WILMERHALE

Foreign Corrupt Practices Act Alert

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LITIGATION/CONTROVERSY

Anti-Corruption Enforcement Developments: 2011 Year-in-Review and 2012 Preview

I. Introduction

The year 2011 proved to be another busy year for enforcement of the Foreign Corrupt Practices Act ("FCPA"). The US Department of Justice ("DOJ" or "Department") and the US Securities and Exchange Commission ("SEC") continued their vigorous enforcement efforts, initiating a total of 23 and 26 cases, respectively.[1] A flurry of activity in December doubled the number of cases brought by DOJ and nearly doubled those brought by the SEC. There were 26 cases brought against companies and 23 cases brought against individuals. Both DOJ and the SEC have made the prosecution of individuals for FCPA violations an enforcement priority, and cases brought in 2011 reflect the continued pursuit of that goal. For example, the year ended with DOJ charging eight former executives and intermediaries of Siemens AG and its subsidiaries and the SEC filing charges against six of the same individuals and settled charges against a seventh former executive; civil charges were also brought by the SEC against three former executives of Magyar Telecom, Plc.

The overall enforcement trends persist. In addition to the continued focus on prosecuting individuals, a major portion of the cases continue to involve third-party intermediaries, and substantial financial penalties continue to be imposed. Three of the 11 largest FCPA settlements in history were announced in 2011—the JGC Corporation and Johnson & Johnson cases, both announced in April 2011, took places on the list, and Magyar Telekom and its German parent, Deutsche Telekom AG, just made the list with the December 29 announcement of their settlement.

As described in our Anti-Corruption Enforcement Developments: 2010 Year-in-Review and 2011 Preview, 2010 was a record-breaking year for FCPA enforcement, both in terms of the sheer number of cases initiated—90—and in the penalties extracted—approximately $1.8 billion in financial penalties paid by companies and millions more by individuals. The enforcement activity in 2010 dwarfed that in 2009, which had itself been a record-breaking year. While the pace continues to be brisk, it has noticeably slowed in 2011. The smaller number of cases in comparison to the two prior years, however, should not be interpreted as an indication of a lack of enforcement interest. DOJ has announced that it has more than 150 open FCPA investigations and has signaled it will continue its aggressive prosecution of FCPA violations. In January 2011, in a speech to the Washington Metropolitan Area Corporate Counsel Association, Assistant Attorney General Lanny Breuer said:

> "[i]n the Criminal Division, we have dramatically increased our enforcement of the Foreign Corrupt Practices Act in recent years.... We recently promoted a [n]ew head of the Section's FCPA Unit and two assistant chiefs, and we have also increased the number of line prosecutors in the Unit, attracting high caliber attorneys with extensive experience—including Assistant U.S. Attorneys with significant trial and prosecutorial experience and attorneys from private practice with defense-side knowledge and experience. These changes have significantly increased our FCPA enforcement capabilities."[2]

In October, at an ABA panel, Denis McInerney, Chief of the Criminal Division's Fraud Section, said that DOJ would continue to use aggressive investigative techniques to pursue white-collar criminals and that prosecutors would continue to seek lengthy sentences for those convicted of white-collar crime.[3]

The somewhat smaller number of filed cases appears to be the result of resources from the Fraud Section being diverted to sustain the large volume of trial activity, most, but not all, of which comes as a result of the Department's focus on individuals, who are more likely than companies to litigate. As McInerney noted at the October American Conference Institute FCPA conference, DOJ is spending significant time and resources working with US Attorneys offices on various trials.[4] What remains unclear is how DOJ will balance the massive drain on resources caused by trials with the Department's goal of continuing to pursue new investigations.

In addition to trials, DOJ also appears to be spending time modifying and harmonizing its standard charging documents and agreements and is in the process of preparing FCPA guidance.

On November 8, 2011, in a speech at the National Conference on the FCPA, Assistant Attorney General Breuer announced that DOJ would publish guidance on the FCPA in 2012. Breuer said that "in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the Act's criminal and civil enforcement provisions." He did not elaborate on what form the guidance would take, and DOJ has declined to offer further details. Commentators and others have expressed hope that the forthcoming guidance will offer greater predictability with regard to DOJ's FCPA enforcement.

The most notable development of 2011 is the record level of trials and related litigation, with guilty verdicts returned in the Haiti Teleco cases, a mistrial declared in the trial of the first group of SHOT Show Sting defendants, and the convictions returned in the Lindsey Manufacturing case being vacated and the indictments dismissed as a result of the court's conclusion that the government had engaged in prosecutorial misconduct. These and other cases also generated judicial decisions and guidance on key issues relating to the FCPA, including the definition of "foreign official," the knowledge requirement under the FCPA, and the jurisdictional scope of the Travel Act, which is often also charged in FCPA cases. Prior to the recent increase in FCPA litigation, judicial interpretations of the FCPA were limited and positions asserted by enforcement authorities often were unchallenged in the context of settlements. Given that key decisions issued in 2011 are the subject of appeals and that significant trial activity is expected to continue in 2012, further judicial guidance is likely forthcoming, along with the possibility of interesting and surprising developments, if 2011 is any guide.

As enforcement activity has increased in recent years, critics have argued that the FCPA disadvantages US businesses and creates an unpredictable business environment. Some have advocated for amendments to the 1977 legislation or for other legislation to alter the enforcement landscape. In June 2011, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the FCPA, which focused on a range of criticisms of the FCPA, its potential harmful effects on US business interests, and possible reforms intended to clarify and amend various aspects of the FCPA. The Subcommittee hearing and proposed legislative changes, similar to those introduced in prior years and with a likewise uncertain future, are discussed below.

After the major staffing and organizational changes in 2010, there were fewer changes in 2011. In June 2011, FCPA Unit Chief Cheryl Scarboro left the SEC. In September 2011, Kara Brockmeyer was appointed to head the SEC's FCPA Unit. Brockmeyer was an Assistant Director in the Enforcement Division for six years, and led FCPA investigations involving Halliburton Co., KBR Inc., Technip S.A., and Snamprogetti Netherlands B.V./ENI S.p.A. She will help oversee and implement the SEC's strategy for FCPA enforcement and will head a team of 30 attorneys. One of her biggest challenges in 2012 will be

effectively managing and investigating tips received under the new Whistleblower Program, discussed in detail below.

Although indications are that the SEC will continue to vigorously pursue FCPA violations, SEC Enforcement Division Chief Robert Khuzami recently stated that the SEC will consider filing negligence-based charges where appropriate, but that the agency does not follow a strict liability approach with regard to FCPA enforcement and would not "degenerate" into such an approach.[5] Khuzami specifically mentioned that the agency does not follow a strict liability approach with regard to FCPA enforcement.

The SEC's FCPA Unit, which was one of five new specialized enforcement units launched in 2010, pursued industry-wide "sweep" investigations in 2011, a continuation of an enhanced strategy used by both the SEC and DOJ previously. Although many members of the SEC's FCPA Unit are based in Washington DC, others are located in the SEC's regional offices. Early in the year, the Boston office issued requests to various financial services firms seeking information on their dealings with sovereign wealth funds. In June 2011, various oil companies announced that they had received an inquiry from the Miami office related to their operations in Libya.

The SEC launched an FCPA website in 2011, which provides a comprehensive list of FCPA enforcement actions, from 1978 to the present, and includes links to relevant documents for cases since 2000.[6] DOJ has a similar site, which was redesigned in 2010, that contains a link to related enforcement actions.[7]

In addition to US anti-corruption efforts, other countries made significant efforts over the past year in the enforcement and legislative spheres. The United Kingdom's Bribery Act 2010 ("UK Bribery Act"), which was passed in 2010 and came into force on July 1, 2011, appears to rival the FCPA in scope and jurisdictional reach. Both Canada and Australia initiated their first significant prosecutions under their anti-corruption laws. International cooperation has also continued among global enforcement authorities. For example, DOJ has acknowledged a high level of cooperation from the Haitian government in connection with the Haiti Teleco case and significant assistance provided by the authorities in Greece, Poland, and the United Kingdom in connection with the Johnson & Johnson case, both of which are discussed below.

This article discusses the most significant FCPA and anti-corruption related developments of the past year and looks forward to what 2012 will bring.

II. The FCPA

The FCPA's anti-bribery provisions make it unlawful for any issuer, domestic concern, or person acting within the United States to offer or make a payment of anything of value directly or indirectly to a foreign official, international organization official, political party, or party official, or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business.[8] A covered company can be held liable for payments made on its behalf by agents or distributors.

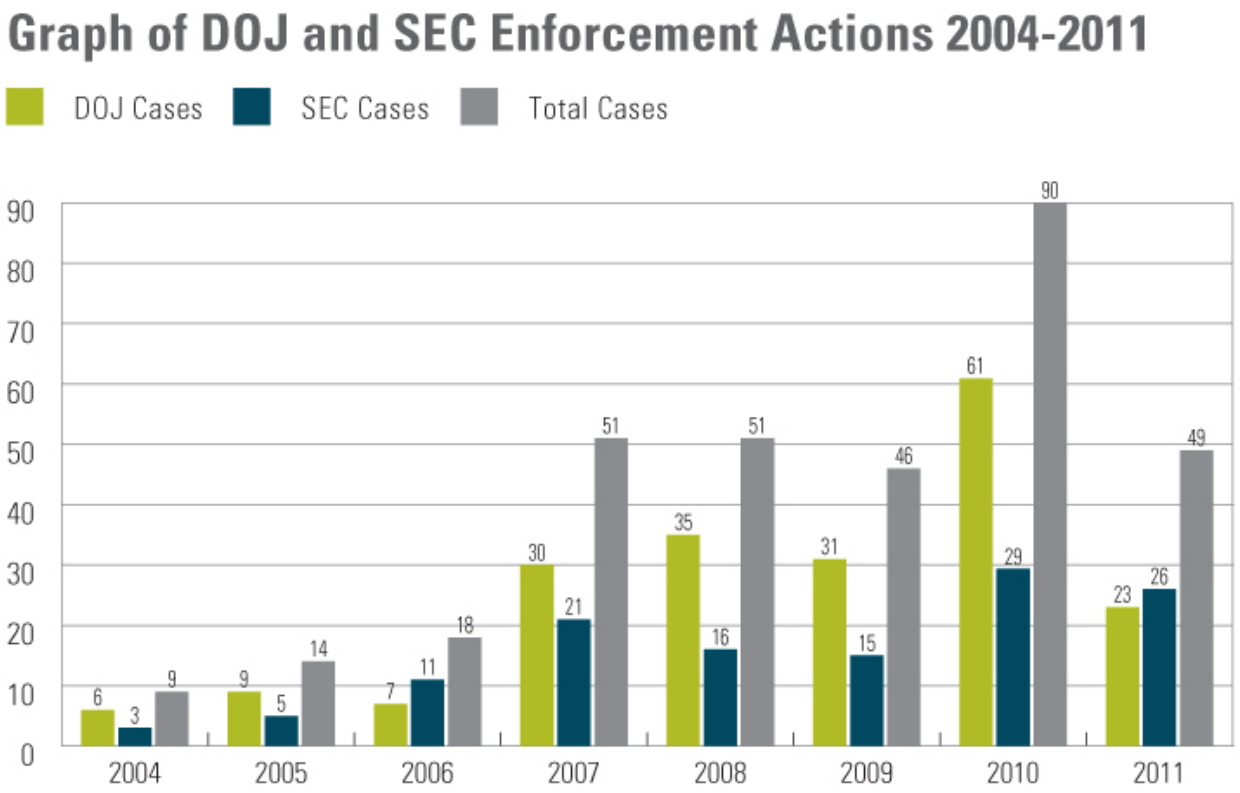
The FCPA's accounting provisions require companies with securities listed in US trading markets to keep books, records, and accounts that accurately and fairly reflect any transaction and disposition of assets in reasonable detail, and to maintain an adequate system of internal accounting controls.[9] A covered company is responsible for ensuring that its controlled subsidiaries, including foreign subsidiaries, comply with the FCPA's accounting provisions.

III. Enforcement Trends and Statistics

US authorities continued their strong enforcement efforts, initiating a total of 49 cases in 2011—26 against companies and 23 against individuals. A flood of activity in December significantly increased the number of cases initiated in 2011. As discussed above and as illustrated in Figure 1 below, enforcement activity increased dramatically in recent years, culminating in the record-breaking 90 cases initiated in 2010. It remains to be seen whether activity has peaked, but a close look at the 2010 numbers may indicate that the numbers were unusually high as a result of several cases involving an uncommon number of defendants. For example, as reported in our 2010 Year-in-Review, in January 2010, 22 individuals were indicted in connection with a single FBI undercover operation at the SHOT Show, a

weapons trade show in Las Vegas. Several other matters involved numerous defendants, such as Panalpina World Transport (Holding) Ltd. (involving a total of seven companies) and the Tobacco Industry settlements (involving three subsidiaries and two global tobacco parent companies, as well as individual defendants).

Figure 1.



A. Large FCPA Sanctions Continue

FCPA settlements continue to involve large sanctions, with three settlements from 2011 making it into the top 11 corporate FCPA settlements, as illustrated in Figure 2 below. 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 eleventh largest collective FCPA settlements all occurred in 2010 or 2011. Interestingly, nearly all of the companies in those settlements are headquartered outside the United States.

Also of note is the March 2011 guilty plea by Jeffrey Tessler, one of the consultants hired by the TSKP joint venture in connection with the Bonny Island project in Nigeria. As part of his plea, Tessler agreed to forfeit $148,964,568—an amount that would place him at number eight, were he a company.

Figure 2.

Top 11 Corporate FCPA Settlements		
No.	Corporation (HQ; Year)	Total US Settlement Amount
1	Siemens (Germany; 2008)	$800M
2	KBR/Halliburton (US; 2009)	$579M
3	BAE Systems (UK; 2010)	$400M
4	Snamprogetti/ENI (Holland/Italy; 2010)	$365M
5	Technip (France; 2010)	$338M
6	JGC (Japan; 2011)	$219M
7	Daimler (Germany; 2010)	$185M
8	Alcatel-Lucent (2010)	$137M
9	Magyar Telekom/Deutsche Telekom (Hungary/Germany; 2011)	$95M
10	Panalpina (Switzerland; 2010)	$82M
11	Johnson & Johnson (US; 2011)	$70M

B. Prosecution of Individuals is Continued Priority

In 2011, US enforcement authorities reiterated their priority of prosecuting individuals for FCPA violations. In a January 26, 2011 speech, Assistant Attorney General Breuer said "we have aggressively pursued individual executives under the FCPA," citing the charges against the president and the CFO of Lindsey Manufacturing and the former CEO and former vice president of Latin Node, Inc. ("LatiNode").[10] At the October ABA FCPA conference, a special agent with the FBI's FCPA squad said "holding individuals responsible and putting them in jail is a really good deterrent."[11] Charles Duross, Deputy Chief of DOJ's Criminal Division and the head of DOJ's FCPA Unit, echoed the sentiment at the National Conference on the FCPA, noting that just because a case against a company is resolved and time has passed, it does not mean DOJ is finished. He specifically cited the LatiNode case, where a corporation settled FCPA issues and DOJ later prosecuted individual executives.[12] The recent indictment of former executives from Siemens is another example.

As for the SEC, in October 2011, Tracy Price, Assistant Director of the SEC's FCPA Unit, said, "You're going to see a lot more cases against individuals…. We are continuing to increase our efforts to bring charges against corrupt individuals who have a role in the accounting and control violations that occur."[13] This may be in part due to changes under the Dodd-Frank regulatory regime, as the act clarifies the SEC's power to bring actions against "control persons." Under the "control person" theory of liability, the individual who had authority over the person (or company) who committed the wrongdoing can be held responsible. This provision allows executives to be held liable even if they had no direct knowledge of the alleged misconduct. Thus far, the SEC has only pursued that theory of liability once in an FCPA case.

Although larger FCPA settlements in recent years have had fewer attendant individual prosecutions than might be expected, US enforcement authorities appear 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.

In 2011, charges against a number of individuals were either brought or resolved. Individual resolutions included guilty pleas by three SHOT Show defendants; guilty pleas by four former executives of Miami-based LatiNode, which had settled a corporate FCPA case in 2009; and an SEC settlement against Paul W. Jennings, the former CEO of Innospec, Inc., which had settled corporate FCPA charges in 2010. Many of the new cases initiated against individual defendants in 2011 were brought in December. On December 13, 2011, DOJ and the SEC filed criminal and civil charges against former senior executives and agents of Siemens AG and its subsidiaries.[14] Assistant Attorney General Breuer remarked that the Siemens indictment "reflects our commitment to holding individuals, as well as companies, accountable for violations of the FCPA."[15] The criminal indictment alleges that two middlemen and six former Siemens executives, including the first board member of a Fortune Global 50 company to be charged under the FCPA, committed to $100 million in bribes to secure a $1 billion government contract to produce national identity cards for Argentina. One former Siemens executive is accused of smuggling $10 million into Switzerland for bribe payments; other former executives and agents allegedly participated in meetings to negotiate the bribes, authorized payments of $60 million over a decade to officials at the highest levels of two Argentine presidential administrations, and concealed the bribes during an arbitration aimed at recovering the anticipated proceeds of the cancelled contract. The SEC also announced charges against six of the same former Siemens executives and an additional former executive. One of them, Bernd Regendantz, settled with the SEC without admitting or denying the allegations and consented to the entry of a final judgment that permanently enjoins him from committing future violations. He paid a €30,000 administrative fine ordered by the Munich prosecutor (approximately $40,000).

These alleged acts in Argentina were part of the 2008 Siemens corporate settlement of global bribery allegations requiring payments of $1.6 billion to US and German authorities, including the largest FCPA settlement to date of $800 million in combined DOJ and SEC penalties. Siemens pleaded guilty to violating the FCPA internal controls and books and records provisions but was not charged with a substantive bribery offense, preserving the company's ability to do business under federal contracts.[16] DOJ had faced criticism for not bringing charges against individual executives involved. With the cooperation of Siemens and its audit committee in the long investigation, DOJ is now pursuing bribery charges against the individual Siemens executives, in addition to charges of wire fraud, conspiracy to commit wire fraud, and conspiracy to commit money laundering. The investigation and prosecution of Siemens is an example of global cooperation among enforcement authorities.

As reported in our 2010 Year-in-Review, Snamprogetti Netherlands B.V., Technip S.A., KBR/Halliburton, and JGC Corporation entered into a four-company joint venture 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. All four companies and several individuals have pleaded guilty, including KBR's former CEO and a former KBR sales consultant; sentences are scheduled for 2012. JGC, a Japanese engineering and construction company, the last joint venture partner to resolve the matter, settled the charges in 2011 (the 6th largest FCPA fine—the other joint venture partners paid the 2nd, 4th, and 5th) and entered into a deferred prosecution agreement ("DPA") with DOJ, which requires it to retain an independent compliance consultant for two years to review and design the implementation of its compliance program and to enhance its compliance program to ensure it meets certain standards.[17]

According to court documents, Jeffrey Tessler was hired by TSKP as a consultant along with a Japanese trading company to pay bribes to Nigerian government officials.[18] Tessler controlled a Gibraltar corporation that was paid $132 million by TSKP in funds that in part were intended to be used for paying the bribes. Tessler was extradited from the United Kingdom and pleaded guilty to one count of conspiracy to violate the FCPA and one count of violating the FCPA in March 2011. As noted above, Tessler agreed to forfeit $148,964,568 in connection with his plea. Sentencing for Tessler is scheduled for February 2012.

On July 12, 2011, DOJ filed a superseding indictment in the long-running Haiti telecommunications case ("Haiti Teleco"), charging three additional individuals and one additional company for their roles in the foreign bribery, wire fraud, and money laundering case.[19] The charges relate to the scheme by officials and employees of Florida-based telecommunications companies to bribe officials of Haiti's state-owned national telecommunications company. Two individuals had been indicted in December 2009 in the same case.

C. Third-Party Risks

Another continuing trend is the involvement of sales agents, intermediaries, and other third parties in FCPA violations. At the National Conference on the FCPA, Deputy Chief Charles Duross said that third parties present a significant risk for FCPA exposure and that third parties were involved in all of the most recent cases.[20] The 2011 settled matters are consistent with that trend.

In April 2011, Johnson & Johnson ("J&J"), the manufacturer of medical devices, pharmaceuticals, and consumer health care products, agreed to pay a $21.4 million fine to DOJ as a part of a DPA for violations of the FCPA.[21] J&J entered into the agreement to resolve improper payments by its subsidiaries to government officials in Greece, Poland, and Romania as well as kickbacks paid to the former government of Iraq as part of the UN Oil-for-Food Program. J&J acknowledged that employees and agents of its subsidiaries made various improper payments to publicly employed health care providers in order to induce them to purchase medical devices and pharmaceuticals. Additionally, kickback payments were made to the former Iraqi government on behalf of J&J subsidiary companies to secure contracts to provide humanitarian supplies. J&J was not required to retain a corporate monitor but must report to DOJ on the implementation of its remediation and compliance efforts every six months during the three-year agreement. Although DOJ found that the company's pre-existing compliance and ethics program was "effective," J&J was required to undertake "enhanced compliance undertakings," including conducting FCPA audits at least once every three years of at least five operating companies that are at high risk for corruption because of their sector and location, and appointing a senior corporate executive with significant FCPA experience as Chief Compliance Officer. According to the DPA, the $21.4 million fine represents a 25% reduction off of the bottom of the US Sentencing Guidelines' fine range and was the result of J&J's "voluntary and thorough disclosure of the misconduct at issue, the nature and extent of J&J's cooperation in this matter, penalties related to the same conduct in the United Kingdom and Greece, J&J's cooperation in the Department's investigation of other companies, and J&J's extraordinary remediation."[22] In a settlement with the SEC related to the same conduct, J&J agreed to pay $48.6 million in disgorgement of profits, including pre-judgment interest.[23]

On December 29, 2011, DOJ and the SEC announced criminal and civil settlements totaling more than $95 million with the largest telecommunications provider in Hungary, Magyar Telekom, Plc. ("Magyar Telekom") and its German parent, Deutsche Telekom AG ("Deutsche Telekom").[24] The parallel FCPA settlements resolve allegations that Magyar Telekom entered into a secret agreement with government officials to protect the company's T-Mobile brand from competition in the Macedonian mobile phone market. Magyar Telekom admitted that executives made payments of approximately $6 million to intermediaries under bogus consulting and marketing contracts that they "knew, or were aware of a high probability" would be paid directly or indirectly to Macedonian government officials. Magyar Telekom also admitted to paying approximately $9 million in a similar bribery scheme in Montenegro. The two-year DPA requires Magyar Telekom to implement an enhanced compliance program and report annually to DOJ on compliance and remediation efforts. Deutsche Telekom entered into a separate two-year NPA with DOJ to resolve charges that it obscured the true purpose of the Magyar Telekom bribes on its consolidated financial statements and failed to include the sham contracts in its books and records. The SEC separately announced charges against three former Magyar Telekom officials, including the former Chairman and Chief Executive.

In January 2011, Maxwell Technologies Inc. ("Maxwell"), a California-based manufacturer of energy-storage and power-delivery products, settled criminal and civil FCPA charges stemming from improper payments related to sales of Maxwell's products to state-owned manufacturers of electric-utility infrastructure in several Chinese provinces. DOJ and the SEC alleged that Maxwell's wholly owned Swiss subsidiary, through the use of a Chinese agent, bribed officials at state-owned manufacturers in China to secure contracts worth more than $15.4 million. Maxwell allegedly made these payments at the agent's

instruction by adding 20% to the invoices of state-owned customers and passing the surplus to the agent who then used the amount to bribe officials at the same state-owned customers. Members of Maxwell's US management discovered the bribery scheme in 2002 and knowingly perpetuated it by mischaracterizing the bribes as sales commissions and reclassifying kickbacks as a reduction in revenue. Maxwell agreed to pay more than $14 million to resolve the charges, entering into a three-year DPA with DOJ and settling with the SEC, without either admitting or denying the SEC's allegations. According to the DPA, Maxwell's criminal penalty was 25% below the bottom end of the range recommended by the US Sentencing Guidelines due to Maxwell's voluntary disclosure and cooperation with the investigation.

Another settlement involving improper payments made by an agent involved Comverse Technology, Inc., a New York-based provider of software for communication and billing services, which settled criminal and civil FCPA charges stemming from improper payments made by its Israeli subsidiary, Comverse Limited (collectively, "Comverse").[25] According to the charging documents, Comverse engaged an Israeli agent to transfer approximately $536,000 to employees connected to Hellenic Telecommunications Organisation S.A. ("OTE"), a partially state-owned telecommunications provider in Greece, to secure business from OTE. During the period at issue, the Greek government was the entity's largest single shareholder and was also the OTE's largest customer for telecommunications services. The agent opened a bank account and used a shell company based in Cyprus to transfer payments to the OTE employees that were recorded in Comverse's records as agency fees. Comverse agreed to pay a combined monetary penalty in excess of $2.8 million, entering a non-prosecution agreement ("NPA") with DOJ and civil settlement with the SEC, in which Comverse did not admit or deny the allegations.

D. Travel and Entertainment in High-Risk Markets

On March 18, 2011, International Business Machines Corporation ("IBM") entered into a $10 million settlement with the SEC to resolve FCPA books and records and internal controls charges involving IBM subsidiaries in South Korea and China.[26] The settlement reflects the SEC's apparent willingness to allege that a parent's internal controls were deficient based on conduct in a subsidiary in circumstances where there was no evidence that the parent had knowledge or reason to know of the alleged improper payments. The SEC alleged that employees of IBM's Korean subsidiary and a Korean joint venture, in which IBM held a 51% interest, provided a total of $207,157 in cash payments, and an unspecified total value of entertainment, travel, and gifts to South Korean government officials in exchange for confidential information and mainframe and personal computer sales contracts. The SEC also alleged that employees of IBM's two wholly-owned subsidiaries in China engaged in a widespread practice of providing overseas trips, entertainment, and improper gifts to Chinese government officials of an unspecified total value. More than 100 IBM-China employees were allegedly involved in an improper travel and entertainment scheme planned by two key IBM-China managers. There were also allegedly more than 114 instances of fabricated invoices, improperly documented and/or funded trips, and unapproved sightseeing activities. In addition, IBM-China personnel allegedly falsely designated travel agents as training providers and submitted fraudulent purchase requests to funnel payments for unapproved trips for Chinese officials.

On December 20, 2011, Aon Corporation and its subsidiaries (collectively, "Aon"), an international insurance firm based in Chicago, agreed to pay $16.26 million to resolve allegations involving improper international travel and entertainment expenses, as well as other improper payments to government officials.[27] In its NPA with DOJ, Aon admitted that while many of the trips had a business connection, significant portions of the funds were used for the personal benefit of the officials and their spouses and that Aon's books and records did not accurately reflect the true purposes of these expenses. DOJ "substantially reduced" the monetary penalty as a result of Aon's comprehensive global internal investigation, complete disclosure of facts to DOJ and the SEC, and extensive remediation of the company's internal controls. The penalty was also reduced in light of an earlier £5.25 million (approximately $8 million) penalty paid to the UK's Financial Services Authority ("FSA") to resolve bribery allegations involving conduct in six Asian and European countries. The civil settlement with the SEC resolved charges of improper payments to officials or third-party facilitators in Egypt, Vietnam, Indonesia, the United Arab Emirates, Myanmar, Bangladesh, and Costa Rica.

E. High-Risk Markets and Industry-Specific Risks

A number of cases involved business activities in high-risk markets, such as China, including Maxwell, discussed above. In addition, on October 13, 2011, the SEC issued an administrative cease and desist order to Watts Water Technologies, Inc. ("Watts"), a Delaware corporation that designs, manufactures, and sells water valves and related products, and Leesen Chang, a former interim general manager for Watts Valva Changsha Co., Ltd., ("CWV"), a wholly-owned Chinese subsidiary, in connection with violations of the FCPA's books and records and internal control provisions.[28] The SEC alleged that CWV paid employees of Chinese state-owned design institutes to recommend CWV products and to create design specifications that favored CWV products for infrastructure projects developed and run by state-owned entities. CWV's sales policy provided that all sales-related expenses—including travel, meals, entertainment and "consulting fees" paid to design institutes—would be born by CWV sales employees out of their sales commission, which was approximately 7% of the contract price, and provided that sales personnel could use their commission to make payments to employees of design institutes of up to 3% of the total contract amount. The SEC alleged that Chang had approved many of these and knew or should have known the payments were improperly recorded as sales commissions. Chang also resisted efforts to have the sales policy translated, which prevented Watts from discovering the improper payments sooner. Watts agreed to penalties of $3.7 million, including $2,755,815 in disgorgement, $820,791 in prejudgment interest, and a $200,000 penalty. Chang agreed to pay a $25,000 penalty.

A settlement was reached with Rockwell Automation, Inc. ("Rockwell") involving similar conduct in China. In May 2011, the SEC filed an administrative action alleging that a Rockwell subsidiary in China used third-party intermediaries to pay $615,000 to employees of state-owned Chinese design institutes, which the SEC alleged had the power to influence contract awards by state-owned customers.[29] While the design institutes did provide legitimate services, the SEC alleged that Rockwell intended the payments to buy influence. The SEC further alleged that $450,000 was used to fund sightseeing and non-business related travel and entertainment for design center employees and these expenses were booked as legitimate business expenditures. Rockwell voluntarily reported the misconduct, consented to a cease-and-desist order, and agreed to pay $2,761,091 in disgorgement, prejudgment interest, and a civil penalty.

On July 27, 2011, Diageo plc—one of the world's largest producers and distributors of premium alcoholic beverages—settled charges with the SEC for multiple violations of the FCPA. Diageo agreed to pay more than $16 million, consisting of $11,306,081 in disgorgement, $2,067,739 in prejudgment interest, and a $3 million penalty.[30] According to the SEC's cease-and-desist order, Diageo paid more than $2.7 million to various government officials in India, Thailand, and South Korea to increase sales and obtain tax benefits relating to its Johnnie Walker and Windsor Scotch whiskeys, among other brands. With respect to India, the SEC alleged that Diageo paid $1.7 million in bribes to government officials to secure sales that yielded more than $11 million in profit for the company. In Thailand, Diageo allegedly made payments of nearly $600,000 to a Thai government and political-party official for "consulting" services. The Thai official intervened on Diageo's behalf in multi-million dollar tax and customs disputes, helping Diageo obtain favorable resolutions with the Thai government. In South Korea, Diageo allegedly made $86,000 in payments to a customs official who helped secure significant tax rebates from the government. Other payments went to customs officials for travel and entertainment expenses connected with the tax negotiations. Diageo also gave hundreds of cash payment gifts to South Korean military officials to obtain and retain liquor business. The SEC found that Diageo and its subsidiaries failed properly to account for these improper payments in their books and records by concealing them as legitimate vendor or other business expenses and in several instances failed to record the improper payments altogether. Diageo was credited for its cooperation and remedial actions, including termination of responsible employees.

In addition to risks posed in high-risk markets, companies face industry-specific risks, such as interactions with government officials in connection with licensing and permitting, customs, and immigration. For example, in February 2011, Tyson Foods, Inc. settled criminal and civil FCPA charges related to conduct that occurred in its wholly-owned Mexican subsidiary, which allegedly made $90,000 in payments to Mexican state-employed veterinarians who were involved in certifying Tyson food products for export. A payment scheme was established whereby the veterinarians' wives were included on the subsidiary's payroll and fictitious invoices were submitted for payment by one of the veterinarians. A local plant manager reported to a Tyson accountant that the wives did not actually perform any work for Tyson and that unusual monthly invoices were paid to a veterinarian. Tyson executives met in Arkansas to discuss

the issue and concluded that the veterinarians' wives must be removed from the payroll, but they then endeavored to modify the scheme and shift the payroll payments to the veterinarians themselves. The invoices for the veterinarians subsequently showed an increased amount for "professional honoraria" in exactly the amount previously paid to the wives. Tyson agreed to disgorge to the SEC $1.2 million in ill-gotten gains and prejudgment interest. It resolved criminal charges with DOJ through a two-year DPA, agreed to pay a $4 million criminal fine, and agreed to report on its compliance program twice a year. In announcing the settlement, Assistant Attorney General Breuer cited Tyson's voluntary disclosure of the misconduct, a comprehensive internal investigation, cooperation with government regulators, and remedial measures. Tyson's criminal fine was 20% below the applicable minimum under the US Sentencing Guidelines.

These cases highlight the importance of being aware of—and taking steps to address—local business practices that may raise corruption issues. Thorough risk assessments are therefore a key component of effective compliance programs. Both the US Sentencing Guidelines and the UK Bribery Act's 2011 Guidance list periodic compliance program risk assessment as a key element in creating and implementing an effective anti-corruption program. Commercial organizations should regularly and comprehensively assess the nature and extent of the risks relating to bribery to which they are exposed. Relevant risk factors 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. In *Maxwell*, for example, DOJ listed the following areas of risks to be assessed: (1) geography; (2) interaction with types and levels of government officials; (3) industrial sector of operations; (4) involvement with joint ventures; (5) licenses and permits in operations; (6) degree of government oversight; and (7) volume and importance of goods and personnel going through customs and immigration.

F. A New Tool at the SEC—Deferred Prosecution Agreements

On May 17, 2011, the SEC announced that it entered its first-ever DPA, a part of the SEC's 2010 Cooperation Initiative.[31] The case involved Tenaris S.A., a global supplier of steel products and services related to the oil and gas industry, and allegations that Tenaris employees violated the FCPA by bribing Uzbekistan officials to award the company several pipeline contracts, which resulted in nearly $5 million in profits. Tenaris agreed to pay $5.4 million to the SEC in connection with the DPA. On the same day, the company announced a settlement of related criminal charges through a two-year NPA with DOJ requiring it to pay a $3.5 million criminal penalty.[32] In announcing the settlement, SEC Director of the Division of Enforcement Robert Khuzami said that Tenaris's "immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training made it an appropriate candidate for the Enforcement Division's first Deferred Prosecution Agreement."[33]

It remains to be seen whether such agreements will be seen as meaningfully different from other types of FCPA settlements available to the SEC, including administrative proceedings. Prior to the implementation of Dodd-Frank, the SEC could only levy administrative monetary penalties against "regulated" persons, such as investment advisors and brokers who are required to register with the SEC. If the SEC wanted to assess a financial penalty against a non-regulated company or executive, it had to file a settlement, subject to judicial approval, in a US District Court. Following the implementation of Dodd-Frank in 2010, the SEC has the ability to levy administrative fines directly against non-regulated individuals and entities. In recent Congressional testimony, SEC Chairwoman Mary Schapiro cited the $3 million administrative penalty imposed against Diageo plc for alleged FCPA violations as a feature of Dodd-Frank that provides additional investor protections. Schapiro observed "these new tools are augmenting our Enforcement Division's own, proactive initiatives to enhance its effectiveness by bringing more cases—and more significant cases—more swiftly and more efficiently."[34] As discussed above, in July 2011, the SEC resolved a case against Diageo through an administrative proceeding.

G. Merger & Acquisition Risks

On March 24, 2011, Ball Corporation ("Ball"), a Colorado-based household product manufacturer, settled SEC civil charges that it had violated the FCPA's books and records and internal controls provisions.[35] Ball agreed to pay a $300,000 penalty and agreed to the entry of a cease-and-desist order. According to

the SEC papers, during its acquisition of an Argentinean company, Ball discovered that the target had made improper payments to customs officials. Despite knowledge of the improper payments, Ball neglected to implement post-acquisition internal controls designed to detect and prevent such payments, allowing its Argentinean subsidiary to continue to make over $100,000 in payments to Argentinean customs officers. The payments were disguised on the subsidiary's books and records as legitimate customs expenses, and the president and vice president of the subsidiary were allegedly aware of the improper payments and improper bookkeeping. In announcing the fine, the SEC noted that Ball had voluntarily disclosed the misconduct and cooperated with the investigation.

The Ball settlement is a reminder that acquirers should conduct sufficient due diligence prior to closing and that due diligence findings, however unpleasant, should not be ignored. Post-closing integration of the new business into the parent compliance program is also a key component of M&A activity. In the action against Ball, the SEC stressed that although external due diligence performed on the target suggested that its executives may have previously authorized questionable payments to customs officials, Ball failed to bring about effective changes, and key personnel responsible for dealing with customs issues remained at the target after the acquisition.

H. Intersection of FCPA and Antitrust

The September 2011 Bridgestone Corporation ("Bridgestone") settlement is another example of the continued focus on the oil services industry and also highlights the intersection between the FCPA and other laws—in this case, antitrust. Bridgestone, a Tokyo-based manufacturer of marine hose (used to transfer oil between tankers and oil storage facilities) and other industrial products, agreed to plead guilty to conspiring to violate the Sherman Act and the FCPA by conspiring to rig bids, fix prices, and allocate market share of marine hose, and conspiring to make corrupt payments to government officials in Latin America to obtain and keep business.[36] DOJ asserted jurisdiction over the Tokyo manufacturer based on the allegation that emails or faxes were sent to or from Japan to the United States in connection with the bribery scheme. DOJ agreed to a substantially-reduced fine of $28 million, which was the result of mitigating factors, among them Bridgestone's cooperation with investigations, including conducting a worldwide internal investigation, voluntarily making employees available for interviews, and collecting, analyzing, and providing voluminous evidence and information to DOJ. Bridgestone also undertook extensive remediation efforts and committed to enhance its compliance program and internal controls.

I. Shift Away from Compliance Monitors; Increased Use of Alternatives

Imposition of compliance monitors appeared to decline in 2010, along with the appearance of alternative enhanced compliance measures. In 2011, the majority of matters resolved with DOJ involved alternative compliance measures, with approximately half requiring defendants to file self-reports to the government regarding their compliance efforts. Among them were Johnson & Johnson, Armor Holdings, and Magyar Telekom. In contrast, JGC Corporation was required to retain an independent compliance consultant to review the design and implementation of its compliance program. There were no 2011 cases in which a compliance monitor was imposed.

IV. Record-Level Trial Activity and Related Litigation

Prior to the government's increased focus on individuals, there were four litigated cases involving the FCPA (and, accordingly, four individual decisions interpreting the statute). In recent years, however, there has been a significant increase in the number of defendants (including some corporate defendants) challenging FCPA charges at trial or otherwise litigating FCPA issues. This creates risks both to prosecutors—whose interpretations of the FCPA until now had been largely unchallenged in settlements—and to defendants—who face the uncertainties that come with trials. The trial activity in 2011 delivered victories and setbacks for both groups.

A. New Judicial Precedent on the Meaning of "Foreign Official"

In 2011, courts in two FCPA prosecutions issued significant opinions on the meaning of "foreign official." In both cases, the defendants moved to dismiss charges brought in connection with alleged bribes paid to officers and employees of state-owned companies, arguing that such entities are not government

instrumentalities within the meaning of the FCPA.[37] Declining to adopt a categorical rule, both courts held that state-owned companies generally *may* qualify as governmental instrumentalities, depending on a fact-specific analysis of multiple factors. Applying the factors, one court concluded that the state-owned company at issue was a government instrumentality within the meaning of the FCPA. The other court found that the issue was a question of fact that was intertwined with evidence relating to the alleged offense that would be presented at trial. A third decision, issued in early January 2012, also rejected a challenge based on the meaning of the term "foreign official."[38]

1. *Lindsey Manufacturing* Challenge

In *Lindsey Manufacturing*, prosecutors alleged that the defendants bribed employees at the Mexican government-owned electricity utility Comisión Federal de Electricidad ("CFE"). Judge A. Howard Matz of the Central District of California held that a "state-owned corporation having the attributes of CFE may be an 'instrumentality' of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be 'foreign officials' within the meaning of the FCPA."[39] The undisputed facts established that CFE was created and wholly-owned by the Mexican government; Mexican statutory law defined CFE as a public entity and mandated that its governing board be composed of public officials; the Mexican president possessed statutory authority to appoint CFE's director general; the Mexican constitution provided that the supply of electricity is solely a governmental function; and CFE's own website defined it as an agency of the Federal Government.[40]

In its ruling, the district court held that the jury should not singularly consider the Mexican government's ownership level in CFE, but instead also should evaluate the government's level of control, CFE's origins, and its purpose.[41] Judge Matz also based his ruling on the definition of "instrumentality," following the defendants' suggestion that the court "look for defining similarities between agencies and departments and consider only entities that share these qualities to fall within the definition of 'instrumentality.'"[42] The court offered a "non-exclusive list" of factors to consider when determining whether an entity qualifies as an instrumentality of a foreign government, including:

- The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[43]

Judge Matz found that "CFE ha[d] all of these characteristics."[44] The ruling is a narrow one and appears to leave open the possibility of future challenges. While the court clearly rejected the defendants' argument that *no* corporation could qualify as an "instrumentality," the court left open the question of whether *all* corporations that perform some public function qualify as "instrumentalities."

2. Control Components Inc./*Carson* Challenge

In May 2011, Judge James Selna, also in the Central District of California, in *Carson* issued the second denial of a "foreign official" challenge. The government charged Stuart Carson (the former CEO of valve manufacturing company Control Components Inc. ("CCI")) and other former CCI executives with paying bribes to government-owned (and non-government owned) oil and power companies in China, Korea, Malaysia, and the UAE.[45] Like the defendants in *Lindsey Manufacturing*, the defendants argued that the employees of state-owned entities were not foreign officials under the FCPA.

Judge Selna held that whether a state-owned company is an instrumentality for FCPA purposes "is a fact-specific question that depends on the nature and characteristics of the business entity."[46] The court noted that government ownership does not control the analysis. The court articulated six non-exclusive, non-dispositive factors to consider in determining whether a state-owned entity is an instrumentality for FCPA purposes:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment, and loans).[47]

Judge Selna denied the motion to dismiss because it was "not entirely segregable from the evidence to be presented at trial."[48]

While these cases resulted in findings that state-owned entities were (or might be) instrumentalities under the FCPA, the entities at issue in these cases had strong indicia of government ownership, involvement, and control. It remains to be seen whether entities with minority government ownership or more passive government involvement (as has been alleged by the government in settled cases) will be similarly treated.[49]

B. *Lindsey Manufacturing* Dismissal

On May 10, 2011, after a five-week trial, Lindsey Manufacturing was convicted of charges of violating the FCPA. The company's CEO Keith E. Lindsey, CFO Steve K. Lee, and one of its third-party intermediaries were also convicted at trial.

A month after the jury returned its verdict, the prosecution disclosed that it had failed to turn over transcripts of an FBI agent's testimony before the grand jury. Defendants Lindsey Manufacturing, Keith E. Lindsey, and Steve K. Lee moved to dismiss the charges based on prosecutorial misconduct. On December 1, 2011, Judge Matz granted the motion, vacating the convictions of defendants Lindsey Manufacturing Company and executives Lindsey and Lee, and dismissing the indictment against them.[50] The court strongly criticized the prosecution's conduct as "reckless" and "flagrant."[51] The court remarked that the government's "mistakes" were "So many in fact, and so varied, and occurring over so lengthy a period (between 2008 and 2011) that they add up to an unusual and extreme picture of a prosecution gone badly awry."[52] DOJ is appealing the dismissal.[53]

As discussed below, DOJ suffered another setback in the SHOT Show Sting trial, when testimony by a witness was thrown out after prosecutors failed to disclose notes relied upon by the witness.

C. Knowledge Under the FCPA

Among the key issues getting attention in 2011 was the definition of knowledge under the FCPA. Judge Matz in the *Lindsey Manufacturing* case rejected a willful blindness jury instruction and scolded the prosecutor for discussing willful blindness in his closing argument.

The jury instructions defined "knowledge" under the FCPA as:

> A person has knowledge for purposes of the FCPA if: (a) he is aware that he is engaging in conduct, or that a circumstance exists, or that a result is substantially certain to occur; or (b) he

> has a firm belief that such circumstance exists or that such result is substantially certain to occur. A person is deemed to have such knowledge if the evidence shows he was aware of a high probability of the existence of such circumstance, unless he actually believes such circumstance does not exist.[54]

The court had previously rejected the government's request to give separate instructions on "deliberate ignorance" or "willful blindness." Nevertheless, during its closing argument, the prosecution essentially conveyed the willful blindness standard to the jury. The prosecutor argued that "the law is saying that you can't turn a blind eye;" that "Defendants … cannot see all of this smoke and all these red flags and then close their eyes;" and covered his eyes for emphasis.[55] While noting the prosecutor was talented and that lawyers experience great stress and fatigue at the end of lengthy trials, Judge Matz found that the prosecution's discussion of a "willful blindness" standard during closing arguments was a misstatement that likely prejudiced the defense.[56]

On the other hand, the trial court in *United States v. Kozeny* (hereinafter "*Bourke*"), gave a separate willful blindness instruction, which the Second Circuit affirmed.[57] In its jury instructions, the district court defined a person possessing knowledge as "a person [who] is aware of a high probability of its existence and consciously and intentionally avoided confirming the fact."[58] Further, the district court elaborated that "[k]nowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge."[59] In affirming Frederic Bourke's 2009 conviction for conspiring to violate the FCPA and the Travel Act, and of making false statements, the Second Circuit held that Bourke violated the FCPA without acquiring actual knowledge of the bribery scheme, because he consciously avoided learning the truth of his associates' actions. The Court noted that there must be a "factual predicate" for the instruction, which would allow a reasonable juror to conclude that the defendant consciously avoided a known risk of illegal activity. The Court noted evidence that indicated Bourke had knowledge of suspicious facts that could indicate bribery: he knew of Azerbaijan's reputation for corruption and his business associate's international reputation for corruption and larceny; he had multiple telephone conversations indicating that he was wary of FCPA violations; and he set up a shell company to shield himself and other investors from potential FCPA liability. Under these facts, the Court found that "a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that [the business associate] and his cohorts may be paying bribes."[60]

A recent Supreme Court decision on willful blindness may also have consequences in FCPA prosecutions. In May 2011, the Supreme Court, in a patent infringement case, articulated a two-part test for willful blindness that requires proof that: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."[61] It noted that willful blindness can only serve as a proxy for actual knowledge in the "appropriately limited" circumstance where both prongs of the articulated definition are met. The Supreme Court rejected the test followed by the Federal Circuit because "First, it permits a finding of knowledge when there is merely a 'known risk' that the induced acts are infringing. Second, in demanding only 'deliberate indifference' to that risk, the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities."[62] In his dissent, Justice Kennedy wrote that the majority's decision "appears to endorse the willful blindness doctrine here for all federal criminal cases involving knowledge."[63]

If *Global-Tech*'s logic is applied in the FCPA context, simply being aware of and indifferent to a "known risk" will not be enough to sustain a conviction. Rather, for a finding of willful blindness under this framework, the defendant must make active efforts to avoid knowledge of the activities. The FCPA's statutory definition of knowledge embraces the willful blindness doctrine, but does not include *Global-Tech*'s second willful blindness element.[64] It thus remains unclear whether the government's historically broad definition of knowledge under the FCPA has been limited by any of these decisions.

D. Jurisdictional Scope of the Travel Act

The jurisdictional scope of the Travel Act was another area in which judicial guidance was provided in 2011. Charges under the Travel Act,[65] which prohibits the use of interstate or foreign commerce to facilitate certain specified unlawful activities, including bribery in violation of state or federal law, have in

recent years been increasingly brought in connection with FCPA-related charges. The Travel Act encompasses conduct that violates either state or federal law, so long as a defendant employs interstate or foreign commerce to further such conduct. Thus, the Travel Act can be used to prosecute bribery of officers or employees of privately owned (*i.e.*, non-government) entities where it is prohibited by state law, as was alleged in the *Carson* prosecution.[66] There, the prosecution alleged that defendants used interstate and foreign commerce to commit acts that violated California's anti-corruption laws, including the knowing facilitation of alleged improper wire transfers to individuals in foreign countries from the defendants' offices in California. In moving to dismiss the Travel Act charges, the defendants argued, *inter alia*, that the statute does not apply extraterritorially. Judge Selna rejected the argument, finding that (1) the criminal offense was completed domestically—even though the target of the bribery scheme may have been abroad—and thus an extraterritorial analysis did not apply; and (2) even if an extraterritorial analysis was necessary, the Travel Act reached such conduct.[67] The court ruled that "criminal statutes may apply extraterritorially even without an explicit Congressional statement" and found that the "plain language of the Travel Act demonstrates Congress's desire to reach conduct overseas."[68] Judge Selna also disagreed with the defendants' position that "the subsequent enactment of the FCPA provides a clear inference that the Travel Act was not intended to apply extraterritorially."[69] He stated that "multiple criminal statutes can often be applied to the same criminal conduct" and that he did "not discern any conflict between the Travel Act and the FCPA."[70] Consequently, the court found the Travel Act charges against the defendants were proper and consistent with Supreme Court precedent and denied the motion to dismiss.

E. SHOT Show Sting Trials

As reported in our 2010 Year-in-Review, on January 19, 2010, DOJ announced the indictment of 22 executives and employees from 16 defense products companies. The arrests were the result of a massive sting operation in which an FBI agent posed as a procurement agent for Gabon's Minister of Defense. The sting operation utilized undercover informant and defense-industry insider Richard Bistrong.[71] DOJ prosecutors allege that the 22 defendants agreed to pay Gabon's Minister of Defense $1.5 million to secure a defense equipment contract (the deal was fabricated and no Gabonese officials were involved). This was the first large-scale use of undercover law enforcement to uncover FCPA violations. Although the case continues to unfold, the new tactics have been shown to present risks for the government.

Three sting case defendants, Haim Geri, Daniel Alvirez, and Jonathan Spiller, have pleaded guilty, although Alvirez recently retained new counsel, fueling speculation that he might withdraw his guilty plea. The remaining 19 defendants were divided into four trial groups.

In May 2011, the first highly anticipated trial began in the DC District Court against defendants Pankesh Patel, Andrew Bigelow, John Benson Weir, and Lee Allen Tolleson with Judge Richard Leon presiding.[72] Defense counsel attempted to argue that the government entrapped the defendants and intentionally withheld evidence, but their pre-trial motions were denied. The government spent three weeks presenting its case and, notably, did not offer the testimony of Richard Bistrong. The government presented evidence intended to show that the defendants agreed to corruptly pay $1.5 million to an individual they believed was the Gabonese Minister of Defense. The defense presented evidence that the FBI mismanaged Bistrong and that FBI handlers erroneously directed Bistrong to lie to the defendants and tell them that the proposed deal was lawful—when a defendant told Bistrong his lawyer had expressed concerns about the deal, Bistrong replied by email that the deal had been approved by the Department of State. The defendants argued that because the deal was intentionally made to look legitimate, it was not clear that the defendants knew the payments were corrupt. The defense also elicited testimony from Bistrong's FBI handlers regarding Bistrong's history of drug abuse, falsification of drug test results, and his habit of hiring prostitutes.

On July 7, 2011, after six days of jury deliberation, Judge Leon declared a mistrial. DOJ prosecutors immediately informed the court that they intended to retry all four defendants. Following the mistrial, Judge Leon allowed prosecutors and defense counsel to speak with the jurors. Jurors indicated they were wary of the government's use of a sting operation and many were unconvinced that the defendants knew the payments were illegal.[73]

On September 28, 2011, the second sting trial began against defendants John Mushriqui, Jeana Mushriqui, R. Patrick Caldwell, Stephen Giordanella, John Godsey, and Mark Morales. DOJ's change in strategy following the mistrial was readily apparent; rather than avoid the topic of informant Bistrong, the prosecution used opening arguments to be open with jurors about Bistrong's various misdeeds and later offered Bistrong as a witness. During direct examination, Bistrong testified about his drug use, his trips to rehab, and the corrupt deals he participated in when he was in the defense products industry. Defense counsel waged an aggressive cross-examination of Bistrong—attacking his character and portraying him as shrewd and manipulative. During cross-examination, Bistrong admitted that he should not have told the defendants the deal was legal.

The prosecution suffered several adverse court rulings. Judge Leon scolded prosecutors for neglecting to turn over notes relied upon by a witness and excluded part of the witness's testimony. At the conclusion of the prosecution's case, Judge Leon dismissed the conspiracy charges against the six defendants, resulting in an acquittal for Stephen Giordanella, who had only been charged with conspiracy. Judge Leon found that the prosecution failed to present evidence that the defendants participated in a single overarching conspiracy, noting that the deal was structured such that the success or failure of a defendants' deal was not linked to the success or failure of any of the others. Judge Leon noted that, in fact, the defendants were actually competing against each other to sell as many goods as possible.[74]

At the time of this writing, the second trial was still underway. The outcome is likely to impact DOJ's strategy for the three remaining trials, including the re-trial of the first trial, which are scheduled for 2012.

V. Sentencing Trends

In 2011, the government's pursuit of weighty sentences in FCPA cases continued unabated, but with somewhat mixed results. In a continuation of a trend we identified in our 2010 Year-in-Review, judges in 2011 by and large handed down sentences far less severe than those sought by DOJ. As described below, however, this year also yielded notable exceptions to the trend, including when a Miami federal judge imposed the longest incarceratory sentence—15 years—in the history of the FCPA.

On September 7, 2011, Jorge Granados, the founder and CEO of Miami-based telecommunications company LatiNode, was sentenced for his role in a scheme to funnel more than $500,000 in bribes to officials at Honduras' state-owned telecommunications provider. Granados pleaded guilty to one count of conspiracy to violate the FCPA, carrying a statutory maximum five-year sentence. Prosecutors sought that maximum, arguing that Granados, whose otherwise applicable guidelines range was 135-168 months, received a built-in 50% discount by operation of the statutory cap.[75] District Court Judge Joan Lenard disagreed, sentencing Granados to 46 months imprisonment and two years supervised release. LatiNode itself pleaded guilty in 2009 and paid a $2 million criminal fine.

Further sentencing in the LatiNode cases will take place in early 2012, when Granados' co-defendants, Manuel Salvoch, LatiNode's former CFO; Manuel Caceres, former Vice-President of Business Development; and John Vasquez, former Chief Commercial Officer, go before Judge Lenard in January and February 2012. Like Granados, Salvoch, Caceres, and Vasquez each pleaded guilty to one conspiracy count. Unlike Granados, the others provided assistance to the government. Salvoch, the earliest cooperator (who pleaded guilty in January 2011), is already the beneficiary of a 5K1.1 motion filed by the government requesting a downward departure of 40% to reflect his substantial assistance to prosecutors.

We see further evidence of judicial resistance to harsh sentences sought by the government in the case of Ousama Naaman, the former Innospec, Ltd. agent who pleaded guilty in June 2010 to bribing Iraqi government officials to secure contracts to supply tetraethyl lead. Naaman's sentence and criminal fine calculations were the subject of heated argument and a flurry of legal filings in 2011. Initially the government sought a $2.6 million fine, which purported to represent Naaman's profits from the scheme. Naaman argued for a fine of no more than $175,000. (Naaman had already disgorged more than $800,000 to the SEC and was required to pay an additional penalty of $438,038. The amount of his criminal fine will be credited against those sums.) After months of wrangling, US District Judge Ellen Huvelle stated during a status hearing that she "[had] never seen a more unnecessarily complicated issue" and would not impose a fine greater than $250,000.[76] The government and Naaman ultimately

agreed to a $250,000 fine. Still, Naaman's sentence remained hotly contested. Prosecutors initially supported a reduction to 90 months from 120 months, based on Naaman's cooperation during the investigation. Later, the government threatened to withdraw that support, saying that Naaman made false statements to the government. On December 22, 2011, Judge Huvelle sentenced Naaman to 30 months in prison with credit for time served.

A departure from the trend took place in the case of former Terra Telecommunications Corporation ("Terra") executives Joel Esquenazi and Carlos Rodriguez. After a two-and-a-half-week trial in August 2011, a Miami federal jury convicted the pair on two counts of conspiracy, seven counts of violating the FCPA's anti-bribery provisions, and 12 counts of money laundering. Evidence at trial demonstrated that Esquenazi and Rodriguez caused Terra to pay more than $890,000 in bribes to Haitian telecommunications officials, routed through shell companies, as part of a scheme to secure favorable call rates. In October 2011, Judge Jose Martinez imposed sentences on Esquenazi and Rodriguez of 15 years and seven years, respectively. Esquenazi's 15-year sentence is an FCPA record, although it covered other charges. Judge Martinez also ordered the defendants to jointly forfeit $3.09 million, consisting of $2.2 million in gains to Terra (in the form of reduced costs) in addition to the $890,000 they had paid in bribes.

Four other individual defendants also have been convicted and sentenced for their role in the Haiti Teleco case, including Antonio Perez. Perez, the former controller for Terra, was sentenced on January 21, 2011 to 24 months in prison, followed by two years of supervised release, and ordered to forfeit $36,375, which was the amount he admitted, in connection with his guilty plea, that he had paid in bribes. Perez's sentence was substantially pre-determined when he agreed as part of his plea deal to a guidelines range sentence. Still, probation recommended a "minor role" adjustment, which the court ultimately granted, notwithstanding the government's objection.[77]

The year 2011 also yielded a surprising coda in the case of Gerald and Patricia Green, a movie producer and his wife who were convicted of bribing Thai officials in a bid to run the Bangkok International Film Festival. As reported in our 2010 Year-in-Review, DOJ, which had sought 10-year sentences for the Greens, ended 2010 by appealing the trial court's sentences of six-months incarceration and six-months home confinement. However, in August 2011, the government dropped its appeals altogether.[78] A DOJ spokesperson declined to comment on the reason the appeals were withdrawn.

VI. Legal Guidance and Legislative Developments

A. New SEC Whistleblower Award Program in Effect

For companies facing potential FCPA exposure, the SEC Whistleblower Program, part of the Dodd-Frank Act, may have a significant impact. On May 25, 2011, the SEC approved rules implementing the whistleblower award program established by the July 2010 Dodd-Frank Act. The Whistleblower Program Rules establish the procedures and standards the SEC will use in awarding whistleblowers monetary compensation for providing tips about securities law violations that lead to successful SEC enforcement actions. The Whistleblower Program Rules became effective August 12, 2011 but apply retroactively back to July 21, 2010, the date the Dodd-Frank Act was enacted.

Under the final rules, an individual who "voluntarily" provides the SEC with "original information" relating to a "possible violation of the federal securities laws [including the FCPA]…that has occurred, is ongoing, or is about to occur," and which results in a successful SEC enforcement action yielding a recovery of more than $1 million, is entitled to a 10% to 30% share of the recovery.[79]

To be eligible for the award, the whistleblower must provide *original* information to the SEC, defined as, among other things, information derived from independent knowledge or analysis and not known to the SEC from any other source. If the whistleblower has reported the violation to his or her company's compliance program, the whistleblower will have a 120-day time period in which he or she can report the information to the SEC and still have it be considered "original" information.

The program does not require the whistleblowers to first contact their employers regarding their concerns. Business groups unsuccessfully lobbied for an internal reporting rule. SEC Chairwoman Mary Schapiro said that this was "the most vigorously-debated issue" when the SEC drafted the rules.

The original information provided by the whistleblower must lead to a *successful* enforcement action. The rules provide that an action is deemed successful if the information was sufficiently specific, credible, and timely to cause the SEC staff to commence an investigation or to reopen an investigation.

The $1 million threshold can be met by civil monetary penalties, disgorgement payments, and prejudgment interest obtained by the SEC. Notably, the award amount is calculated by aggregating multiple cases that arise out of the same nucleus of operative facts, as well as related actions brought by other governmental agencies, including criminal prosecutions by DOJ, so long as the SEC obtained monetary sanctions of more than $1 million. If the whistleblower is convicted of a criminal violation in connection with the successful enforcement action, he or she is ineligible to receive an award.

The Dodd-Frank Act also increased the rights of whistleblowers, and Section 922 provides specific anti-retaliation provisions.[80]

To implement this new program, the SEC has tasked Sean McKessy to lead a new whistleblower office. The office has five lawyers who are detailed from other parts of the agency for a one-year term. The SEC has said it expects to receive approximately 30,000 tips a year. Given the retroactive nature of the program, at the time of implementation, 20 FCPA cases had already crossed the $1 million recovery eligibility threshold. It is unclear if any of those cases involved whistleblowers, or meet the other eligibility criteria.

The SEC must provide Congress with a report on the Whistleblower Program each fiscal year. For fiscal year 2011, the program had only been operational for about seven weeks, so the report is brief and likely does not provide a complete picture of the program. However, the report indicated that the SEC's Office of the Whistleblower received 334 tips and fielded 900 calls. There were 191 matters that met the requirements to be eligible under the program, but no awards had been paid.[81]

B. Challenges to Longstanding SEC Settlement Practices

In 2011, the SEC's longstanding practice of allowing defendants to settle actions on a "neither admit nor deny" basis was called into question. District Court Judge Jed Rakoff rejected the proposed consent judgment between the SEC and Citigroup Global Markets Inc. relating to allegations that Citigroup misled investors regarding mortgage bonds tied to the collapsing housing market. Judge Rakoff found that the inclusion of the "neither admit nor deny wrongdoing" language meant the settlement did not satisfy the "fair, reasonable, adequate, and in the public interest" standard and ordered the parties to prepare for trial.[82]

It has been standard practice for SEC resolutions, including administrative settlements and DPAs, to contain language that allowed the defendant to "neither admit nor deny" any wrongdoing. In 2011, every SEC consent judgment, cease-and-desist agreement, and DPA related to alleged FCPA violations included this language. Judge Rakoff sharply criticized the SEC's practice, saying it was "hallowed by history, but not by reason."[83] The SEC argued that many defendants would refuse to settle cases if the "neither admit nor deny" language was omitted, which would divert SEC resources from investigations and tie them up in litigation.[84] For defendants, the concern is that by admitting wrongdoing in an SEC settlement, they are more susceptible to private lawsuits. And for government contractors, an admission of wrongdoing might result in collateral consequences, including potential disbarment.

On December 15, 2011, the SEC filed a Notice of Appeal stating that it was appealing Judge Rakoff's order to the Second Circuit. That same day, Enforcement Division Director Khuzami issued a statement saying that the SEC "believed the district court committed legal error by announcing a new and unprecedented standard that inadvertently harms investors by depriving them of substantial, certain, and immediate benefits." Khuzami further noted that "other frauds might never be investigated or be investigated more slowly because limited agency resources are tied up in litigating a case that could have been resolved." Khuzami also seemed to hint that Judge Rakoff's decision was based, at least in part, on

the size of defendant Citibank, saying "the law does not permit the Commission to seek penalties based upon a defendant's wealth."[85]

The SEC initially gave every indication it would stand by its use of the "neither admit nor deny" language, and included the language in settlements with Aon Corporation and with Magyar Telekom and Deutsche Telekom, both filed after Judge Rakoff's decision (although presumably negotiated before the decision).[86] In early 2012, however, *The New York Times* reported that the SEC would begin telling companies that they will no longer be allowed to say they neither admit nor deny the commission's civil charges when they have admitted to or been convicted of criminal violations related to the same conduct.[87] Khuzami indicated the agency would continue to use the "neither admit nor deny" language in settlements that only concerned civil securities law violations and there was no criminal violation. Citigroup's case does not have a concurrent criminal charge, thus the Second Circuit's ruling on the use of this language in civil-only settlements will be much-anticipated. This change in SEC policy and the Second Circuit's ruling on the issue might alter a corporation's calculus when deciding whether to disclose to, settle with, or go to trial against the SEC. It also remains to be seen whether the SEC will avoid the courts and opt for administrative remedies in 2012.

C. Declinations Unlikely to Be Made Publicly Available

DOJ has indicated a reluctance to disclose information or announce statistics regarding decisions not to prosecute companies for alleged FCPA violations. At an October 2011 ABA panel, Deputy Chief Duross said, in response to a question regarding the release of declination statistics, that he was "not particularly comfortable doing it…. It's a very foreign concept to me."[88] He acknowledged, however, that the Department had discussed the merits of disclosing declinations or declination statistics as a method of "better market[ing]" the benefits for corporations that vigorously ferret out corruption and implement strong compliance programs. At the same panel, Fraud Section Chief McInerney said that DOJ issued more declinations than one might suspect.[89]

In June 2011, Representatives Sandy Adams and James Sensenbrenner sent a letter to DOJ on behalf of the House Judiciary Committee, requesting information regarding declinations. DOJ declined to provide information on specific cases or statistics, and instead provided examples of situations where DOJ had declined to prosecute: voluntary disclosure cases; an acquiring company conducted thorough pre-acquisition due diligence on a potentially liable subsidiary and undertook significant remediation efforts following acquisition; situations in which a company reached a civil resolution with the SEC and otherwise demonstrated a declination was appropriate; cases in which only a single employee was involved in the corrupt conduct; and where the improper payments were minimal compared to the overall revenue of the company.[90]

Charles Cain and Tracy Price, both Assistant Directors of the SEC's FCPA Unit, have stated that the SEC regularly declines to pursue cases; however, the SEC does not publicly release such information.[91]

D. DOJ Opinion Procedure Release

Despite DOJ's encouragement of the use of the opinion procedure system, it is still rarely used. DOJ issued only one FCPA Opinion Procedure Release in 2011, offering guidance consistent with previous Opinions. As illustrated by the Opinion, when the system is used, it is often for relatively uncontroversial scenarios. Companies appear to be unconvinced about the value of obtaining an opinion, given the perceived time-consuming process, particularly when balanced against the risk of potentially attracting unwanted attention from DOJ.

In Opinion Procedure Release No. 11-01, the Requestor sought to pay for the travel of representatives from two foreign agencies to learn about the Requestor's adoption services.[92] The Requestor sought clarification regarding the circumstances in which it could rely on the "promotional expenses" exception to FCPA liability for payment of the reasonable travel, food, and entertainment expenses of foreign officials.

The "promotional expenses" exception is an affirmative defense that permits covered entities to provide foreign officials with a "payment, gift, offer, or promise of anything of value" that might otherwise be prohibited, if the expense incurred is "a reasonable and bona fide expenditure, such as travel and lodging

expenses," that is "directly related to…the promotion, demonstration, or explanation of products or services."[93] In Opinion Procedure Release No. 11-01, DOJ announced that it did not presently intend to take any enforcement action against the Requestor. DOJ found that the proposed expenses were reasonable under the circumstances; were consistent with similarly approved expenses in previous Opinions; and qualified for the "promotional expenses" exception to the FCPA's anti-bribery provisions. DOJ relied on the following facts surrounding the Requestor's proposed expenditures: the Requestor did not have any "non-routine" business pending before the foreign agency; the routine business that was before the agency was subject to "international treaty and administrative rules with identified standards"; the Requestor was selecting the individual representatives and the representatives' families would not attend; expenses would be paid directly to vendors, not to the representatives; representatives would not receive a stipend or compensation; the Requestor would not "fund, organize, or host any other entertainment, side trips, or leisure activities"; the costs would be reasonable and necessary to demonstrate the services of the US adoption service; and another adoption service provider was also invited to attend.

E. Legislative Developments

Increased FCPA enforcement and the growing financial penalties imposed on companies have caused various constituencies to push for a range of reforms. Similar efforts were made in 2010; however, the likelihood of success of these efforts appears to be uncertain, at best.

Congressional FCPA Reform: On June 14, 2011, the House Subcommittee on Crime, Terrorism and Homeland Security, part of the House Judiciary Committee, held a hearing on potential reforms of the FCPA.[94] The hearings arose in part in response to an October 2010 report by the US Chamber Institute for Legal Reform (the "ILR"), the legal advocacy arm of the US Chamber of Commerce.[95] The ILR's report expressed concerns that the FCPA has disadvantaged US businesses in the global economy and recommended a series of five reforms to the FCPA "aimed at providing more certainty to the business community."[96] Specifically, the ILR recommended amending the FCPA to include a compliance defense, limit the circumstances giving rise to successor liability, limit liability for actions of a subsidiary, clarify the definition of a "foreign official" or an "instrumentality" of a foreign government, and require corporations to act "willfully" before liability may attach.[97] The Subcommittee's June hearing focused on two of these proposed reforms: the FCPA's definition of a "foreign official" and the recommendation to include a compliance defense.

The Subcommittee first heard testimony from Greg Andres, Acting Deputy Assistant Attorney General of the Criminal Division. On behalf of DOJ, Andres testified in opposition to reforming the FCPA.[98] Citing the recent cases of Daimler AG and Siemens AG, he explained that the current enforcement regime focuses on cases that "often involved systematic, longstanding schemes in which significant sums of money were paid" and "did not involve single bribe payments of nominal sums."[99] Andres also testified that DOJ's Principles of Federal Prosecution of Business Organizations require prosecutors to consider a company's pre-existing compliance program. He opposed the adoption of an explicit compliance defense based on concerns that it would encourage companies to implement "paper compliance" regimes without rigorous enforcement procedures.

Three NGOs—Global Witness, Revenue Watch Institute, and Citizens for Responsibility and Ethics in Washington—submitted written statements that supported the position that the FCPA has been effective in addressing global corruption, has enhanced US business in the global marketplace, and would be undermined by the ILR's proposed reforms.[100]

In addition to Andres, the Subcommittee heard testimony from three witnesses who endorsed reforming the FCPA. Former Attorney General Michael Mukasey, now in private practice and testifying on behalf of the ILR, reiterated the ILR's key reform recommendations. His testimony focused on the definition of "foreign official." Mukasey argued in favor of requiring foreign governments to own a majority interest in any "instrumentality" for its personnel to be considered foreign officials. Shana-Tara Regon of the National Association of Criminal Defense Lawyers focused on the proposed "willfulness" requirement for corporate liability, and former Deputy Attorney General George Terwilliger, now in private practice, focused on the compliance defense.[101]

Committee members, including prominent Democrats John Conyers (D-MI) and Ranking Member Robert Scott (D-VA), appeared open to reform of the FCPA, particularly with respect to including a compliance defense and providing more clarity to the definition of "foreign official." It is worth noting, however, that previous efforts to adopt a compliance defense were unsuccessful.

In the wake of the hearing, there was widespread speculation that the House would introduce an FCPA reform bill including some of the recommendations from the ILR's report. To date, the anticipated legislation has not materialized.

In a November 2011 speech, Assistant Attorney General Breuer indicated that DOJ was open to working to improve the FCPA, but he went on to note, that "[DOJ has] no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery…. This is precisely the wrong moment in history to weaken the FCPA."[102]

Disclosure of Corporate Ownership: On August 2, 2011, Senators Carl Levin (D-MI) and Chuck Grassley (R-IA) reintroduced legislation that would require states to obtain the names of beneficial owners of corporations and limited liability companies and require disclosing such information to authorities under specific circumstances.[103] The proposed law is intended to assist law enforcement investigations into a broad range of conduct, including money laundering, terrorist financing, drug trafficking, tax evasion, and global corruption. The Act has been praised by anti-corruption NGOs such as Global Witness and criticized by pro-business organizations like the US Chamber of Commerce. Judging by the past history of this legislation, it is unlikely that the bill will be signed into law. Senator Levin had previously introduced this bill in 2008 and 2009.

Private Right of Action for FCPA Violations by Foreign Concerns: On November 30, 2011, Representative Ed Perlmutter (D-CO) reintroduced legislation that would amend the FCPA to create a private right of action for damages caused by a "foreign concern" that violates the FCPA.[104] The proposed legislation would permit any US issuer, domestic concern, or person to seek damages from the foreign concern for loss of business due to the foreign concern's violation of the FCPA. With respect to damages, the plaintiff would be entitled to the higher of the total amount of the contract that the foreign concern gained in obtaining or retaining business or the total amount that the plaintiff failed to gain by virtue of the foreign concern's FCPA violation. The bill also provides for treble damages and recovery of attorneys' fees and costs. This legislation has previously been introduced and did not pass.[105]

Debarment Bill: As reported in our 2010 Year-in-Review, in September 2010, by a unanimous vote, the House passed a bill that proposed debarment from any contract or grant with the federal government for any entity found to be in violation of the FCPA's anti-bribery provisions within 30 days after entry of a final judgment. The Senate did not act on the legislation before the end of the 111th Congress. On December 7, 2011, Representative Peter Welch (D-VT) reintroduced this legislation, known as the Overseas Contractor Reform Act.[106] The Act limits mandatory debarment in two circumstances: (1) the Act proposes a potential exemption for entities that self report FCPA violations (subject to the discretion of the relevant agency head); and (2) a federal agency head may waive the Act for a federal contract or grant. As noted in our 2010 Year-in-Review, it is unclear what effect the debarment legislation, if enacted, might have on corporations. The limitations on debarment, described above, may undercut the threat of debarment in practice. In addition, the legislation would have no impact on the many FCPA investigations that result in NPAs or DPAs, neither of which results in entry of a final judgment.

VII. Collateral Litigation

As reported in our 2010 Year-in-Review, companies face increasing risk of collateral litigation stemming from the disclosure of potential FCPA violations and government-initiated investigations. Although the FCPA does not provide for a private right of action, there has been an increasing number of civil lawsuits based on the same conduct that underlies FCPA cases. Often these suits are filed within a few months of FCPA-related allegations becoming public. The private plaintiffs include shareholders, employees, competitors, customers, and/or business partners seeking remedies for a wide range of allegations, including breach of fiduciary duty, common law fraud, RICO, restraint of trade, wrongful termination, and tort claims involving bodily harm.

In 2011, shareholder derivative suits based on FCPA-related allegations were filed against several companies, including Bio-rad, Tidewater, and Johnson & Johnson. In essence, a derivative suit alleges that a company's directors breached their corporate fiduciary duties to the company. Because directors are given deference to run their companies as they see fit, derivative lawsuits have a high pleading standard, and the plaintiffs must either make a demand on the board (*i.e.*, 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. Although the most common claim in FCPA-related shareholder derivative suits is that the board of directors failed to establish adequate controls to prevent FCPA violations, companies may face additional shareholder claims. For example, in a derivative suit against Tidewater, a single shareholder claimed that the board breached its fiduciary duties by knowingly or recklessly disregarding improper payments to Azerbaijan officials, failing to enforce existing policies, and failing to train employees.[107] The case was brought in February 2011, several months after the company settled actions with DOJ and the SEC based on the same conduct. The case is scheduled for a jury trial in September 2012. In another example, immediately following resolution of FCPA-related charges with DOJ and the SEC, the plaintiffs filed a derivative suit against Johnson & Johnson, claiming that, in addition to failing to implement sufficient controls to prevent improper payments to public doctors and administrators in Europe, the board failed to disclose the full extent of the company's potential FCPA liability.[108] A hearing is set for January 2012 on the defendants' motion to dismiss, which argues the plaintiffs failed to make a demand on the board and are not excused from doing so.

As in many types of litigation, shareholder derivative suits are often resolved through settlement. A December 2011 settlement of three derivative lawsuits against SciClone Pharmaceuticals ("SciClone") could serve as a new model for similar cases. In that case, three California state court derivative lawsuits alleging breach of fiduciary duty were filed soon after SciClone announced that it was under investigation by the SEC and DOJ for *possible* violations of the FCPA.[109] The plaintiffs agreed to settle their claims in exchange for SciClone committing to a detailed anti-corruption compliance program and agreeing to pay $2.5 million for the plaintiffs' legal fees, which will be covered primarily by SciClone's insurers.

In addition to derivative suits, companies at risk for FCPA-related violations also face potential lawsuits from former employees claiming wrongful termination. The allegations in these cases often involve claims that the plaintiff was terminated for reporting FCPA-related conduct. For example, in October 2010, a former Allison Transmission, Inc. executive brought an action under a state whistleblower statute alleging that he was terminated after raising concerns about potential FCPA violations in the company's China offices.[110] The lawsuit was dismissed in January 2011 after the parties agreed to a settlement.

Wrongful termination suits also arise in situations where employees claim that they were wrongfully terminated for refusing to engage in conduct that would violate the FCPA, as was the case in *Michelon v. Sempra Global*.[111] In that case, a former controller of Sempra Global's operations in Mexico filed suit in November 2010 claiming that Sempra terminated him in retaliation for his objections to a number of company practices, including the bribery of Mexican officials. The case settled in January 2011 with the filing of a stipulation and submission of the case to binding arbitration.

As in both the *Allison Transmission* and *Sempra Global* cases, FCPA-related civil cases often end in settlement or arbitration. The dismissal of such cases, however, may not be the end of a defendant's troubles, as such suits may make a company a more likely target of a government investigation. For example, in February 2008, Aluminum Bahrain B.S.C. ("Alba") filed a RICO lawsuit against Alcoa, Inc. The suit alleged that Alcoa conspired to overcharge Alba for alumina, the raw ingredient in aluminum, and used the overage to pay bribes to an Alba official. Unlike many cases in this area, this civil suit was brought prior to any enforcement actions by government regulators. DOJ launched a criminal investigation into the claims and requested a stay of the civil proceedings, stating that the subject matter giving rise to the lawsuit was also the subject of an ongoing federal criminal investigation.[112] The district court stayed the civil litigation in March 2008; however, in November 2011, the case was re-opened at Alcoa's request, so that it could file a motion to dismiss.[113] According to press reports, Bahrain also opened an investigation into the bribery allegations.[114]

Another significant area of collateral litigation involves suits by competitors. In September 2011, Innospec announced in an SEC filing that it settled a bribery-related suit with its competitor NewMarket Corporation for $45 million.[115] In that case, NewMarket alleged that Innospec's bribes led to a field test failure of

NewMarket's subsidiary's fuel additive. NewMarket claimed that Innospec's conduct (which had been previously charged in DOJ, SEC, and SFO enforcement actions) violated the Robinson-Patman Act, the Virginia Business Conspiracy Act, and the Virginia Antitrust Act.

Plaintiffs have also brought tort-related claims for conduct that would be violative of the FCPA. In January 2011, Carlos A. Morán Hidalgo and his spouse sued Siemens AG and Siemens Argentina under the Alien Tort Claims Act, the Torture Victims Protection Act, as well as RICO. Hidalgo alleged that the defendants conspired with the Argentine government to bribe Hidalgo's former employer and an independent government watchdog organization to overlook Siemens' bribery in Argentina. The allegations also included claims that when Hidalgo indicated he would report the improper conduct, he was threatened and beaten by several assailants, one of whom was a Siemens employee. The case was dismissed in July 2011 after the plaintiffs failed to properly serve Siemens with a summons.[116]

Finally, in a novel case, telecommunications company Instituto Costarricense de Electricidad ("ICE") filed a petition to block a DOJ FCPA settlement with Alcatel-Lucent over allegations that its subsidiaries bribed government officials in Costa Rica, Honduras, Malaysia, and Taiwan.[117] ICE alleged the agreement violated the Mandatory Restitution Act, which provides for restitution for victims of federal crimes, including those to which the subsidiaries of Alcatel-Lucent pleaded guilty. Both the magistrate judge and the district judge ruled that ICE was not entitled to restitution under the Act because corruption was widespread at ICE, negating any right to restitution. ICE's petition for a writ of mandamus to the Eleventh Circuit was denied on June 17, 2011.

VIII. International Anti-Corruption Developments

A. United Kingdom Anti-Corruption Efforts

The UK Bribery Act came into effect on July 1, 2011.[118] The UK Bribery Act prohibits the giving and taking of bribes to and by government officials. Specifically, Section 1 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.

Importantly, and in contrast to the FCPA, the UK Bribery Act provides a full defense to Section 7 if the company can prove that it had "adequate procedures in place to prevent persons associated with [it]" from bribing. Guidance issued by the Ministry of Justice in March 2011 ("2011 Guidance") states that the adequacy of procedures will depend on the "particular facts and circumstances of the case" and that the burden will remain with the organization to demonstrate by a "balance of probabilities" that its procedures were sufficient.[119] The 2011 Guidance also states that any departure from the "Six Principles" outlined in the Guidance would not necessarily give rise to a presumption of inadequacy.[120] Serious Fraud Office ("SFO") head Richard Alderman recently wrote that "the key question is whether the Board [of Directors] has put effective structures in place to prevent bribery from taking place."[121]

In certain respects, the UK Bribery Act goes further than the FCPA, although the practical effects of the differences between the two statutes remains to be seen.

Jurisdiction: Section 7 of the UK Bribery Act has a broader jurisdictional reach than the FCPA. Section 7 creates liability for a "relevant commercial organisation" that fails to prevent bribery (1) "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere" where the offending commercial organization has been formed under UK law or (2) where the organization "carries on a business, or part of a business, in any part of the United Kingdom." It remains to be seen how aggressively the SFO and the UK courts will interpret Section 7's jurisdictional provisions. The 2011 Guidance acknowledges that the courts will be the final arbiters of whether an organization "carries on a business, or a part of a business," in the UK, based on the particular facts and circumstances of a case. Comments from SFO Director Alderman indicate that the UK authorities could

take a broad approach on this issue: "I tell corporations that it will be very unwise of them to try to rely upon a very technical interpretation of the Bribery Act in order to persuade themselves that it is safe to carry on using bribery. I have said that they might be in for a very unpleasant surprise in a number of years time when our Supreme Court gives its views on this test. I say to corporations that the only safe way of doing business is not to use bribery."[122]

Commercial Bribery: Unlike the FCPA, Sections 1 and 2 of the UK Bribery Act prohibit not only bribery of government officials, but also improper payments to private parties. The 2011 Guidance explains that "bribery in both the public and private sectors is covered." That said, as discussed above, DOJ has pursued commercial bribery using the Travel Act. In addition, DOJ and the SEC have used the FCPA's books and records provisions to bring charges involving commercial bribery.

Facilitation Payments: Unlike the FCPA, the UK Bribery Act does not provide any exception for facilitation or expediting payments. Because there is no carve-out for facilitation payments in the UK Bribery Act, and given the statute's long jurisdictional reach, commercial organizations doing business in the United Kingdom should assess their current *global* practices regarding facilitation and expediting payments to ensure they are operating within the bounds set by the UK authorities. The 2011 Guidance contains a case study on facilitation payments that suggests steps a company could take to mitigate the risks associated with operating in an environment where facilitation payments are commonly demanded.[123]

Reasonable Entertainment Expenses: Unlike the FCPA, there is no affirmative defense under the UK Bribery Act for hospitality, gifts, travel, or other promotional expenses, and therefore expenses are subject to the main provisions of the Act, including the adequate procedures defense. Reasonable and proportionate hospitality expenditures are unlikely to violate the statute because they are unlikely to be given with the requisite intent—that is an intent to induce another to act improperly or to influence an official in his or her official capacity. The 2011 Guidance states that, in relation to bribery of foreign public officials, to establish a sufficient connection between hospitality/gifts/travel and an intention to influence or gain a business advantage, a prosecutor would need to show that factors such as "the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business" demonstrated this intent. The 2011 Guidance goes on to say that "the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return."[124]

The year 2011 brought the first prosecution under the UK Bribery Act, as well as several notable prosecutions under other UK anti-corruption laws.

In February 2011, the SFO announced its enforcement action against M.W. Kellogg Limited ("MWKL") in connection with the Bonny Island bribery scheme.[125] During the time of the alleged scheme, MWKL was jointly owned by KBR and JGC, two of the partners in the TSKP joint venture, and the case arose from the same facts that gave rise to US enforcement actions against the TSKP joint venture partners and others, discussed above. The High Court in England ordered MWKL to pay more than £7 million (approximately $11.3 million) as a result of sums it was due to receive that were generated through third parties' criminal activity. According to the SFO, the funds due to MWKL were share dividends payable from profits and revenues generated by contracts obtained by bribery and corruption undertaken by MWKL's parent company and others. The contracts were awarded to a company partly owned by MWKL on behalf of its US parent company, KBR. The SFO recognized that MWKL took no part in the criminal activity that generated the funds. The order was made under Part 5 of the Proceeds of Crime Act 2002. The SFO added that its agreement with MWKL required MWKL to overhaul its internal audit and control measures to ensure compliance with UK laws. The company also agreed to pay the investigation's costs.

In October 2011, Munir Yakub Patel, an administrative law clerk at a London Magistrates' Court, pleaded guilty to requesting and receiving a bribe under Section 2 of the UK Bribery Act and to a misconduct in public office charge. Patel is believed to have accepted approximately £20,000 (approximately $30,600) in payments from 53 individuals seeking to reduce traffic infractions, including a payment that occurred in August 2011. Patel was sentenced to three years imprisonment for bribery and six years for misconduct in public office, to be served concurrently. While the charge, plea, and sentence generated a great deal of

media and legal community interest, Patel's case, which necessarily focuses on his abuse of his government position, provides scant guidance for organizations seeking to assess the contours of UK authorities' interpretation of the UK Bribery Act for the purposes of designing effective compliance and monitoring programs.

In July 2011, the UK insurance broker Willis Group Holdings reached a settlement with the UK FSA and paid a £6.985 million (approximately $10.7 million) fine as a result of what the FSA deemed to be inadequate controls to prevent improper payments to third-party agents in high-risk jurisdictions from 2005 to 2009. Willis had identified £140,622 (approximately $227,000) in suspicious payments and had reported these findings to the FSA.

Victor Dahdaleh, a long-time agent of Pittsburgh-based aluminum manufacturer Alcoa Inc., was arrested and charged with bribing officials of the state-owned company Aluminium Bahrain B.S.C. ("Alba") in connection with Alcoa contracts to ship aluminum from Australia to Bahrain.[126] The arrest came after a three-year investigation by British and American authorities into claims that bribes paid by Dahdaleh resulted in Alcoa overcharging Alba by hundreds of millions of dollars for alumina, the raw material used in aluminum manufacturing. Alcoa and Dahdaleh have repeatedly denied any wrongdoing. Dahdaleh was charged under the Prevention of Corruption Act of 1996, the Criminal Law Act of 1977, and the Proceeds of Crime Act. The bribes allegedly took place between 2001 and 2005, and well before the UK Bribery Act came into effect. Dahdaleh is also a defendant in the civil suit filed by Alba against Alcoa and other defendants, discussed above.

In October 2011, the SFO charged former Innospec executives Paul W. Jennings (the former CEO), Dennis Kerrison (the former CFO), and David Turner (a senior sales executive) with violations of UK criminal law; the charged crimes pre-date the UK Bribery Act and stem from the same facts that gave rise to US enforcement actions against Innospec, Mr. Naaman (a former Iraqi agent of Innospec), Mr. Turner, and Mr. Jennings. On January 17, 2012, Mr. Turner pleaded guilty to three counts of conspiracy to corrupt in the Southwark Crown Court. Jennings settled charges with the SEC in January 2011. WilmerHale represented Mr. Jennings in the US investigation.

Looking Ahead: In an October 2011 speech, SFO Director Alderman described his 80 "frontline staff" working on 50 anti-corruption cases, the majority of which are pre-UK Bribery Act cases.[127] It is possible that 2012 will bring the first corporate changes under the UK Bribery Act. If it does, such cases could shed light on (1) the approach the SFO and courts will take on jurisdiction; (2) what is considered "adequate" in terms of compliance procedures under Section 7; and (3) what would be defined as "reasonable and proportionate" when it comes to hospitality expenses. It may also provide an opportunity to evaluate the risk and rewards of voluntary disclosure to the UK authorities. Alderman has urged preemptive disclosure of anti-corruption concerns: "You will not be surprised, for example, to hear that we [are] looking through Wikileaks and the other information becoming available as a result of the Arab Spring in order to see what corporations have been doing over a period of years. We are going to be very interested in the sorts of deals that are going to come to light and I am sure that this will be a fruitful source of work for us. The message from me is that if corporations are worrying about this, then they ought to come and talk to us now rather than wait for the dawn raid."[128] In addition, the SFO has indicated that it is "actively looking for cases" where it can apply Section 14 of the UK Bribery Act to senior officers or board members who "consent or connive in bribery," given the responsibility of senior members of a corporation to ensure that their organization has an ethical culture.[129]

Also likely in 2012 is further clarity on the respective roles of the SFO and the UK courts in light of recent court judgments in which the SFO has been reminded that only the UK courts have the final authority to resolve cases. Parliament has weighed in, urging that future plea agreements be "drafted more tightly" and spell out "what those involved are required to do and include a timetable for the actions required of the company."[130] Also on the horizon is possible legislation creating Deferred Prosecution Agreements under UK law. Alderman and UK Solicitor General Edward Garnier have been pushing to add this prosecutorial tool to their arsenal, while the UK courts have pressed for a larger role in resolving cases via plea agreements.

Alderman is set to leave his post in April 2012 and will be replaced by David Green QC, the former director of the Revenue and Customs Prosecutions Office. It remains to be seen what impact this change will have on the SFO's focus and aggressiveness.

B. Other International Anti-Corruption Efforts

1. International Scrutiny of Health Care Industry

As discussed in our 2010 Year-in-Review, many countries have publicly funded health systems, in which physicians and other health sector employees are government employees and may be considered government officials for FCPA purposes. This presents a problem for drugmakers and other companies that interact with health care providers. In those countries, even what might be typical relationships between doctors and pharmaceutical representatives in the United States could have serious FCPA implications.

In August 2011, AstraZeneca was indicted in Serbia for alleged bribery.[131] According to SEC filings, the company's office in Belgrade, Serbia was served with a criminal indictment alleging that local employees made allegedly improper payments to physicians at the Institute of Oncology and Radiology of Serbia.[132] The indictment follows the 2010 arrests of the director of the Institute and others, including an executive from AstraZeneca, for involvement in an alleged bribery scheme.[133] The company has denied the allegations and has moved to dismiss the indictment.

In Poland, a trial has begun against more than 20 defendants, including hospital directors, hospital managers, and others alleged to have engaged in a bribery and kickback scheme in connection with sales of medical equipment to hospitals.[134] Three of the defendants are former employees of Philips Polska Sp.z.o.o., a subsidiary of health care equipment manufacturer Royal Philips Electronics ("Philips"). According to media reports, the prosecution in Poland does not target Philips directly, and prosecutors indicate there is no evidence Philips had knowledge of the scheme. Philips is participating in the proceedings as the "injured party." Following the initiation of the proceedings in Poland, the company began an internal investigation and alerted US enforcement authorities.[135]

These international efforts follow an industry-wide investigation by DOJ and the SEC targeting the pharmaceutical industry in 2010. That investigation appears to focus on various aspects of the pharmaceutical industry's dealings in foreign countries, including the recruitment of physicians for clinical trials.

2. First Foreign Bribery Prosecutions in Canada and Australia

Niko Resources Ltd. pleaded guilty on June 24, 2011 to bribery under Canada's Corruption of Foreign Public Officials Act.[136] This was the first major prosecution under the law. The Canadian energy company was convicted of providing a $190,000 vehicle and covering travel costs for the Energy Minister of Bangladesh at the same time it was engaged in negotiations for a gas pricing contract with the country's government. Niko was fined $9.5 million and is subject to Court supervision and audits. The Canadian government worked closely with DOJ in the prosecution, and used the FCPA as a guide in sentencing.

Australian Federal Police brought foreign bribery charges against two subsidiaries of the Reserve Bank of Australia, Securency International Pty Ltd and Note Printing Australia Limited, and their senior executives.[137] The charges are connected to alleged bribes paid to government officials in Indonesia, Malaysia, and Vietnam, and carry with them potential fines of up to $90 million for the companies, and 10 years imprisonment and $1.1 million in fines for the executives. This is the first prosecution under Australia's foreign bribery law since it was enacted in 1999.

3. Swiss Prosecution of Alstom

In November 2011, the Swiss Office of the Attorney General closed its investigation of two entities of the Alstom Group, a French power and engineering group.[138] The Swiss Attorney General issued a "summary punishment order" against an Alstom Swiss subsidiary for millions of Euros worth of improper payments to government officials in Latvia, Malaysia, and Tunisia, made in return for securing government contracts

to build power stations. Alstom was ordered to pay a CHF 2.5 million fine and to disgorge more than CHF 36.4 million in profits (totaling approximately $41 million). Alstom's French parent company was not prosecuted, instead agreeing to donate CHF 1 million to the Red Cross (approximately $1,047,500). Alstom is also under investigation by the UK SFO in connection with these projects. The relatively speedy resolution of this investigation, which began in 2008, was aided by Alstom's cooperation with prosecutors and efforts to remedy compliance shortcomings.

4. International Legislative Developments

As reported in our China's Own FCPA Alert, in February 2011, China amended its criminal law to prohibit bribery of foreign officials.[139] The amendment took effect May 1, 2011, and applies to companies organized under Chinese law. It prohibits corporations and individuals from providing "money or property" to any foreign government official or official of a public international organization to "obtain an improper commercial benefit." In contrast to the FCPA, the amendment only applies to officials of governments and public international organizations, not to foreign political parties, political candidates, or party officials. Violations of the law may result in "fines and a prison sentence up to 10 years." The definition and enforcement of specific terms will be developed by the Supreme People's Court and Supreme People's Procuratorate. This law is part of a larger effort on behalf of the Chinese government to increase anti-corruption enforcement.

In May 2011, Russian President Dimitri Medvedev signed sweeping legislation criminalizing foreign bribery that resembles the UK Bribery Act.[140] The law imposes monetary sanctions on both individuals and companies who bribe foreign officials. This new law prohibits commercial bribery and the offering (directly or indirectly) of payments to government officials, foreign government officials, or officials of public international organizations. The law also prohibits the receipt of such payments. The maximum penalty under this new law is a fine of 100 times the amount of the bribe, not to exceed 500 million rubles (approximately $17.8 million), and up to 12 years of incarceration. There is no indication that this law will not apply to US companies doing business in Russia. Finally, the new law's definition of "foreign official" seems to embrace DOJ's approach that employees of government-owned enterprises are also "foreign officials."

Morocco, Taiwan, and Ukraine also enacted anti-corruption legislation in 2011 and proposed legislation was introduced in Australia, India, Indonesia, and Jordan. In addition to criminalizing bribery of foreign officials, India and Indonesia's proposed laws would also prohibit commercial bribery.[141] Australia's proposed legislation would ban facilitation payments and carry extra-territorial effect.[142]

IX. 2012 Preview

The year 2011 was another busy year for anti-corruption issues, with aggressive enforcement efforts by DOJ and the SEC, as well as increased attention by authorities in the United Kingdom and elsewhere. As a result of these increased and sustained efforts, bribery is one of the most important compliance issues for global companies. The anti-corruption efforts of the US government appear to flourish regardless of who controls the White House or Congress. We therefore expect that the active enforcement environment will continue unabated, and expect to see the following trends:

- further judicial interpretations of the FCPA issues that have often been unchallenged in the context of corporate settlements, as additional cases are litigated;
- decisions in appeals of key 2011 decisions, including appeals of the dismissal in *Lindsey Manufacturing* and the denial of the motion for an acquittal or new trial in *Haiti Teleco*;
- investigations initiated as a result of the whistleblower provisions of the Dodd-Frank Act;
- an increase in prolonged and probing investigations as DOJ and the 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;

- further developments in the United Kingdom, including enforcement actions brought under the UK Bribery Act;

- additional investigations involving commercial bribery, both under the provisions of the UK Bribery 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 industry sweeps and attention to common business models, likely including the technology industry, which has not yet seen significant numbers of enforcement actions.

In light of this dynamic enforcement environment, and what we see in our practice at WilmerHale in counseling more than 50 companies on anti-corruption issues, we believe that in 2012 companies will 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 corruption 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 facilitation payments, to ensure compliance with the 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 ANTI-CORRUPTION ENFORCEMENT DEVELOPMENTS MATTERS, CONTACT:

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[1] Initiated cases include indictments, criminal informations, complaints or other charges (including those that are simultaneously settled) filed by DOJ and the SEC. Where charges are asserted against multiple entities (*e.g.*, both a parent and subsidiary) or multiple individuals, each is counted as a separate initiated action.

[2] Asst. Attorney Gen. Lanny A. Breuer of the Criminal Div. Speaks at the Annual Meeting of the Washington Metro. Area Corp. Counsel Ass'n ("Breuer Corp. Counsel Speech") (Jan. 26, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html.

[3] Chris Matthews, *Fraud Section Chief: Aggressive White Collar Prosecution Here to Stay*, Just Anti-Corruption (Oct. 28, 2011), http://www.mainjustice.com/justanticorruption/2011/10/28/fraud-section-chief-aggressive-white-collar-prosecution-here-to-stay/.

[4] Matt Ellis, *What FCPA Enforcement Is Thinking*, FCPAmericas Blog (Nov. 14, 2011), http://mattesonellislaw.com/fcpamericas/what-fcpa-enforcement-is-thinking.

[5] Yin Wilczek, *Khuzami: SEC Pursuit of Negligence Cases Will Not Devolve into Strict Liability Approach*, BNA Sec. Law Daily, Nov. 14, 2011.

[6] SEC Enforcement Actions: FCPA Cases, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

[7] DOJ, Criminal Division, Fraud Section: Foreign Corrupt Practices Act, http://www.justice.gov/criminal/fraud/fcpa/. A link provides information regarding related enforcement cases.

[8] 15 U.S.C. §§78dd-1 to -3.

[9] 15 U.S.C. §78m(b).

[10] Breuer Corp. Counsel Speech, *supra* note 2.

[11] Rachel G. Jackson, *With Expanded Authority, SEC Sets Sights on Individuals*, Just Anti-Corruption (Nov. 28, 2011), http://www.mainjustice.com/justanticorruption/2011/11/28/with-expanded-authority-sec-sets-sights-on-individuals/.

[12] Ellis, *supra* note 4.

[13] Jackson, *supra* note 11.

[14] Press Release, DOJ, *Eight Former Senior Execs. and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme* (Dec. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-atj-1626.html; Press Release, SEC, *SEC Charges Seven Former Siemens Execs. with Bribing Leaders in Argentina* (Dec. 13, 2011), *available at* http://sec.gov/news/press/2011/2011-263.htm.

[15] DOJ, *Eight Former Senior Execs. and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme*, *supra* note 14.

[16] Gov't's Sentencing Mem., *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367 (D.D.C. Dec. 12, 2008).

[17] Press Release, DOJ, *JGC Corp. Resolves FCPA Investigation and Agrees to Pay a $218.8 Million Criminal Penalty* (Apr. 6, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

[18] *United States v. Tessler*, No. 09-cr-00098 (S.D. Tex. 2009).

[19] Press Release, DOJ, *Florida Telecomm. Co.*, *Two Execs., an Intermediary and Two Former Haitian Gov't Officials Indicted for Their Alleged Participation in Foreign Bribery Scheme* (Jul. 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-crm-910.html.

[20] Ellis, *supra* note 4.

[21] Press Release, DOJ, *Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve FCPA and Oil for Food Investigations* (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html.

[22] Deferred Prosecution Agreement, at 5, *United States v. DePuy, Inc.*, No. 11-cr-00099 (D.D.C. Apr. 8, 2011).

[23] Litigation Release, SEC, *Johnson & Johnson to Pay More Than $70 Million in Settled FCPA Enforcement Action* (Apr. 8, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21922.htm.

[24] Press Release, DOJ, *Magyar Telekom and Deutsche Telekom Resolve FCPA Investigation and Agree to Pay Nearly $64 Million in Combined Penalties* (Dec. 29, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html; Press Release, SEC, *SEC Charges Magyar Telekom and Former Execs. with Bribing Officials in Macedonia and Montenegro* (Dec. 29, 2011), *available at* http://sec.gov/news/press/2011/2011-279.htm.

[25] Press Release, DOJ, *Comverse Tech. Inc. Agrees to Pay $1.2 Million Penalty to Resolve Violations of the FCPA* (Apr. 7, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-438.html; Press Release, SEC, *SEC Files Settled FCPA Case Against Comverse* (Apr. 7, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21920.htm.

[26] Litigation Release, SEC, *IBM to Pay $10 Million In Settled FCPA Enforcement Action* (Mar. 18, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr21889.htm.

[27] Press Release, DOJ, *Aon Corp. Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the FCPA* (Dec. 20, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html; Litigation Release, SEC, *SEC Files Settled FCPA Charges Against Aon Corp.* (Dec. 20, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22203.htm.

[28] *Watts Water Tech. Inc. and Leesen Chang*, Exchange Act Release No. 65555 (Oct. 13, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-65555.pdf.

[29] *Rockwell Automation, Inc.*, Exchange Act Release No. 64380 (May 3, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-64380.pdf.

[30] *Diageo plc*, Exchange Act Release No. 64978 (July 27, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-64978.pdf.

[31] Press Release, SEC, *Tenaris to Pay $5.4 Million in SEC's First-Ever DPA* (May 17, 2011), *available at* http://www.sec.gov/news/press/2011/2011-112.htm.

[32] Press Release, DOJ, *Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the FCPA* (May 17, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-crm-629.html.

[33] SEC, *supra* note 31.

[34] Mary L. Schapiro, SEC Chairman, Statement Before Senate Comm. on Banking, Housing, and Urban Affairs (Dec. 6, 2011), *available at* http://www.sec.gov/news/testimony/2011/ts120611mls.htm.

[35] *Ball Corp.*, Exchange Act Release No. 64123 (Mar. 24, 2011), *available at* http://www.sec.gov/litigation/admin/2011/34-64123.pdf.

[36] Press Release, DOJ, *Bridgestone Corp. Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Gov't Officials* (Sept. 11, 2011), *available at* http://www.justice.gov/opa/pr/2011/September/11-at-1193.html.

[37] *United States v. Noriega*, No. 2:10-cr-01031-AHM (C.D. Cal. Feb. 28, 2011) (hereinafter "*Lindsey Manufacturing*"); *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal. Feb. 21, 2011).

[38] *United States v. O'Shea*, No. 4:09-cr-00629 (S.D. Tex. Jan. 3, 2012). O'Shea also involved alleged bribery of officials at the same state-owned utility company at issue in the *Lindsey Manufacturing* case. US District Judge Lynn N. Hughes denied O'Shea's motion to dismiss, without issuing a written opinion, rejecting his argument that the recipients of the alleged bribes were not foreign officials. Rachel G. Jackson, *Challenge to 'Foreign Official' Definition Denied in Texas Bribery Case*, Just Anti-Corruption (Jan. 5, 2012), http://www.mainjustice.com/justanticorruption/2012/01/05/challenge-to-foreign-official-definition-denied-in-texas-bribery-case/. However, on January 16, 2012, Judge Hughes granted O'Shea's motion for acquittal. According to media reports, Judge Hughes said he found that the testimony of the government's chief witness did not link O'Shea to the crime and that O'Shea's motives were lawful. Mike Koehler, *O'Shea Not Guilty of Substantive FCPA Charges*, FCPA Professor (Jan. 17, 2012), http://www.fcpaprofessor.com/oshea-not-guilty-of-substantive-fcpa-charges.

[39] *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1112 (C.D. Cal. 2011).

[40] *Id.* at 1112.

[41] *Id*. at 1115.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *See United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011).

[46] *Id.* at *8.

[47] *Id*. at *4.

[48] *Id.* at *3.

[49] Courts have also addressed the meaning of "foreign official" in the context of jury instructions. For example, in the Haiti Teleco case, US District Judge Jose E. Martinez addressed the definition of "foreign official" in the context of jury instructions, using a definition and multiple, non-exclusive, non-dispositive factors similar to *Lindsey Manufacturing* and *Carson*. *United States v. Esquenazi*, slip op. at 23 (S.D. Fla. Aug. 5, 2011). In guiding the jury as to the meaning of instrumentality in the context of a state-owned enterprise, Judge Martinez instructed that the jury could consider:

> Factors including but not limited to:
> (1) whether it provides services to the citizens and inhabitants of Haiti;
> (2) whether its key officers and directors are government officials or are appointed by government officials;
> (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans, or revenue from government-mandated fees;
> (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and
> (5) whether Teleco is widely perceived and understood to be performing official or governmental functions.

Id. at 23-24. The court subsequently rejected defendants' challenge to this jury instruction in denying its motion for judgment of acquittal or new trial. Slip op. at 12-13 (S.D. Fla. Oct. 14, 2011). The court held that it "properly instructed the jury through a non-exclusive multi-factor definition that permitted the jury to determine whether Teleco was an instrumentality of a foreign government." *Id*. at 13. The court also rejected defendants' argument that a declaration by Haiti's Prime Minister Jean Max Bellerive stating, *inter alia*, that "Téléco has never been and until now is not a State enterprise" constituted newly discovered evidence that would have affected the jury verdict. *Id*. at 23, 25. The court found that the government received the declaration on August 9, 2011, five days after the jury found Esquenazi and Rodriguez guilty on all counts of the indictment. At trial, the prosecution had presented an expert,

as well as fact witnesses, that testified that Haiti Teleco was a state-instrumentality. The defense retained an expert on the issue but did not call him at trial. In November 2011, defendants Carlos Rodriguez and Joel Esquenazi filed notices of appeal; the appeal is expected to address the definition of foreign official and foreign government instrumentality.

[50] Slip op. (Dec. 1, 2011).

[51] The court found that "the Government team allowed a key FBI agent to testify untruthfully before the grand jury, inserted material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly reviewed e-mail communications between one Defendant and her lawyer, recklessly failed to comply with its discovery obligations, posed questions to certain witnesses in violation of the Court's rulings, engaged in questionable behavior during closing argument and even made misrepresentations to the Court." *Id*. at 2.

[52] *Id*. at 5.

[53] In the meantime, it has agreed to vacate the conviction of the agent, Angela Aguilar, pending the appeal. Ms. Aguilar had agreed to a sentencing deal in June 2011 that required her to forfeit $3 million in assets and allowed her release from federal detention.

[54] *Id*. at 21.

[55] *Id*. at 22.

[56] The Court found that the "case against the Lindsey Defendants was far from compelling," that "the circumstantial evidence, at best, was murky," and that the government investigation was "sloppy, incomplete and notably over-zealous." *Id*. at 37, 40.

[57] *United States v. Kozeny*, No. 09-4704, 2011 WL 6184494 (2d Cir. Dec. 14, 2011).

[58] Jury Charge, at 27, *United States v. Bourke*, 1:05-cr-00518-SAS-2.

[59] *Id*.

[60] *Bourke*, *supra* note 57, at *8.

[61] *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011).

[62] *Id*. at 2071.

[63] *Id*. at 2073 (dissenting opinion). Although the *Bourke* decision was issued after *Global Tech.*, it did not reference the Supreme Court decision.

[64] *See* 15 U.S.C. §§ 78dd-1(f)(2); 78dd-2(h)(3); 78dd-3(f)(3).

[65] 18 U.S.C. § 1952.

[66] *E.g.*, *United States v. Carson*, *supra* note 45; *United States v. Kozeny*, No. 05-cr-518 (S.D.N.Y. filed May 12, 2005); *United States v. Amoako*, No. 3:05-mj-01122-JJH-1 (D.N.J. filed June 28, 2005).

[67] Order Denying Defendants' Motion to Dismiss Counts, Slip op. at 8 (C.D. Cal. Sept. 20, 2011).

[68] *Id*. at 8-9.

[69] *Id*. at 10 n.9.

[70] *Id*.

[71] In September 2010, Bistrong pleaded guilty to conspiracy to violate the FCPA for his conduct while he was an executive for Armor Holdings, Inc., years before he helped the government set up the SHOT Show sting. He has not yet been sentenced and it is unclear how his cooperation as an undercover informant will impact his sentencing. On July 13, 2011, Armor Holdings, Inc. agreed to settle criminal and civil FCPA charges stemming from the conduct of its former employee, Bistrong. The settlement related to Bistrong's scheme to pay commissions to an agent while knowing the agent would pass along a portion of the money to a UN procurement officer to cause the officer to provide the company with information enabling it to win UN procurement contracts. The settlement also alleged that the company improperly recorded more than $4 million in third-party commissions, although these were unrelated to any alleged bribes. Armor Holdings, which was acquired by BAE Systems, Inc. after the conduct at issue, agreed to pay just over $2 million in disgorgement and prejudgment interest and a $3,680,000 civil penalty to the SEC. Armor Holdings entered into a NPA with DOJ and agreed to pay a $10.3 million fine. Armor Holdings is required to report to DOJ regarding its enhanced compliance measures at six-month intervals for two years. In its press release, DOJ acknowledged the company's complete voluntary disclosure, internal investigation, cooperation, and extensive remedial efforts. Press Release, DOJ, *Armor Holdings Agrees to Pay $10.2 Million Criminal Penalty to Resolve Violations of the FCPA* (July 13, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-crm-911.html. WilmerHale represented Armor Holdings in these matters.

[72] Before sending the case to the jury, Judge Leon issued the first-ever court ruling on the FCPA's section 78dd-3, which applies to individuals or companies that are not issuers (US public companies) or domestic concerns (US incorporated companies or US citizens or residents) but rather take actions "while in the territory of the United States." Defendant Patel, a citizen of the UK and Managing Director of a UK company, was indicted on multiple counts as part of the sting. Prior to his visit to the US, Patel mailed

one copy of the allegedly corrupt purchase agreement to the undercover agents in the US via DHL, a commercial interstate mail carrier. In count 3 of the indictment, DOJ argued that mailing the package satisfied the jurisdictional element because Patel had taken other acts within the United States that were the basis for other counts in the indictment. DOJ argued that each count does not have to include an act in the US, as long as one act was taken in US territory. Judge Leon called this interpretation of the statue "novel" and concluded that the act alleged in count 3 of the indictment happened in UK territory. Judge Leon ruled that the corrupt act itself must be taken while in the territory of the US and therefore dismissed this count against Patel.

[73] Chris Matthews, *DOJ Stung in Using FCPA Sting*, Just-Anti-Corruption (July 8, 2011), http://www.mainjustice.com/justanticorruption/2011/07/08/doj-stung-in-using-fcpa-sting/.

[74] Rachel G. Jackson, *Judge Dismisses Conspiracy in Sting Trial, Defendant Goes Free*, Just Anti-Corruption (Dec. 22, 2011), http://www.mainjustice.com/justanticorruption/2011/12/22/judge-dismisses-conspiracy-in-sting-trial-defendant-goes-free/.

[75] *See* Gov't's Response to Def.'s Sentencing Mem., at 3, *United States v. Granados*, No. 1:10-cr-20881 (JAL) (S.D. Fla. Sept. 6, 2011).

[76] Rachel G. Jackson, *Under Pressure from Judge, U.S. Accedes to Lower Fine for Foreign Bribery Defendant*, Just Anti-Corruption (Nov. 29, 2011), http://www.mainjustice.com/justanticorruption/2011/11/29/under-pressure-from-judge-u-s-accedes-to-lower-fine-for-foreign-bribery-defendant.

[77] *See* Tr. of Sentencing Hr'g, at 3-7, *United States v. Perez*, 1:09-cr-20347 (JEM) (S.D. Fla. Jan. 21, 2011).

[78] *See* Order Granting Appellant's Motion for Voluntary Dismissal of Appeal, *United States v. Green*, 2:08-cr-00059-GW-1 (C.D. Cal. Oct. 5, 2011).

[79] Rule 21F-3(a) and 21F-5(b).

[80] SEC Release for Rules Implementing the Whistleblower Provisions of Section 21F of Securities Exchange Act of 1934, at 18 (May 24, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf.

[81] SEC, Annual Report on the Dodd-Frank Whistleblower Program—Fiscal Year 2011, *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

[82] *SEC v. Citigroup Global Markets, Inc.*, Slip op. at 8, No. 11cv7387 (JSR) (S.D.N.Y. Nov. 28, 2011).

[83] *Id.* at 9.

[84] David S. Hilzenrath, *Judge Rejects SEC-Citigroup Settlement*, Washington Post, Nov. 28, 2011, *available at* http://www.washingtonpost.com/business/economy/judge-rejects-sec-citigroup-settlement/2011/11/28/gIQA8KsH5N_story.html.

[85] Press Release, SEC, *SEC Enforcement Director's Statement on Citigroup Case* (Dec. 15, 2011), *available at* http://www.sec.gov/news/press/2011/2011-265.htm.

[86] Litigation Release, SEC, *SEC Files Settled FCPA Charges Against Aon Corp.* (Dec. 20, 2011), *available at* http://www.sec.gov/litigation/litreleases/2011/lr22203.htm; Press Release, SEC, *SEC Charges Magyar Telekom and Former Execs. with Bribing Officials in Macedonia and Montenegro* (Dec. 29, 2011), *available at* http://sec.gov/news/press/2011/2011-279.htm.

[87] Edward Wyatt, *S.E.C. to Change Policy on Companies' Admission of Guilt*, N.Y. Times, Jan. 6, 2012, *available at* http://www.nytimes.com/2012/01/07/business/sec-to-change-policy-on-companies-admission-of-guilt.html?_r=1&hp.

[88] Mary Jacoby, *Duross on Declinations*, Just Anti-Corruption (Oct. 28, 2011), http://www.mainjustice.com/justanticorruption/2011/10/28/duross-on-declinations/.

[89] Ellis, *supra*, note 4.

[90] Letter from Assistant Attorney General Ronald Weich to Honorable Sandy Adams, US House of Representatives (Aug. 3, 2011).

[91] Ellis, *supra*, note 4; Jacoby, *supra*, note 88.

[92] DOJ, Foreign Corrupt Practices Act Opinion Procedure Release No. 11-01 (June 30, 2011) *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf.

[93] 15 U.S.C. §§ 78dd-1(c)(2)(A), 78dd-2(c)(2)(A), 78dd-3(c)(2)(A).

[94] Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary ("Judiciary Hearing"), 112th Cong. 47 (2011). The House hearing followed on the heels of the Senate's hearings on FCPA enforcement practices on November 30, 2010, which we reported in our 2010 Year-in-Review.

[95] US Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (Oct. 2010). In September 2011, the Open Society Foundation published a prominent critique of the ILR white paper, contending that the ILR's proposed reforms would hamper enforcement efforts and grant businesses a "license to commit pervasive and intentional bribery." David Kennedy and Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*

(Sept. 2011).

[96] US Chamber Institute for Legal Reform, *supra* note 95, at 11.

[97] *Id*. at 11-27.

[98] Judiciary Hearing, *supra* note 94 (statement of Greg Andres, Acting Deputy Asst. Attorney Gen.).

[99] *Id*.

[100] Judiciary Hearing, *supra* note 94 (statement of Global Witness; statement of Karin Lissaker, Revenue Watch Institute; statement of Citizens for Responsibility and Ethics in Washington).

[101] Judiciary Hearing, *supra* note 94 (statement of Michael B. Mukasey, on behalf of US Chamber Institute for Legal Reform; statement of Shana-Tara Regon, Nat'l Ass'n of Criminal Defense Lawyers; statement of George J. Terwilliger III).

[102] Asst. Attorney Gen. Lanny A. Breuer Speaks at the 26th Nat'l Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

[103] Incorporation Transparency and Law Enforcement Assistance Act, S. 1483, 112th Cong. (2011). On November 14, 2011, Rep. Carolyn Maloney (D-NY) introduced companion legislation in the House. *See* H.R. 3416, 112th Cong. (2011).

[104] Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011).

[105] Rep. Perlmutter introduced the same legislation on two prior occasions. *See* H.R. 2152, 111th Cong. (2009); H.R. 6188, 110th Cong. (2008).

[106] Overseas Contractor Reform Act, H.R. 3588 112th Cong. (2011).

[107] Complaint, at 1, *Strong v. Taylor*, No. 11-cv-00392 (E.D. La. Feb. 16, 2011).

[108] Complaint, at 5, *In re Johnson & Johnson FCPA S'holder Derivative Litig.*, No. 11-cv-02511 (D.N.J. May 2, 2011).

[109] *In re SciClone Pharm., Inc. S'holder Derivative Litig.*, Case No. CIV-499030 (Cal. Super. Ct. Sept. 22, 2010).

[110] *Lowe v. Allison Transmission, Inc.*, No. 49D10-10-11-PL-049493 (Ind. Super. Ct. Nov. 15, 2010).

[111] *Michelon v. Sempra Global*, No. 37-2010-00103591-CU-FR-CTL (Cal. Super. Ct. Nov. 4, 2010).

[112] Unopposed Motion to Intervene, at 1, *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-CV-00299-DWA (W.D. Pa. March 20, 2008).

[113] Unopposed Motion to Intervene, *supra* note 112.

[114] *Feds Investigating Alcoa for FCPA Violations*, The FCPA Blog (Mar. 21, 2008), *at* http://www.fcpablog.com/blog/2008/3/21/feds-investigating-alcoa-for-fcpa-violations.html; Ruthie Ackerman, *DOJ Digs into Alcoa*, Mar. 21, 2008 *at* http://www.forbes.com/2008/03/21/alcoa-alba-aluminum-markets-equity-cx_ra_0321markets14.html. RICO is often a statute used to bring actions related to conduct that would violate the FCPA. For example, an earlier suit brought by the Republic of Iraq, alleging improper payments to secure contracts under the UN Oil-for-Food Program, remain pending. *Republic of Iraq v. ABB AG*, No. 08-CV-05951-SHS (S.D.N.Y. June 27, 2008).

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