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THE NEW ERA OF FCPA ENFORCEMENT: MOVING TOWARD A NEW ERA OF COMPLIANCE

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Abstract. The DOJ and the SEC are aggressively enforcing the FCPA in what has come to be called the New Era of FCPA enforcement. [2] *Those efforts are reflected by expansive interpretations of the statute, the increasing use of industry sweeps, spiraling costs to settle corporate cases and a focus on individuals, coupled with demands for longer prison sentences. This has spawned increasing demands for amendments to the statutes. Congress has considered the question but not acted. Enforcement officials could spur compliance by amending their prosecution guidelines to include items such as a compliance defense but have not. Yet business organizations and their employees remain at risk. To avoid or at least mitigate liability, business organizations need to step-up and implement reasonable compliance systems and begin a new era of compliance.*

I. INTRODUCTION.

It has been over thirty years since the U.S. became the first country to pass anti-corruption legislation known as the Foreign Corrupt Practices Act ("FCPA" or "the Act").[3] At the time, many thought that the Act would impede the ability of U.S. business to compete

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[2] "[O]ur FCPA enforcement is stronger than it's ever been – and getting stronger. I am aware that, for some of you, as we have become more aggressive, you have become more worried. On one hand, I want to tell you this afternoon that you are right to be more concerned. As our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we are here to stay." Lanny A. Breuer, Assistant Attorney General, Remarks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[3] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1415-25 (codified as amended at 15 U.S.C. §§ 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff).

abroad.[4] Nevertheless, Congress wrote and passed the legislation, which was signed into law by President Jimmy Carter.

Passage of the Act was spurred by a series of "questionable payment" cases initiated by the Securities and Exchange Commission ("SEC" or "Commission") in the wake of the Watergate scandal. Those actions culminated with the Commission's highly effective "volunteer program," under which hundreds of corporations came forward and admitted foreign bribery.[5]

Following its passage, enforcement was not a priority.[6] In the late 1990s, however, other countries became signatories to the anti-bribery convention of the Organization for Economic Cooperation and Development ("OECD").[7] The FCPA was amended to conform to certain provisions of the convention.[8] Other signatories have enacted legislation to implement the policies and goals of the OECD convention.[9] One of the most stringent may be the U.K. Bribery Act which came into force July 1, 2011.[10]

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4 Roger M. Witten, Kimberly A. Parker and Jay Holtmeier, Complying With The Foreign Corrupt Practices Act at 1-1 (2010) ("Witten").

5 *See generally*, SEC Report on Questionable and Illegal Corporate Payments and Practices: Hearing Before the S. Comm. On Banking, Housing & Urban Affairs, 94th Cong., 2nd Sess. (Comm. Print 1976); Promotion of Reliability of Financial Information, Exchange Act Release No. 34-15,570 (Feb. 15, 1979); *see also* Edward D. Herlihy & Theodore A. Levine, Corporate Crisis: The Overseas Payment Problem, 8 LAW & POL'Y INT'L BUS. 547 (1976).

6 *See* Foreign Corrupt Practices Act, available at http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (compilation by the SEC of all of its FCPA cases).

7 Organization for Economic Cooperation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) OECD Doc. DAFFE/IME/BR(97)20, available at http://www.oecd.org/dataoecd/4/18/38028044.pdf. *See also* Organization of American States, Secretariat for Legal Affairs, Inter-American Convention Against Corruption, OAS Doc. B-58 (1996), available at http://www.oas.org/juridico/english/treaties/b-58.html; Council of Europe, Criminal Law Convention of Corruption, ETS No. 17327.1.1999 (1998), available at http://www.conventions.coe.int/Treaty/EN/Treaties/Html/173.htm; United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (2003), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/453/15/PDF/N0345315.pdf?OpenElement.

8 The International Anti-Bribery and Fair Competition Act of 1998 § 2, Pub. L. No. 105-366, 112 Stat. 3302, 3302-04 (Nov. 10, 1998) (codified as amended at 15 U.S.C. § 78dd-1).

9 *See* Witten at 13-2.

10 U.K. Bribery Act 2010. *See also* Phase 3 Report On Implementing the OECD Anti-Bribery Convention in the United Kingdom (March 2012), available at http://www.oecd.org/dataoecd/52/19/50026751.pdf (discussing the implementation of the Act).

Anti-corruption enforcement is increasing around the world.[11] In the United States, which continues to be the enforcement leader,[12] enforcement officials have declared "a new era of FCPA enforcement."[13] The "New Era" is evidenced by an increasing number of FCPA cases being brought by enforcement officials. It is also reflected in the increasing amounts being paid in settlement by business organizations and the spiraling cost of cooperating with government officials. There is a focus on individuals, a demand for longer prison sentences, and more cases going to trial.[14]

Business groups and others are demanding amendments to the FCPA as the New Era continues to unfold, claiming vague standards and policies hinder compliance and make enforcement inconsistent. Enforcement officials counter with claims that amendments are unnecessary. Nobody disagrees with the goal of the Act, which is to eliminate corruption from a segment of the world marketplace in order to create a level playing field where businesses compete on the merits.[15] Some, however, argue that the Act impedes the competitive position of U.S. business, a claim reminiscent of those made at the time of its initial passage.[16] Others argue

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11 As of January 2010, 38 countries had ratified the OECD convention and adopted implementing legislation. Witten at 13-2.

12 Witten at 13-2; *see also* OECD, Directorate For Financial and Enterprise Affairs, United States: Phase 3, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendations on Combating Bribery in International Business Transactions (Oct. 15, 2010), available at www.oecd.ord/dataoecd/10/49/46213841.pdf.

13 *See supra* note 2.

14 Lanny A. Breuer, Assistant Attorney General, Remarks at the Practicing Law Institute (Nov. 4, 2010) available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101104.html. *See generally* Hearing before Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 112th Congress, 1st Session, June 14, 2011 at 9-18 ("June 2011 House Hearing") (Prepared Statement of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 9-18); Hearing Subcommittee on Crime and Drugs, Committee on the Judiciary, U.S. Senate, 111th Congress, Nov. 30, 2010 ("Nov. 2010 Senate Hearings") (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 3-12).

15 June 2010 House Hearings (Prepared Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 10) (quoting 1977 legislative history).

16 *See, e.g.*, Andrew Weissmann and Alixandra Smith on behalf of the U.S. Chamber of Commerce, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act (Oct. 2010), available at
(footnote continued)

that enforcement is overreaching, that key portions of the Act are undefined or vague, making compliance difficult and enforcement unfair, that compliance efforts are not given due recognition and encouragement and that key defenses have been all but eliminated.[17] Still others contend that New Era enforcement, with its reliance on non-prosecution and deferred prosecution agreements, is a façade.[18] Although Congress has held hearings to consider amendments, none have been enacted. Nevertheless, corruption cases continue to unfold while the drive for amendments continues unabated.

Few would argue that a New Era of FCPA enforcement has arrived. The real question, however, is whether it can be sustained and, ultimately, if the New Era is fostering the kind of effective compliance which is the ultimate goal of law enforcement. To assess this critical question, five key points will be examined: (1) FCPA investigations – creating a presence in the marketplace; (2) aggressive interpretations of the Act; (3) the spiraling cost of resolving FCPA cases; (4) prosecutions against individuals; and (5) the types of reforms being demanded, along with the position on those claims of enforcement officials. The conclusion analyzes the various trends, the calls for reform and offers an approach for resolving the conflicts and facilitating effective enforcement.

(footnote continued)
http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf. *See also infra* at Section IV.

17 *See generally*, The FCPA and its Impact on International Business Transactions – Should Anything Be Done To Minimize The Consequences of the U.S.'s Unique Position On Combating Offshore Corruptions? New York City Bar, Committee on International Business Transactions (Dec. 2011), available at http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf ("New York Bar Report") at 23 ("Our position is that (1) the competitive landscape of the 21st century global economy warrants the reevaluation of the United States' strategy in fighting foreign corruption, (2) the current anti-bribery regime – which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a 'light touch' – is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets and (3) even putting aside the disproportionate costs borne by U.S. regulated companies, the continued unilateral and zealous enforcement of the FCPA by the United States may not be the most effective means to combat corruption globally – in fact, in some circumstances it may *exacerbate* the problem of overseas corruption.") (emphasis original).

18 Mike Koehler, The Façade of FCPA Enforcement, 41 GEO. J. INT'L. L. 907 (2010).

II. FCPA INVESTIGATIONS – CREATING A PRESENCE IN THE MARKETPLACE.

Enforcement officials have repeatedly touted their ability to conduct industry-wide inquiries, while encouraging self-reporting, cooperation and disclosure.[19] Creating a seemingly ubiquitous presence in the marketplace spurs compliance. Indeed, this is critical for law enforcement in view of its limited resources. Accordingly, FCPA enforcement officials have crafted over time a growing presence in the marketplace through pronouncements about industry-wide investigations and targeted sweeps. Those efforts have been aided by disclosures from issuers and the growing legion of whistleblowers.[20]

A. Industry-Wide inquiries and sweeps

Enforcement officials have over the years identified various industries to be scrutinized for possible FCPA violations. Probes into those industries are, in some instances, a proactive sweep which constitutes a kind of prospecting for fraud while in others they may have emanated from a specific lead or tip. In 2007, Department of Justice ("DOJ") officials identified several industries "of interest." Those included the banking, insurance, gaming, manufacturing and telecommunications industries.[21] In 2009, the DOJ added the pharmaceutical industry.[22]

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19 In announcing the resolution of an action against a medical device company, Kara Novaco Brockmeyer, Chief of the SEC Enforcement Division's FCPA Unit, noted "Biomet's misconduct came to light because of the government's proactive investigation of bribery within the medical device industry." Press Release, SEC, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), available at http://www.sec.gov/news/press/2012/2012-50.htm. *See also* Comments of Cheryl J. Scarboro, then Chief of the SEC's FCPA Unit stating in part that "The FCPA Unit will continue to focus on industry-wide sweeps, and no industry is immune from investigation." Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials, (Nov. 4, 2010), available at http://www.sec.gov/news/press/2010/2010-214.htm.

20 *See infra* at Section II(C) discussing whistleblowers.

21 Mark Mendelson, Deputy Chief, Fraud Section, U.S. Department of Justice, Prepared Remarks at the American Conference Institute Eighteenth National Conference on the Foreign Corrupt Practices Act (Nov. 13, 2007), Witten, Section 7.08.

22 Lanny A. Breuer, Assistant Attorney General, Criminal Division, Prepared Keynote Address to The Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum at 1 (Nov. 12, (footnote continued)

Subsequently, FCPA actions have been brought against business organizations involved in the targeted industries. In the telecommunications industry, for example, actions were brought against Alcatel-Lucent S.A.,[23] Latin Node, Inc. and Veraz Networks, Inc.[24] An FCPA action was brought against investment fund Omega Advisors, Inc.[25] In the pharmaceutical industry, Johnson & Johnson, Inc. settled an FCPA inquiry,[26] while other probes reportedly are in progress. SciCone Pharmaceuticals, Inc. has reported that it received a subpoena from the SEC and a letter from the DOJ indicating its sales in foreign countries, including China, were being investigated.[27] Merck & Co., Inc., Astra Zeneca PLC, Bristol-Myers Squibb Company, and GlaxoSmithKline plc are also reportedly being scrutinized.[28]

In some instances, the existence of an industry-wide inquiry has emerged as settlements are announced, or the inquiries are disclosed by a company. Recent case settlements for

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2009), available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf. According to some reports, the SEC and DOJ have been investigating the orthopedic implant industry since early 2007. Watch that Inkblot, The FCPA Blog (Dec. 11, 2007), available at http://www.fcpablog.com/blog/2007/12/12/watch-that-inkblot.html.

23 *See infra* at Section IV C.

24 *U.S. v. Latin Node, Inc.*, No. 09-cr-20219 (S.D. Fla. filed Mar. 23, 2009); *SEC v. Veraz Networks, Inc.*, No. 10-cv-2849 (N.D. Cal. filed Jun. 29, 2010).

25 Press Release, U.S. Attorney's Office for the Southern District of New York, U.S. Announces Settlement with Hedge Fund Omega Advisors, Inc. in connection with Omega's Investment in Privatization Program in Azerbaijan (Jul. 6, 2007) available at http://www.justice.gov/usao/nys/pressreleases/July07/omeganonprospr.pdf.

26 Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 9, 2011) available at http://www.justice.gov/opa/pr/2011/April/11-crm-446.html.

27 *See* SciClone Pharmaceuticals, Inc. Form 10-Q Quarterly Report dated Aug. 9, 2010.

28 Michael Rothfeld, Drug Firms Face Bribery Probe, WALL STREET JOURNAL, Oct. 4, 2010; *see also* The Novartis Speakers Bureau, The FCPA Blog (Oct. 5, 2010) available at http://fcpablog.squarespace.com/blog/2010/10/5/the-novartis-speakers-bureau.html. FCPA cases have also been brought against telecommunications companies and several of their executives. *See e.g., U.S. v. Esquenazi*, No. 09-cr-21010 (S.D. Fla.) (and related cases) discussed *infra* Section V.

example, with medical device manufactures Biomet Inc.,[29] Smith & Nephew, Inc.,[30] and AGA Medical,[31] coupled with comments by enforcement officials [32] confirm a sweep in that industry.

Other sweeps include one by the SEC targeting certain financial institutions and their dealings with sovereign wealth funds.[33] The Commission also is reportedly conducting a sweep of Hollywood, probing the relationships between film studios such as 20th Century Fox, DreamWorks Animation and Disney with Chinese officials.[34] As that probe unfolds and others are initiated and continue, it is apparent that enforcement officials are focused on companies doing business in high risk venues.[35]

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29 *U.S. v. Biomet, Inc.*, No. 12-cr-080 (D.D.C. Filed March 26, 2012); *SEC v. Biomet, Inc.*, No. 1:12-cv-00454 (D.D.C. Filed March 26, 2012) (settled FCPA actions centered on claims of improper payments to officials in Argentina and doctors employed by state-owned enterprises in Brazil and China).

30 *U.S. v. Smith & Nephew, Inc.*, 12-cr-030 (D.D.C. filed Feb. 6, 2012); *SEC v. Smith & Nephew*, Civil Action No. 1:12-cv-00187 (D.D.C. Filed Feb. 6, 2012) (settled FCPA case based on alleged payments to Greek health care providers).

31 AMA Medical resolved the FCPA charges with DOJ by entering into a deferred prosecution agreement and agreeing to pay a $2 million fine. Press Release, U.S. Dept. of Justice, AGA Medical Corporation Agrees to Pay $2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (Jun. 3, 2008) available at http://www.justice.gov/opa/pr/2008/June/08-crm-491.html.

See also, e.g., *SEC v. Akzo Nobel, N.V.*, No. 07-cv-02293 (D.D.C. filed Dec. 20, 2007) (U.N. Oil-for-Food Program); *SEC v. Fu*, Case No. 1:07CV01735 (D.D.C. filed Set. 28, 2007) (payments by founder and chairman of company to doctors in Taiwan employed in private and public hospitals); *U.S. v. DPC (Tianjin) Co. Ltd.*, 05-cr-482 (C.D. Cal. filed May 20, 2005) (plea to violation of anti-bribery provisions in connection with sales of medical equipment in China); *SEC v. Schering-Plough Corp.*, No. 1:04-cv-00945 (D.D.C. filed Jun. 9, 2004) (payments to charity headed by government official who was head of health fund to influence purchases); Non-Prosecution Agreement with Micrus Corporation, dated February 28, 2005) (private medical device company for sales to doctors at publicly owned and operated hospitals in the French Republic, the Republic of Turkey, the Kingdom of Spain and the Federal Republic of Germany), available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/02-28-05micrus-agree.pdf .

32 *See supra* note 19 quoting SEC FCPA Unit chief regarding the inquiries.

33 Dionne Searcy and Randall Smith, SEC Probes Banks, Buyout Shops Over Dealings With Sovereign Funds, WALL STREET JOURNAL, Jan. 14, 2011.

34 Anuna Viswanatha, Exclusive: SEC probes movie studios over dealings in China, Business & Financial News, Reuters.com (Apr. 24, 2012) available at http://www.reuters.com/article/2012/04/24/sec-movies-idUSL2E8FOL0D20120424.

35 *See, e.g.*, The James Mintz Group, Where The Bribes Are: Behold the Worldwide Sweep of FCPA – Ten Years of FCPA Cases Brought by the U.S. Government, available at http://fcpamap.com/ (world map identifying location of FCPA investigations).

B. The Two Largest Industry-Wide Investigations.

Two large groups of cases are illustrative of the industry-wide investigations. One centers on the U.N. "Oil-For-Food Program." The other involves a series of cases focused on the oil services and freight forwarding business.

1. The U.N. "Oil-For-Food Program" Cases.

The Oil-for-Food Program FCPA cases are the largest "industry-wide" inquiry. That program emanates from an embargo the United Nations imposed on Iraq following its invasion of Kuwait in 1990. It was designed to alleviate hardship on the people of Iraq from the embargo by permitting the sale of oil and the purchase of humanitarian goods under the auspices of the United Nations.[36] Following widespread allegations of corruption in the program, an investigation was conducted and a report prepared by a commission chaired by former Federal Reserve Chairman Paul Volcker. The report identified 2,253 companies worldwide who made more than $1.8 billion in illicit payments to the Iraqi government.[37]

The DOJ and the SEC have brought a series of FCPA cases related to the program. The actions can be divided into those on the humanitarian and those on the oil sides of the program. On the humanitarian side, the cases typically involve the payment of a 10% surcharge demanded by the Iraq government. It was usually added to the contract price before the agreement was submitted to the U.N. for approval under the terms of the program.

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[36] The U.N. Security Council modified the sanctions under Resolution 986 to permit Iraq to sell oil, provided that the proceeds were deposited into a U.N. monitored bank account in Manhattan. The proceeds were to be used exclusively for the purchase of humanitarian goods to benefit the people of Iraq. Saddam Hussein's regime determined who could purchase oil, and from whom humanitarian goods would be acquired. The Iraqi government was not given direct access to the New York bank account, however. Rather, all contracts for the sale of oil or the purchase of humanitarian goods had to be approved in the first instance by a U.N. committee. S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1994) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/109/88/PDF/N9510988.pdf?OpenElement.

[37] *See generally*, Press Release, U.S. Attorney's Office for the Southern District of New York, U.S. Announces Charges In Connection With Secret Kickbacks To The Iraqi Government Related To The United Nations' Oil-For-Food Program (Oct. 21, 2005) available at http://www.justice.gov/usao/nys/pressreleases/October05/chalmersetalsupersederpr.pdf.

The case against Italian manufacturer Fiat, S.p.A. is typical of those on the humanitarian side of the program.[38] Between 2000 and 2003, Fiat entered into a series of agreements with a value of over €46 million to sell industrial pumps, gears and similar equipment. Over $4 million in what were called "after sales service fees" – kickbacks – were added to the contract prices. The fees were not properly recorded in the books and records of the company.[39]

Fiat, whose ADRs were traded in New York until the company delisted in 2007, and its subsidiaries resolved the criminal inquiry by entering into a deferred prosecution agreement with the DOJ at the parent company level, coupled with guilty pleas by three subsidiaries. The parent company accepted responsibility for the acts of its subsidiaries, although it was not charged, and agreed to pay a $7 million criminal fine.[40] Two subsidiaries pleaded guilty to charges of conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA. A third pleaded guilty to a charge of conspiracy to commit wire fraud. The FCPA bribery provisions were not implicated because the payments went to the government of Iraq, not a

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38 Other examples of humanitarian side cases include: *U.S. v. Novo Nordisk A/S*, Case No. 1:09-cr-00126 (D.D.C. May 11, 2009) and *SEC v. Novo Nordisk A/S*, Civil Action No. 1:09-CV-00862 (D.D.C. filed May 11, 2009) (actions involving the sale of insulin and other medicines; the DOJ investigation was settled with a deferred prosecution agreement and the payment of a $9 million criminal fine); *SEC v. AB Volvo*, No. 08-00473 (D.D.C. Filed Mar. 20, 2008) (involving the sale of humanitarian goods; the DOJ investigation was settled when the company agreed to execute a deferred prosecution agreement and pay a $7 million criminal fine, Press Release, U.S. Dept. of Justice, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Mar. 20, 2008), available at http://www.justice.gov/opa/pr/2008/March/08_crm_220.html); *SEC v. Akzo Nobel, N.V.*, No. 07-02293 (D.D.C. filed Dec. 20, 2007) (DOJ investigation resolved with a non-prosecution agreement which required the company to cooperate with the Dutch National Public Prosecutor's Office a pay a fine of at least €381,000, Press Release, U.S. Dept. of Justice, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government, (Dec. 20, 2007), available at http://www.justice.gov/opa/pr/2007/December/07_crm_1024.html); and *SEC v. Textron Inc.* No. 07-01505 (D.D.C. Filed Aug. 23, 2007) (DOJ investigation resolved with the payment of a $1.15 million fine and entry into a non-prosecution agreement).

39 Press Release, U.S. Dept. of Justice, Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program (Dec. 22, 2008) available at http://www.justice.gov/opa/pr/2008/December/08-crm-1140.html.

40 *See* Letter from DOJ to John Hardiman ("Fiat Deferred Prosecution Agreement"), dated Dec. 22, 2008, available at http://www.justice.gov/opa/documents/fiat-dpa.pdf.

"foreign official" as defined in the Act.[41] The settlement of the case was impacted by the cooperation of the company, as the DOJ acknowledged, which conducted a complete investigation and instituted certain remedial measures.[42]

Fiat also settled with the SEC. The parent company consented to the entry of a permanent injunction prohibiting future violations of the FCPA books and records provisions. It also agreed to pay disgorgement of about $5.3 million, prejudgment interest and a civil penalty of $3.6 million.[43]

Iraq also demanded kickbacks on the oil side of the program. In those cases, the improper payments were typically made by adding a surcharge to the price. The action involving Chevron Corporation is typical. From April 2001 to May 2002, the company purchased about 78 million barrels of crude oil from Iraq under 36 contracts with third parties. It paid about $20 million in surcharges or kickbacks to Iraqi's State Oil Marketing Organization or "SOMO." Before the purchases, Chevron learned about Iraq's demand for kickbacks. In January 2001, the company instituted a policy prohibiting the payment of surcharges and directing that traders obtain prior written approval from the Director of Global Crude Trading before any Iraqi oil purchase, as well as a management review of the proposed deal. Traders ignored the policy. Management routinely approved the purchases, although documents suggested it knew about the surcharges.[44]

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41 *U.S. v. Iveco S.p.A.*, No. 1:08-cr-00377 (D.D.C. Dec. 22, 2008); *U.S. v. CNH Italia S.p.A.*, No. 1:08-cr-00377 (D.D.C. Dec. 22, 2008); *U.S. v. CNH France S.A.*, No. 1:08-cr-00377 (D.D.C. Dec. 22, 2008). These cases are a good example of enforcement officials effectively broadening the reach of the statutes. *See* Section III *infra.*

42 The papers do not indicate how the fine was calculated. Fiat Deferred Prosecution Agreement at 2-3.

43 *SEC v. Fiat S.p.A.*, No. 1:08-cv-02211 (D.D.C. Filed Dec. 22, 2008); SEC Litig. Rel. 20835 (Dec. 22, 2008).

44 The facts are drawn from the SEC's complaint in *SEC v. Chevron Corp.*, No. 07-cv-10299 (S.D.N.Y. filed Nov. 14, 2007) and Press Release, U.S. Attorney's Office for the Southern District of New York, Chevron Corporation Agrees to Pay $30 Million in Oil-For-Food Settlement (Nov. 14, 2007) available at

(footnote continued)

Chevron resolved possible criminal charges by entering into a non-prosecution agreement with the U.S. Attorney's Office for the Southern District of New York ("USAO SDNY"), while simultaneously settling[45] with the SEC, the Office of Foreign Asset Control ("OFAC") and the New York County District Attorney's Office ("Manhattan DA"). In that settlement, the company agreed to make the following payments: (1) $20 million to the USAO SDNY (which was transferred to the Development Fund of Iraq); (2) $5 million to the Manhattan DA; and (3) a $2 million civil penalty to OFAC.[46] The USAO SDNY cited the cooperation of the company, which was considered in the overall settlement.[47]

To settle with the SEC, Chevron consented to the entry of a permanent injunction prohibiting future violations of the FCPA books and records and internal control provisions and agreed to pay disgorgement of $25 million, along with prejudgment interest and a penalty of $3 million. Those obligations were satisfied by the payments made to resolve the two criminal investigations.[48]

(footnote continued)
http://www.justice.gov/usao/nys/pressreleases/November07/chevronagreementpr.pdf ("USAO SDNY Chevron Press Release").

45 A number of FCPA cases involve simultaneous investigations by U.S. government agencies. An increasing number involve parallel investigations by U.S. enforcement officials, as well as those in other countries. *See, e.g.,* the actions involving Siemens A.G., BAE Systems PLC and Daimler A.G., discussed *infra* in Section IV.

46 USAO SDNY Chevron Press Release.

47 That cooperation included: (1) making available the results of its internal investigation; (2) committing to continued cooperation; (3) implementing enhanced compliance procedures; (4) terminating culpable employees; and (5) entering into the agreements with other regulators. *See* USAO SDNY Chevron Press Release.

48 *SEC v. Chevron Corp.*, No. 07-cv-10299 (S.D.N.Y. filed Nov. 14, 2007); SEC Litig. Rel. No. 20363 (Nov. 14, 2007). Examples of other oil side cases include: *U.S. v. Innospec Inc.,* Case No. 1:10-cr-00061 (D.D.C. Filed March 18, 2010); *SEC v. Innospec Inc.,* Case No. 1:10-cv-00448 (D.D.C. Filed March 18, 2010); *U.S. v. Wyatt*, Case No. 1:05-cr-00059 (S.D.N.Y. Feb. 7, 2007); Press Release, U.S. Attorney's Office for the Southern District of New York, U.S. Announces Oil-For-Food Settlement With El Paso Corporation (Feb. 7, 2007), available at: http://www.usdoj.gov/usao/nys/pressreleases/February07/elpasoagreementpr.pdf; *SEC v. El Paso Corporation*, Case No. 07-00899 (S.D.N.Y. Filed Feb. 7, 2007); SEC Litig. Rel. No. 19991 (Feb. 7, 2007); Press Release, U.S. Attorney's Office for the Southern District of New York, Texas Oilman Enters Mid-Trial Guilty Plea To Charges Of Conspiring To Make Illegal Payments To The Former Government Of Iraq (Oct. 1, 2007) available at http://www.justice.gov/usao/nys/pressreleases/October07/wyattpleapr.pdf.

2. The Oil Services-Freight Forwarding Cases.

A second significant group of industry-wide actions focused on the oil services and freight forwarding industry. Six companies were involved: Panalpina Worldwide Transport (Holdings) Ltd. ("Panalpina"), Pride International, Inc. ("Pride"), Royal Dutch Shell plc ("Shell") Noble Industries, Inc. ("Noble"), Tidewater Inc. (Tidewater"), and Transocean, Inc. ("Transocean") and/or their subsidiaries.[49] The SEC also brought an action against GlobalSantaFe Corporation, which had merged into Transocean in 2007.[50]

The cases in this group trace to an earlier investigation, a sweep and two corporate whistleblowers. In 2007, the DOJ and the SEC settled actions with Vetco Gray Controls, Inc. and others. That inquiry involved bribes paid through the services of an international freight forwarding and customs clearing company in Nigeria where Panalpina conducted business and where most of the activities in this group of cases occurred.[51] Following the Vetco cases, the DOJ conducted a sweep of the oil services companies.[52] In addition, while under investigation for possible FCPA charges, Pride furnished enforcement officials with a substantial amount of

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49 Press Release, U.S. Dept. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010) available at http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html ("Nov. 4, 2010 DOJ Press Release").

50 *See infra* note 49.

51 Press Release, Dept. of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), available at http://www.justice.gov/opa/pr/2007/February/07_crm_075.html. The freight forwarding company appears to be Panalpina, who had been under investigation since 2006, according to DOJ. Government's Motion for Downward Departure, filed in *U.S. v. Panalpina Inc.*, No. 10-cr-765 (S.D. Tex. Filed Dec. 10, 2010).

52 *See, e.g.*, Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), available at http://www.sec.gov/news/press/2010/2010-214.htm ("Nov. 4, 2010 SEC Press Release"); *see also* Witten, Section 8.01 (discussing sweeps).

information about Panalpina which, in turn, provided information on others as part of its cooperation efforts.[53]

Five of the six cases in this group involved, in part, bribes paid in Nigeria to customs officials relating to the development of Nigeria's first deep water oil drilling operation known as the Bonga Project.[54] The sole exception is the case involving Pride International, which is a Houston-based worldwide operator of offshore oil and gas drilling rigs. The charges in that action centered on claims that between 2003 and 2004 the company, through certain subsidiaries, branches, employees and agents, paid over $804,000 in bribes to, or for the benefit of, government officials in Venezuela, India and Mexico to extend drilling contracts, secure a favorable administrative decision relating to a customs dispute and avoid the payment of customs duties. Pride received at least $13 million in benefits. The bribes were improperly recorded in the books and records of subsidiaries, which were consolidated into those of the parent.[55]

The company settled with the DOJ, entering into a deferred prosecution agreement under which the company agreed to pay a fine of $32,625,000.[56] Its subsidiary, Pride Forasol, S.A.S., pleaded guilty to charges of conspiracy to violate, and violations of the anti-bribery provisions and aiding and abetting violations of the books and records provisions.[57] The DOJ considered

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53 Nov. 4, 2010 DOJ Press Release ("Pride provided information and substantially assisted in the investigation of Panalpina."). *See also U.S. v. Pride Int'l, Inc.,* No. 10-CR-766 (S.D. Tex. Nov. 4, 2010); Government's Motion for Downward Departure in *U.S. v. Panalpina, Inc*. No. 4:10-cr-00765 (S.D. Tex. Dec. 7, 2010) ("Motion in Panalpina case").

54 Many of the payments characterized as bribes in this group of cases appear to be facilitation payments related to customs issues. Nov. 4, 2010 DOJ Press Release.

55 *See* Nov. 4, 2010 DOJ Press Release.

56 Deferred Prosecution Agreement at 10 in *U.S. v. Pride International, Inc.*, No. 4:10-cr-00766 (S.D. Tex. filed Nov. 4, 2010), available at http://www.justice.gov/opa/documents/pride-intl-dpa.pdf. ("Pride Deferred Prosecution Agreement"). The information charged the company with conspiracy to and violating the anti-bribery and book and records provisions of the FCPA. *Id.*

57 *U.S. v. Pride Forasol,* S.A.S. No. 4:10-cr-00771 (S.D. Tex. Filed Nov. 4, 2010).

the extensive cooperation of the company in resolving the case. That is reflected in the fine of $32,625,000, which is about half of the lower end of the sentencing guideline calculation.[58]

Pride International also settled with the SEC. The terms were substantially similar to those of the other cases in this group, except for Shell. The company consented to the entry of a permanent injunction prohibiting violations of the anti-bribery and books and records and internal control provisions of the FCPA and agreed to pay $23,529,718 in disgorgement and prejudgment interest.[59]

Panalpina was at the center of each of the other cases in this group. The company is a global freight forwarding and logistics services firm. Enforcement officials claimed it had a culture of corruption. Over a five-year period beginning in 2002, the company was alleged to have paid bribes to foreign officials valued at $49 million, including $27 million on behalf of U.S. customers. Bribes were also paid in six other countries to circumvent local rules regarding the import of goods and materials.[60] Panalpina settled with the DOJ, executing a deferred prosecution agreement in which it agreed to pay a $70.56 million fine, which was reduced from the guideline range based on cooperation.[61] The company also agreed to report to enforcement officials on its compliance efforts. Panalpina, Inc., the U.S. subsidiary and a domestic concern, pleaded guilty to charges of conspiracy to violate the books and records provisions and aiding

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58 Pride Deferred Prosecution Agreement at 4-9.

59 *SEC v. Pride International, Inc.*, No. 4:10-cv-4385 (S.D. Tex. Nov. 4, 2010); SEC Litig. Rel. 21726 (Nov. 4, 2010).

60 *See* Nov. 4, 2010 DOJ Press Release.

61 The information contained one count of conspiracy and another based the bribery provisions. *U.S. v. Panalpina World Transport (Holdings) Ltd.*, No. 4:10-cr-0769 (S.D. Tex. Filed Nov. 5, 2010). After not cooperating for several months, the company provided substantial assistance to the Department and the SEC in addition to implementing significant remedial measures. *See* Deferred Prosecution Agreement (Nov. 4, 2010) in *U.S. v. Panalpina World Transport (Holdings) Ltd.*, No. 4:10-cr-0769 (S.D. Tex. Filed Nov. 5, 2010) at ¶¶ 5(g) & (h), available at http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf .

and abetting certain customers in violating those provisions of the FCPA.[62] The settlement reflected what the DOJ called the "extensive cooperation" of the company.[63] That cooperation included furnishing information regarding others to enforcement officials.[64]

The U.S. subsidiary of the company settled with the SEC. It consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery provisions and from aiding and abetting violations of the books and records provisions of the FCPA. It also agreed to pay $11,329,369 as disgorgement. This was an unusual case for the SEC since it did not involve a publicly traded company. It was based on claims that the company acted in conjunction with issuers.[65]

Shell Nigerian Exploration and Production Co. Ltd. ("SNEPCO"), a subsidiary of Royal Dutch Shell plc, whose ADRs were traded in New York, obtained what is perhaps the most favorable SEC settlement in this group. The action focused on the period March 2004 through

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62 *U.S. v. Panalpina Inc.*, No. 4:10-cr-0765, (S.D. Tex. Filed Nov. 4, 2010). The Plea Agreement, dated November 4, 2010, available at http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf, states at ¶ 19 that the base fine level is $45.5 million and the fine range is $72.8 million to $145.6 million.

63 *See* Lanny A. Breuer, Assistant Attorney General, Remarks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html. The sentencing guideline calculation yielded a fine range of $72.8 million to $145.6 million, with the inclusion of a 2-level deduction for cooperation. The company agreed with the DOJ to a fine of $70,560,000 which is slightly below the lowest end of the guideline range. The cooperation consisted of: (1) conducting comprehensive anti-bribery compliance investigations of operations of the company's subsidiaries in seven countries in addition to separate investigations related to the U.S. and Swiss operations; (2) reviewing certain transactions and operations in 36 countries; (3) voluntarily reporting the results of its inquiries in over 60 meetings and phone calls with DOJ and the SEC; (4) ensuring the availability of over 300 current and former employees including instituting a limited amnesty program to ensure cooperation; (5) developing evidence against third parties; and (6) taking extensive remedial steps including retaining outside compliance counsel to advise the company in undertaking further remedial measures and compliance enhancements. *See* Deferred Prosecution Agreement in *U.S. v. Panalpina Worldwide Transport, Ltd.*, No. 10-cr-769 (S.D. Tex. filed Nov. 4, 2010).

64 Motion in Panalpina case at 4.

65 *SEC v. Panalpina, Inc.*, No. 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010); SEC Litig. Rel. No. 21727 (Nov. 4, 2010).

Shortly before the DOJ and the SEC announced their settlements with Panalpina, the company agreed to plead guilty and pay a criminal fine for its role in a price fixing conspiracy. Panalpina World Transport was one of six companies in the international freight forwarding business to enter into the plea agreements. Press Release, U.S. Dept. of Justice, Six International Freight Forwarding Companies Agree to Plead Guilty to Criminal Price-Fixing Charges (Sept. 30, 2010) available at http://www.justice.gov/opa/pr/2010/September/10-at-1104.html.

November 2006 during the construction phase of the Bonga Project and the efforts by SNEPCO and others to explore and produce oil in the first deepwater project in Nigeria. The company paid over $2 million to subcontractors and agents for customs clearance services, knowing that some or all of the money paid through Panalpina was reimbursement for sums paid to Nigerian Customs Services to expedite the delivery of materials. Avoiding Nigerian duties, taxes and penalties resulted in a $7 million financial benefit to the company. The payments were not accurately reflected in the books and records of the company, which were consolidated with those of Royal Dutch Shell.[66]

SNEPCO entered into a deferred prosecution agreement with the DOJ and agreed to pay a criminal penalty of $30 million. The agreement acknowledged the cooperation of the company. Noticeably missing, however, was any discussion of those efforts as in the *Panalpina* papers. Although the conduct here did not appear to be as extensive as in *Panalpina*, the fine was similar in that it was slightly below the bottom of the sentencing guideline range.[67]

To settle with the SEC, Royal Dutch Shell plc and its U.S. subsidiary, Shell International Exploration and Production Inc., consented to the entry of a cease and desist order prohibiting future violations of Exchange Act §§ 30A, 13(b)(2)(A) and 13(b)(2)(B) in a Commission administrative proceeding. The Respondents also agreed to pay $18,149,459 in disgorgement and prejudgment interest. The SEC did not mention the cooperation of the company. Yet, this was the only case in this group to be resolved with an administrative cease-and-desist order,

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66 *See* Nov. 4, 2010 DOJ Press Release.

67 *See* Nov. 4, 2010 DOJ Press Release. The underlying criminal information alleged that SNEPCO conspired to violate the anti-bribery and books and records provisions of the FCPA and aided and abetted violations of the books and records provisions. *U.S. v. Shell Nigeria Exploration and Production Company Ltd,,* No. 10-cr-767 (S.D. Tex. Filed Nov. 4, 2010). The Deferred Prosecution Agreement entered into in this case sets forth a fine calculation which shows the base fine as $28.5 million. The fine range is $34.2 million to $68.4 million. Deferred Prosecution Agreement in *U.S. v. Shell Nigeria Exploration and Production Company Ltd,,* No. 10-cr-767 (S.D. Tex. Filed Nov. 4, 2010) at 8, available at http://www.justice.gov/criminal/fraud/fcpa/cases/snepco/11-04-10snepco-dpa.pdf.

rather than a Federal Court injunction. There was no discussion in the papers which indicated the basis for this settlement.[68]

Noble Corporation was the only company in this group to settle potential criminal liability with a non-prosecution agreement. According to the court papers, beginning in January 2003, and continuing through early 2007, whenever the temporary arrangement to have company drilling equipment in the country was about to expire, false paper work was submitted on Noble's behalf to Nigerian officials. This permitted Noble to maintain its equipment in the country and avoid paying duties as required by law. Payments were made to government officials in connection with these transactions. The overall benefit to the company was about $2,973,000.[69]

The non-prosecution agreement reflected the cooperation of the company, according to the DOJ: "The non-prosecution agreement recognizes Noble's early voluntary disclosure, thorough self-investigation of the underlying conduct, full cooperation with the department and extensive remedial measures . . ."[70] As part of that agreement, the company did, however, pay a $2.59 million criminal fine.[71]

In contrast, Noble settled with the Commission on the same terms as the other defendants in this inquiry, with the exception of Shell. The company consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery and books and records and internal control provisions and agreed to pay disgorgement and prejudgment interest of $5,576,998.[72]

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68 *In the Matter of Royal Dutch Shell plc, and Shell International Exploration and Production Inc.*, Adm. Proc. File No. 3-14107 (Nov. 4, 2010).

69 *See* Non-Prosecution Agreement between DOJ and Noble (Nov. 4, 2010), available at http://www.justice.gov/opa/documents/noble-npa.pdf .

70 *See* Nov. 4, 2010 DOJ Press Release; Non-Prosecution Agreement between DOJ and Noble (Nov. 4, 2010), available at http://www.justice.gov/opa/documents/noble-npa.pdf . The Non-Prosecution Agreement does not discuss a fine range for Noble.

71 *Id.*

72 *SEC v. Noble Corporation*, No. 4:10-cv-4336 (S.D. Tex. filed Nov. 4, 2010); SEC Litig. Rel. No. 21728 (Nov. 4, 2010).

Like Noble, Transocean self-reported and cooperated. Unlike Noble, however, the company resolved the charges by entering into a deferred prosecution agreement rather, than a non-prosecution agreement.

Transocean is a Cayman Islands corporation with principal executive offices in the islands and Houston, Texas. Through a merger in 2008, the company became a subsidiary of Transocean Ltd., a Swiss company. The charges against Transocean centered on approximately $90,000 in bribes paid by its freight forwarding agents in Nigeria to customs officials in that country to circumvent local customs regulations regarding the import of goods and materials including deep-water oil rigs.[73] In its settlement with the DOJ, Transocean agreed to pay a criminal file of $13,440,000 which is about 20% below the bottom of the guideline range.[74]

The company also settled with the SEC. The Commission's complaint alleged violations of the anti-bribery provisions, as well as the books and records provisions, despite the fact that the payments appeared to fall within the facilitation payment provisions and were recorded in a facilitation account in the records of the company. Nevertheless, the company consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery and books and records provisions and agreed to pay disgorgement and prejudgment interest of $7,265,080.[75]

Tidewater is the third company in this group of cases which self-reported. Like Transocean, the company resolved the criminal inquiry by entering into a deferred prosecution agreement.

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[73] The information filed against Transocean charged one count of conspiracy to violate the anti-bribery and books and records provisions of the FCPA, one count alleging a violation of the anti-bribery provisions and two counts of violating the books and records provisions. *See* Information in *U.S. v. Transocean, Inc.*, No. 4:10-cr-00768 (S.D. Tex. filed Nov. 4, 2010); *see also* Nov. 4, 2010 DOJ Press Release.

[74] The fine range was $16.8 million to $33.6 million. Deferred Prosecution Agreement at 4-11 in *U.S. v. Transocean Inc.*, (S.D. Tex. Nov. 4, 2010) available at http://www.justice.gov/opa/documents/transocean-info.pdf.

[75] *SEC v. Transocean Inc.*, No. 1:10-cv-01891 (D.D.C. filed Nov. 4, 2010). The complaint names both the Swiss parent and the subsidiary. *See also* SEC Litig. Rel. No. 21725 (Nov. 4, 2010).

Transocean is a Delaware corporation with headquarters in New Orleans, Louisiana. The company operates offshore service and supply vessels. Tidewater Marine International, Inc. ("TMII"), a wholly-owned subsidiary, was the primary international operating entity for Tidewater. The DOJ alleged that TMII caused $160,000 in bribes to be paid to tax inspectors in Azerbaijan to improperly secure favorable tax assessments. It also paid approximately $1.6 million in bribes through Panalpina to Nigerian customs officials to induce them to disregard customs regulations.[76] Tidewater and TMII entered into a Deferred Prosecution Agreement to resolve charges with the DOJ and paid a criminal fine of $7.35 million, which is about 30% below the bottom of the guideline range.[77]

In settling with the SEC, Tidewater consented to the entry of a permanent injunction prohibiting future violations of the bribery and books and records provisions. It also agreed to pay disgorgement and prejudgment interest of $8,104,362 and a penalty of $217,000. The SEC stated that the fine was not increased because of the criminal penalties.[78] This statement is puzzling since Tidewater was the only company in this group to settle with the DOJ and the SEC and pay a civil fine.[79]

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[76] *See* Information in *U.S. v. Tidewater Marine International, Inc.*, 4:10-cr-00770 (S.D. Tex. filed Nov. 4, 2010); *see also* Nov. 4, 2010 DOJ Press Release.

[77] The range was $10.5 million to $21 million. Deferred Prosecution Agreement at 4-11 in *U.S. v. Tidewater Marine International, Inc.*, No. 4:10-cr-00770 (S.D. Tex. filed Nov. 4, 2010) available at http://www.justice.gov/opa/documents/tidewater-info.pdf.

[78] *SEC v. Tidewater Inc.*, No. 2:10-CV-04180 (E.D. La. filed Nov. 4, 2010); *see also* SEC Litig. Rel. No. 21729 (Nov. 4, 2010).

[79] The SEC did impose a civil fine on GlobalSantaFe. *SEC v. GlobalSantaFe Corp.*, No. 1:10-cv-01890 (D.D.C. filed Nov. 4, 2010). There, the company resolved possible charges by consenting to the entry of a permanent injunction prohibiting future violations of the anti-bribery and books and records provisions of the FCPA. The company also agreed to pay disgorgement of $3,758,165 and a civil penalty of $2.1 million. SEC Litig. Rel. No. 21724 (Nov. 4, 2010). The DOJ did not enter into a settlement with this company, however, which, by the time of the case, had merged with a subsidiary of Transocean Ltd. This suggests that at least as to this group of cases the SEC deferred demanding a civil fine where a criminal penalty was imposed – except as to Tidewater.

Collectively this group of cases highlights the repeated statements of enforcement officials regarding their increasing ability to conduct such industry-wide investigations and sweeps. It also illustrates the presence of enforcement officials in a variety of industries involved in international transactions. This presence is critical to the enforcement efforts of the New Era.

C. Whistleblowers

In the future, the efforts of enforcement officials may be aided by two groups of whistleblowers. First, an emerging trend in "cooperation credit" is the new corporate whistleblower. Business organizations ensnared in FCPA inquires are developing evidence against others in an effort to mitigate their own liability. Companies such as Panalpina, Siemens A.G. and Johnson & Johnson, Inc. have furnished enforcement officials with information about others developed through their investigations in an effort to earn cooperation credit with the DOJ and the SEC and mitigate their own liability.[80] Since companies can be expected to have significant information regarding their industry, business partners and competitors, this new trend may significantly bolster the efforts of enforcement officials.[81] If this trend continues, it may well be an important source of information for enforcement officials.

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[80] Government's Motion for Downward Departure in *U.S. v. Panalpina, Inc*. No. 4:10-cr-00765 (S.D. Tex. Dec. 7, 2010) ("As a part of its overall cooperation efforts, Panalpina developed and timely provided detailed and significant information regarding third parties …"); Department's Sentencing Memorandum in *U.S. v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. filed Dec. 12, 2008) at 16 ("As part of its overall cooperation efforts, Siemens … has developed and timely provided detailed and significant information regarding third parties, including individuals and entities that were used as conduits to conceal corrupt payments made to foreign government officials."); Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 9, 2011) available at http://www.justice.gov/opa/pr/2011/April/11-crm-446.html ("The [deferred prosecution] agreement recognizes … the extraordinary cooperation provided by the company to the department, the SEC and multiple foreign enforcement authorities, including significant assistance in the industry-wide investigation.").

[81] DOJ has used this approach for years in other areas. For example, individuals have long sought to mitigate criminal liability by offering to cooperate and furnish information on others involved in violations of the law. Similarly, the DOJ's antitrust division has offered amnesty to the first company to report a conspiracy and identify its other members. Scott D. Hammond and Belinda A. Barnett, "Frequently Asked Questions (footnote continued)

Second, the new SEC whistleblower rules may also significantly aid the efforts of enforcement officials. Under those provisions, the whistleblower can obtain a bounty of 10% to 30% of certain amounts obtained by the SEC in a successful enforcement action developed from the tip. The whistleblower is not required under the Rules to report the information first to the company and is protected under Section 922 of the Dodd-Frank Act.[82] The Commission's rules provide a significant incentive for employees to "blow the whistle" on their employer in view of the potentially large bounties which may be available given the large sums which are frequently paid to resolve FCPA cases.[83] These tips, those from corporate whistleblowers and the increasing experience of enforcement officials in conducting industry-wide inquiries may well result in more sweeps and industry-wide investigations and create a virtual omnipresence in the marketplace for enforcement officials.[84] Corporate officials would be well advised to carefully monitor enforcement trends in their industry.

III. EXPANSIVE INTERPRETATIONS OF THE FCPA.

One of the defining characteristics of the new era of enforcement is an aggressive application of the statutes. In part, this emanates from the lack of litigated cases and court

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(footnote continued)
Regarding The Antitrust Division's Leniency Program And Model Leniency Letters (November 19, 2008)," U.S. Dept. of Justice (Nov. 19, 2008) available at http://www.justice.gov/atr/public/criminal/239583.htm.

82 Section 21F, Securities Exchange Act, 15 U.S.C. §78u-6.

83 Securities Whistleblower Incentives and Protections, 17 C.F.R. §§ 240.21F–1 to 240.21F–17.

84 The SEC has also adopted measures intended to foster cooperation by individuals, as well as companies. These include the use of cooperation agreements as well as non-prosecution and deferred prosecution agreements modeled on those which have long been used by the DOJ. Press Release, Securities and Exchange Commission, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010) available at http://www.sec.gov/news/press/2010/2010-6.htm. The fact that the SEC's first deferred prosecution agreement was entered into in an FCPA case may suggest that the Commission is actively fostering cooperation in this area through the use of these new tools. Press Release, Securities and Exchange Commission, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011) available at http://www.sec.gov/news/press/2011/2011-112.htm. The SEC is also rewarding individuals for cooperation. For example, it recently declined to prosecute an individual involved in a fraud at his company based on the cooperation of the person as well as the fact that he was no longer in the securities business. SEC Litig. Rel. No. 22298 (Mar. 19, 2012).

decisions interpreting key provisions of the Act which can turn prosecutorial charging discretion into the interpretation of the statute.[85] In part, undefined terms in the Act which offer little meaningful guidance for those involved in international business transactions can facilitate an expansive approach to enforcement.

Aggressive interpretation begins with expanding the reach of the Act. Jurisdiction under the FCPA is broad, but it has limits. In the first instance, it is keyed to the mails or any other means or instrumentality of interstate commerce "in furtherance of" any illegal offer or payment. Under these provisions, virtually any use of the mail, phone, fax, e-mail, text message or any other method of interstate transportation is sufficient, according to enforcement officials.[86] This remains the only predicate for prosecuting non-U.S. issuers under the bribery provisions.

The reach of the statutes was augmented in 1998 when amendments were added to include jurisdictional provisions based on the nationality principle, conforming the FCPA to the OECD convention. This extended jurisdiction to cover the unlawful acts of any U.S. person or entity outside the U.S.[87] The amendments also extended jurisdiction to include non-U.S. persons who engage in prohibited conduct while in the U.S.[88]

The settlement with JGC Corporation ("JGC"), a Japanese engineering and construction firm, is instructive on the DOJ's view of the jurisdictional provisions. The company was one of the joint partners in the TSKJ consortium, a four-company joint venture involving the now infamous Bonnie Island bribery scheme in Nigeria.[89] JGC is based in Japan. It is not a domestic

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85 Michael Levy, Prosecutorial Common Law, The FCPA Professor Blog (Mar. 16, 2011) available at http://fcpaprofessor.blogspot.com/2011/03/prosecutorial-common-law.html.

86 *See e.g.*, 15 U.S.C. § 78dd-2(h)(5).

87 15 U.S.C. § 77dd-1(g); 15 U.S.C. § 78dd-2(i).

88 15 U.S.C. § 78dd-3(a).

89 *See* Section IV *infra*. . TSKJ consisted of Technip S.A., Snamprogetti Netherlands B.V., Kellogg, Brown & Root, Inc., and JGC. *See* Information in *U.S. v. JGC Corporation*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011).

concern and its shares are not registered for trading in the U.S. Nevertheless, the DOJ asserted jurisdiction over the company based on two theories. One was conspiracy. The other was aiding and abetting. "Non-U.S. person" jurisdiction under Section 78dd-3 was cited. The criminal information filed in conjunction with the deferred prosecution agreement alleged that JGC either conspired with, or aided and abetted, "domestic concerns" and "issuers" to pay bribes in violation of the FCPA.[90] The government also contended that it had jurisdiction over JGC under a territorial jurisdiction theory based on acts done "while in the U.S. making use of the mail or means of interstate commerce." This assertion was based on claims that JGC aided a "domestic concern" in causing U.S. dollar payments to be wire transferred from a bank in Amsterdam to a financial institution in Switzerland via a correspondent bank in New York.[91] A similar approach has been used in other cases.[92]

In *U.S. v. Patel*, however, the DOJ suffered a setback in utilizing this approach. *Patel* is one of the now collapsed "Africa Sting" cases arising from the largest FBI sting operation in an FCPA case.[93] There, the U.S. asserted territorial jurisdiction over a British subject who sent a DHL package containing a contract from the United Kingdom to the United States. Judge Leon, in an oral opinion on a motion under Fed. R. Crim. P. 29, held that Mr. Patel was not in the territory of the United States when he made use of the mails or means of interstate commerce

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90 *See also supra* the discussion of the SEC's assertion of jurisdiction on *Panalpina* in Section II(B)(2).

91 *See* Information in *U.S. v. JGC Corporation*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011).

92 In the *ABB Vetco Gray, Inc*. cases, the government alleged that the U.K. subsidiary of ABB, Ltd. (a Swiss holding company) paid bribes to Nigerian government officials to obtain contracts for oil exploration projects in the country. There are no actions of any employees of the U.K. subsidiary cited in the charging papers. Jurisdiction was apparently based on the use of interstate commerce to obtain an accounting of, and to reimburse illicit payments made by an employee of ABB's U.S. subsidiary at the request of the U.K. subsidiary. *U.S. v. ABB Vetco Gray, Inc.*, No. 04-cr-279 (S.D. Tex. Jun. 24, 2004); s*ee also U.S. v. Syncor Taiwan, Inc.*, No 02-cr-1244 (C.D. Cal. Dec. 4, 2002) (charging foreign subsidiary of U.S. company with FCPA violations based on e-mail messages from California to Taipei relation to bribes of Taiwanese government officials).

93 *U.S. v. Patel*, No. 1:09-cr-335 (D.D.C.) discussed *infra* in Section V..

and thus did not fall under the statutes making it unlawful "while in the U.S. to make use of the mail or means of interstate commerce."[94]

In a number of cases, a parent company has become entangled in FCPA charges through the acts of a subsidiary. The *Armor Holdings* case employed this approach. There, Armor Products International, Ltd. ("API"), a U.K. subsidiary of Armor Holdings, Inc., which is an issuer and a subsidiary of BAE Systems, Inc., made payments to a third-party intermediary, which in turn made payments to a U.N. official who directed business to the U.K. subsidiary. A second subsidiary, Armor Holdings Products, LLC ("AHP"), disguised the payments in its books and records which were made to intermediaries who brokered sales of goods to foreign governments. The SEC charged Armor Holdings with violations of the anti-bribery provisions, as well as the books and records sections, on the theory that the company controlled its subsidiaries. The complaint alleged that the subsidiaries were agents of the parent, but offered little supporting detail.[95]

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[94] *See* Minute Entry for Proceedings on Jun. 6, 2011 in *U.S. v. Patel*, No. 1:09-cr-335 (D.D.C.); *see also* Michael Koehler, Significant dd-3 Development in Africa Sting Case, The FCPA Professor Blog (Jun. 9, 2011) available at http://fcpaprofessor.blogspot.com/2011/06/significant-dd-3-development-in-africa.html.

[95] *SEC v. Armor Holdings, Inc.*, No. 1:11-cv-01271 (D.D .C. Filed July 13, 2011); SEC Litig. Rel. 22037 (Jul. 13, 2011). Armor Holdings Inc. also entered into a non-prosecution agreement with the Department of Justice and agreed to pay a $10.29 million penalty to resolve a criminal inquiry regarding this matter. *See* Press Release, U.S. Dept. of Justice, Armor Holdings Agrees to Pay $10.2 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Jul. 13, 2011) available at http://www.justice.gov/opa/pr/2011/July/11-crm-911.html.

Armor Holdings also illustrates the difficulties often encountered in mergers. BAE acquired the firm in 2007, after the conduct involved. BAE self-reported and eventually resolved the case at the subsidiary level after the merger closed with a non-prosecution agreement and a civil fine. It appears that the conduct may have been discovered prior to the acquisition, but that the settlement could not be completed until after the deal closed. In some deals, the conduct may not be discovered until later. In the actions involving Watts Water Technologies, Inc., the company acquired a business in China in 2006 and installed FCPA procedures, but did not implement training until 2009. During that period, payments were made to the employees of a state-owned enterprise which were discovered by the parent company during training. The matter was resolved with the payment of $2,755,815 in disgorgement, prejudgment interest and a civil penalty of $200,000, along with the entry of a cease and desist order. *In the Matter of Watts Water Technologies, Inc.*, Adm. Proc. File No. 3-14585 (Oct. 13, 2011). *See also* Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 9, 2011) available at http://www.justice.gov/opa/pr/2011/April/11-crm-446.html (acquired subsidiary continued making illegal payments after the acquisition and the firm failed to fully implement FCPA compliance procedures).

Enforcement officials also appear to be expanding the definition of a bribe. Facilitating payments or so-called "grease payments" are excluded from the scope of the bribery provisions.[96] The Act exempts "any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." The statute goes on to define routine government action in terms of "obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country … processing governmental papers … providing police protection, mail pickup and delivery, or scheduling inspections … providing phone service, power and water … [and] actions of a similar nature."[97]

Despite this directive from Congress, the exclusion seems to be vanishing. Many of the payments in the *Panalpina* case were to customs officials for facilitation.[98] In the recent settled action against liquor giant Diago plc, a company with ADRs traded in the United States, the SEC seems to have taken a similar approach. The administrative proceeding is based on alleged violations of Exchange Act §§ 13(b)(2)(A)&(B) stemming from small payments to government-owned liquor store operators for product placement, label registration, lobbying fees and promotion. The bulk of the payments did not seem to be bribes. Another payment was to a Korean Customs Service official as a reward for assistance in negotiating a tax refund. Rewards are not bribes, but gratuities under domestic U.S. law. Gratuities are not violations of the FCPA,

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96 The OECD opposes facilitation payments and has criticized the U.S. position. Organization for Economic Cooperation and Development, "United States: Phase 3: Report On The Application Of The Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions And The 2009 Revised Recommendation On Combating Bribery In International Business Transactions" (Oct. 15, 2010), available at http://www.oecd.org/dataoecd/10/49/46213841.pdf. *See also* Jon Jordan, The OECD's Call For an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act, U. Pa. J. Bus. L. (2011). Most countries do not permit such payments. Even in the U.S. most companies do not permit them. Elizabeth Spahn, Repeal the Facilitation Payment Loophole, The FCPA Blog (Apr. 26, 2012) available at http://www.fcpablog.com/blog/2012/4/26/repeal-the-facilitation-payment-loophole.html.

97 *See e.g.*, 15 U.S.C. § 78dd-1(f).

98 *See supra* Section II(B(2).

which requires that the defendant make the payment "corruptly" and to influence official decisions.[99] The company settled charges that it improperly recorded the payments in its books and records, consenting to a cease and desist order based on the those provisions.[100]

In contrast, in *Noble*, the payments were actually booked in a facilitating payments account.[101] There, government officials scrutinized the nature of the payments involved, concluding that they were in fact bribes, not facilitation payments. Accordingly, the SEC charged the company with violations of the books and records provisions.

A related issue arises with respect to payments made under compulsion. The statute limits the concept of bribery to payments made corruptly and to obtain or retain business.[102] In view of those requirements, payments made under distress or by compulsion should not be considered bribes. The SEC's case in *NATCO Group* seems apposite to this point. The company is a Houston-based issuer. While doing business in Kazakhstan and using local workers and expatriates, local immigration authorities claimed the expatriates did not have the proper documentation and threatened to impose fines and to either jail or deport the workers if the company did not pay the fines. Management paid the fines based on the belief that the workers would otherwise be jailed, according to the SEC's Order for Proceedings. The local subsidiary

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99 Corruptly is generally interpreted to mean with an evil motive, a point reflected in the legislative history. Witten at Section 2.08.

100 *In the Matter of Diago plc,* Adm. Proc. File No. 3-14410 (Jul. 27, 2011). This case is another illustration of the difficulties that can be encountered with acquisitions. There, the SEC alleged in its Order that "Diago's history of rapid multiinternational mergers and acquisitions contributed to defects in its FCPA compliance programs." *See also U.S. v. Bizjet International Sales and Support, Inc.,* Case No. 12-cr-61 (N.D. Okla. Filed March 14, 2012) (subsidiary of Lufthansa Technik AG settled FCPA inquiry with the subsidiary entering into a deferred prosecution agreement and the parent entering into a non-prosecution agreement. The agreements include terms requiring that appropriate pre-merger FCPA compliance be conducted, that appropriate training be conducted and that a report be furnished to the DOJ of any corrupt payments or inadequate internal controls in newly acquired or merged businesses be disclosed).

101 *See supra* at Section II B2. *SEC v. Noble Corporation*, No. 4:10-cv-4336 (S.D. Tex. filed Nov. 4, 2010); SEC Litig. Rel. No. 21728 (Nov. 4, 2010); *See also SEC v. Pride International, Inc.*, No. 4:10-cv-4335 (S.D. Tex. filed Nov. 4, 2010) (payments booked as related to customs services).

102 15 U.S.C. § 78dd-2(h)(3)(defining "knowingly").

also made payments to facilitate the proper visas. To secure the payments, a consultant provided the local subsidiary with bogus invoices totaling $80,000 for the funds. The invoices were necessary under local law to withdraw the money from the bank. The company reimbursed the invoices, although it knew their purpose. Despite the fact that the payments did not appear to be bribes, NATCO settled the case based on FCPA books and records charges.[103]

Finally, the expansive definition of who is a foreign official, coupled with the vague test for determining who falls within the definition, leaves any person doing business abroad at risk. The term is a key limitation on the reach of the bribery provisions. It is defined in the Act to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality."[104] The government has taken the position that the term "agency or instrumentality" includes state-owned enterprises and their employees.[105]

In view of the increasing trend in many countries to utilize state-owned entities, the question of who is a foreign official is critical. This question has been litigated in four recent cases.[106] Each case involved allegations of payments to an employee of a state-owned enterprise. Critical to each case was the question of what is an "instrumentality" under the FCPA. In each case, the defendant or defendants moved to dismiss the Indictment on the grounds that the state-owned enterprise was not an "instrumentality" and its employees were not "foreign officials."

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103 *In the Matter of NATCO Group, Inc.*, Adm. Proc. File No. 3-13742 (Jan. 11, 2010); *SEC v. NATCO Group, Inc.*, No. 4:10-cv-00098 (S.D. Tex. Jan. 11, 2010).

104 15 U.S.C. § 78dd-2(h)(2).

105 Instrumentality includes "state-owned and state-controlled enterprises." Nov. 2010 Senate Hearing (Response to written questions, Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 29).

106 *U.S. v. Carson*, No. 08-09-cr-0007 (C.D. Cal.), *U.S. v. Esquenazi*, No. 09-cr-21010 (S.D. Fla.), notice of appeal filed Nov. 10, 2011; *U.S. v. Lindsey Mfg, Co.*, No. 2:10-cr-01031 (C.D. Cal.) and *U.S. v. O'Shea*, Case No. 09-629 (S.D. Tex.).

The defendants' arguments did not succeed in any of the cases. In *Carson* and *Esquenazi*, for example, the Court denied the motions to dismiss, but submitted the issue to the jury. In the words of Judge Selna in *Carson*: "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact." Both Courts held that there were several factors (none of which were dispositive) that must be considered by the jury when determining if the state-owned enterprise was an "instrumentality."[107] This reflects the approach used by the DOJ which is based on all the particular facts and circumstances of the case.[108]

The difficulty with the facts and circumstances approach is two fold. First, many state-owned enterprises appear to be no different than any other business organization and their use is increasing. Second, the fact intensive analysis used by the courts can only be made after careful study of all the pertinent facts and circumstances. Stated differently, the test can only effectively be applied with hindsight, and then with difficulty.

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[107] *See* Minute Entry for May 18, 2011in *U.S. v. Carson*, No. 09-cr-777 (C.D. Cal.); Order Denying Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and For Vagueness in *U.S. v. Esquenazi*, No. 09-cr-21010 (S.D. Fla. Nov. 19, 2010).

In *Lindsey Mfg.*, Judge A. Howard Matz also rejected the arguments raised by the defendants, noting that "[u]nder the Mexican Constitution, the supply of electricity is solely a government function," and that Comisión Federal de Electricidad ("CFE"), was an electric utility company owned by the government of Mexico that was responsible for supplying electricity to all of Mexico other than Mexico City. The Court ruled that, under its ordinary meaning, CFE was an "instrumentality" of Mexico and therefore, its employees were "foreign officials." Minute Entry for April 20, 2011 in *U.S. v. Lindsey Mfg, Co.*, No. 2:10-cr-01031 (C.D. Cal.). The defendants in *Lindsey Mfg.* were convicted in May 2011. Press Release, U.S. Dept. of Justice, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011) available at http://www.justice.gov/opa/pr/2011/May/11-crm-596.html. That verdict was set aside on post trial motions based on prosecutorial misconduct. *See* Order Granting Motion to Dismiss in *U.S. v. Aguilar*, 2:10-cr-01031 (C.D. Cal. Dec. 1, 2011). Although the government initially appealed that ruling, it subsequently dismissed the appeal. Government's Motion for Voluntary Dismissal of Appeal in *U.S. v. Aguilar*, No. 11-50507 (9th Cir. May 25, 2012). In *O'Shea* (which also concerned payments to employees of the CFE), the motion to dismiss based on the "foreign official" issue was also rejected. *See* Management Order in *U.S. v. O'Shea*, No. 09-629 (S.D. Tex. Jan 3, 2012). Subsequently the Court dismissed all of the FCPA counts. *See* Order on Acquittal in *U.S. v. O'Shea*, No. 09-629 (S.D. Tex. Jan 17, 2012). Later, the DOJ dismissed the remaining counts. *See* Motion to Dismiss the Remaining Counts of the Indictment in *U.S. v. O'Shea*, No. 09-629 (S.D. Tex. Feb. 9, 2012).

[108] Nov. 2010 Senate Hearing (Response to written questions, Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 28).

For business organizations encountering these organizations on a daily basis, the use of a hindsight driven test can be problematic. While it is obvious that bribery is not an appropriate way to conduct business, the question here can impact every-day decisions regarding routine matters such as plant tours, promotions and entertainment. Paying for these items for potential customers is routine in many industries. If, however, the customer turns out with hindsight to be a "foreign official" because he or she is employed at an "instrumentality," the routine payment becomes a bribe that could end with a prison term.[109] Viewed in this context, the vague definitions in the Act combined with the difficulty of determining who is a foreign official and aggressive enforcement can create a trap for those who may well believe they are engaged in nothing more than routine business activity. While it can be argued that the intent provisions of the FCPA mitigate against such a result, no company or executive should be required to face the prospect of even civil enforcement charges, let alone a criminal indictment under such circumstances. Nevertheless, the expansive approach taken by enforcement officials on this question, along with those on other key points of the statutes, coupled with the growing use of state-owned enterprises means that many international companies will be at risk in their routine business dealings.

IV. THE SPIRALING COST OF RESOLVING CORPORATE INQUIRIES.

One of the characteristics of the new era is the spiraling costs incurred by business organizations to resolve FCPA charges. What was once a record-setting sum paid to resolve an FCPA investigation today is no longer large enough to rank in the top ten. In 2007, for example,

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[109] *See, e.g.*, Press Release, U.S. Dept. of Justice, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), available at http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html (settled action with UTSarcom, Inc. where company arranged and paid for employees of Chinese state-owned telecommunications companies to travel to popular tourist destinations in the U.S. supposedly as part of a trip for training). *See also* 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2). *Cf.*, FCPA Review Procedure Release No. 08-03 (July 11, 2008) (approving limited payments).

Baker Hughes, Inc. and its subsidiary, Baker Hughes Services International Inc., paid $44 million to resolve FCPA investigations with several agencies. That sum set a new record for payments to settle with enforcement officials.[110] Four years later, not only has the Baker Hughes record been surpassed, the amount paid by the company is not even large enough to rank in the top ten.

Presently, the ten largest amounts paid by corporations to resolve FCPA charges are:

1. Siemens A.G.: $800 million in the U.S. and $1.6 billion overall in 2008;
2. Kellogg Brown & Root LLC and Halliburton Company: $579 million in 2009;
3. BAE System PLC: $400 million in 2010;
4. Snamprogetti Netherlands B.V.: $365 million in 2010;
5. Technip S.A.: $338 million in 2010;
6. JGC Corporation: $218 million in 2011;
7. Daimler AG: $185 million in 2010;
8. Alcatel-Lucent S.A.: $137 million in 2010;
9. Magyar Telekom / Deutsche Telekom: $95 million in 2011;
10. Panalpina Worldwide Transport (Holdings) Ltd.: $81.8 million in 2010.[111]

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110 The subsidiary paid an $11 million criminal fine, and baker Hughes, Inc. settled with the SEC and agreed to pay $10 million in civil penalties and more than $23 million in disgorgement. Press Release, U.S. Dept. of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as part of Largest Combined Sanction Ever Imposed in FCPA Case (April 26, 2007), available at http://www.justice.gov/opa/pr/2007/April/07_crm_296.html ("The $44 million in combined fines and penalties is the largest monetary sanction ever imposed in an FCPA case."); SEC Litig. Rel. 20094 (Apr. 26, 2007) *SEC v. Baker Hughes Inc.*, No. 07-cv-1408 (S.D. Tex. Apr. 26, 2007). *See also* USAO SDNY Chevron Press Release (announcing a $30 million settlement with multiple agencies), SEC Litig. Rel. 20363 (Nov. 14, 2007); *SEC v. Chevron Corp.*, No. 07-cv-10299 (S.D.N.Y. filed Nov. 14, 2007). *See also* Press Release, U.S. Dept. of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 million in Criminal Fines (Feb. 6, 2007), available at http://www.justice.gov/opa/pr/2007/February/07_crm_075.html (the press release notes that the sum paid was the largest criminal fine at that time paid in an FCPA case).

111 This list is compiled and is periodically updated by the FCPA Blog, which is an excellent source of current information on FCPA cases. *See* Richard J. Cassin, With Magyar In New Top Ten, It's 90% Non-U.S., The FCPA Blog (Dec. 29, 2011), available at http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html.

The charges in these cases tend to reflect the pattern of wrongful conduct and the jurisdictional reach of the statutes.[112] The outcome of possible criminal charges is, in most instances, impacted by cooperation which can result in a deferred prosecution agreement or, in rare instances, a non-prosecution agreement. In some instances, there are guilty pleas by subsidiaries.[113] The criminal fine is a function of the sentencing guidelines which, as appropriate, considers the impact of cooperation.[114] Settlements with the SEC tend to be formulaic, with little impact for cooperation.

Often overlooked in the glare of headlines about sums paid to prosecuting authorities is the cost of earning cooperation credit. That credit is a function of a series of factors including self-reporting, furnishing the DOJ and the SEC all the facts as gathered in a comprehensive

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112 A key point in settlement negotiations for some companies is the question of debarment. A company which is convicted or pleads guilty to an FCPA violation may be precluded from contracting with the federal government. This is an issue that is resolved by the particular agency rather than the DOJ since it has not traditionally been viewed as a law enforcement issue. Some have advocated mandatory debarment. The DOJ opposes such an approach as then Deputy AG, Criminal Division, DOJ Greg Andres made clear in his response to written questions to the Senate Subcommittee on Crime and Drugs: "The purpose of debarment proceedings historically has been to protect the public fisc, not to deter or punish wrongdoing. Linking mandatory debarment to a criminal resolution would fundamentally alter the incentives of a contractor-company to reach an FCPA resolution because such a resolution would likely lead to the cessation of revenues for a government contractor – a virtual death knell for the contractor company. Similarly, mandatory debarment would impinge negatively on prosecutorial discretion. If ever criminal FCPA resolution were to carry with it mandatory debarment consequences, then prosecutors would lose the necessary flexibility to tailor an appropriate resolution given the facts and circumstances of each individual case." Nov. 2010 Senate Hearing (Prepared statement of Deputy AG, Criminal Division, Greg Anders at 65). *But see*, Drury D. Stevenson and Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775 (2011) ("If ridding foreign markets of corruption truly is a top priority of the United States, it seems both unfair and imprudent for federal agencies to continue awarding lucrative, multi-billion dollar contracts it firms recently prosecuted for fraudulently obtaining them overseas.")

113 Enforcement officials also decline prosecutions in certain instances. The DOJ does not publish statistics on the number of declinations. June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 67) ("We don't [publish statists on this] in large part, because we don't want to penalize a company or an individual that has been investigated and not prosecuted, that there may be some prejudice from that."). While no company wants it published that the DOJ or SEC declined prosecution, enforcement officials could provide important guidance to the marketplace by releasing statistics on the number of cases where this occurs and in public statements giving examples of the types of situations in which it happens without identifying the specific company. *See* note 240 *infra* discussing a DOJ announcement of a declination.

114 The DOJ and the SEC have guidelines concerning cooperation and its potential impact on a charging decision. *See* U.S. Attorney's Manual / DOJ Manual Title 9, Chapter 9-28.700; *SEC Seaboard Release*, Press Release, Securities and Exchange Commission, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010) available at http://www.sec.gov/news/press/2010/2010-6.htm.

internal investigation and full remediation. The investigative costs for outside counsel and a team of professionals frequently is a huge expense which is amplified by the drain on company resources. Siemens for example, paid approximately $850 million in legal and accounting fees during the course of a two year investigation. Daimler spent about $500 million in legal and accounting fees during a five-year inquiry.[115] Remediation can add millions more to the sums paid. Siemens spent an additional $150 million in connection with its remedial efforts.[116] When those amounts are added to the sums paid to resolve the enforcement investigations, it is not surprising that Siemens, Daimler, ABB and other foreign multinationals have delisted their securities from trading in the U.S. in the wake of FCPA investigations.

The top ten cases are based on a range of conduct. Careful examination of the actions provides a good insight into current enforcement trends and issues. It also highlights in many instances the lack of effective FCPA compliance procedures or, in one case, the failure to properly extend them when acquiring a company. The cases can be divided into three groups based on the underlying conduct: (1) pervasive patterns of violations; (2) a years-long conspiracy; and (3) more limited wrongful conduct.

A. **Pervasive Conduct**.

The cases involving Siemens AG, Daimler AG, Alcatel-Lucent SA, Panalpina (discussed earlier) and BAE Systems Plc are based on patterns of conduct which enforcement officials variously described as pervasive, using bribery as a way of conducting business or in similar

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115 June 2011 House Hearing (Prepared Testimony of George J. Terwilliger at 39 n. 1). Similarly, Avon Products, Inc., which is under investigation for possible FCPA violations spent $59 million in 2009 and an additional $96 million in 2010. *Id.* By 2012 the costs had increased to over $240 million. Chris Dolmetsch, Avon Products Shareholder Seeks Records Over Bribery Probe, Bloomberg (May 14, 2012). The investigations are continuing.

116 *See infra* at Section IV(A)(1).

terms.[117] With the exception of BAE, each company cooperated and received credit. The description of those efforts by the DOJ varied significantly. At the parent company level, only Siemens pleaded guilty in this group of cases. The others entered in deferred prosecution agreements at that level. Siemens, Daimler and Panalpina subsidiaries did, however, plead guilty to FCPA charges. Each cooperating company also obtained credit in the calculation of the criminal fine. In contrast, there is no evidence to suggest that cooperation ameliorated the charges or penalties in the settlements with the SEC.

1. Siemens

Siemens resolved possible criminal charges by being the first company to plead guilty to one count of failing to maintain internal controls and one count of books and records violations. The company also agreed to pay a record criminal fine of $445 million and to retain an independent monitor for four years. Three of its subsidiaries pleaded guilty to conspiracy charges.[118] While the fine was significant, it represented about half of the lower end of the sentencing guideline calculation.[119]

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117 For example, Siemens' conduct reflected "a willful and deliberate practice of engaging in corrupt practices to obtain and maintain their business," that is, using bribery as a "business strategy," according to the government. Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations, DOJ (Dec. 15, 2008), available at http://www.justice.gov/opa/pr/2008/December/08-opa-1112.html. *See also infra* note 126.

118 *See, e.g.*, Press Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008) available at www.justice.gov/opa/pr/2008/December/08-cm-1105.html ("DOJ Siemens Press Release"). *U.S. v. Siemens Aktiengesellschaft*, No. 08-cr-367 (D.D.C. Filed Dec. 15, 2008); *U.S. v. Siemens S.A. (Argentina)* No. 08-cr-368 (D.D.C. Filed. Dec. 15, 2008); *U.S. v. Siemens Bangladesh Ltd.*, No.08-cr-369 (D.D.C. Filed. Dec. 12, 2008); *U.S. v. Siemens S.A. (Venezuela)*, No.08-cr-370 (D.D.C. Filed. Dec. 15, 2008).

119 The plea agreement calculated the fine range to be $1.35 to $2.70 billion. This took into account the full cooperation of the company. The parties agreed that the fine should be in the amount of $448.5 million. This was based on the sentencing guidelines, defendant's assistance in the investigation of other individuals and organizations, its payments of fines or disgorgement in other related proceedings in the U.S. and Germany, substantial compliance and remediation efforts, its extraordinary rehabilitation and the factors in 18 U.S.C. § 3553(a). Plea Agreement in *U.S. v. Siemens Aktiengesellschaft*, No. 08-cr-367 (D.D.C. Filed Dec. 15, 2008) available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensakt-plea-agree.pdf.

To settle with the SEC, the company consented to entry of a permanent injunction prohibiting future violations of the bribery and books and records provisions. The company also agreed to pay about $350 million in disgorgement, along with prejudgment interest. The SEC complaint alleged that bribes were paid using U.S. jurisdictional means including subsidiaries, the banking system and loans from the World Bank and the U.S. Export Import Bank.[120]

The underlying conduct reflected in the charges traced to at least the mid-1990s and continued through 2007. It was facilitated by a decentralized structure and fostered by significant pressure from the parent company to meet sales quotas and a failure to clearly state that the company would rather lose business than pay bribes, according to the court papers. Compliance programs were limited and ineffective while warnings over the years of improper conduct were ignored.[121]

From the time Siemens AG was listed on the New York Stock Exchange through 2007, about $1.36 billion in payments were made through various mechanisms. Of that amount, about $805.5 million were corrupt payments to foreign officials. Another $554.5 million was paid for unknown purposes, including $341 million that went directly to business consultants.[122] The bribes were paid by subsidiaries in the Middle East, Latin America and Bangladesh.[123]

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120 *SEC v. Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. Filed Dec. 15, 2008).

121 *See, e.g.*, DOJ Siemens Press Release.

122 *See, e.g.*, DOJ Siemens Press Release.

123 *Middle East:* Four subsidiaries were involved in the U.N. Oil-For-Food Program. They obtained 42 contracts from the Iraq Ministries of Electricity and Oil. The agreements had a combined value of $80 million and yielded $38 million in profits. Over $1.7 million in kickbacks were paid that were improperly recorded. *Id.*; *see also* Statement of Offense agreed to by DOJ and the company filed in *U.S. v. Siemens Aktiengesellschaft*, No. 08-cr-367 (D.D.C.).

Latin America: Over $31 million in corrupt payments were made to various Argentine officials by Siemens S.A. (Argentina) over a nine year period beginning in 1998. The company obtained favorable business treatment in connection with a $1 billion national identity card project. *See also infra* at Section V discussing charges brought by the DOJ and the SEC against certain individuals involved in these transactions. In addition, beginning in October 2001and continuing until about May 2007, the company made over $18 million in corrupt payments to various Venezuelan officials to obtain favorable treatment in connection with two major metropolitan mass transit projects. All of the payments were improperly booked. *See* DOJ Siemens Press Release.

(footnote continued)

The DOJ termed the cooperation of Siemens "extraordinary," although the company did not self-report. The settlement papers have a more extensive discussion of that cooperation than in any of the other top ten cases. According to the DOJ, investigative counsel conducted an extensive and completely independent inquiry without any limitation. The investigative work took place in 34 countries, involved over 1,750 interviews, 800 informational meetings and the collection of over 100 million documents. Approximately 24,000 documents totaling over 100,000 pages were produced to the DOJ.[124]

Siemens established a Project Office at its headquarters staffed by 16 full time employees. The company also implemented, in consultation with DOJ, amnesty and leniency programs to ensure the cooperation of employees. As part of the process, Siemens took extensive steps to preserve and collect data worldwide despite the difficulty of this task, and developed information on others. The company also undertook extensive remediation efforts which were a critical part of the overall effort, revamping its entire top leadership and reorganizing its operations while greatly expanding its compliance organization.[125]

2. Daimler

Enforcement officials claim that Daimler had a culture similar to that of Siemens, which facilitated the wrongful conduct.[126] The wrongful conduct was also furthered by deficient anti-

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(footnote continued)
Bangladesh: Siemens Bangladesh Ltd. admitted that from May 2001 to August 2006 it made corrupt payments of over $5.3 million to obtain favorable treatment during the bidding process on a mobile telephone project. *Id.*

124 *See* Department's Sentencing Memorandum in *U.S. v. Siemens Aktiengesellschaft*, No. 08-cr-367 (D.D.C. Filed Dec. 12, 2008) available at http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensvenez-sent.pdf ("Siemens Sentencing Memorandum").

125 Siemens Sentencing Memorandum.

126 One enforcement official described the company as one which "saw foreign bribery as a way of doing business." Press Release, U.S. Dept. of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010) available at http://www.justice.gov/opa/pr/2010/April/10-crm-360.html ("Daimler Press Release").

bribery procedures.[127] In contrast to Siemens however, the parent company, Daimler A.G., whose shares were traded in New York, resolved the criminal inquiry by entering into a deferred prosecution agreement with a term of three years. The criminal information charged the company with one count of conspiracy to violate the books and records provisions of the FCPA and a second which alleged violations of those provisions based on the fact that U.S. based subsidiaries were involved in the bribes. Under the agreement, Daimler paid a criminal fine of $93.6 million and had a monitor installed for a period of three years. As part of the overall resolution of the case, two Daimler subsidiaries pleaded guilty while a third entered into a deferred prosecution agreement.[128]

Daimler settled with the SEC on the same terms as Siemens. It consented to the entry of a permanent injunction prohibiting future violations of the bribery and books and records provisions and agreed to pay disgorgement of $91.4 million along with prejudgment interest.[129]

The settlements were based on a decade-long scheme alleged to have involved millions of dollars and which yielded about $50 million in profits from transactions with a U.S. nexus. The three subsidiaries charged by the DOJ were at the center of the bribery. Frequently, employees from the corporate parent facilitated the conduct of the subsidiaries. Millions of dollars in bribes were paid in 22 countries, according to the charging papers, including China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Nigeria, Russia, Serbia

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127 The charging papers identified ten specific weaknesses. *See* Information in *U.S. v. Daimler AG*, No. 10-cr-063 (D.D.C. Filed March 22, 2010).

128 *See* Daimler Press Release; *U.S. v. Daimler AG*, No. 10-cr-063 (D.D.C. Filed March 22, 2010); *U.S. v. Daimler Chrysler Automotive Russia SAO*, No. 10-cr-064 (D.D.C. filed March 22, 2010); *U.S. v. Daimler Export and Trade Finance GmbH*, No. 10-cr-065 (D.D.C. filed March 22, 2010); *U.S. v. Daimler Chrysler China Ltd.*, No. 10-cr-066 (March 22, 2010) (deferred prosecution agreement and a criminal information charging one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of violating those provisions).

129 *SEC v. Daimler, AG*, No. 1:10-cv-00473 (D.D.C. filed Apr. 1, 2010); Press Release, Securities and Exchange Commission, SEC Charges Daimler AG With Global Bribery (Apr. 1, 2010) available at http://www.sec.gov/news/press/2010/2010-51.htm ("Daimler SEC Press Release").

and Montenegro by Daimler and its German and Russian subsidiaries. A variety of mechanisms were used to make the payments, including corporate ledger accounts known internally as "third-party accounts" and "cash desks," in addition to offshore bank accounts, deceptive pricing arrangements and third-party intermediaries. To conceal these transactions, the books and records were repeatedly falsified. Indeed, the SEC counted 151 separate violations of the books and records provisions.[130]

Like Siemens, Daimler also made extensive efforts to cooperate which the DOJ described as "excellent."[131] Like Siemens, Daimler did not self-report. Cooperation followed an accusation of corruption by an employee. Throughout its internal investigation, the company kept authorities apprised of its progress, took appropriate disciplinary actions terminating 45 employees, imposed sanctions on 60 others and made "certain witnesses" available on request. Daimler also undertook a series of remedial actions, including centralizing its compliance operations and corporate audit functions, adding a compliance component at the board level, setting up a whistleblower hotline and adding anti-bribery terms to its contracts. Unlike Siemens, the company did not develop information about other companies for the government. The impact of this cooperation is reflected by the deferred prosecution agreement as well as the criminal fine which is about 20% below the bottom of the sentencing guideline range.[132]

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130 *See* Daimler Press Release.

131 The cooperation of the company is summarized in both the Deferred Prosecution Agreement and the Sentencing Memorandum. *See* Deferred Prosecution Agreement at 3-7 in *U.S. v. Daimler A.G.*, No. 1:10-cr-00063 (D.D.C. Mar. 24, 2010) ("Daimler Deferred Prosecution Agreement") available at http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerag-agree.pdf; United States' Sentencing Memorandum in *U.S. v. Daimler A.G.*, No. 1:10-cr-00063 (D.D.C. Mar. 24, 2010.) ("Daimler Sentencing Memorandum") available at http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerag-sent.pdf. The SEC also noted the cooperation of the company in its press release. Daimler SEC Press Release.

132 *See* Daimler Sentencing Memorandum.

3. Alcatel-Lucent

Alcatel-Lucent also settled with the DOJ by entering into a deferred prosecution agreement at the parent level. Like Siemens, the company was charged in an information with one count of violating the FCPA internal controls provisions and one count of violating the books and records provisions. Three subsidiaries were also charged and pleaded guilty to a conspiracy charge.[133]

Alcatel-Lucent also settled with the SEC, consenting to the entry of a permanent injunction prohibiting future violations of the bribery and books and records provisions. As part of the settlement, the company agreed to engage an independent compliance monitor and to pay $45,372,000 in disgorgement and prejudgment interest.[134]

Like the other companies in this group, the wrongful conduct by Alcatel-Lucent involved a pervasive pattern of repeated violations. It was facilitated by the business model of the company and a lack of anti-corruption procedures.[135]

Alcatel Lucent is the product of a 2006 merger between French telecommunications equipment and services company, Alcatel, S.A., and U.S. based company, Lucent Technologies. Its shares were traded in New York. The French company had a decentralized structure and conducted business through third-party agents and consultants retained by subsidiary Alcatel Standard A.G. Before 2006, virtually no due diligence was conducted prior to retaining an agent

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133 Press Release, U.S. Dept. of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010) available at http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html ("Alcatel-Lucent Press Release"); *U.S. v. Alcatel-Lucent S.A.*, No. 10-20907 (S.D. Fla. Dec. 27, 2010); *U.S. v. Alcatel-Lucent France, S.A.*, No. 10-20906 (S.D. Fla. Dec. 27, 2010).

134 *SEC v. Alcatel Lucent, S.A.*, No. 10-24620 (S.D. Fla. Dec. 27, 2010); SEC Litig. Rel. No. 21795 (Dec. 27, 2010).

135 Alcatel-Lucent Press Release.

or consultant, a practice DOJ later characterized "prone to corruption." While the company had anti-corruption procedures, they were largely ignored, according to the settlement papers.[136]

From the late 1990s through the time of the merger, Alcatel, through various subsidiaries, engaged in multiple violations of the FCPA, according to the court papers. The claimed wrongful conduct in Costa Rica yielded more than $300 million in business and over $23 million in profits. In Honduras, there were about $47 million in contracts with about $870,000 in profits, while in Malaysia and Taiwan there were over $100 million worth of contracts, all from unlawful conduct. The company also admitted to FCPA violations relating to its internal controls and books and records "related to the hiring of third-party agents in Kenya, Nigeria, Bangladesh, Ecuador, Nicaragua, Angola, Ivory Coast, Uganda and Mali." Alcatel-Lucent earned approximately $48.1 million in profits as a result of these improper payments. All of the illegal payments were improperly recorded in the books and records of the company which also had inadequate internal controls.[137]

At first the company gave "limited and inadequate cooperation," which later "substantially improved," according to the government.[138] The court papers in the criminal case made little mention of the cooperation, in sharp contrast to those in *Siemens* and *Daimler*. Alcatel-Lucent did, however, voluntarily reform its basic business model, a step DOJ termed "unprecedented."[139] The impact of that cooperation is perhaps best reflected by the fact that the parent company entered into a deferred prosecution agreement and did not plead guilty like

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136 *See* Exhibit A to the Deferred Prosecution Agreement in *U.S. v. Alcatel-Lucent S.A.*, No. 10-20907 (S.D. Fla. Feb. 22, 2011) available at http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/02-22-11alcatel-dpa.pdf ("Alcatel-Lucent Deferred Prosecution Agreement").

137 *See* Alcatel-Lucent Press Release.

138 Alcatel-Lucent Deferred Prosecution Agreement.

139 *See* Alcatel-Lucent Press Release.

Siemens. The criminal fine was set at the low end of the guideline range however, in contrast to those paid by Siemens and Daimler, which were below the calculated minimum.[140]

4. BAE

BAE plead guilty to conspiring to defraud the government, to making false statements about its FCPA compliance program and to violating the Arms Export Control Act and International Traffic in Arms Regulations. The company agreed to pay a criminal fine of $400 million, which was the maximum fine for the charges. A corporate monitor was installed for three years to supervise the compliance.[141] There is no reference to cooperation in the papers.

BAE, like *Siemens, Daimler* and *Alcatel-Lucent*, reflected a pervasive pattern of conduct. At the same time, the action differed substantially from the other cases in this group. The FCPA allegations stemmed from the undertakings of the company to the U.S. government to implement FCPA compliance procedures in view of its role as the world's second largest defense contractor and fifth largest provider of defense materials to the U.S. government. In November 2000, as the company expanded its role as a U.S. defense contractor, BAE represented to the U.S. government that it would comply with the FCPA as if it were subject to the Act. The company told government officials that appropriate compliance mechanisms would be put in place within twelve months. Two years later, in the face of rumors that it had obtained several contracts in Eastern Europe by paying bribes, BAE reassured the Department of Defense in writing and presentations that all of its business had been obtained in compliance with the FCPA.[142]

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140 *See* Alcatel-Lucent Deferred Prosecution Agreement.

141 Press Release, U.S. Dept. of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 10, 2010) available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html ("BAE Press Release"); *U.S. v. BAE Systems plc*, 1:10-cr-035 (D.D.C. Filed Mar. 1, 2010).

142 BAE Press Release; Information in *U.S. v. BAE Systems plc*, 1:10-cr-035 (D.D.C. Filed Mar. 1, 2010).

The representations were false. The company made payments that were not subject to the level of scrutiny which BAE assured the government it had used. Rather, using elaborate systems constructed to secrete its activities, BAE repeatedly made payments when it was aware that there was a high degree of probability they would be used to influence government decision makers in the purchase of defense materials. Overall, BAE intentionally failed to create mechanisms to ensure compliance with the FCPA. The company also failed to identify commission payments as required in connection with the sale and exports of defense articles and services. According to an agreed statement of facts, BAE's violations resulted in a gain of $200 million.[143]

B. Years-Long Conduct

Four companies in the current top ten participated in the same years-long conspiracy and joint venture: Kellogg Brown & Root,[144] Technip S.A.,[145] Snamprogetti Netherlands B.V.,[146] and JGC Corporation.[147] While the violations involve a pattern of conduct over an extended period of time as in *Siemens* and *Daimler,* the wrongful conduct centered on a single on-going project rather than a pattern of acts involving multiple projects and jurisdictions as in the cases in the first group. Each company cooperated once the conduct was discovered. The impact of these efforts on the charging decision varied.

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143 *Id.*

144 *U.S. v. Kellogg Brown & Root LLC*, No. 4:09-cr-00071 (S.D. Tex. filed Feb 6, 2009); *SEC v. Halliburton Co.*, No. 4:09-cv-399 (S.D. Tex. filed Feb. 11, 2009).

145 *U.S. v. Technip S.A.*, No. 10-cr-349 (S.D. Tex. Filed June 28, 2010); *SEC v. Technip*, No. 4:10-cv-002289 (S.D. Tex. filed June 28, 2010).

146 *U.S. v. Snamprogetti Netherlands B. V.*, No. 10-cr-460 (S.D. Tex. Filed July 7, 2010); *SEC v. ENI, S.p.A.*, No. 4:10-cv-0214 (S.D. Tex. Filed July 7, 2010); SEC Litig. Rel. No. 21588 (July 7, 2010).

147 *U.S. v. JGC Corporation*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011). *See also supra* at Section III.

For each of the companies the underlying conduct traces to 1990. The four companies formed the TSKJ joint venture[148] to secure contracts from Nigeria LNG, Ltd., a company created by the Nigerian government to capture and sell natural gas associated with oil production in that country. The government retained a 49% interest in Nigeria LNG.[149]

The joint venture determined that bribes had to be paid to secure business. Former KBR CEO Albert Stanley and others met at crucial times with three successive former holders of a top-level office in the Nigerian government to ask for the designation of a representative with whom the joint venture could discuss bribes for government officials. Mr. Stanley and others negotiated the amount of the bribes with a representative of the officeholder and agreed to hire two agents to make the payments.[150] The joint venture then paid about $132 million to one agent and $50 million to another. The payments were funneled through sham contracts with shell companies. They yielded contracts worth more than $6 billion. The corrupt payments were not properly recorded in the books and records of any of the companies.[151]

The charges against each company appear to be a function of the underlying conduct and the jurisdictional reach of the statute. KBR and Technip were the two joint venture partners with the most significant U.S. contacts. KBR was a domestic concern. Its chairman, a U.S. citizen residing in Houston, Texas was also a domestic concern and assumed a prominent role in the

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148 The name "TSKJ" stood for the four companies: Technip, Snamprogetti, Kellogg Brown & Root and JGC Corporation.

149 Press Release, U.S. Dept. of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine, Enforcement Actions by DOJ and SEC Result in Penalties of $579 Million for KBR's Participation in a Scheme to Bribe Nigerian Government Officials to Obtain Contracts (Feb. 11, 2009), available at http://www.justice.gov/opa/pr/2009/February/09-crm-112.html ("DOJ KBR Press Release").

150 *See* Information in *U.S. v. Stanley*, No. 4:08-cr-00597 (S.D. Tex. Filed Aug. 29, 2008).

151 *See* DOJ KBR Press Release.

operations of the conspiracy. He eventually pleaded guilty to FCPA charges and was sentenced to prison.[152]

KBR, a subsidiary of the Halliburton Company, resolved the DOJ investigation by pleading guilty to a five-count information charging conspiracy and four counts of bribery – a harsher result in terms of the number of guilty pleas than any of the companies in the first group. As part of the plea arrangement, the company agreed to retain a monitor for three years and to pay a $402 million criminal fine which is only marginally below the mid-point of the sentencing guideline range.[153] In the papers, the DOJ acknowledged the cooperation of the company without further comment, a sharp contrast to the descriptions in *Siemens* and *Daimler*.[154]

Technip is a French issuer with a class of securities registered for trading with the SEC. Accordingly, it is subject to the non-U.S. issuer jurisdictional provisions. The information claimed, in part, that the company caused its agent to wire money from one foreign bank through New York to another foreign bank for the TSKJ joint venture, in addition to other U.S. contacts by agents of the conspiracy.[155] Technip resolved the charges by entering into a deferred prosecution agreement under which it was required to pay a criminal fine of $240 million, a 25% reduction from the bottom of the guideline range which reflected the full cooperation of the

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152 Mr. Stanley pleaded guilty to one county of conspiracy to violate the FCPA and one count of conspiracy to commit wire fraud. He was sentenced to serve two and one half years in prison. *U.S. v. Stanley*, No. 4:08-cr-00597 (S.D. Tex. Filed Aug. 29, 2008).

153 DOJ KBR Press Release, Plea Agreement in *U.S. v. Kellogg Brown & Root LLC*, No. H-09-071 (S.D. Tex. filed Feb. 11, 2009) available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/kbr-plea-agree.pdf ("KBR Plea Agreement").

154 Compare DOJ KBR Press Release and KBR Plea Agreement *with* Siemens Sentencing Memorandum and Daimler Deferred Prosecution Agreement.

155 Press Release, U.S. Dept. of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (Jun. 28, 2010) available at http://www.justice.gov/opa/pr/2010/June/10-crm-751.html ("DOJ Technip Press Release").

company. The underlying information charged one count of conspiracy and one count of violating the FCPA.[156]

In contrast, neither Snamprogetti nor JGC are issuers or domestic concerns. Both were charged in two-count indictments alleging conspiracy to violate the FCPA and aiding and abetting KBR's violations of the anti-bribery provisions based on U.S. contacts by agents through the banking system.[157] Both companies resolved the criminal inquiries by entering into deferred prosecution agreements. In addition, Snamprogetti agreed to pay a criminal fine of $240 million which was a 20% discount from the lower end of the guideline range, while JGC paid $218.8 million which represented a 30% discount from the bottom of the range.[158] The DOJ acknowledged the cooperation of each company, although JGC initially declined to cooperate while raising jurisdictional questions.[159]

Finally, the three companies over whom it had jurisdiction settled with the SEC on essentially the same terms. KBR consented to the entry of a permanent injunction prohibiting future violations of the anti-bribery and record falsification provisions and from aiding and abetting violations of the record keeping and internal control provisions of the FCPA. Its parent, the Halliburton Company, agreed to the entry of an injunction prohibiting future violations of the record keeping and internal control provisions. The companies also agreed to pay disgorgement

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156 *Id*., Deferred Prosecution Agreement in U.S. v. Technip S.A., No. 10-cr-460 (S.D. Tex. Filed Jun. 28, 2010) available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-28-10-technip-agreement.pdf ("Technip Deferred Prosecution Agreement").

157 Information in *U.S. v. Snamprogetti Netherlands B. V.*, No. 10-cr-460 (S.D. Tex. Filed Jul. 7 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf; Information in *U.S. v. JGC Corporation*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf

158 Deferred Prosecution Agreement in *U.S. v. Snamprogetti Netherlands B. V.*, No. 10-cr-460 (S.D. Tex. Filed Jul. 7 2010) available at http://www.justice.gov/criminal/fraud/fcpa/cases/docs/07-07-10snamprogetti-dpa.pdf ("Snamprogetti Deferred Prosecution Agreement"). Deferred Prosecution Agreement in *U.S. v. JGC Corporation*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011) available at http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf (JGC Deferred Prosecution Agreement").

159 *See* Snamprogetti Deferred Prosecution Agreement; JGC Deferred Prosecution Agreement.

of $177 million.[160] Technip consented to the entry of a permanent injunction prohibiting future violations of the bribery and books and records provisions and agreed to pay $98 million in disgorgement.[161] Snamprogetti consented to the entry of a permanent injunction prohibiting future violations of the bribery and record keeping and internal controls provisions while its former parent, ENI, S.p.A., agreed to be enjoined from future violations of the recordkeeping and internal control provisions, based on allegations that it failed to ensure that its former subsidiary complied with its internal controls concerning the use of agents. The two companies were jointly liable for the payment of $125 million in disgorgement.[162]

C. Limited Conduct

The underlying conduct in the actions involving Magyar Telekom Plc and Deutsche Telekom AG differ significantly from that of the others in the top ten. In these cases, there were no allegations that bribery was a way of doing business or that there was a years-long conspiracy. Rather, the actions focused two events – efforts to forestall competition in Macedonia in 2005 and 2006 and, in Montenegro, the acquisition of a company on favorable terms in 2005.

First, in 2005 the Republic of Macedonia enacted a new law which liberalized the telecommunications market in a manner which would permit regulatory bodies to hold a public tender for a license to operate a third mobile telephone business. Such a business would compete in the country against Magyar Telekom's subsidiary, Makedonski Telekommunikacii A.D. Skopje ('MakTel").

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160 *SEC v. Halliburton Company*, No. 4:09-cv-399 (S.D. Tex. Filed Feb. 11, 2009); SEC Litig. Rel. No. 20897A (Feb. 11, 2009).

161 *SEC v. Technip*, No. 4:10-cv-02289 (S.D. Tex. filed Jun. 28, 2010); SEC Litig. Rel. No. 21578 (June 28, 2010).

162 *SEC v. ENI, S.p.A.*, No. 4:10-cv-0214 (S.D. Tex. Filed July 7, 2010); SEC Litig. Rel. No. 21588 (July 7, 2010).

Magyar Telekom, whose ADRs were traded in New York at the time, and its executives, sought to prevent the implementation of the new laws and regulations. Utilizing a secret agreement called a "protocol of cooperation" entered into by the company and certain high-ranking government officials in Macedonia, payments of €4.875 (approximately $6 million) were made with the knowledge or the firm belief, or under circumstances that made it substantially certain, that all or a portion of the funds would be paid, offered or promised through consultants, intermediaries and other third-parties to government officials. In return, officials agreed to adopt regulatory changes favorable to Magyar Telekom's subsidiary and prevent the entry of a new competitor into the market.

The payments were improperly recorded in the books and records of the company. Magyar Telekom's books and records were consolidated into those of Deutsche Telekom which owned 60% of the company. At the time Deutsche Telekom's ADRs were also traded in New York.[163]

Second, in 2005 the company sought to acquire on favorable terms Telekom Crne Gore A.D. ("TCG") and its mobile company subsidiary, the Montenegrin state-owned fixed line and cellular telecommunications companies. To facilitate the deal, the company made payments of €7.35 million to several third-party consultants under four sham consulting agreements. Magyar Telekom received no legitimate value in return. The payments were made with the knowledge, the firm belief, or under circumstances which made it substantially certain that all or a portion of the payments would be offered, promised or paid to Montenegrin officials to facilitate the transaction on favorable terms. Again the transactions was not properly recorded in the books and records of the company.

To resolve the inquiries with the DOJ, the company entered into a deferred prosecution agreement. The underlying information contained one count alleging bribery and two based on the

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[163] *See* Press Release, U.S. Dep't of Justice, Magyar Telekom And Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation And Agree To Pay Nearly $64 Million In Combined Criminal Penalties (Dec. 29, 2011) available at http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-mt-dt-press-release.pdf ("DOJ Magyar Telekom Press Release"). DOJ also alleged that Magyar Telekom made improper payments in connection with its acquisition of a state-owned telecommunications company in Montenegro. *Id.*

books and records provisions of the FCPA. Under the terms of the two year deferred prosecution agreement, the company agreed to: (1) pay a $59.6 million penalty; (2) implement and enhanced compliance program; and (3) submit annual reports regarding its efforts to implement to compliance measures and remediate past problems.[164]

Deutsche Telekom also resolved the matter, entering into a two-year non-prosecution agreement. It also agreed to pay a $4.36 million penalty.[165]

Both companies entered into a settlement with the SEC. There, the complaint alleged violations of the FCPA bribery provisions by Magyar Telekom and violations of the books and records provisions by that company and Deutsche Telekom. Each company consented to the entry of a permanent injunction based on, respectively, the bribery and books and records provisions as to Magyar Telekom, and the books and records provisions as to Deutsche Telekom. Magyar Telekom also agreed to pay more than $31.2 million in disgorgement and pre-judgment interest. Deutsche Telekom was not required to pay any additional amount in light of its settlement with the DOJ.[166]

The DOJ acknowledged the cooperation of both companies, noting that they voluntarily disclosed the violations to the government. The DOJ also cited "the leadership of Magyar Telekom's audit committee in pursuing a 'thorough global internal investigation concerning bribery and related misconduct.'" The deferred prosecution agreement executed by Magyar Telekom goes on to note that both companies had "already undertaken remedial measures and … committed to further remedial steps through the implementation of an enhanced compliance program."[167] This

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164 *U.S. v. Magyar Telekom Plc*, No. 11-cr-00597 (E.D. Va. Dec. 29, 2011); DOJ Magyar Telekom Press Release.

165 DOJ Magyar Telekom Press Release.

166 SEC Litig. Rel. 22213 (Dec. 29, 2011); *SEC v. Magyar Telekom Plc*, No. 11-cv-9646 (S.D.N.Y. Filed Dec. 29, 2011). The SEC brought an action against the former CEO and two other executives, as well. ; *SEC v. Straub*, No. 11-cv-9645 (S.D.N.Y. Filed Dec. 29, 2011).

167 DOJ Magyar Telekom Press Release.

cooperation was reflected in the criminal fine which was below the lower end of the fine range calculated under the sentencing guidelines.[168]

The conduct in *Magyar Telekom* differed significantly from the pervasive patterns of violations or years-long conspiracy on which the cases against the other companies in the top ten were built. The fact that the company paid a smaller sum in settlement than most of the others in the top ten undoubtedly reflects that fact. At the same time, the case illustrates the evolution of FCPA settlements, since the sum paid by Magyar Telekom and Deutsche Telekom significantly eclipses prior record-setting settlements based on a much more extensive pattern of violations resulting in part from a disregard of FCPA compliance procedures. Indeed, it exceeded the amount paid by Panalpina just two years ago based on a much more extensive pattern of violations.

Another key thread through the cases in the top ten is the inadequacy or lack of FCPA compliance procedures. Siemens and Daimler, for example, had some procedures but, as in Chevron, they were wholly inadequate or not followed. Others, such as BAE, simply failed to install them despite specific representations to the contrary.[169]

Cooperation is also a key theme. While Magyar Telekom / Deutsche Telekom are the only companies to self-report in this group, each of the others, with the exception of BAE, cooperated to various degrees. Some made extensive efforts to cooperate such as Siemens, and Panalpina which developed evidence on others. This reflects the evolution of efforts by those involved in FCPA investigations to try and win cooperation credit despite the significant expense

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168 The fine range was $72,500,000 to $145,000,000. The parties agreed on a fine of $59,600,000 based on the on self-reporting and cooperation. Deferred Prosecution Agreement at 8, filed in *U.S. v. Magyar Telekom, Plc*, Criminal Case No. 1:11CR00597 (E.D. Va. Filed Dec. 29, 2011).

169 The fact that the procedures were installed, but were not effective, does not necessarily mean that they were not reasonably designed and could not serve as a defense for the company as enforcement officials have acknowledged. *See also infra* note 240, discussing the declination involving Morgan Stanley.

involved.[170] When the cost of the inquiries, the remedial efforts and the lost executive time is tabulated, those expenses may be the most severe sanction suffered by the organizations, eclipsing even the increasing large payments being made to enforcement officials.

V. THE FOCUS ON INDIVIDUALS.

A key focus of the "New Era" of FCPA enforcement is the targeting of individuals coupled with a demand for longer prison terms as a mechanism for deterring future violations. As Attorney General Eric Holder told those gathered at the OECD Paris headquarters recently, "Let me be clear, prosecuting individuals is a cornerstone of our enforcement strategy because, as long as it remains a tactic, paying large monetary penalties cannot be viewed by the business community as merely 'the cost of doing business.' The risk of heading to prison for bribery is real, from the boardroom to the warehouse."[171]

This view is reflected in basic statistics. In 2004, the DOJ charged two individuals with criminal FCPA violations. In 2005 the DOJ charged five individuals and collected about $16.5 million in FCPA cases. In 2009 and 2010 over fifty individuals were charged and almost $2 billion was collected.[172]

A focus on individuals also means that more cases go to trial. Initial trial results seemed to echo the success suggested by the statistics. In July 2009, Frederic Bourke, the co-founder of famous handbag maker Dooney & Bourke was convicted on FCPA and Travel Act charges in

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170 In part, this may be a reflection of the "where else" question frequently asked by enforcement officials meaning, where else are their violations in addition to those which have been reported. This can cause a company to extend its inquiry significantly increasing the cost. *See infra* Section VII discussing the impact of this issue.

171 Eric Holder, Attorney General, Dep't of Justice, Remarks at the Organisation for Economic Co-Operation and Development, Paris France (May 31, 2010), available at http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html.

172 Lanny A. Breuer, Assistant Attorney General, Dep't of Justice, Remarks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) available at http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

connection with the unsuccessful scheme promoted by fugitive Viktor Kozeny to gain control of Azerbaijan's state oil company, Socar.[173] In September 2009 Hollywood film producers Gerald and Patricia Green were convicted by a jury on conspiracy, FCPA and money laundering charges in connection with a scheme to bribe officials related to a film festival in Thailand.[174] In May 2011, Lindsey Manufacturing became the first company to be convicted on FCPA charges by a jury, along with its executives.[175] In August 2011 Joel Esquenazi and Carlos Rodriguez were found guilty by a jury on FCPA charges related to bribing officials at state-owned Telecommunications D'Haiti S.A.M. or ("Haiti Telco").[176]

As this trend unfolded, the DOJ conducted the largest sting operation in FCPA history, resulting in what became known as the Africa Sting cases.[177] The heralded operation yielded nineteen indictments against twenty-two individuals.[178] The operation started with an undercover FBI agent posing as a sales agent of Gabon. Executives were told that the defense minister for the African country was prepared to spend $15 million to outfit the country's presidential guard. The undercover agent told executives that a 20% commission was required. Half of the commission would go to the agent and half to the minister. To participate, the

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173 *U.S. v. Kozeny*, Case No. 1:05-cr-00518 (S.D.N.Y.).

174 *U.S. v. Green*, No. 2:08-cr-00059 (C.D. Cal).

175 *U.S. v. Aguilar*, Case No. 2;10-cr-01031 (C.D. Cal.). That conviction was subsequently vacated. *See supra* note 107.

176 *U.S. v. Esquenazi*, No. 09-cr-21010 (S.D. Fla.). *See also* Press Release, U.S. Dept. of Justice, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Aug. 5, 2011) available at http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html.

177 DOJ subsequently filed a superseding Indictment bringing all twenty-two defendants into a single case. *See* Superseding Indictment in *U.S. v. Goncalves*, No. 09-cr-335 D.D.C. (Filed Apr. 16, 2011).

178 Press Release, U.S. Dept. of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), available at http://www.justice.gov/opa/pr/2010/January/10-crm-048.html ("DOJ FCPA Africa Sting Press Release").

executive was required to create two price quotes for the equipment. One included the commission, while the other did not.[179]

The deal was set up in two phases. The first was a small "test," with the second being the supposed real transaction. During the test phase, the businessman allegedly confirmed the arrangement in e-mails which contained the price quotations and the "commissions." If the test was successful, the deal moved to the second phase. There, the businessman would meet with a sales agent and another FBI undercover agent. He would be told that the Minister of Defense was pleased with the result and be furnished with a written agreement for execution. It contained the corrupt commissions.[180]

Initially, the case appeared successful for the government. Three individuals pleaded guilty.[181] The defendants were divided into groups to facilitate trial. Once the trials commenced however things began to unravel. The first African Sting trial against four defendants ended with a hung jury after the court dismissed substantive FCPA charges as to certain defendants and each money laundering charge. Reportedly, the jury was concerned over the definition of "willfulness" in the context of the sting operation.[182] The second trial ended with a dismissal of one defendant under Fed. R. Crim. P. 29 by Judge Richard Leon, the acquittal of two defendants by the jury and a hung jury as to three defendants.[183] Ultimately the DOJ moved to dismiss all of the remaining indictments and vacated the three pleas.[184]

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179 *See* DOJ FCPA Africa Sting Press Release.

180 *See* DOJ FCPA Africa Sting Press Release.

181 Jonathan M. Spiller, Haim Geri and Daniel Alvirez each pled guilty in the consolidated case, *U.S. v. Goncalves*, No. 09-cr-00335 (D.D.C.).

182 Tillman, The Blog of the Legal Times, "Mistrial Declared in FCPA Sting Case" (Jul. 7, 2011) available at http://legaltimes.typepad.com/blt/2011/07/judge-declares-mistrial-in-fcpa-sting-case.html.

183 *U.S. v. Goncalves*, No. 09-cr-335 D.D.C. (Filed Apr. 16, 2011). During the second Africa Sting trial, the government suffered two setbacks. First, the Judge in the case involving Lindsey Manufacturing and its executives dismissed the case based on prosecutorial misconduct (noting, among other things, that he viewed the government's evidence as weak). *U.S. v. Aguilar*, 2:10-cr-01031 (C.D. Cal. Order Filed Dec.
(footnote continued)

Despite the set backs in African Sting case, enforcement officials continue to target individuals. In late 2011 and early 2012, FCPA charges were brought against former Siemens and Noble executives. With respect to Siemens, eight former executives were charged with criminal violations of the FCPA by the DOJ, while seven were named as defendants in a parallel SEC action.[185] The case centers on conduct tied to the original action against Siemens A.G. Similarly, the SEC's action against three Noble executives stems from the original charges against the company.[186]

While it is clear that the number of FCPA prosecutions against individuals has increased, prior to the filing of the actions against the Siemens executives in late 2011 and the Noble officials in early 2012, Congress, as well as some commentators, had expressed concern that enforcement officials have been, at best, inconsistent in this area. In congressional hearings concern has been expressed[187] about the lack of prosecutions against the individuals involved in large corporate cases such as those included in the top ten.[188] Commentators have argued that

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(footnote continued)
1, 2011). Second, a Judge in Houston dismissed all the FCPA charges as to former ABB official John O'Shea and the DOJ subsequently dismissed the remaining charges. *U.S. v. O'Shea*, 09-cr-429 (S.D. Tex.).

184 *U.S. v. Goncalves*, No. 09-cr-335 D.D.C. (Filed Apr. 16, 2011).

185 *U.S. v. Sharef,* 11 Crim 1056 (S.D.N.Y.); *SEC v. Sharef,* 11 CIV 9073 (S.D.N.Y. Filed Dec. 13, 2011). The underlying conduct traces to 1994 when the government of Argentina issued a tender for bids for a project to create a new system of national identity booklets. During the bidding process, the defendants and others committed Siemens to paying about $100 million in bribes. Later, the project was suspended and then terminated. In an effort to recover lost profits the defendants caused Siemens to institute an arbitration against Argentina in Washington, D.C. Evidence about the bribes was suppressed in the proceeding and the company prevailed. Later during its FCPA inquiry the company disavowed the verdict. One defendant settled with the SEC. The others are contesting the charges. *Id. See also* note 166 *supra.*

186 *SEC v. Jackson*, No. 4:12-cv-00564 (S.D. Tex. Filed Feb. 24, 2012); *SEC v. O'Rourke*, No. 4:12-cv-00564 (S.D. Tex. Filed Feb. 24, 2012). The executives are alleged to have participated in the scheme which resulted in an FCPA inquiry against the company. *See* note 123 *supra* . One of the defendants settled with the SEC at the time the action was filed. The other two are litigating the case.

187 *See* notes 190 and 191 *infra.*

188 Charges were brought against individuals involved in the actions against KBR and Alcatel-Lucent. Former KBR former CEO Albert Stanley pleaded guilty to FCPA charges and has been sentenced to prison. *U.S. v. Stanley,* No. 4:08-cr-00597 (S.D. Tex. Filed Aug. 29, 2008). Jeffrey Tesler, a U.K. attorney involved in that case was extradited from England and pleaded guilty to FCPA charges. *U.S. v. Tesler*, No. 4:09-cr-00098 (S.D. Tex. Filed Feb. 17, 2009, unsealed Mar. 5, 2009); Press Release, U.S. Dept. of Justice, UK Solicitor
(footnote continued)

enforcement officials have been inconsistent,[189] a point rejected by enforcement officials.[190] It is doubtful that those concerns have been allayed by the actions involving the Siemens and Noble executives, particularly in view of the collapse of the African Sting case.[191]

The DOJ has also been demanding longer prison terms as part of its focus on individuals. Enforcement officials have obtained mixed results with this approach, as reflected by the following sample of cases.

- *U.S. v. Esquenazi*, No. 09-cr-21010 (S.D. Fla.). Defendants Joel Esquenazi and Carlos Rodriguez were sentenced on October 26, 2011 to, respectively, 15 years and 7 years. Each was convicted on charges of bribing officials at state-owned Haiti Telco. With respect to Mr. Esquenazi, this is the longest sentence ever imposed in a case involving the Foreign Corrupt Practices Act, according to the U.S. Attorney's Office for the Southern District of Florida.[192]

(footnote continued)
Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011) available at http://www.justice.gov/opa/pr/2011/March/11-crm-313.html. Mr. Tesler's co-defendant, Wojciech Chodan, pleaded guilty in December 2010. Press Release, U.S. Dept. of Justice, UK Citizen Pleads Guilty to Conspiring to Bribe Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Dec. 6, 2009) available at http://www.justice.gov/opa/pr/2010/December/10-crm-1391.html

189 *See, e.g.*, Nov. 2010 Senate Hearing (Answers to written questions of Professor Mike Koehler at 32-38).

190 In his written testimony prepared for a congressional committee Deputy AG, Criminal Division, Greg Andres noted: "While the prosecution of individuals remains a crucial component of the Department's FCPA enforcement program, it is worth noting the substantial challenges involved in these prosecutions. Often they involve jurisdictional hurdles, foreign evidence and witnesses, foreign prosecutions, and issues with the relevant statute of limitations. " Mr. Andres went on to note that in Germany a number individuals have been prosecuted in connection with the *Siemens* case. Nov. 2010 Senate Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 49-50).

191 *See, e.g.,,* James B. Stewart, Bribes Without Jail Time, NEW YORK TIMES (Apr. 27, 2012).

192 Press Release, U.S. Attorney's Office for the Southern District of Florida, Executive Sentenced To 15 Years In Prison For Scheme To Bribe Officials At State-Owned Telecommunications Company In Haiti (Oct. 26, 2011) available at http://www.justice.gov/usao/fls/PressReleases/111026-01.html.

- *U.S. v. Naaman,* No. 1:08-cr-00246 (D.D.C.). Defendant Ousama M. Naaman pleaded guilty to conspiracy and FCPA charges. He acted as an agent for Innospec Inc., defrauding the U.N. oil-for-food program in connection with bribes paid to the Iraqi government. He was sentenced on December 22, 2011 to serve 30 months in prison. The DOJ had requested a sentence of 90 months.[193]

- *U.S. v. Smith*, No. 8:07-cr-00069 (C.D. Cal.). Defendant Leo Winston Smith pleaded guilty to conspiracy, obstruction and making a false statement. The court sentenced him to 6 months in prison and 6 months of home confinement on December 6, 2010. The DOJ sought a sentence of 37 months in prison. Mr. Smith was the former director of sales and marketing for Pacific Consolidated Industries. He admitted bribing an official from the U.K. Ministry of Defense in return for equipment orders.[194]

- *U.S. v. Nguyen*, No. 2:08-cr-00522 (E.D. Pa.). Defendants Nam Nguyen, Kim Nguyen, and Joseph Lukas were sentenced on September 16, 2010 after pleading guilty. Nam Nguyen pleaded guilty to counts of conspiracy, FCPA, Travel Act and money laundering violations and was sentenced to 16 months in prison. The DOJ had sought a sentence of 168 –210 months. Defendant Kim Nguyen pleaded guilty to conspiracy and Travel Act and money laundering violations. She was sentenced to two years probation. The DOJ

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193 *See* Press Release, U.S. Dep't of Justice, Innospec Agent Pleads Guilty to Bribing Iraqi Officials and Paying Kickbacks Under the Oil for Food Program, (Jun. 25, 2010), available at http://www.justice.gov/opa/pr/2010/June/10-crm-747.html; United States' Sentencing Memorandum And Motion For Downward Departure From Guideline Sentencing Range in *U.S. v. Naaman,* No. 1:08-cr-00246 (D.D.C. Filed Dec. 22, 2011); Minute Entry in *Naaman* (Filed Jan 22, 2011); and Judgment in *Naaman* (Filed Mar. 22, 2012).

194 *See* Press Release, U.S. Dep't of Justice, Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to U.K. Ministry of Defense Official (Sept. 3, 2009) available at http://www.justice.gov/opa/pr/2009/September/09-crm-928.html; Government's Reply To Defendant Leo Winston Smith's Sentencing Memorandum in *U.S. v. Smith,* No. 8:07-cr-00069 (C.D. Cal. Filed Dec. 1, 2010); Judgment and Probation/Commitment Order in *Smith* (Filed Dec. 6, 2010).

had sought a "substantial sentence of imprisonment," but below the guideline range of 70-87 months. Defendant Joseph Lukas pleaded guilty to conspiracy and FCPA violations. He was also sentenced to two years of probation. The DOJ had sought a substantial term of imprisonment, but below the guideline range of 37-46 months. Defendant An Quo Nguyen pleaded guilty to counts of conspiracy, FCPA, Travel Act and money laundering. She was sentenced to nine months in prison. The guideline sentence was 88-108 months. The underlying case centered on bribes paid by Nexus Technologies Inc. to Vietnamese government officials in exchange for contracts.[195]

- *U.S. v. Green*, No. 2:08-cr-00059 (C.D. Cal.). Defendants Gerald and Patricia Green were convicted on nineteen counts which included conspiracy, FCPA and money laundering charges. The government sought sentences of ten years in prison despite the advanced age of the defendants. The court imposed a sentence on September 10, 2010 of six months. The underlying charges centered on the payment of bribes by the movie producing defendants to the head of the Tourism Authority of Thailand in an effort to secure a no-bid contract to manage the prestigious Bangkok International Film Festival and for other business arrangements.[196]

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195 *See* Press Release, U.S. Dep't of Justice, Former Nexus Technologies Inc. Employees and Partner Sentenced for Roles in Foreign Bribery Scheme Involving Vietnamese Officials (Sept. 16, 2010), available at http://www.justice.gov/opa/pr/2010/September/10-crm-1032.html; Government's Sentencing Memorandum [as to Nam Nguyen] in *U.S. v. Nguyen*, No. 2:08-cr-00522 (E.D. Pa. Filed Sept. 8, 2010); Government's Sentencing Memorandum And Motion For Downward Departure From Guideline Sentencing Range [as to Kim Nguyen] in *Nguyen* (Filed Sept. 8, 2010); Government's Sentencing Memorandum And Motion For Downward Departure From Guideline Sentencing Range [as to Lukas] in *Nguyen* (Filed Sept. 8, 2010); Government's Sentencing Memorandum [as to An Quo Nguyen] in *Nguyen* (Filed Sept. 8, 2010).

196 *See* Press Release, U.S. Dep't of Justice, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009) available at http://www.justice.gov/opa/pr/2009/September/09-crm-952.html; Government's Sentencing Memorandum Re: Three Most Instructive FCPA Cases; Exhibits; Appendices Of Cases (As Amended) in *U.S. v. Green*, No. 2:08-cr-00059 (C.D. Cal. Filed May 6, 2010); Judgment in *Green*, (Filed Sept. 10, 2010).

- *U.S. v. Grandos*, No. 10-cr-20881 (S.D. Fla.). Defendant Jorge Grandos was sentenced on September 8, 2011 to serve 46 months in prison after pleading guilty to one count of conspiracy. The DOJ had requested a sentence of 60 months. The founder and CEO of Latin Node, Inc. was charged in connection with his role in the bribery scheme involving Hondutel, which is a wholly state-owned telecommunications company in Honduras.[197]

- *U.S. v. Warwick*, No. 3:09-cr-449 (E.D. Va.). Defendant John Webster Warwick pleaded guilty to one count of conspiracy to violate the FCPA. The case was based on his role in a scheme to bribe former Panamanian government officials to secure maritime contracts. The pre-sentence report contained a range of 37-46 months. The government requested a sentence of 40 months. The Court ordered 37 months on June 25, 2010.[198]

- *U.S. v. Jumet*, No. 09-cr-00397 (E.D. Va.). Defendant Charles Jumet pleaded guilty to one count of conspiracy to violate the FCPA and one count of making a false statement. The guideline range was 87-108 months in prison. He was involved in the same scheme as John Warwick. The government requested 87 months, which the Court ordered on April 19, 2010.[199]

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197 *See* Press Release, U.S. Dep't of Justice, Former CEO of U.S. Telecommunications Company Sentenced to 46 Months in Prison for Bribing Foreign Government Officials (Sept. 8, 2011) available at http://www.justice.gov/opa/pr/2011/September/11-crm-1155.html; Government's Response To Defendant's Sentencing Memorandum filed in *U.S. v. Grandos*, No. 10-cr-20881 (S.D. Fla. Filed Sept. 6, 2011).

198 Press Release, U.S. Dept. of Justice, Virginia Resident Sentenced to 37 Months in Prison for Bribing Foreign Government Officials (Jun. 25, 2010) available at http://www.justice.gov/opa/pr/2010/June/10-crm-750.html; Government's Sentencing Memorandum in *U.S. v. Warwick*, No. 3:09-cr-449 (E.D. Va. Filed Jun. 14, 2010).

199 Press Release, U.S. Dept. of Justice, Virginia Resident Sentenced To 87 Months In Prison For Bribing Foreign Government Officials (Apr. 19, 2010) available at
(footnote continued)

- *U.S. v. Steph*, No. 07-cr-307 (S.D. Tex.). Joseph Edward Steph pleaded guilty to one count of conspiracy to violate the FCPA. The sentence, handed down on January 28, 2010, was 15 months in prison. The former general manager of a Willbros Group Inc. subsidiary pleaded guilty to conspiring to bribe official of the government of Nigeria.[200]

While the DOJ's position on this issue has been consistent, it is clear that the courts have not always been sympathetic. Nevertheless, there is no indication that the Department is about to change its position.

VI. THE CALLS FOR REFORM.

The New Era of FCPA enforcement has spawned calls for reform from business groups and others, a not altogether surprising result of aggressive enforcement. Business groups such as the U.S. Chamber of Commerce and the Business Round Table, as well as some academics and prominent FCPA practitioners, have argued that reform is long overdue. Those commentators uniformly laud the goals of the Act, but note that key terms are vague, often defined only by the prosecutorial discretion of enforcement official and that certain defenses need to be added or have effectively been eliminated through a series of settlements.[201] Under these circumstances,

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(footnote continued)
http://www.justice.gov/criminal/fraud/fcpa/cases/jumetc/04-19-10jumet-pressrelease.pdf; Government Sentencing Memorandum in *U.S. v. Jumet*, No. 09-cr-00397 (E.D. Va. Filed Mar. 12, 2010).

200 Press Release, U.S. Dept. of Justice, Former Willbros International Executives Sentenced to Prison for Their Roles in $6 Million Foreign Bribery Scheme (Jan. 28, 2010) available at http://www.justice.gov/opa/pr/2010/January/10-crm-102.html.

201 *See, e.g.*, June 2011 House Hearing (Written Testimony of Michael B. Mukasey on behalf of the U.S. Chamber Institute for Legal Reform at 21).

application of the Act can be unpredictable and enforcement overreaching and thus a hindrance to the competitiveness of U.S. business, according to critics.[202]

Predictably enforcement officials counter that foreign corruption continues to be a significant problem[203] and overall the FCPA is good for U.S. business.[204] It creates a level playing field where companies can compete on the merits, rather than through kickbacks, while ensuring the integrity of business transactions. The Act also gives any U.S. company a built-in defense to a request for a kickback: it is illegal and violates the FCPA. This view is bolstered by the recent report by the OECD. It endorsed and gave high praise to the enforcement efforts of the DOJ and the SEC.[205]

The position of the DOJ and the SEC is fortified by the passage in other countries of even more stringent anticorruption legislation. The U.K. Bribery Act, which went into force on July 1, 2011, is widely viewed as essentially a strict liability version of the FCPA.[206] Other countries are also increasing their anti-corruption efforts, although a recent report by Trace International, Inc. suggests that in most parts of the world enforcement continues to be lax.[207]

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202 *See, e.g.,* June 2011 House Hearing (Comments of Senator Sensenbrenner, Chairman at 2) ("FCPA prosecutions should be effective and fair, and they must be predictable. The rules of the road must be communicated clearly. Companies should have the same ability to guide themselves as motorists do, so that business can start moving again."). *See also* New York Bar Report at 21.

203 June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 6) ("Foreign corruption remains a problem of significant magnitude. The World Bank estimates that more than $1 trillion in bribes are paid each year, roughly 3 percent of the world economy. Some experts have concluded that bribes amount to a 20 percent tax on foreign investment. In the end, corruption undermines efficiency and good business practices.").

204 June 2011 House Hearing (Written Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 2).

205 Organization for Economic Cooperation and Development, "United States: Phase 3: Report On The Application Of The Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions And The 2009 Revised Recommendation On Combating Bribery In International Business Transactions" (Oct. 15, 2010), available at http://www.oecd.org/dataoecd/10/49/46213841.pdf.

206 Bribery Act 2010, c.23 (United Kingdom).

207 Trace International, Inc., Global Enforcement 2011 (Aug. 2011) available at https://secure.traceinternational.org/news/documents/GlobalEnforcementReport2011_001.pdf. *See also* Canada Clamps Down On Corruption, CALGARY HERALD (Nov. 30, 2011) (noting that Canada has recently (footnote continued)

Efforts to reform the FCPA typically center on five key points:

- *Compliance defense:* Several commentators have argued that a compliance defense should be added to the Act. Under this approach, business organizations who install reasonably designed compliance procedures could offer an affirmative defense to possible FCPA charges. Incorporation of this defense would encourage corporate compliance, which is the goal of the Act, according to its proponents. It would also avoid situations where an otherwise compliant business organization is subjected to liability from the acts by one [208] or a few rogue employees.[209] Proponents of this theory point to the new U.K. Bribery Act as well as the anticorruption statutes in Italy as models for this approach.[210] Enforcement officials counter that there is no need to amend the statute in this regard since the compliance procedures of the organization are fully considered at every portion of the FCPA investigative and charging process.[211]

(footnote continued)
increased corruption enforcement). *But see* New York Bar Report at 23 (discussing lack of foreign enforcement).

208 No system of internal controls is foolproof as the SEC has recognized. *See* SEC Div. Of Corp. Fin., Staff Statement on Management's Report on Internal Controls Over Financial Reporting (May 16, 2005) (noting that internal controls can be overridden by fraud) available at http://www.sec.gov/info/accountants/stafficreporting.htm. *See also* note 204 *infra.*

209 *See, e.g.*, June 2011 House Hearing (Written Testimony of Michael Mukasey [Former Attorney General, now a partner at Debevoise & Plimpton] at 19) (stating in support of a compliance defense: "The system now in place has conflicting incentives. On the one hand, an effective compliance program can hold out a qualified promise of indeterminate benefit should a violation occur and be disclosed. On the other hand, if all that can be achieved is a qualified and indeterminate benefit, there is a perverse incentive not to be too aggressive lest wrongdoing be discovered, and there is a resulting tendency of standards to sink to the level of the lowest common denominator, or at best something that is only a slight improvement over it. This Catch-22 policy doesn't really serve anyone's interest."). Others have argued for a safe harbor if there are adequate procedures. June 2011 House Hearing (Testimony of George J. Terwilliger, III [a partner at White & Case LLP] at 38). For a criticism of this defense, *see* David Kennedy & Dan Danielsen, Busting Bribery, Sustaining the Global Momentum of the Foreign Corrupt Practices Act (Sept. 2011).

210 June 2011 House Hearing (Written Testimony of Michael Mukasey at 23-24). *But see* June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 59) (noting that the Italian provision has been "roundly criticized in the international circles. The OECD said that the defense provided little assistance in determining what an acceptable model is in a particular case. That defense has actually never been applied in practice.").

211 June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 62-63). *See also* Nov. 2010 Senate Hearing (Answers to written
(footnote continued)

- *Successor liability:* A number of commentators argue that it is unfair to hold a successor entity liable solely for the FCPA violations of an acquired entity.[212] Some commentators have urged that the liability of the acquiring company be limited while others have suggested a period of repose follow the acquisition during which the acquirer could fully investigate possible issues and remediate them.[213] Enforcement officials note that the DOJ does not hold the acquiring company strictly liable. Rather, a series of factors are evaluated on a case-by-case basis. In some instances, the DOJ has declined to prosecute.[214]

- *Willfulness:* Many commentators argue that the intent standards of the FCPA are inconsistent since they require that "willfulness" be established to prove a violation by an

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questions of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 26). Congress previously considered a similar defense but ultimately it was not adopted. H.R. Conf. Rep. on H.R. 3, 100th Cong., 2d Sess. 916, 922-23 (1988).

212 June 2011 House Hearing (Written Testimony of Michael Mukasey at 30-33).

213 *See, e.g.,* Testimony of George J. Terwilliger, III, Partner White & Case LLP, House 2011 hearings at 38 ("I believe it is worthy to consider providing by statute a post-closing period of repose for companies involved in acquisitions during which they would be shielded from FCPA enforcement while undertaking a review of FCPA compliance in the acquired business and undertaking steps to remediate potential FCPA issues that are discovered as a result of that review."); *see also* Johnson & Jonson deferred prosecution agreement, Attachment D **(**which requires pre-acquisition due diligence but notes that "Where such anticorruption due diligence is not practicable prior to acquisition of a new business for reasons beyond J&J's control, or due to any applicable law, rule or regulation, J&J will conduct FCPA and anticorruption due diligence subsequent to the acquisition and report to the Department."). The agreement is filed in *U.S. v. Johnson & Johnson, Inc. (Depuy),* No. 11 cr 099 (D.D.C. April 8, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf

214 Nov. 2010 Senate Hearing (Answers to written questions of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 29) (noting that "Successor liability is a well-established principle of corporate criminal liability. The Department seeks to impose successor liability on a company only when supported by the particular facts and circumstances of the case and the law. The Department does not hold acquirers strictly liable for the acts of their predecessors. Rather, the Department decides whether to seek to impose successor liability on a case-by-case basis after making an evaluation of all the relevant facts and circumstances.").

individual, but not a corporation.[215] The DOJ argues that an amendment is not necessary since under its principles governing corporate prosecution, all of the relevant factors including intent are carefully evaluated.[216]

- *Subsidiary liability:* No business organization should be held liable for the acts of a foreign subsidiary that were taken in derogation of company policy and without the knowledge of the parent company, according to proponents of an amendment to the statutes to address this issue.[217] The DOJ notes that, under its charging policies, it does not impose criminal liability on a parent company based solely on the act of a rogue employee.[218]

- *Instrumentality definition:* The application of the bribery provisions centers on the definition of "foreign official," which includes the term "instrumentality." That term is not defined in the statute. This permits enforcement officials to claim that virtually every state-owned entity is a "foreign official," resulting in an overly aggressive application of the Act beyond the intent of Congress which had sought to craft a narrowly focused Act,

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215 Andrew Weissmann and Alixandra Smith on behalf of the U.S. Chamber of Commerce, "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act" (Oct. 2010) available at http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf.

216 *See generally* June 2011 House Hearing (Prepared Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 11-13).

217 *See, e.g., In re United Industrial Corp.,* Exchange Act Release No. 60006, 2009 WL 10507586 (May 29, 2009) (holding parent liable for claimed acts of subsidiary in violation of bribery provisions in the absence of an allegation that the parent had direct knowledge of the violations).

218 June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 58) ("[T]he Department does not prosecute corporations based on the acts of a single rouge employee. It hasn't certainly not in this field.").

according to critics.[219] It also means that the applicable definition is based on the facts and circumstances of each case which of necessity varies from situation to situation, making its application unpredictable.[220] Enforcement officials note that their determination regarding who is a foreign official and what constitutes an instrumentality is a facts-and-circumstances determination made in the context of each case. They also note that the courts have recently rejected efforts to challenge their determinations of what constitutes an instrumentality under the Act.[221]

Retired U.S. District Court Judge and former SEC Enforcement Director Stanley Sporkin, widely regarded as the father of the FCPA, has offered a different approach to the question of FCPA liability by business organizations. Under what Judge Sporkin calls his "inoculation" program, a company would not be prosecuted for FCPA violations for five years, except in extreme cases, if it effectively institutes a six step program: (1) it conducted a full and complete FCPA compliance review of the past five years; (2) the review is conducted by a major law firm or specialty/forensic accounting firm; (3) the results are disclosed to the DOJ, the SEC and the public; (4) when violations are discovered, the appropriate corrective steps were taken; (5) the

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219 Andrew Weissmann and Alixandra Smith on behalf of the U.S. Chamber of Commerce, "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act" (Oct. 2010), available at http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf.

220 June 2011 House Hearing (Written Testimony of Michael Mukasey at 28) (noting "If the definitions of these fundamental statutory terms [foreign official and instrumentality] vary by circumstance and by case, and therefore must be determined by a jury rather than as a matter of law, it becomes impossible for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA."). *See also* June 2011 House Hearing (Testimony of Shana-Tara, Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers at 46).

221 *See, e.g., U.S. v. Aguilar,* No. 10-1031 (C.D. Cal. April 20, 2011); *U.S. v. Carson,* No. 09-00077 (C.D. Cal. May 18, 2011). In the former, Lindsey Manufacturing and its executives, and in the latter, former employees of Control Components, Inc., challenged the definition of foreign official. In each case the court rejected the challenge, relying of an facts-and-circumstances test. *See also* June 2011 House Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 71) (noting that the Department considers a variety of factors in making this determination).

company submits to an annual review for five years; and (6) an FCPA compliance officer is retained who provides the SEC and DOJ with an annual certificate of compliance.[222]

Judge Sporkin's proposal, and variations, such as a suggestion that an immunity program similar to the one used by the antitrust division of the Department of Justice be adopted, have been rejected by the DOJ. Enforcement officials note that, under either proposal, violators of the law could be immunized, which would be inappropriate. Furthermore, the antitrust model is not workable in the FCPA context, because it focuses on the identification of other members in a cartel or a conspiracy, in contrast to the typical corruption case, which centers on the individual acts of a company.[223]

Congress held hearings on amending the FCPA in 2010 and 2011. To date however no consensus has emerged to amend the FCPA. In the meantime, the New Era of aggressive FCPA enforcement continues.

VII. ANALYSIS AND CONCLUSION

When the FCPA was passed in 1977, it represented a focused commitment to conducting business in a fair and ethical manner. The Act envisioned a new ethics in the marketplace where products and services would compete on their merits, rather than because of secret envelopes of cash exchanged behind closed doors. The FCPA did not attempt to regulate every business transaction, but only those in a limited sphere. The statute stood alone on the world stage at the time of passage.

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222 Nov. 2010 Senate Hearing (Testimony of Michael Volkov) (available at http://judiciary.senate.gov/pdf/10-11-30%20Volkov%20Testimony.pdf). Mr. Volkov acknowledged that Judge Sporkin was the source for this proposal. *Id.* at 5.

223 Nov. 2010 Senate Hearing (Testimony of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 8) (opposing the immunity approach).

The New Era of Enforcement

More than three decades later, 38 nations are signatories to the OECD convention on foreign bribery, written in the wake of the FCPA.[224] Yet, the goals of the statute, as well as the Convention, remain a work in process. In furtherance of those goals, U.S. enforcement officials have ushered in the New Era of FCPA Enforcement. It is characterized by industry-wide inquiries and sweeps, coupled with a growing legion of whistleblowers, all of which creates an aura of ubiquitous marketplace presence to compel compliance.

The New Era is evidenced by aggressive enforcement and spiraling sums being paid by business organizations to resolve FCPA inquiries. While cooperation is encourages, the cost of cooperation credit is increasing at a rapid rate. More prosecutions of individuals, followed by demands for longer prison terms and a string of courtroom victories are also hallmarks of the New Era.

The efforts have won praise from the OECD. They have galvanized the attention of the business community. The New Era seems to be achieving its goals.

Troubling signs

For all of its success, there are troubling signs on the horizon which could undercut the achievements of the New Era and the goals its seeks. Seemingly ever-increasing fines and penalties garner headlines, but if they are not rooted in the charges, or appear to be overreaching, they can make enforcement appear arbitrary and thereby undercut its goals.

Similar questions appear about the sums paid in settlement. The amount paid by each firm in the current top ten (except one) was mitigated by cooperation. All but two of the cases were settled in 2010 or after. This may suggest that as enforcement ramps up, larger cases are being brought. It also supports the inference that settlement costs are on the rise.

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[224] This figure is as of 2010. Witten at Section 13.01.

A closer look at the cases in the top ten suggests that, in fact, settlement costs are on the rise. Siemens, BAE, Daimler, Alcatel-Lucent and Panalpina were variously described by enforcement officials as using bribery as a way of doing business. Huge fines as part of the settlement are thus not surprising. Similarly, KBR, Snamprogetti, Technip and JGC were members of the TSKJ consortium, a years-long conspiracy which generated billions in revenue as a result of its bribery scheme. Again, large fines would be expected as part of the settlement.

In contrast, Magyar Telekom/Deutsche Telekom was not involved in either pervasive conduct or a years-long conspiracy. Rather, the cases focused on two distinct transactions. This is hardly comparable to "bribery as a way of business" or a years-long international conspiracy. Nevertheless, the amount paid in settlement put Magyar Telekom/Deutsche Telekom in the top ten. This fact adds support to the notion that the cost of settlement is spiraling and bolsters suggestions of overly aggressive enforcement to the point of arbitrariness, which undercuts effective law enforcement.

Perhaps more troubling is the fact that the cost of self-reporting and cooperating is increasing at a rate which may well give corporate officials significant concerns about taking such steps. One of the key features of New Era enforcement is the cooperation of the business community. Enforcement officials have long emphasized self-reporting and cooperation, promising meaningful credit for such steps. As the results in the top ten well illustrate, the DOJ has repeatedly rewarded cooperation in the charging process.[225]

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[225] The impact of cooperation credit is readily seen in the calculation of the criminal fine. In the calculation credits are given for cooperation and self-reporting. In some instances, such as *Siemens*, it is also reflected by an agreement with the DOJ that the criminal fine will be set at an amount which is below the bottom number in the calculated fine range. *See supra* Section II A1*; see also* the settlements in *Panalpina*, discussed *infra* at Section , and II(B)(2), the those with Daimler, Technip, Snamprogetti and JGC, discussed *supra* in Section II B2. In contrast, settlements with the SEC frequently do not evidence the impact of cooperation credit. Those in the top ten for example, reflect a cookie-cutter approach.

Nevertheless, corporate officials may understandably feel conflicted when faced with a self-reporting -- cooperation decision. If self-reporting means the company faces spiraling settlement costs which are compounded with the increasing cooperation costs, frequently driven by the typical "where else" question from enforcement officials, a reluctance to cooperate becomes understandable.[226] Viewed in this context, the decision to self- report and cooperate is means that the company is agreeing to a series of unknowns in which it has: (1) promised to pay a large but indeterminate sum for investigation, remediation and cooperation over a period of years; (2) promised to pay an unknown amount of fines, penalties, disgorgement and interest at the end of the case; and (3) is seeking an unknown and undefined credit for its cooperation and the often huge sums paid for the installation of compliance systems. Regardless of the organization's determination to be a good corporate citizen, the difficulty of the decision in view of these factors cannot be denied. It also gives meaning to the statement of the President of TRACE International, a global anti-bribery nonprofit, that "'[i]n the great majority of situations, companies choose not to disclose.'"[227] To the extent this is correct – and it is certainly true for the top ten where only one company self reported – it undercuts the goals of the New Era and the statute.

Uncertainties can also undercut other key New Era goals such as the installation of effective compliance systems. A key goal of FCPA enforcement is the installation of effective compliance systems by business organizations. It is noteworthy that none of the top ten had fully

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226 Following the investigation of the matters which initiated the investigation in many instances the question from enforcement officials to the company is "where else," meaning are there other locations where improper conduct may have taken place. In some instances the question may be based on evidence uncovered in the inquiry or the patterns of conduct reflected in that evidence. In others it may simply be speculation. It can however trigger another round of extensive and expensive inquiries. Anticipation of the question can also drive the company and investigators to significantly extend their procedures beyond the parameters of the known difficulty in an effort to secure cooperation credit. Michael Koehler, A Q & A With Claudius Sokenu On "Where Else" FCPA Professor Blog (Apr. 4, 2012) available at http://www.fcpaprofessor.com/a-qa-with-claudius-sokenu-on-where-else.

227 Alexandra Wrage, quoted in Matt Egan, Failure to Disclose Exacerbates Wal-Mart Scandal, Fox Business (April 26, 2012).

effective compliance systems. Siemens allegedly disregarded the systems it installed, as did Daimler. The crux of the charges against BAE is that the company failed to comply with its undertakings to install effective procedures and then made a series of misrepresentations regarding that fact as well as its conduct.[228]

One reason may be questions about their value. Installing and implementing effective compliance systems is a significant undertaking for any business organization in terms of time, expense and resources. Aside from the difficulties of crafting the appropriate standards, the value of such an undertaking is difficult to gauge in view of current settlement trends, and the fact a procedures defense is not recognized and opposed by the DOJ. While DOJ enforcement officials have repeatedly stated that compliance systems are considered in the charging decision, beyond those statements there is little to indicate the impact of the systems in the overall process of resolving potential FCPA liability. Indeed, it was not until recently that the DOJ specifically acknowledged that it declined to prosecute a company based at least in part on its compliance procedures.[229] These uncertainties, coupled with the difficulties of crafting such systems and the associated expense can be a disincentive to implement comprehensive procedures, undermining a key enforcement goal.[230]

Other uncertainties regarding the application of the statute, while perhaps not insurmountable, can also undercut the deterrent effect of New Era trends. One emerges from the

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228 *See supra* Section II(B)(2).

229 Press Release: Former Morgan Stanley Managing Director Pleads Guilty for Role In Evading internal Controls Required by FCPA (April 25, 2012), available at http://www.justice.gov/opa/pr/2012/April/12-crm-534.html ("DOJ Peterson Press Release"); *U.S. v. Peterson*, 12-cr-224 (E.D.N.Y. Filed March 26, 2012); *SEC v. Peterson*, 12-cv-2033 (E.D.N.Y. Filed April 25, 2012) (FCPA actions against former Morgan Stanley & Co.. employee who pleaded guilty and settled with the SEC, but where the DOJ stated that it declined to prosecute the firm based on its compliance procedures).

230 It may be that declinations offer better insight into the impact of compliance systems. There are no available statistics on these decisions. Clearly it would be inappropriate to publicize such decisions At the same time there is no reason that the DOJ and the SEC cannot publish statistics recording the number of declinations each year. Similarly, officials could discuss these decisions in a general manner in various speeches to give guidance to the marketplace without revealing the identity of the company involved.

meaning of the undefined term "instrumentality," which is contained in the definition of "foreign official." At the time the Act was passed in 1977 the lack of a definition for the term "instrumentality" may not have presented significant difficulties when assessing who is a foreign official. With the increasing use of state-owned enterprises, the landscape has changed. If every state-owned organization is an "instrumentality" and every employee of the entity is a "foreign official," then the application of the FCPA is clear. In contrast, if some state-owned enterprises are instrumentalities, and if only some employees of those enterprises are considered to be "foreign officials," in practice the difficulty of making the determination can make compliance virtually impossible. The crux of the difficulty becomes apparent when considering product demonstration and customer entertainment expenses. What may be considered standard operating procedure in a particular industry for employees of private corporations might be viewed as bribes if the individual is a "foreign official." Under these circumstances, the lack of a definition can become a trap for the unwary.[231]

The definition for the term used by the courts and apparently employed by enforcement officials, is of little assistance in crafting compliance standards. Each court which has considered the question adopted what is essentially an "all pertinent facts" approach in the context of the particular case. The approach is thoughtful and lawyer like but fraught with difficulty. It is predicated on assembling all the facts after an event. By definition, this means it relies on hind-sight. Thus, the approach may be useful when making a charging decision or instructing a jury, both of which have the benefit of a pre-decision fact-finding process. It is obvious, however, that this approach is unworkable for planning compliance on a prospective, forward-looking basis.

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[231] Since there must be a corrupt intent to establish a violation, it can of course be argued that this exaggerates the concern here. While this may be true, no company or executive should have to face the risk of criminal or even civil prosecution simply because the standards are undefined.

Similar uncertainties are threaded through other key provisions of the statute and charging process. Facilitation payments are an exception to the bribery provisions. Yet, current enforcement trends suggest that the defense has all but evaporated from the statute or is so constricted that it is all but unworkable.[232] Payments made under compulsion should not, by definition, be bribes, yet at least some decisions by enforcement authorities seem to indicate otherwise.[233] While guidance is available on business promotional and hospitality expenses, a careful study of the available materials suggests that such payments are inherently suspect which can lead to a decision to avoid the question.[234] That, of course, may disadvantage the careful business enterprise, as well as state-owned and other governmental entities. That was not the intent of the Act.

The question of successor liability presents a similar dilemma. Enforcement officials have stated that an acquiring company will not be held strictly liable solely for prior acts of an acquired company.[235] The difficulties of pre-acquisition due diligence and post-deal integration can however preclude a complete assessment of potential difficulties at the time of the deal. In view of the significant potential liabilities under the FCPA, many companies may chose to avoid the question by foregoing the opportunity. Again, however, the Act was not intended to hinder legitimate business, but rather to facilitate it.

Toward a New Era of Compliance

These uncertainties need not undermine the compliance goals of the New Era. The recognition of a procedures defense as under the UK Act can eliminate any uncertainty regarding the value of installing effective compliance procedures. Such a defense should encourage

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232 *See supra* Section III.

233 *See supra* Section III.

234 For a discussion of the guidance available on this issue see Witten, § 4.03 (2010)

235 Nov. 2010 Senate Hearing (Response to written questions of Greg Andres, Acting Deputy Assistant Attorney General, Criminal Division, Dep't of Justice at 29).

corporate officials to install reasonable procedures to avoid FCPA liability and assist in fostering a culture of compliance. The key here is to have reasonable and effective procedures, since no regime is foolproof. Accordingly, the focus is not on buying every "bell and whistle" in the marketplace. Rather, it should be on reasonably designed procedures which are effectively tied to the internal controls of the company and which stem from a culture of compliance driven by the top of the organization.[236]

The recognition of such a defense should also aid enforcement. It fosters compliance, which is a key enforcement goal. It also serves as an effective enforcement tool. If a review of the procedures demonstrates that they are ineffective or ignored as in *Siemens* and *Daimler,* or that the claims about them are baseless, as in *BAE*, those statements will tend to support prosecution claims about intent. Viewed in this context, the recognition of a procedures defense can only foster better compliance by business organizations and aid enforcement officials.

Similarly, the creation of a period of repose for mergers and acquisitions can eliminate the uncertainties regarding the question of successor liability. If corporate officials are afforded a sufficient period following a merger or acquisition to complete due diligence, remediate and report any difficulties and install appropriate compliance procedures, it will remove the current uncertainties. Under these circumstances effective FCPA compliance procedures can foster compliance and become good business.

Elimination of other uncertainties regarding the administration of the Act can also have a salutary effect on compliance. A forward-looking definition of instrumentality and clarity regarding facilitation payments and travel, entertainment and promotion items can facilitate the preparation and implementation of better and more effective compliance standards. In contrast, the current standards, which many find difficult to apply, do not facilitate drafting such standards

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[236] *See supra* note 240 discussing the recent actions involving a former Morgan Stanley employee.

or encourage compliance. Indeed, to the extent that they cause corporate officials to avoid the question by banning such payments, they effectively rewrite the statutes in a fashion that was never intended by Congress, while undermining business. Again, this is not a result which is conducive to effective law enforcement, compliance or business.

In the end, the critical question is the implementation of these points. One method is through amendments to the statutes. Business organizations have championed this approach. Both the House and the Senate have held hearings and considered testimony on several of these points. Nevertheless, at this point it does not appear that amendments will come from Congress in the immediate future.

An alternative approach is for the Department of Justice and the Securities and Exchange Commission to amend their principles of corporate prosecution. Each has long-established principles which guide the charging of business organizations with violations of the law. Accordingly, an efficient, straight and effective method for implementing the necessary changes is to incorporate them into prosecution policy by the DOJ and the SEC.[237] This would be fully consistent with the statement of the DOJ that it will provide additional guidance on FCPA issues.[238]

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[237] A similar approach was used to resolve issues concerning the waiver of attorney client privilege. Following the issuance of the Thompson Memorandum in 2003 which then governed DOJ policy regarding the prosecution of corporations, what critics later called a "culture of waiver" developed in which many claimed it was routine for enforcement officials to require the waiver of attorney client privilege and work product protections as a condition of cooperation credit. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Jan. 20, 2003). Business groups as well as the American Bar Association raised significant concerns regarding this issue. *See, e.g.*, Thomas O. Gorman, New DOJ Cooperation Principles: Substituting the Culture of Avoidance for the Culture of Waiver, 39 Bloomberg Law Reports, No 2 (Sept. 29, 2008). Legislation was introduced in Congress. *See, e.g.*, Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). Ultimately portions of the standards were held unconstitutional. *U.S. v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006), *reaff'd.* 495 F. Supp. 2d 390 (S.D.N.Y. 2007). The initial decision of the district court was affirmed by the Second Circuit. *U.S. v. Stein*, 541 F. 3d 130 (2d Cir. 2008) Eventually, the DOJ revised its policies on waiver without legislation.

[238] *See, e.g.*, Samuel Rubenfeld, Breuer Teases FCPA Guidance to Come In 2012, The Wall Street Journal Blog (Nov. 8 2011) available at http://blogs.wsj.com/corruption-currents/2011/11/08/breuer-teases-fcpa-guidance-to-come-in-2012/.

Ultimately business organizations are the key to reform. While Congress debates the issue and enforcement officials consider the questions, every business organization in the international markets is at risk. Congress may amend the statutes. The DOJ and the SEC may modify their enforcement policies. Compliance, however, begins with each business organization. To be sure, installing effective compliance systems is fraught with difficulties. At the same time the risks for business organizations which do little or adopt inadequate procedures are well documented.[239] Enforcers are aggressive. Industry-wide investigations and sweeps are increasing and are more effective. Whistleblowers lurk within the company and among its partners, suppliers and competitors. Liability is draconian. While calls for reform have merit and are well grounded, inaction by corporate executives and their organizations is simply not an option and may call into question the commitment of corporate officials to fully implement their obligations. It is thus incumbent on the organization to take the appropriate steps to protect its interests and those of its employees and shareholders.

In the New Era, the only prudent course is for organizations to act by implementing reasonable compliance programs tailored and crafted to fit their business model. In this regard, the focus should be on reasonable procedures and policies to address the key elements of FCPA liability. Where definitions are lacking and standards are vague, reasonably designed protocols based on available guidance can be crafted and documented to give the organization and its employees, agents and representatives the necessary guidance. A good starting point is to adopt an appropriately tailored version of Judge Sporkin's inoculation program. The implementation

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239 The recent tribulations of Wal-Mart, Inc. are instructive. Following the publication of an article alleging that the company engaged in years of FCPA violations in the Mexican market, all of which was ignored if not covered up the company, according to the article, Wal-Mart became the subject not just of the on-going investigations but of intense media scrutiny. David Barstow, Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle, NEW YORK TIMES (Apr. 22, 2012). Reportedly, this is impacting the ability of the company to conduct business in other areas. Stephanie Clifford and Steven Greenhouse, Wal-Mart Bribery Scandal Complicates U.S. Expansion Plans, NEW YORK TIMES (Apr. 30, 2012).

of such a program is not a guarantee against liability as envisioned by the Judge. Nor is it a substitute for the proper statutory amendments by Congress or the pertinent additions to enforcement policy by the DOJ and the SEC. If properly crafted and followed, however, it can be a defense since it demonstrates a lack of the kind of intent necessary to prove a violation of the FCPA. Stated differently, it should constitute a defense to liability for the organization while demonstrating a determination to foster compliance with the Act. That will cast the organization as a good corporate citizen, aiding the implementation of the goals of the Act. It should also protect the organization and its people who follow its guidance.[240] If this step is taken, the New Era will continue but not as one focused on enforcement but on compliance originating from the business community.

[240] There is some indication that enforcement officials may be moving toward this approach. In the recent FCPA actions against former Morgan Stanley employee Garth Peterson the DOJ specifically declined to prosecute the firm in view of its compliance procedures as well as the fact that it self-reported and cooperated. Indeed, the DOJ Press Release and the SEC complaint each have sections which highlight Morgan Stanley's compliance procedures. DOJ Peterson Press Release; *SEC v. Peterson*, 12-cv-2033 (E.D.N.Y. Filed Apr. 25, 2012).