight forwarders, customs brokers, and logistics agents.

FOR MORE INFORMATION ON THIS OR OTHER FCPA AND ANTI-CORRUPTION MATTERS, CONTACT:

Roger M. Witten +1 212 230 8850 roger.witten@wilmerhale.com
Kimberly A. Parker +1 202 663 6987 kimberly.parker@wilmerhale.com
Jay Holtmeier +1 212 295 6413 jay.holtmeier@wilmerhale.com
Tim Matthews +44 (0)20 7645 2504 tim.matthews@wilmerhale.com

---

[1] Lanny A. Breuer, Assistant Attorney General, Criminal Division, US Department of Justice, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[2] Press Release, US Department of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

[3] Lanny A. Breuer, Assistant Attorney General, Criminal Division, US Department of Justice, Remarks at the American Bar Association National Institute on White Collar Crime (Feb. 25, 2010), *at*

http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf.

[4] *Id.*

[5] Global Industries, Ltd., Current Report (Form 8-K), at 1 (Mar. 24, 2010).

[6] Compliance and Enforcement: By the Book, FCPA BLOG (Dec. 6, 2010), *at* http://www.fcpablog.com/blog/2010/12/6/compliance-and-enforcement-by-the-book.html?printerFriendly=true.

[7] Press Release, US Securities and Exchange Commission, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), *at* http://www.sec.gov/news/press/2010/2010-214.htm.

[8] Barry Vitou & Richard Kovalevsky, *SFO's Stark Warning to Pharmaceutical Companies: Act Now or Take Your Medicine*, THEBRIBERYACT.COM (Nov. 6, 2010), *at* http://thebriberyact.com/2010/11/06/sfos-stark-warning-to-pharmaceutical-companies-act-now-or-take-your-lumps/.

[9] Roger M. Witten, *et al., Anti-Bribery Considerations for Private Equity Firms and Investors*, 13 THE JOURNAL OF PRIVATE EQUITY 4, 58 (Fall 2010) (quoting Mark F. Mendelsohn, Deputy Chief, Fraud Section, US Department of Justice, in remarks delivered at the American Conference Institute 2009 National Conference on the Foreign Corrupt Practices Act, November 18, 2008).

[10] Eric Holder, Attorney General, Remarks at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *at* http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html.

[11] Jesse Sunenblick, *Q&A with Cheryl Scarboro*, MAIN JUSTICE (Feb. 25, 2010), *at* http://www.mainjustice.com/2010/02/25/qa-with-cheryl-scarboro/.

[12] Lanny A. Breuer, Assistant Attorney General, Criminal Division, US Department of Justice, Remarks at the Practising Law Institute (Nov. 4, 2010), *at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101104.html.

[13] Eric Holder, Attorney General, Remarks at the African Union Summit (July 25, 2010), *at* http://www.justice.gov/ag/speeches/2010/ag-speech-100725.html.

[14] Amanda Bronstad, *Hollywood Couple Draw 6-Month Prison Term in FCPA Bribery Case*, NATIONAL LAW JOURNAL (Aug. 13, 2010), *at* http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202466371673&rss=newswire.

[15] *United States v. Nam Quoc Nguyen*, No. 08-CR-522 (E.D. Pa. Sept. 8, 2010) (Government's Sentencing Memorandum).

[16] Press Release, US Department of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), *at* http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

[17] Rule 35 provides that, upon the government's motion, a court may reduce a defendant's sentence if he provided "substantial assistance in investigating or prosecuting another person."

[18] President Barack Obama, Remarks at Millenium Development Goals Summit (Sept. 22, 2010), *at* http://www.america.gov/st/texttrans-english/2010/September/20100922172556su0.2969934.html#.

[19] Greg Andres, Acting Deputy Assistant Attorney General, Statement Before Senate Judiciary

Subcommittee on Crime and Drugs (Nov. 30, 2010), *at* http://www.justice.gov/criminal/pr/testimony/2010/crm-testimony-101130.html.

[20] Robert Amaee, *Under Britain's New Bribery Act, the Buck Stops with Company Directors*, TRUSTLAW (Aug. 19, 2010), *at* http://www.trust.org/trustlaw/blogs/anti-corruption-views/under-britains-new-bribery-act-the-buck-stops-with-company-directors.

[21] Richard Alderman, Director, UK Serious Fraud Office, Speech at the 28th Cambridge International Symposium on Economic Crime (Sept. 6, 2010), *at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2010/the-28th-cambridge-international-symposium-on-economic-crime.aspx.

[22] Dominic Grieve, Attorney General for England and Wales, Remarks at the World Bribery & Corruption Compliance Forum (Sept. 14, 2010), *at* http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/Attorney%20General%20World%20Bribery%20and%20Corruption%20Compliance%20forum.aspx.

[23] In re *The Dow Chemical Company Derivative Litigation*, Civil Action No. 4349-CC, at 32-33 (Del. Ch. Jan. 11, 2010).

[24] *Id.*

[25] Samuel Rubenfield, *Halliburton To Pay $35 Million To Settle Nigeria Bribery Charges*, WSJ BLOGS: CORRUPTION CURRENTS (Dec. 21, 2010), *at* http://blogs.wsj.com/corruption-currents/2010/12/21/halliburton-says-it-will-pay-35-million-to-settle-nigeria-bribery-charges/.

[26] Press Release, UK Serious Fraud Office, Innospec Limited Prosecuted for Corruption by the SFO (Mar. 18, 2010), *at* www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.