Foreign Corrupt Practices Act

WILMERHALE

FCPA Indictment Dismissed on Statute of Limitations Grounds; New FCPA Cases Against Individuals and Companies

With some sources reporting a record-setting 55 companies currently under investigation for violations of the Foreign Corrupt Practices Act (FCPA), it is clear that FCPA enforcement continues to be a priority for the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Over the last few months in particular, there have been a large number of developments, including a circuit split on the statute of limitations under the statute, and several investigations announced relating to oil or oil services industry companies. Enforcement actions against individuals also continue apace. Here are the highlights of a busy recent FCPA season:

- On April 26, 2007, the DOJ and the SEC announced settlements with Baker Hughes, Inc., a Houston-based oil and natural gas company, and its subsidiary, Baker Hughes Services International, Inc. (BHSI), for alleged corrupt payments in connection with obtaining an oil-field services order in Kazakhstan, and civil charges for alleged FCPA violations in Kazakhstan, Angola, Indonesia, Nigeria and Russia. This was the second settlement for FCPA issues for Baker Hughes since 2001, and resulted in a combined civil and criminal monetary penalty of $44 million—the largest combined monetary sanction ever in an FCPA case.

- On June 21, 2007, the Southern District of New York (S.D.N.Y.) dismissed, on statute of limitations grounds, charges that Frederic Bourke and David Pinkerton violated the FCPA. Bourke and Pinkerton had been indicted for allegedly conspiring with Viktor Kozeny to bribe Azerbaijani officials in the privatization of Azerbaijan's state-owned oil company. This is the first case to conduct a detailed analysis of the tolling provisions applicable to the FCPA for situations in which the government seeks evidence from foreign countries. The court held that the DOJ must apply for and receive a tolling order **prior to** the termination of the initial statute of limitations. In another part of the opinion, the court also suggested that a defendant's knowledge of a preexisting corrupt payment that benefits him may be sufficient to create liability under the FCPA.

- In a related case, the Department of Justice recently entered into a non-prosecution agreement with Omega Advisors, Inc., regarding the company's involvement with the Azeri oil privatization program. The case provides a good example of the factors that the DOJ considers (from the "Principles of Federal Prosecution of Business Organizations") in deciding when a non-prosecution agreement is appropriate.

- The DOJ and the SEC are conducting investigations into 11 oil and oil services companies regarding potentially improper payments to customs agents. The 11 companies received letters asking about their relationship with Panalpina World Transport Holding, Ltd., a Swiss-based shipping and logistics management company. The new investigations highlight the increasing enforcement of FCPA matters in natural resources industries. Global Santa Fe, Tidewater and Noble Corporation have also announced that they are conducting their own internal investigations of their operations and dealings with customs officials in Nigeria. The relatively recent guilty pleas entered by three Vetco Gray companies (prior to their acquisition by GE) arose in the same context—oil field services and customs brokers.

- In its August 2007 10-Q, Pride International, Inc., announced that the internal investigation it commenced in March 2006 had found evidence suggesting that between 2003 and 2005, improper

payments may have been made to government officials in Venezuela and Mexico, and that improper payments may have been made in Saudi Arabia, Kazakhstan, Brazil, the Republic of Congo and India between 2002 and 2005. In addition, the DOJ has requested that Pride provide information on its operations in Nigeria.

- Four recent judgments and a recent indictment highlight that the DOJ and SEC are vigorously pursuing individuals for FCPA violations. Si Chan Wooh, a former Schnitzer Steel Industries, Inc., executive, pled guilty on June 29, 2007, to criminal charges of conspiring to bribe managers of government-owned mills in China. Wooh also settled with the SEC, paying civil fines of $41,000, although he did not admit or deny the charges. Christian Sapsizian, a former Alcatel CIT executive, pled guilty to two counts—conspiracy and violating the FCPA—in Federal District Court in Miami on June 7, 2007. The case highlights the assertedly broad reach of the FCPA, as Sapsizian's only business connection to the United States was the fact that Alcatel traded its stock in the United States. Two former IXTC executives pled guilty to conspiring to bribe telecommunications officials in Nigeria, Rwanda and Senegal on July 25, 2007. Finally, on July 27, 2007, Jason Steph, a former Wilbros executive, was indicted for allegedly paying $6 million in bribes to Nigerian officials.

- Shortly after being acquired by Monsanto Company and delisting its securities, Delta and Pine Land Company settled an SEC investigation regarding the activities of its wholly owned Turkish subsidiary Turk Deltapine, Inc. On July 27, 2007, Delta and Pine paid a $300,000 penalty and agreed to retain a monitor to ensure FCPA compliance, an agreement that is binding on any acquirer or successor of Delta and Pine.

- On July 24, 2007, the DOJ issued an opinion release confirming the elements that must be met to provide travel and entertainment expenses for visiting officials under the FPCA's affirmative defense for bona fide expenditures.

The FCPA's Antibribery and Accounting Provisions

The FCPA's antibribery 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, political party, party official or any candidate for public office, for the purpose of influencing that official to assist in obtaining or retaining business.[1] 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.[2] A covered company is responsible for ensuring that its controlled subsidiaries, including foreign subsidiaries, comply with the FCPA's accounting provisions.

Baker Hughes and Subsidiary Settle FCPA Charges with the DOJ and the SEC

On April 26, 2007, Baker Hughes and its subsidiary BHSI settled criminal charges for allegedly corrupt payments made through an agent to obtain an oil field services order in Kazakhstan and civil charges for FCPA violations in Kazakhstan, Angola, Indonesia, Nigeria and Russia. The combined $44 million in monetary penalties, the highest combined FCPA penalty to date, included $23 million in disgorgement, $11 million in criminal fines and an additional $10 million in civil fines. The SEC also filed charges against a Baker Hughes corporate executive in the civil proceeding, which is currently pending in the Southern District of Texas. This is the second FCPA action against Baker Hughes in recent years. The first, in 2001, related to alleged violations of the FCPA accounting provisions arising from improper payments in Indonesia, India and Brazil, and resulted in a cease-and-desist order.

According to the settlement papers, Baker Hughes's accounting records labeled payments to a Kazakhoil agent, which were allegedly passed to Kazak officials as legitimate expenses with descriptions such as "commissions," "fees" and costs for "legal services." From 2001 to 2003, Baker Hughes allegedly paid

approximately $4.1 million to the Kazakhoil agent, and generated a total of approximately $189.2 million in revenues and $19.9 million in profits from work on the Karachaganak project.

BHSI pled guilty to a three-count Information charging it with: 1) conspiring with the Kazakhoil agent and the agent's consulting firm to violate the FCPA; 2) violating the FCPA antibribery provisions by making payments to the Kazakhoil agent; and 3) aiding and abetting violations of the FCPA accounting provisions by causing Baker Hughes to have false accounting records. Baker Hughes entered into a two-year deferred prosecution agreement with the DOJ that requires the company to continue cooperating with the government, implement an effective anticorruption compliance program and engage a monitor for three years to review and evaluate the effectiveness of its internal controls and compliance program.

S.D.N.Y. Dismisses FCPA Action on Statute of Limitations

On May 12, 2006, a federal grand jury indicted Viktor Kozeny, Fredric Bourke and David Pinkerton on charges of conspiring to bribe senior government officials in the Republic of Azerbaijan in order to profit from the privatization of the State Oil Company of the Azerbaijan Republic (SOCAR). On June 21, 2007, Judge Shira Scheindlin of the Southern District of New York (S.D.N.Y.) dismissed, on statute of limitations grounds, 11 out of 12 charges against Bourke, and six out of seven charges against Pinkerton, including all FCPA charges in the respective indictments.[3] Since most FCPA cases in recent years have been settled without litigation, the case represents the rare court opinion grappling with various legal aspects of the FCPA.

Azerbaijan began to privatize some of its state-owned enterprises, including SOCAR, in the 1990s. The privatization program included providing Azeri citizens with voucher booklets (comprised of voucher coupons) that were freely tradable and could be used to bid for shares of privatized enterprises at auction. Foreigners who wanted to participate in an auction were required to purchase options, sold at an official government price, at the ratio of one option to each voucher coupon held.

According to the Indictment, Kozeny was President and Chairman of the Board of Oily Rock Group Ltd. (Oily Rock) and President and Chairman of the Board of Minaret Group Ltd. (Minaret). Oily Rock invested in privatization vouchers and options for the primary purposes of 1) acquiring a controlling interest in SOCAR at auction, and 2) subsequently issuing Oily Rock stock to individuals and entities. Minaret engaged in investment banking activities, particularly the acquisition and safeguarding of the vouchers and options for Oily Rock, its shareholders and its co-investors.

Bourke was the principal shareholder of an investment vehicle called Blueport International, Ltd. (Blueport). The DOJ alleged that Blueport invested $8 million in Oily Rock shares, on the understanding that Kozeny had paid and would pay bribes to obtain a controlling interest in SOCAR. Bourke also allegedly assisted Kozeny in making medical treatment arrangements for two Azeri officials in New York City. In addition, Bourke was charged with traveling with Kozeny to various locations to further investments in the privatization of SOCAR.

Pinkerton, the Managing Director of AIG Global Investment Corporation (AIG), was responsible for initiating and supervising AIG's investment in Azeri privatization with Kozeny. Pinkerton allegedly caused AIG's subsidiary and affiliate, Marlwood Commercial Inc., to enter into an investment agreement with Pharos Capital Management, L.P., which in turn had entered into a letter of intent with Oily Rock and Minaret. Between April and June 1998, David Pinkerton allegedly learned that Kozeny had obtained non-public information about the Azeri government's intent to privatize SOCAR, including the timing of that privatization, for the purpose of ensuring Oily Rock's successful participation. The indictment alleged that Pinkerton proceeded with the investment in Oily Rock and Minaret on the understanding that Kozeny had paid and would continue to pay bribes to obtain a controlling interest in SOCAR.

Both Bourke and Pinkerton were charged with wiring money for their investments from financial institutions in New York to banks abroad for the purchase of options and vouchers in Azerbaijan.

Kozeny's alleged bribes included cash payments, wire transfers, a promise of two-thirds of the profits

from privatization, the transfer of two-thirds of Oily Rock's vouchers and options to Azeri Officials, agreements to purchase vouchers from certain officials, the issuance of $300 million worth of Oily Rock shares to Azeri officials, jewelry and luxury items, medical expenses, private jet transportation, hotel accommodations, clothing, and meals. The timeframe for the alleged corrupt payments ran from 1997 to 1999, with Bourke and Pinkerton implicated from 1997 to 1998.

The FCPA does not provide for a specific statute of limitations. Consequently, it is subject to the general five-year federal statue of limitations under 18 U.S.C. §3282.[4] The conduct charged in the Indictment occurred between March and July of 1998. Thus, without tolling, the five-year statue of limitations should have run between March and July of 2003.

Title 18 U.S.C. § 3292 allows for a suspension of the statute of limitations to permit the United States to obtain foreign evidence. If an application for suspension is filed before the return of an indictment, and a court finds an official request for evidence was made, the court may suspend the running of the statute of limitations for three years, beginning on the date of the official request and ending on the date of final action by the foreign country.[5]

In this case, the DOJ's Office of International Affairs (OIA) submitted an official request to the Netherlands on October 29, 2002, seeking bank account records of Dutch banks that received wire transfers on behalf of Azeri government officials. On January 13, 2003, OIA submitted an official request to Switzerland, seeking bank records of Oily Rock, Minaret and Azeri officials. Seven months later, on July 21, 2003, the US government applied for an order to suspend the statute of limitations based on the two official requests. On July 22, 2003,[6] Judge George Daniels (S.D.N.Y.) granted the application, finding that evidence reasonably appeared to be in the Netherlands and Switzerland, and that no final action had been taken by either country. The order suspended the statute of limitations, beginning on the date of the official request and ending on the earlier of final action by both countries, or three years, i.e., until October 29, 2005. Switzerland produced its final documents on September 10, 2004, and the Netherlands on November 8, 2005. During this time, the grand jury returned the Indictment on May 12, 2005.

On October 20, 2006, Bourke and Pinkerton moved separately to dismiss various counts of the Indictment as time barred and for failure to adequately charge federal offenses under Federal Rule of Criminal Procedure 12. The government argued that, under § 3292, the statute of limitations was tolled while DOJ was awaiting the information from the Netherlands and Switzerland.

Judge Scheindlin found that all the counts were time barred, with the exception of the false statement counts included in the Indictment. She concluded that the statute is ambiguous on whether both the application and the order must be made within the original five-year statute of limitations period, or whether only the official request to the foreign country must be within the five-year period. However, in reading the statue as a whole, the judge found that the district court must order the toll before the original statute of limitations expires even though the tolling period begins when the official request is made.[7] The court held that fairness reasons underlying the statute of limitations and the doctrine of constitutional avoidance (i.e., the avoidance of Due Process violations and retroactivity under the Ex Post Facto Clause) forestalled the government's argument because the alternative interpretation would allow the government to revive time-barred offenses. As a result of this finding, the court held that the statute of limitations for Bourke and Pinkerton was not tolled because the government's application was submitted and the court's order released after the initial five-year period.

The court acknowledged that the Ninth Circuit and the District Columbia have held that only the official request must be within the statute of limitations.[8] The court nevertheless distinguished those cases because the courts did not engage in a thorough analysis of the statute or in any review of the legislative history. In concluding its discussion on the statute of limitations, the court noted that the dismissal could have been easily avoided if the government had simply applied for tolling before March of 2003, rather than waiting for nine months after making its official requests.[9]

In dicta after the dispositive issue was decided, the court noted the following:

- If the government's application for the order had been timely, the final action would have occurred when **all** of the foreign governments at issue had made such dispositive responses. In this case, that date would have been November 8, 2005. However, because the tolling provision expires on the earlier of three years or the final action, tolling would have expired on October 29, 2005. Nevertheless, the May 12, 2005, Indictment would have been proper because it fell within the three-year period.

- The word "willful" in the FCPA statute requires the government to prove that the defendant must have realized his or her conduct was unlawful while engaging in it, but the word does not need to be specifically included in an indictment in order to adequately charge a violation of the FCPA.

- Inclusion of the statutory language and express cites to the criminal section of the FCPA (18 U.S.C. § 78dd-2) as supplying the defendant's offense is enough to put defendants on notice as to the nature of the charges against them.

- The "business nexus element" of the FCPA (found in the phrase "in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person"[10]) was intended by Congress to be construed broadly, and bribes to Azeri officials to ensure privatization, and Bourke and Pinkerton's participation in the privatization, would fall within the "obtain or retain business" requirement of the FCPA.

- The allegations that Pinkerton joined the conspiracy knowing about pre-existing bribes were, along with the allegation of an overt act by any co-conspirator, sufficient to survive a motion to dismiss and the government was not required to allege specific intent in the indictment.

Omega Advisors, Inc., Enters Non-Prosecution Agreement with US Government

In a second FCPA case emerging from the SOCAR privatization, on July 6, 2007, Omega Advisors, Inc., a New York hedge fund, entered into a non-prosecution agreement (the Agreement) with the US government for its role in the privatization program in Azerbaijan.

In February of 2004, former Omega employee Clayton Lewis pled guilty to conspiracy to violate the FCPA and to violating the FCPA.[11] Lewis was Omega's point of contact for its investment in the SOCAR privatization program. During his guilty plea, Lewis admitted that he received information from Kozeny that Kozeny had entered into corrupt relationships with Azeri government officials. This information gave those officials incentives to privatize SOCAR and to allow Kozeny's companies (Oily Rock and Minaret) to have majority control after privatization. Lewis also admitted to entering into the investment, on behalf of Omega, knowing that he was taking advantage of the corrupt payments and arrangements set up by Kozeny. Omega lost all of its investments, and to date SOCAR has not been privatized. As a result of its failed and corrupt investments, Omega has sued Kozeny and Lewis.

The Agreement, signed by the US government and Omega, provides that Omega will not be prosecuted for any crimes (with the exception of criminal tax violations) related to its investments in Azeri privatization. However, Omega will forfeit $500,000 and will continue its cooperation with the government relating to the investigation of this matter.

The government cited the following factors from the "Principles of Federal Prosecution of Business Organizations" as influencing the decision to enter into the non-prosecution agreement: 1) Omega's cooperation with the government; 2) Omega's commitment to continued cooperation; 3) Omega's remedial actions, including implementing an FCPA compliance policy; 4) the absence of previous similar conduct by Omega; and 5) Lewis's prosecution. The government also considered the consequences that prosecution and a criminal Indictment would have on the company. The balance of these factors led the Government to decide that prosecution was not necessary.

Omega's agreement with the US government is another example of the DOJ requirements that must be fulfilled before the DOJ will consider signing a non-prosecution agreement. These requirements include:

- Extensive cooperation with the government in its investigation and enforcement
- Significant remedial steps, including the adoption of an internal FCPA compliance program
- Appropriate disciplinary action for bad actors (e.g., the firing and prosecution of Lewis)[12]

DOJ and SEC Launch New Investigations of 11 Oil and Oil Services Companies

On July 2, 2007, the DOJ sent letters to 11 oil and oil services companies asking the companies to detail their relationship with Panalpina World Transport Holding Ltd., a Swiss-based shipping and logistics-management company. The DOJ is focusing on potentially illegal payments to customs agents providing freight forwarding and other services. The letters indicated that the DOJ is concerned that certain payments violated the FCPA, and asked the companies to list the countries in which Panalpina provided them with services in the last five years, as well as the amount they paid for those services. Each company has also been asked to meet separately with federal prosecutors in Washington DC. The SEC is conducting a related civil investigation.

Panalpina announced that it is starting its own internal investigation. The company has been asked to provide documents to the DOJ relating to services it provides in Nigeria, Kazakhstan and Saudi Arabia. (Nigeria is one of the countries included in the DOJ investigation of the 11 companies.)

In addition, on July 20, 2007, the DOJ called a meeting to discuss the potential problems that arise for oil-related companies operating in Nigeria. The meeting included four companies that did not receive the July 2 letter, but who had previously reported internal investigations of potential FCPA violations in West Africa.

Pride International, Inc., August 2007 10-Q Announces Results of Its Internal Investigation

In March 2006, Pride International, Inc., announced that it had commenced an internal investigation regarding FCPA issues in its Latin American operations. In its August 2007 10-Q, Pride announced that the investigation had found evidence suggesting that payments aggregating less than $1 million were made to officials in Mexico and Venezuela between 2003 and 2005 in possible violation of the FCPA. The payments in Venezuela were made to vendors with the intent that they would be transferred to government officials for the purposes of extending drilling contracts and ensure fulfillment of contracts for work completed on offshore drilling projects. The payments in Mexico were made in connection with clearing a jackup rig and equipment through customs, the movement of personnel through immigration and the potentially improper entertainment of government officials.

In addition, Pride's Audit Committee commenced a review of its other international operations, which found evidence suggesting that, between 2002 and 2005, improper payments aggregating around $1 million may have been made directly or indirectly to government officials in Saudi Arabia, Kazakhstan, Brazil, the Republic of Congo and India. The payments were made in connection with clearing rigs or equipment through customs, or resolving outstanding issues with customs or merchant marine authorities in those countries.

Finally, the DOJ has requested Pride to provide information with respect to a) the company's relationship with a freight and customs agent, and b) its importation of vessels into Nigeria. The Audit Committee is reviewing issues raised by this request, and the company is cooperating with the DOJ.

Recent Cases Highlight FCPA Risks for Companies Involved in Natural Resources Industries

The Baker Hughes settlement agreements, the SOCAR privatization charges, the Omega non-prosecution agreement, the Pride International, Inc., 10-Q announcement, and the DOJ and SEC investigations of oil and oil services companies continue a string of enforcement actions in the natural resources industries begun by Vetco Gray (March 2007 WilmerHale Briefing Series), Statoil (November 2006 WilmerHale Briefing Series) and Oil States (June 2006 WilmerHale Briefing Series). These cases demonstrate that the confluence of several factors create heightened FCPA risks for companies involved in natural resources industries:

- In many countries, governments or government-owned enterprises control the right to explore natural resources;

- The exclusive control over natural resources often leads to problems of corruption;

- The recent rapid rise in prices of raw materials such as oil, natural gas and metals has undoubtedly intensified the pace of natural resources exploration and thereby provided more opportunities for government officials or employees of government-owned enterprises to demand bribes.

In light of these conditions, companies engaged in natural resources extraction or production, as well as those involved in the provision of services, should be aware of the heightened FCPA risks and design compliance procedures to deal with these risks.

Four Recent Pleas and an Indictment Re-Emphasize the DOJ and SEC's Continuing Focus on Individuals

The last few years have seen an increase in FCPA prosecutions against individuals. The recent prosecutions of Si Chan Wooh, Christian Sapsizian, Steven J. Ott and Roger Michael Young—and the indictment of Jason Steph—re-emphasize this trend.

Si Chan Wooh

On June 29, 2007, Si Chan Wooh, a former executive at Schnitzer Steel Industries, Inc.,[13] pled guilty to a federal criminal charge of conspiring to bribe managers of government-owned steel mills in China over a period of at least 10 years. According to the DOJ and the SEC, the corrupt practices resulted in millions of dollars of profit for Schnitzer Steel.

According to the DOJ's court filing, Wooh was in charge of SSI International, Inc., a Schnitzer subsidiary located in Tacoma, Washington, that managed SSI International Far East, another Schnitzer subsidiary in Korea. Wooh pled guilty to approving 1) $204,537 in bribes and gifts to the managers of Chinese-owned steel mills between September 1999 and August 2004, and 2) the wiring of payments from Schnitzer's bank account to off-the-book accounts in South Korea. The company recorded these payments as commission, refunds and gratuities in its financial records. According to court files, Wooh wrote emails to company officials in which he described the corrupt payments and directed a recipient to keep the information confidential. The bribes and gifts induced the mill managers to buy $96,393,740 of Schnitzer metal scrap to feed the mills, providing $6,259,104 in profit to Schnitzer. Wooh received $15,000 in bonuses as a result of his sales.

In addition, the SEC alleged that Wooh made or approved $1.7 million of payments to officers of private mills in South Korea and China, providing Schnitzer with more than $600 million of gross revenue. The SEC complaint alleges that Wooh violated the anti-bribery and accounting provisions of the FCPA.

Wooh reported the illegal activity in 2004 after attending Schnitzer's first training on the FCPA. He disclosed the payments to the compliance department, which triggered an internal investigation and Schnitzer Steel's voluntary disclosure to federal authorities. According to the SEC complaint, Wooh subsequently paid two more bribes in order to satisfy previous agreements. The company paid $15.2

million to settle criminal and civil charges with the DOJ and the SEC.[14]

Wooh agreed to cooperate with the DOJ in its ongoing investigation of Schnitzer's overseas business practices. The sentencing hearing is scheduled for September 2007, at which time Wooh's attorney will recommend probation because of his cooperation with the DOJ. Wooh settled SEC civil charges without admitting or denying the allegations by agreeing to pay $41,000 in disgorged bonuses, interest and penalties, and to comply with an order enjoining him from future FCPA violations.

Christian Sapsizian

On June 7, 2007, Christian Sapsizian, a former Alcatel CIT executive, pled guilty to two counts of conspiracy and violating the FCPA by making corrupt payments to Costa Rican telecommunication officials. Sapsizian pled guilty to conspiring with Edgar Valverde Acosta, Alcatel's senior officer in Costa Rica, to make improper payments, and participating in the payment of $2.5 million in bribes to Costa Rican government officials for the purpose of obtaining a mobile telephone contract from El Instituto Costarricense de Electricidad (ICE), the state-owned telecommunications authority. Sapsizian admitted to having offered a senior ICE official 1.5 to 2 percent of the value of a mobile telephone contract to use his influence to assist Alcatel in getting the contract. In August of 2001, Alcatel was awarded the mobile telephone contract, and payments to the ICE director were funneled through an Alcatel consulting firm in Costa Rica. As part of the plea, Sapsizian has also agreed to cooperate with the DOJ and law enforcement officials in their continued investigation of the case. Sapsizian faces a maximum sentence of 10 years in prison, a $250,000 fine, and $300,000 in forfeiture.

At the time of the corrupt payments, Sapsizian, a French citizen, was the deputy vice president of Alcatel and was responsible for the company's operations in Costa Rica. Until November 30, 2006, Alcatel was a French telecommunications company whose American Depositary Receipts (ADRs) were traded on the New York Stock Exchange (thus making it an issuer under the FCPA[15]). The only connection that Sapsizian had to the United States was through Alcatel's issuance of ADRs.

Steven J. Ott and Roger Michael Young

On July 25, 2007, Steven J. Ott and Roger Michael Young, former executives of IXTC Corp., a global telecommunications company, each pled guilty to a single count of conspiracy to violate the FCPA. Ott served as IXTC's Executive Vice President of Global Services and Young was the company's Managing Director for Africa and the Middle East. In their pleas, Ott and Young admitted to conspiring with each other and other former IXTC officers and executives to cause IXTC to pay $266,000[16] in bribes to foreign officials at wholly or partially state-owned telecommunications carriers in Nigeria, Rwanda and Senegal to obtain and retain contracts for IXTC. Sentencing for these pleas is set for October 29, 2007. The defendants face up to $250,000 in fines and five years in prison.

Jason Steph

On July 27, 2007, the DOJ indicted Jason Steph on charges of arranging $6 million in bribes to Nigerian officials while he managed onshore Nigerian Operations for Wilbros. The indictment alleges that Steph bribed officials of the Nigeria National Petroleum Corp. and its subsidiary Napims, and also alleges that payments were made to a senior official in the executive branch of the Nigerian government and to a political party as well as to employees of Shell's Eastern Gas Gathering System joint venture with the Nigerian government.

Summary

These cases against individuals highlight several issues:

- The DOJ and SEC continue to enforce FCPA violations against individuals rather than solely against entities. Thus, individuals must be aware of the FCPA provisions and best practices for compliance.

- The government continues to require cooperation from persons charged with violating the FCPA as demonstrated through emphasis placed upon cooperation with investigations, and of commitments to future cooperation with investigations.

- Improper payments to employees of wholly or partially state-owned enterprises are considered to be payments to government officials within the meaning of the FCPA.

- Finally, the *Sapsizian* case serves as a reminder that the FCPA assertedly applies to the foreign employees of foreign companies whose relationship with the United States consists solely of trading stock on US exchanges. Alcatel was a French company, Sapsizian a French citizen and Acosta a Costa Rican citizen; however, Sapsizian qualified as a domestic concern because he acted as an agent for Alcatel, a company whose stock was traded on the New York Stock Exchange.

Mergers and Acquisition Case Demonstrates That a Company Cannot Avoid SEC liability by Delisting

Turk Deltapine, Inc. (Turk Deltapine), was a wholly owned subsidiary of Delta & Pine Land Company (Delta & Pine) and, as an agent for Delta & Pine, made improper payments totaling approximately $43,000 to Turkish government officials at the Turkish Ministry of Agricultural and Rural Affairs between 2001 and 2006 to obtain documents needed to operate its business in Turkey. The payments came to light in connection with due diligence being performed by a potential acquirer of Delta & Pine. Delta & Pine was acquired by Monsanto on June 1, 2007. Pursuant to the acquisition, Delta & Pine's common stock was delisted and deregistered on June 5, 2007.

The SEC initiated cease-and-desist proceedings on July 26, 2007, and on the same date accepted Delta & Pine's Settlement Offer, which included paying a $300,000 penalty and retaining a monitor to ensure FCPA compliance.[17] The SEC also ordered Delta & Pine to "cease and desist from committing or causing any violations and any future violations of Exchange Act Sections 13(b)(2)(A) and 13(b)(2)(B)." The settlement provisions regarding the monitor were binding "upon any acquirer or successor in interest to Delta & Pine." The case is yet another in the line of *GE-InVision* and *Syncor Taiwan*, demonstrating that, where a formerly public company is acquired by another public company, the acquirer may be purchasing both FCPA liability and downstream compliance obligations.

Recent DOJ Opinion Release Confirms Elements of Bona Fide Expenditures for Travel and Accommodation Expenses

On July 24, 2007, the DOJ released FCPA Review Opinion Release No. 07-01 responding to the request of a US issuer who proposed to cover the domestic expenses for a four-day trip to the United States by a six-person delegation of the government of an Asian country for an educational and promotional tour of one of the requestor's US operations' sites. The visit was to familiarize the delegates with the nature and extent of the requestor's operations and capabilities, and to help establish the requestor's business credibility. The requestor was interested in participating in future operations in the foreign country similar to those it conducts in the United States. The requestor intended to pay for the domestic lodging, local transport and meals for the six officials. The foreign government planned to pay the costs of the international economy class airfare.

The requestor represented, among other things, that:

- it does not currently conduct operations in the foreign country or with the foreign government, although it is interested in pursuing such opportunities in the future;

- it has obtained written assurance, a copy of which has been provided to the Department of Justice, from an established law firm with offices in both the US and the foreign country that the requestor's

sponsorship of the visit and its payment of the expenses described in the request is not contrary to the law of the foreign country;

- it did not select the delegates who will participate in the visit; rather, the foreign government selected the delegates;

- to the requestor's knowledge, the delegates have no direct authority over decisions relating to potential contracts or licenses necessary for operating in the foreign country;

- it will host only officials working for the relevant foreign ministries and one private government consultant;

- it intends to pay all costs directly to the providers; no funds will be paid directly to the foreign government or the delegates;

- it will not pay any expenses for spouses, family or other guests of the officials;

- any souvenirs that the requestor may provide to the delegates would reflect the requestor's name and/or logo and would be of nominal value;

- apart from meals and receptions connected to meetings, speakers or events the requestor is planning for the officials, it will not fund, organize or host any entertainment or leisure activities for the officials, nor will it provide the officials with any stipend or spending money; and

- all costs and expenses incurred by the requestor in connection with the visit will be properly and accurately recorded in the requestor's books and records.

The DOJ concluded that it would not take any enforcement action with respect to the proposal described in this request. The contemplated expenses are consistent with the FCPA's promotional expenses affirmative defense because they are reasonable under the circumstances and directly relate to "the promotion, demonstration or explanation of products or services." 15 U.S.C. §§ 78dd-1(c)(2)(A) and 78dd-2(c)(2)(A). While not breaking any new ground, the opinion release serves as a reminder of the factors that the DOJ will consider in this type of situation.

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WilmerHale lawyers regularly speak on legal developments under the Foreign Corrupt Practices Act and related enforcement issues. Below is a listing of recent and upcoming topics and events:

Roger Witten, Partner

- September 4, 2007: Financial Times Deutschland Conference "Kriminalitat Und Korruption In Der Wirtschaft." Bucerius Law School (Hamburg, Germany)

- November 9, 2007: New York City Bar Program On The FCPA (New York, New York)

- November 13-14, 2007: ACI Conference (Alexandria, Virginia)

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- September 4, 2007: Financial Times Deutschland Conference "Kriminalitat Und Korruption In Der Wirtschaft." Bucerius Law School (Hamburg, Germany)

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[1] 15 U.S.C. §§ 78dd-1 to -3.
[2] *Id.* § 78m(b).
[3] While the Indictment charged Bourke, Pinkerton and Kozeny, the charges against Kozeny were not dismissed, as the United States is attempting to extradite him from the Bahamas (Kozeny argues that he is not subject to the US anti-bribery laws and thus cannot be extradited).
[4] 18 U.S.C. § 3282(a).
[5] *Id.* § 3292(a)-(b).
[6] While the Indictment and opinion do not clearly present the dates at issue, Bourke and Pinkerton's motions to dismiss state that the conduct at issue occurred prior to July 22, 1998.
[7] § 3292(a)(2) contains a 30-day deadline in which a court must issue a ruling on the application, ensuring that a court acts promptly while the limitations period continues to run.
[8] United States v. Bischel, 61 F.3d 1429 (9th Cir. 1995), United States v. Neil, 940 F. Supp. 332 (D.D.C.), vacated in part on other grounds, 952 F. Supp. 831 (D.D.C. 1996).
[9] March of 2003 is when the statute of limitations would have run on the earliest conduct with which Bourke and Pinkerton were involved. If the government's application for the order had been timely, the final action would have occurred when **all** of the foreign governments at issue had made such dispositive responses. In this case, that date would have been November 8, 2005. However, because the tolling provision expires on the earlier of three years **or** the final action, tolling would have expired on October 29, 2005. Nevertheless, the May 12, 2005 Indictment would have been proper because it fell within the three-year period.
[10] 15 U.S.C. § 78dd-2(a).
[11] Criminal Docket at 6, United States v. Lewis, No. 03-930 (S.D.N.Y. plea entered Feb. 10, 2004).
[12] *See* November 2006 WilmerHale FCPA Briefing Series *Enforcement Authorities Signal Increased Priority for FCPA Enforcement with Major Speech and Two New FCPA Settlements* at www.wilmerhale.com.
[13] Ibid.
[14] Ibid.
[15] 15 U.S.C. § 78dd-1.
[16] These bribes consisted of $166,000 to an official at Nitel, the telecom company wholly owned by the Nigerian government; $26,000 to an official at Rwandtell, which is wholly owned by the Rwandan government, and $74,000 to an employee of Sonatel, a telecommunications carrier.
[17] In re Delta & Pine Land Co., Exchange Act Release No. 56138 (July 26, 2007).