

# FINANCIAL FRAUD LAW REPORT

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# Recent Developments in Global Anti-Bribery Enforcement

ROGER M. WITTEN, KIMBERLY A. PARKER, JAY HOLTMEIER, AND  
LILLIAN HOWARD POTTER

*This article reviews recent anti-bribery enforcement actions around the globe.*

Just a few months into the year, 2010 is shaping up to be as momentous in terms of global anti-bribery enforcement as the record-setting year of 2009. The United States, United Kingdom, and Germany have all announced major settlements of anti-bribery enforcement actions. The prosecution of individuals for Foreign Corrupt Practices Act (“FCPA”) violations — which was at a record high in 2009 and has more than doubled in the last three years — proceeds apace. Lanny Breuer, Assistant Attorney General for the Criminal Division of the U.S. Department of Justice (“DOJ”), recently promised that “the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.” And U.S. Attorney General Eric Holder, speaking at a global anticorruption forum in November 2009, emphasized the DOJ’s “redoubled commitment” to anti-bribery issues and outlined expanded efforts to recover monies paid in bribes to foreign officials.

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## INDICTMENTS IN FIRST EVER FCPA UNDERCOVER STING CASE

On January 18, 2010, 21 people who were executives and employees of military and law enforcement products companies were arrested en masse in Las Vegas, Nevada while attending an annual industry trade show. In total, 22 people were charged in 16 separate indictments with violating the FCPA, conspiring to violate the FCPA, and conspiring to engage in money laundering. The 16 indictments represent the largest single FCPA prosecution against individuals in the DOJ's history.

The indictments are the result of an unprecedented two-and-a-half year undercover sting operation — the first large scale FCPA sting operation in the DOJ history. Apparently, the defendants believed they were participating in a scheme to bribe the Minister of Defense of an undisclosed African country in order to acquire a \$15 million contract for tear gas grenade launchers, M4 rifles, bulletproof vests, and handguns. The minister of defense did not exist. An undercover FBI agent posed as the Minister's sales agent, who was prepared to receive an alleged 20 percent "commission." One hundred fifty FBI agents executed 14 search warrants in various locations across the United States and authorities in the United Kingdom also executed seven search warrants that provided evidence for the cases.

In an unusual twist, the DOJ has argued that the 22 individuals are actually all part of one large conspiracy that was charged separately only because it could not, as a practical matter, be charged together. Judge Richard Leon has expressed some skepticism about the government's theory during preliminary hearings. According to press reports, the government's "one conspiracy" argument may be premised on the attendance by each of the defendants at a meeting at Clyde's Restaurant in Washington, D.C. on October 5, 2009, which was described in similar terms in each of the 16 indictments. The maximum prison sentence for the conspiracy count and for each FCPA count is five years. The maximum prison term for conspiracy to commit money laundering is 20 years.

In a related case, on January 22, 2010, the DOJ charged another individual, Richard Bistrong, with conspiracy to violate the FCPA. According to press reports, sources close to the case have confirmed that Bistrong

cooperated with the FBI in the sting by introducing undercover FBI agents to senior executives in the arms and security equipment business and that Bistrong is the intermediary mentioned in each of the 16 indictments in the FCPA sting case. Bistrong is charged with one count of conspiring to make payoffs to induce United Nations officials, Dutch officials, and Nigerian officials to award contracts to the Jacksonville, Florida, military and law enforcement products company where Bistrong served as vice president of international sales. Bistrong's company is not identified by name in his indictment but has been confirmed in media reports as Armor Holdings, a formerly publicly traded company that was acquired by BAE Systems, Inc. in 2007. Bistrong was fired prior to the acquisition, according to BAE.

Aside from serving as an indication of the willingness of the DOJ and FBI to use a full range of law enforcement techniques, including informants and undercover operations, to pursue FCPA violations, the "FCPA sting" case also raises several interesting issues. This is the first FCPA case in which there appears to have been no actual "foreign official" — only an FBI agent posing as the agent of a foreign official. This raises the question of whether there can be a violation of the FCPA given that the statute requires that the payment be made for the purpose of influencing a foreign official to take certain favorable business actions. There is no FCPA precedent in this area, although cases under analogous statutes may imply that an undercover agent posing as an official may be sufficient to sustain the charge. In addition, the government is likely to be confronted with entrapment defenses by a number of individuals, which will require both the government and the defense to delve into the thorny question of whether a given defendant was predisposed to violate the FCPA.

### **BAE SETTLES ALLEGATIONS OF BRIBERY WITH U.S. AND U.K. AUTHORITIES; U.K. SERIOUS FRAUD OFFICE CHARGES INDIVIDUAL IN RELATED CASE; SHAREHOLDER SUIT DISMISSED**

On February 5, 2010, BAE Systems plc, a U.K.-based company that is Europe's largest military contractor, agreed to plead guilty to two criminal charges and pay nearly \$450 million in penalties in the United States and

the United Kingdom to end long running investigations into alleged payments made to win large contracts. Under its settlement with the DOJ, BAE will plead guilty to one count of conspiring to make false statements about having a sufficient internal program to comply with anti-bribery laws and will pay a \$400 million fine. According to the DOJ, BAE made payments through a network of middlemen and Swiss and Caribbean bank accounts to win contracts for fighter planes and other equipment that American military companies were also seeking.

BAE said it would also plead guilty in the United Kingdom to an accounting violation for failing to properly record commissions paid to a marketing consultant involved in its sale of a radar system to Tanzania in 1999. BAE said it would pay about \$50 million in fines and would make a charitable payment to Tanzania.

Relatedly, on December 29, 2009, the U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of a shareholder derivative suit against a number of current and former directors and executives of BAE Systems plc. The suit, which was filed on behalf of a public employee pension fund, claimed that the company had breached its fiduciary duties and had wasted corporate assets in allegedly making payments to Prince Bandar in order to obtain the Al-Yamamah contract. The district court ruled that English law, not American law, applied to the case and that under English law, the pension fund did not have standing because only the company — not a shareholder — can bring suit for wrongs allegedly committed against the company.

## **DAIMLER AG SETTLES FCPA MATTER FOR \$180 MILLION; RUSSIAN AND GERMAN SUBSIDIARIES PLEAD GUILTY; DAIMLER AG AND CHINESE SUBSIDIARY ENTER DEFERRED PROSECUTION AGREEMENTS**

On April 1, 2010, the U.S. District Court approved German vehicle maker Daimler AG's settlement with the DOJ and SEC of various FCPA charges relating to alleged systematic payments and gifts to state-owned customers and government officials in at least 22 countries. The FCPA investigation into Daimler began in 2004, triggered by the firing of an

alleged whistleblower from the audit group at DaimlerChrysler Corp., Daimler's former U.S. affiliate.

In the DOJ proceedings, Daimler AG entered into a two year deferred prosecution agreement to resolve charges of conspiracy to violate the FCPA's books and records provisions and to violations of those provisions. The DOJ did not charge Daimler AG under the FCPA's anti-bribery provisions. Daimler AG also agreed to pay an overall criminal penalty of \$93.6 million and to retain an independent compliance monitor for three years. Two subsidiaries — DaimlerChrysler Automotive Russia SAO and Daimler Export and Trade Finance GmbH — pleaded guilty to conspiracy to violate the FCPA and to violating the FCPA's anti-bribery provisions. A third subsidiary, DaimlerChrysler China, entered into a two year deferred prosecution agreement to resolve charges of conspiracy to violate the FCPA and violating the FCPA's anti-bribery provisions.

In the related SEC civil proceedings, the Commission had charged Daimler AG under the FCPA's anti-bribery, internal controls, and books and records provisions. Daimler AG, without admitting or denying the allegations of the SEC's complaint, agreed to disgorge \$91,432,867 and to retain a monitor for three years.

## **INNOSPEC INC. PLEADS GUILTY TO FCPA CHARGES**

On March 18, 2010, Innospec Inc. pleaded guilty to a 12-count information charging wire fraud in connection with Innospec's payment of kickbacks to the former Iraqi government under the UN Oil for Food Program ("OFFP"), as well as FCPA violations in connection with bribe payments the company made to officials in the Iraqi Ministry of Oil. Innospec agreed to pay a \$14.1 million criminal fine and to retain an independent compliance monitor for a minimum of three years.

Innospec also settled a civil complaint with the Securities and Exchange Commission ("SEC") charging Innospec with violating the FCPA's anti-bribery, internal controls, and books and records provisions. Innospec agreed to disgorge \$11.2 million in profits to the SEC and to pay \$2.2 million to resolve outstanding matters with the U.S. Office of Foreign Assets Control related to the U.S. embargo against Cuba.

In another related matter brought by the United Kingdom's Serious Fraud Office ("SFO"), Innospec's British subsidiary, Innospec Ltd., pleaded guilty in connection with corrupt payments made to Indonesian officials. Innospec Ltd will pay a criminal penalty of \$12.7 million.

## **TWO MAN SE SUBSIDIARIES REACH SETTLEMENTS TOTALING €150 MILLION WITH GERMAN PROSECUTORS**

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

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

Interestingly, according to media reports, the Munich Prosecutor's office fined MAN Nutzfahrzeuge AG in connection with this matter because its management board did not provide adequate oversight to prevent bribes from taking place — not because there were allegations of direct knowledge or even willful blindness on the part of the board. The statutory basis for this type of prosecution resembles the "control person" theory advanced by the SEC in its case against Nature's Sunshine Products Inc., and may demonstrate that foreign prosecutors are willing to pursue indirect theories of liability in order to hold executives accountable for overseas bribery.

## **THAI OFFICIAL CHARGED IN WAKE OF CONVICTION OF GERALD AND PATRICIA GREEN; GERALD GREEN FACES POSSIBLE LIFE SENTENCE**

On the heels of the conviction at trial in September 2009 of film executives Gerald and Patricia Green on FCPA-related charges, on January 21, 2010, the DOJ unsealed an indictment against Juthamas Siriwan, the former governor of the Tourism Authority of Thailand, and her daughter, Jittisopa Siriwan, in California. Juthamas Siriwan was named in the Green case as the foreign official to whom the Greens had paid bribes in order to secure government contracts to manage and operate Thailand's annual Bangkok International Film Festival. The Siriwans are charged with conspiracy and with six counts of transporting funds to promote unlawful activity — here, violation of Thailand's law against bribery of public officials — for having allegedly accepted over \$1.8 million in bribes from Gerald and Patricia Green. The indictment seeks forfeiture of over \$1.7 million in cash, as well as property, related to the bribes. The Siriwan indictment does not include any substantive FCPA charges; while the FCPA punishes those who pay bribes to foreign officials, the law does not apply to foreign officials themselves. The indictment of the Siriwans by the DOJ is noteworthy because it indicates the DOJ's seriousness in pursuing not only bribemakers but also bribetakers — and to recover the money paid in those bribes — as Attorney General Holder pledged late last year.

Meanwhile, the Greens are scheduled to be sentenced in June 2010. They were convicted of nine counts of violating the FCPA as well as conspiracy to violate the FCPA, conspiracy to engage in money laundering, and tax fraud. Gerald Green faces more than 30 years in prison and Patricia Green faces 19 to 24 years under the federal sentencing guidelines. The DOJ has filed a sentencing memorandum alleging that Gerald Green repeatedly perjured himself at trial and asking the judge to apply various enhancements for obstruction of justice to Green's sentence. These requested enhancements, if accepted, would result in a life sentence for Gerald Green. The Greens are the first entertainment industry executives ever to be charged with FCPA violations.

## **FREDERIC BOURKE AND WILLIAM JEFFERSON SENTENCED TO PRISON TERMS**

Two individuals who were convicted of FCPA-related charges in high profile trials during 2009 have been sentenced to prison terms.

On November 10, 2009, Frederick Bourke was sentenced to a year and a day in prison, followed by three years of probation, and was fined \$1 million for his role as an investor in an investment consortium headed by Viktor Kozeny, which sought to capitalize on the proposed privatization of Azerbaijan's state oil and gas company. At trial, Bourke was accused by the government of "sticking his head in the sand" and being willfully blind to the fact that Kozeny and the consortium were paying systematic bribes to Azeri officials. The DOJ had asked for a 10 year sentence for Bourke. Judge Shira Scheindlin expressed some reservations about the case during the sentencing hearing, saying that "after years of supervising this case, it's still not entirely clear to me whether Mr. Bourke was a victim or a crook or a little bit of both." Bourke is appealing his sentence.

A few days after Bourke's sentencing, on November 13, 2009, former Congressman William Jefferson was sentenced to 13 years in prison following his August conviction on various charges, including conspiracy to violate the FCPA. The government had sought a sentence within the applicable Guidelines range of 27 to 33 years. Jefferson is appealing his sentence. The FCPA charges against Jefferson arose from alleged attempts by Jefferson to bribe the then-President of Nigeria on behalf of iGate, Inc., a U.S. technology company seeking to establish a telecommunications business in Nigeria. In exchange for Jefferson's efforts, the President and CEO of iGate made regular payments to an entity created and controlled by Jefferson and his family. Jefferson allegedly planned to travel to Nigeria to deliver \$100,000 in cash to the Nigerian official; in a now famous incident, the FBI discovered \$90,000 in cash inside Jefferson's freezer.

## **WILLBROS INTERNATIONAL EXECUTIVES SENTENCED TO PRISON TERMS FOR INVOLVEMENT IN \$6 MILLION FOREIGN BRIBERY SCHEME**

Two former executives of Willbros International Inc., a subsidiary of

Houston-based Willbros Group Inc., were sentenced to prison for their roles in a conspiracy to pay more than \$6 million in bribes to Nigerian government officials and officials from a Nigerian political party in order to obtain a \$357 million oil pipeline contract in Nigeria. Jason Edward Steph, 40, was sentenced to 15 months in prison, as well as two years of probation and a \$2,000 fine. Jim Bob Brown, 48, was sentenced to 12 months and one day in prison, as well as two years of probation and a fine of \$1,000 per month during every month he is on probation. Both men had pleaded guilty to one count of conspiracy to violate the FCPA. At the sentencing hearing in Houston on January 28, 2010, U.S. District Court Judge Simeon T. Lake III acknowledged the assistance Steph and Brown provided to ongoing investigations.

Another individual involved in the Willbros case, Paul Novak, who served as a consultant to Willbros International, pleaded guilty in November 2009, to one count of conspiracy to violate the FCPA and to one count of violating the FCPA's anti-bribery provisions. Novak is scheduled to be sentenced in July 2010. A fourth man indicted as a co-conspirator in the Willbros case, Kenneth Tillery, remains a fugitive.

## **ADDITIONAL PLEAS IN HAITI TELECOM BRIBERY CASE**

On February 16, 2010, Jean Fourcand, the President of a Miami-based company, pleaded guilty to money laundering charges related to the bribery of an official of Haiti's state-owned telecommunications company. Fourcand admitted that he received funds from U.S. telecommunications companies that were for the benefit of the Haitian official, Robert Antoine. Fourcand is the third person to plead guilty in the case to date. Antonio Perez, the former comptroller of a U.S. telecommunications company, and Juan Diaz, the President of an intermediary company that allegedly funneled bribes to Fourcand's company, have also pleaded guilty. Charges against five other individuals, including Antoine, two U.S. telecommunications company executives, and a former Haitian official and his sister, are pending.

## **VIRGINIA BEACH EXECUTIVES PLEAD GUILTY TO BRIBING PANAMANIAN OFFICIALS**

On February 10, 2010, John Warwick pleaded guilty to one count of conspiring to violate the FCPA by paying bribes to former Panamanian government officials for the purpose of securing business for Ports Engineering Consultants Corporation (“PECC”). PECC, a company incorporated under the laws of Panama, was affiliated with Overman Associates, an engineering firm based in Virginia Beach. According to the indictment, PECC was created so that Warwick, co-conspirator Charles Jumet, the engineering firm, and others could corruptly obtain maritime contracts to maintain buoys and lighthouses from the Panamanian government. Warwick and Jumet are alleged to have paid bribes totaling \$200,000 to Panamanian officials between 1997 and 2003. Warwick agreed to forfeit \$331,000 and faces up to five years in prison; he was scheduled to be sentenced on May 14, 2010. Jumet pleaded guilty in November 2009, and was sentenced to 87 months in prison, the longest sentence in FCPA history.

## **SEC ANNOUNCES NEW INVESTIGATIVE TOOLS AND NAMES HEAD OF NEW FCPA SPECIALIZED ENFORCEMENT UNIT**

On January 13, 2010, SEC Enforcement Division Director Robert Khuzami announced an expansion of the Division’s “investigative toolbox to include cooperation agreements and related initiatives.” The three new primary enforcement tools are cooperation agreements, which are formal written agreements in which the Division of Enforcement agrees to recommend to the Commission that a cooperator receive credit for cooperating, deferred prosecution agreements, and non-prosecution agreements. Khuzami said the “new cooperation program has the potential to be a game-changer.... For the first time, we will have a formal framework of incentives — incentives to secure the cooperation of persons who saw, heard and witnessed securities fraud first-hand — and who can walk into a courtroom, raise their right hand and tell their story to the world.”

The SEC Enforcement Division also named leaders for its five new national specialized units. The FCPA unit will be led by Cheryl J. Scar-

boro. Ms. Scarboro has served as Associate Director, Assistant Director, Deputy Assistant Director, and Staff Attorney in the SEC's Division of Enforcement. She also was Counsel to SEC Chairman Arthur Levitt, Jr. Previously, she was an associate at Sutherland, Asbill and Brennan LLP in Washington, D.C. Ms. Scarboro received her J.D. from Duke University School of Law, and her B.A. in Political Science from the University of Alabama in Huntsville.

## **OECD REVERSES POSITION, COMES OUT AGAINST FACILITATING PAYMENTS**

The Organization for Economic Cooperation and Development ("OECD") in December called for a prohibition on facilitating or "grease" payments that are currently permitted under the FCPA and some foreign anticorruption statutes. The OECD originally took a position in favor of permitting small payments when the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions was created in 1997. The OECD asked all countries who are parties to the OECD Convention to reassess their position on facilitating payments and encouraged companies to prohibit or discourage the payments in their ethics and compliance policies and procedures. According to some estimates, approximately 80 percent of U.S. companies already prohibit facilitating payments. The OECD's recommendations are likely to further reinforce that growing trend among businesses.

## **U.N. CUTS BACK ON FRAUD INVESTIGATIONS**

The United Nations has cut back sharply on investigations into corruption and fraud within its ranks, shelving cases involving the possible theft or misuse of millions of dollars, an Associated Press review has found. At least five major cases in Afghanistan, Iraq and Africa are among the inquiries halted as the U.N. scaled back on self policing over the past year. The AP review also found that not a single significant fraud or corruption case had been completed during the past year. These cutbacks come in the wake of the massive bribery scandal in the U.N. Oil-for-Food Program in Iraq, which resulted in a number of FCPA-related settlements by companies with the DOJ and SEC.