

# GIBSON DUNN

January 6, 2014

## 2013 YEAR-END FCPA UPDATE

To Our Clients and Friends:

It has been another year of plenty for enforcement of the U.S. Foreign Corrupt Practices Act (“FCPA”) and international anti-corruption statutes worldwide. From a return to the robust enforcement totals of recent years, to a nearly fourfold increase in the size of the average corporate fine, to increasingly aggressive deployment of traditional criminal investigative techniques, to the expansion of multijurisdictional, cross-border cooperation and prosecutions, 2013 marked another year of vigorous international anti-corruption enforcement.

This client update provides an overview of the FCPA and a survey of anti-corruption enforcement, litigation, and policy developments in 2013, including those in the international arena. It also analyzes recent trends and offers practical guidance to help companies and their executives avoid or minimize liability under the FCPA and its foreign counterparts. A collection of Gibson Dunn’s publications on the FCPA and its British counterpart, the U.K. Bribery Act, including prior enforcement updates and more in-depth discussions of the statutes’ complex frameworks, may be found on our [FCPA/U.K. Bribery Act Website](#). **And for more analysis on the year in anti-corruption enforcement, please join us for one or both of our upcoming webcast presentations: FCPA Trends in the Emerging Markets of China, India, Russia, the Middle East and Africa on January 13 (to register, [click here](#)) and FCPA Year-in-Review on February 3 (to register, [click here](#)).**

### FCPA OVERVIEW

The FCPA’s anti-bribery provisions make it illegal to corruptly offer or provide money or anything of value to officials of foreign governments or foreign political parties with the intent to obtain or retain business. The anti-bribery provisions apply to “issuers,” “domestic concerns,” and “agents” acting on behalf of issuers and domestic concerns, as well as to “any person” who violates the FCPA while in the territory of the United States. The term “issuer” covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). In this context, foreign companies whose American Depository Receipts (“ADRs”) are listed on U.S. exchanges are “issuers” for purposes of this statute. The term “domestic concern” is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has its principal place of business in the United States.

As a complement to the anti-bribery provisions, the FCPA’s books-and-records provision requires issuers to make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer’s transactions and disposition of assets. Further, the FCPA’s internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Regulators frequently invoke these latter two sections—collectively known as the accounting provisions—when they cannot establish the elements for an anti-bribery prosecution or as a mechanism for compromise in settlement negotiations. Because there is no requirement that a false record or deficient control be linked to an improper payment, even a payment that does not constitute a violation of

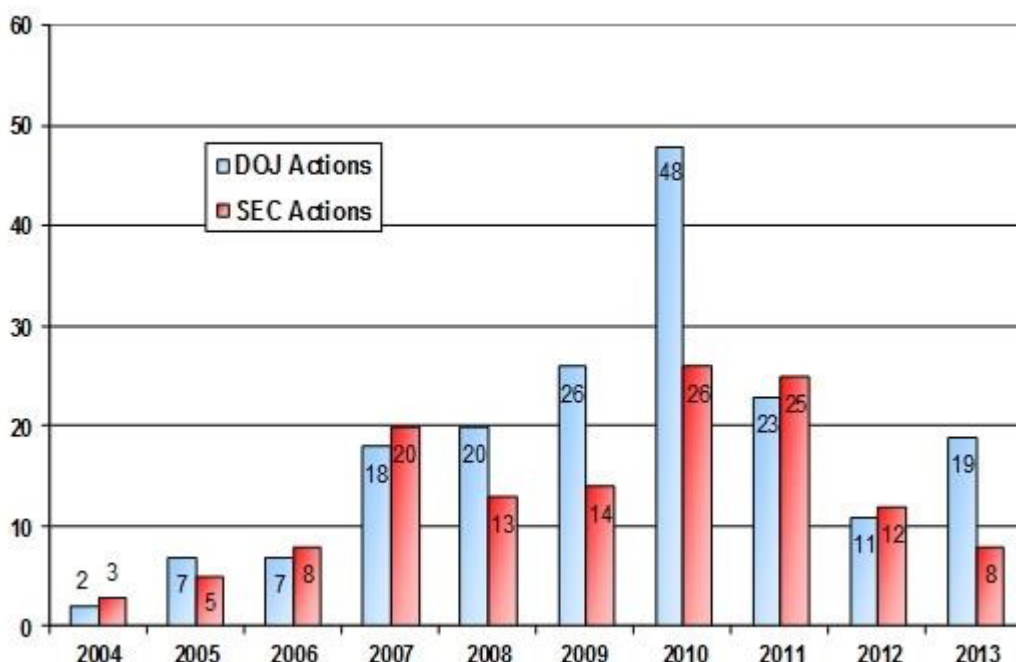
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the anti-bribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

## 2013 FCPA ENFORCEMENT STATISTICS

The following table and graph detail the number of FCPA enforcement actions initiated by the statute's dual enforcers, the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC"), during each of the past ten years. As these figures bear out, the dedicated professionals at DOJ and the SEC (now numbering more than 60) have aggressively and successfully pursued their enforcement mandate in 2013 and recent years past.

2004		2005		2006		2007		2008		2009		2010		2011		2012		2013	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
2	3	7	5	7	8	18	20	20	13	26	14	48	26	23	25	11	12	19	8



## 2013 FCPA ENFORCEMENT TRENDS

In each of our year-end FCPA updates, we seek not only to report on the year's FCPA enforcement actions but also to identify and synthesize the trends that stem from these actions. In 2013, five key enforcement trends stand out from the rest.

### The Growing Cost of Corporate FCPA Resolutions

An unmistakable characteristic of the year in FCPA enforcement is that the market rate for resolving a corporate FCPA enforcement action spiked precipitously in 2013. The average closing price for a corporate FCPA resolution, inclusive of DOJ and SEC fines, penalties, disgorgement, and prejudgment interest, was

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more than \$80 million in 2013. That is a nearly fourfold increase over 2012. And looking at the horizon of cases to come while speaking at the 2013 American Conference Institute FCPA Conference (“ACI FCPA Conference”), DOJ’s FCPA Unit Chief said that he expects DOJ to bring more “top 10 quality type cases” in 2014.

Two of the nine corporate FCPA resolutions of 2013—**Total, S.A.** and **Weatherford International Ltd.**—joined the infamous “FCPA Top 10” list. The particulars of French oil and gas company Total’s \$398.2 million settlement for alleged corruption in Iran are catalogued in our [2013 Mid-Year FCPA Update](#). With respect to Weatherford, DOJ and the SEC announced a joint FCPA resolution with the Swiss oil services firm on November 26, 2013. According to the charging documents, between 2002 and 2011 Weatherford, through its subsidiaries and third-party representatives, made corrupt payments to obtain or retain business in six foreign countries—Albania, Algeria, Angola, Congo, Iraq, and another, unnamed Middle Eastern country.

To resolve the charges, Weatherford entered into a deferred prosecution agreement (“DPA”) with DOJ for a single alleged violation of the internal controls provision. Simultaneously, a Bermudan subsidiary pleaded guilty to one count of violating the FCPA’s anti-bribery provision and the parent company consented to the filing of a civil complaint by the SEC alleging violations of the anti-bribery, books-and-records, and internal controls provisions. Weatherford agreed to pay \$87,178,256 to resolve the criminal FCPA charges, \$65,612,360 to resolve the civil FCPA charges, and agreed to retain an independent compliance monitor for at least an 18-month term.

The Weatherford FCPA settlement was coordinated with export sanctions enforcement actions by the U.S. Attorney’s Office for the Southern District of Texas, Department of Commerce, and Office of Foreign Assets Control. Together, the export sanctions settlements allege that Weatherford and its subsidiaries violated the Trading With the Enemy Act, International Emergency Economic Powers Act, and Export Administration Regulations in connection with sales to Cuba, Iran, Mexico, Syria, and Venezuela. The sanctions side of the coordinated resolution resulted in a separate parent company DPA, two more subsidiary guilty pleas, \$50 million in criminal fines, and a \$50 million administrative penalty. Gibson Dunn represented Weatherford in both the FCPA and sanctions settlements.

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The new Corporate FCPA Top 10 List as of year-end 2013 is as follows:

No.	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG*	\$ 800,000,000	\$ 450,000,000	\$ 350,000,000	12/15/2008
2	KBR/Halliburton	\$ 579,000,000	\$ 402,000,000	\$ 177,000,000	02/11/2009
3	BAE Systems**	\$ 400,000,000	\$ 400,000,000	--	02/04/2010
4	Total, S.A.	\$ 398,200,000	\$ 245,200,000	\$ 153,000,000	05/29/2013
5	Snamprogetti/ENI	\$ 365,000,000	\$ 240,000,000	\$ 125,000,000	07/07/2010
6	Technip S.A.	\$ 338,000,000	\$ 240,000,000	\$ 98,000,000	06/28/2010
7	JGC Corp.	\$ 218,800,000	\$ 218,800,000	--	04/06/2011
8	Daimler AG	\$ 185,000,000	\$ 93,600,000	\$ 91,400,000	04/01/2010
9	Weatherford***	\$ 152,790,616	\$ 87,178,256	\$ 65,612,360	11/26/2013
10	Alcatel-Lucent	\$ 137,372,000	\$ 92,000,000	\$ 45,372,000	12/27/2010

\* Siemens's U.S. FCPA resolutions were coordinated with a €395 million (\$569 million) anti-corruption settlement with the Munich Public Prosecutor.

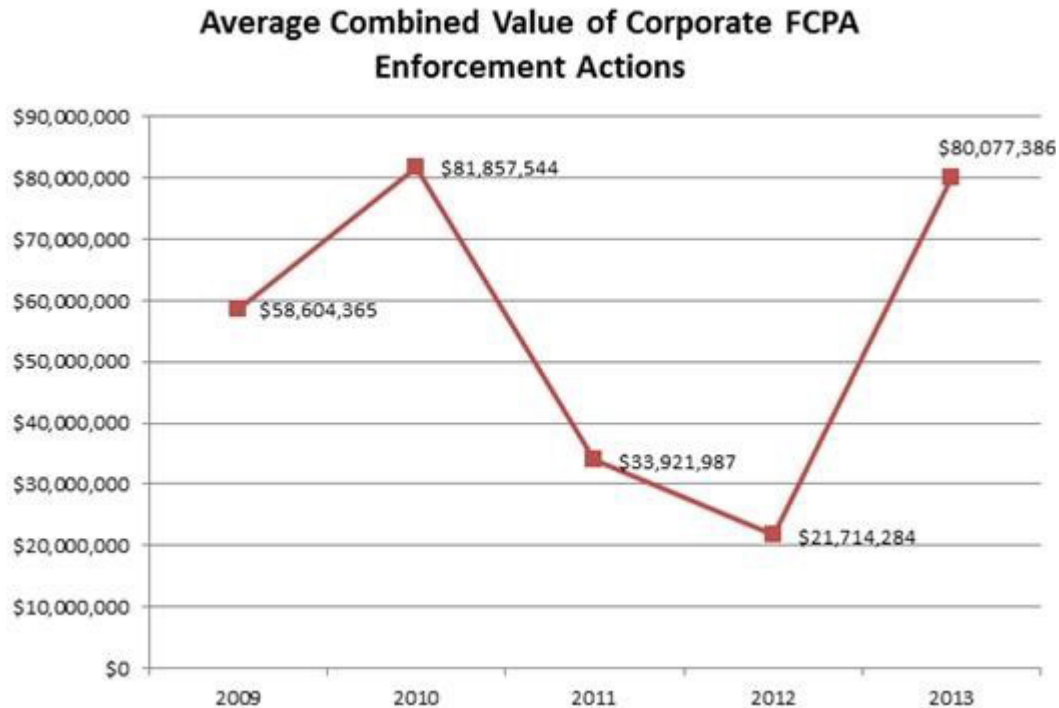
\*\* BAE pleaded guilty to non-FCPA conspiracy charges of making false statements and filing false export licenses, but the alleged false statements concerned the existence of the company's FCPA compliance program, and the publicly reported conduct concerned alleged corrupt payments to foreign officials.

\*\*\* The \$152,790,616 figure includes settlement payments related only to Weatherford's alleged FCPA violations (not export sanctions violations).

Of potentially greater significance than the fact that two new companies joined the FCPA Top 10 in 2013 is that not one of the nine corporate FCPA enforcement actions was resolved for less than \$1 million between DOJ and SEC assessments. Further, only two of these cases closed below eight figures. This contrasts with FCPA resolutions of only a few years ago, where it was common for multiple cases in any given year to settle south of \$1 million—even in years where the average settlement value was slightly higher than the \$80 million of 2013 (due to particularly large resolutions in those years). The most recent FCPA case to settle with a six-figure payment dates all the way back to March 2011, with the \$300,000 settlement between the SEC and Ball Corporation described in our 2011 Mid-Year FCPA Update.

A graph tracking the average combined resolution value of corporate FCPA enforcement actions over the past five years follows:

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## Not Finished Yet

Several of this year's FCPA enforcement actions arose out of investigations that began spawning charges years ago, illustrating the difficulty of determining from the outside when the U.S. Government is truly done with any particular inquiry.

Perhaps the best example of this phenomenon is DOJ's prosecution of German engineering and services company **Bilfinger SE**, announced on December 9, 2013. Bilfinger's is the latest in a string of FCPA enforcement actions relating to the development of the Eastern Gas Gathering System ("EGGS") in Nigeria, the long arc of which dates back to 2006, when former Willbros Group executive Jim Bob Brown pleaded guilty to FCPA conspiracy charges. Over the last seven years, three other Willbros executives and consultants have been charged and the company itself entered into coordinated DOJ and SEC FCPA resolutions as discussed in our [2008 Mid-Year FCPA Update](#).

With respect to the 2013 resolution, the charging documents allege that Bilfinger conspired with its EGGS joint venture partner Willbros to make more than \$6 million in corrupt "landscaping payments" to Nigerian officials in connection with the \$387 million EGGS project. Bilfinger's payments were allegedly made in cash from a safe at its Nigerian subsidiary.

Bilfinger entered into a three-year DPA to resolve substantive and conspiracy FCPA bribery charges. The company paid \$32 million—noticeably comparable to the \$32.3 million combined DOJ and SEC payment made by Willbros in its 2008 resolution. Bilfinger also will retain a compliance monitor for at least the first 18 months and undertake a self-reporting obligation for the balance of the DPA term.

Another 2013 corporate defendant that trailed years after its co-defendants in resolving FCPA charges is global drilling services provider **Parker Drilling Co.** As described in our [2013 Mid-Year FCPA Update](#), Parker Drilling paid \$15.85 million to resolve FCPA bribery, books-and-records, and internal controls charges with DOJ and the SEC arising from the long-running Nigerian customs investigation. As reported in our [2010](#)

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Year-End FCPA Update, seven other companies resolved FCPA charges arising from the same investigation in November 2010.

## Sweeps and Spinoffs

The investigative approach of DOJ and the SEC targeting particular industries via “sweeps” has been much discussed in recent years. Indeed, we noted this as a trend driving the FCPA enforcement train as early as our 2010 Year-End FCPA Update.

In a recent panel discussion at the American Bar Association’s 2013 FCPA Conference (“ABA FCPA Conference”) in Washington, D.C., DOJ and SEC FCPA Unit Chiefs Chuck Duross and Kara Brockmeyer discussed this practice and drew a distinction between sweeps and “following the evidence.” Duross stated that DOJ does not conduct industry sweeps without predication; what it will do, however, is follow-up when a company indicates that its competitors also are engaged in corrupt conduct. According to Duross, “That’s not something I would think of as a sweep. We’re just following the evidence where it goes.” Brockmeyer said that the SEC also “follow[s] an investigation where it goes,” observing that if “someone comes in and says [their five competitors are using the same agent under SEC scrutiny], [t]he five competitors are also likely to get letters from us.” But in contrast to DOJ, Brockmeyer said that the SEC, as a regulatory agency, will occasionally “look at an industry where there are risk factors [and] go out with a voluntary request to see whether there might be an issue [where the SEC] need[s] to probe more carefully.” Brockmeyer observed, however, that the SEC is mindful of the costs spawned by these proactive measures and therefore this approach is “discussed at a very high level” before it is employed.

However characterized, several of the year’s corporate FCPA enforcement actions derive from this follow-on investigative approach. Most recently, in the final FCPA enforcement action of 2013, DOJ and the SEC announced joint enforcement actions against multinational agribusiness **Archer-DanielsMidland Co.** (“ADM”) on December 20, 2013. The focus of the DOJ and SEC actions was on ADM’s operations in Ukraine and, specifically, its receipt of value-added tax (“VAT”) refunds from the Ukrainian government. According to the charging documents, German and Ukrainian subsidiaries of ADM engaged in a scheme to kick back 18-20% of the value of VAT refunds to Ukrainian tax officials in return for the officials releasing the refunds due to ADM. In total, between 2002 and 2008, the ADM subsidiaries are alleged to have paid \$22 million to secure the release of more than \$100 million in VAT refunds.

To resolve these allegations, as well as separate DOJ allegations concerning improper payments in Venezuela, ADM entered into a non-prosecution agreement (“NPA”) with DOJ and consented to the filing of a settled civil action by the SEC alleging violations of the FCPA’s books-and-records and internal controls provisions. Further, ADM’s Ukrainian subsidiary pleaded guilty to one count of conspiring to violate the FCPA’s anti-bribery provision. ADM paid \$33,342,012 in disgorgement and \$3,125,354 in prejudgment interest to the SEC and the Ukrainian subsidiary paid a \$17,771,613 criminal fine. No compliance monitor was imposed as part of the resolution, however ADM will itself be required to file written reports on its compliance remediation efforts with DOJ and the SEC once each year over the three-year NPA term.

DOJ and the SEC each noted ADM’s proactive, voluntary disclosure of the relevant conduct, as well as its “extensive cooperation” in their investigations and the “significant remedial measures” implemented by the company. Undoubtedly, these factors informed the agencies’ decisions not to impose a compliance monitor and DOJ’s decision to resolve the matter via an NPA. Another noteworthy aspect of the ADM settlement is that the company’s criminal fine was offset, in part, by a \$1,338,387 payment made by ADM’s German subsidiary to German law enforcement officials in connection with its investigation of the Ukrainian VAT matter.

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The receipt of Ukrainian VAT refunds was the subject of letters sent by the SEC to multiple companies doing business in the country. Whether these letters were part of a proactive sweep that netted ADM or, alternatively, a follow-on to the ADM investigation is not certain. Nor is it clear whether additional charges will be forthcoming from this Ukrainian VAT investigation.

Another sweep/spinoff-based FCPA case of 2013 is that against **Stryker Corp.**—the latest in a long line of FCPA prosecutions of medical devices companies covered in many of our recent FCPA updates. On October 24, 2013, the SEC announced a settled administrative proceeding alleging that Stryker violated the FCPA's books-and-records and internal controls provisions in connection with \$2.2 million in alleged improper payments to government officials in Argentina, Greece, Mexico, Poland, and Romania between 2003 and 2008. Although the SEC acknowledged that Stryker had a corporate anti-corruption policy during the relevant period, the SEC alleged that the policy was not adequately implemented at the regional and national levels abroad. Indeed, the SEC emphasized what it described as Stryker's decentralized, country-based business structure, which allowed foreign country managers to operate with great autonomy.

To resolve the proceeding, Stryker agreed to pay \$7,502,635 in disgorgement, \$2,280,888 in prejudgment interest, and a \$3,500,000 civil penalty. Notably, Stryker was not required to retain an independent compliance monitor, potentially due in part to the company's retention during the investigation of a "third-party consultant to perform FCPA compliance assessments and compile written reports for Stryker's operations in dozens of foreign jurisdictions across the world." Although operationally this consultant may be performing many of the same functions as would an independent compliance monitor, there undoubtedly were great advantages to Stryker retaining this consultant inhouse—subject to its direction and within the coverage of its attorney-client privilege. DOJ did not announce a parallel FCPA resolution together with the SEC's administrative proceeding; however, Stryker has disclosed that it is in the process of negotiating a potential resolution of criminal off-label marketing charges with a separate component of DOJ.

Still other FCPA enforcement actions derivative of potential sweeps include the Parker Drilling case discussed above, arising out of the Nigerian customs sweep, and the **Koninklijke Philips Electronics N.V.** case discussed in our 2013 Mid-Year FCPA Update, arising like Stryker out of the medical devices sweep.

## Across a Multitude of Industries

To be sure, in 2013 DOJ and the SEC brought FCPA enforcement actions arising out of many of the industries traditionally considered "high risk" for FCPA purposes, like oil and oil services and medical devices. But the year also saw prosecutions in sectors that one normally does not associate with the FCPA, like clothing and automated teller machine manufacturing.

We covered the April 2013 DOJ and SEC NPA resolutions with unlikely FCPA defendant apparel manufacturer **Ralph Lauren Co.** in our 2013 Mid-Year FCPA Update. This case has been the subject of much attention throughout the year, in part because it was the first time the SEC resolved an FCPA case via an NPA. Speaking at the ABA FCPA Conference, SEC FCPA Unit Chief Brockmeyer noted that the alternative resolution vehicle was employed "to reward what [the SEC] viewed as very significant cooperation." At the same time, DOJ and the SEC have emphasized that the FCPA troubles for Ralph Lauren Co. arose because the company allegedly did not have an FCPA compliance program in place during the period in which the conduct took place. DOJ FCPA Unit Chief Duross, speaking at that same ABA FCPA Conference, observed that the lack of a pre-existing FCPA program was what distinguished Ralph Lauren Co. from Morgan Stanley & Co., Inc.—a company that like Ralph Lauren uncovered alleged violations of the FCPA, voluntarily reported them to DOJ and the SEC, and cooperated completely in the ensuing investigations. But unlike Ralph Lauren Co., Morgan Stanley had a robust anti-corruption program already in place prior to the alleged violations and thus received a declination of prosecution rather than two NPAs.

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Another perhaps unlikely FCPA defendant of 2013 is ATM manufacturer *Diebold, Inc.*, against which charges were announced by DOJ and the SEC on October 22, 2013. According to the charging documents, between 2005 and 2010 Diebold subsidiaries in China and Indonesia spent upwards of \$1.8 million bestowing improper travel, entertainment, and gift benefits upon employees of state-owned banks in those countries. The trips, purportedly disguised on Diebold's books as "training," included travel to U.S. tourist destinations such as Disneyland, Hawaii, the Grand Canyon, Las Vegas, and Napa Valley, as well as European destination cities from Amsterdam to Venice. In Russia, a Diebold subsidiary allegedly created false contracts with a distributor to generate a cash fund from which the distributor paid bribes to obtain business for Diebold with privately-owned banking customers.

To resolve the criminal matter, Diebold entered into a three-year DPA alleging a substantive violation of the FCPA's books-and-records provision, as well as a conspiracy to violate the anti-bribery provision, and paid a \$25.2 million fine. On the SEC side, Diebold consented to the filing of a civil complaint alleging violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions and paid \$22.9 million in disgorgement plus prejudgment interest. Diebold also agreed to retain a compliance monitor for at least the first 18 months of the DPA term.

Discussing the Diebold settlement at the ACI FCPA Conference, SEC FCPA Unit Chief Brockmeyer observed, "Business travel can be perfectly legitimate. But if your factory's in Michigan, then you should not be taking your government official to Las Vegas on the way." She also noted with respect to the SEC's charging commercial bribery as books-and-records and internal controls violations that although the SEC is "not out there necessarily looking for commercial bribery cases[,] if we find them [while investigating a foreign corruption case], we are going to be charging these economic violations as well."

## **Continued Focus on Individuals**

As noted in many of our prior FCPA updates, DOJ and the SEC have for years been emphasizing an increased focus on holding individual defendants—and not just their employers—accountable for FCPA violations. A snapshot of new FCPA cases announced in 2013 demonstrates that DOJ is following through on this declaration in a significant way, with 12 of the 19 cases levied against individual defendants. On the SEC side of the ledger, all eight FCPA defendants in 2013 were corporations. But SEC Co-Director of Enforcement Andrew Ceresney recently vowed that his agency would be "more creative and aggressive" in pursuing FCPA enforcement actions against individuals and predicted that the SEC would file more actions against individuals in FCPA cases in the coming months. Further, as discussed below, in 2013 the SEC has been litigating several cases against individual defendants based on FCPA charges filed in prior years.

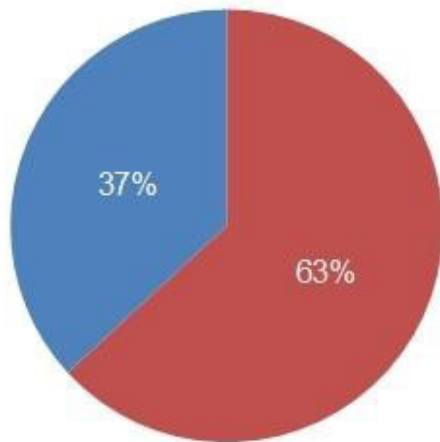


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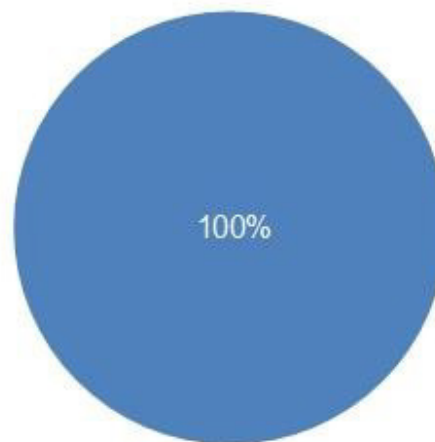
A graphic breakdown of FCPA charges by DOJ and the SEC in 2013 follows:

DOJ FCPA Enforcement Actions in 2013

SEC FCPA Enforcement Actions in 2013



■ Individuals ■ Corporations



■ Corporations

The first group of FCPA charges against individual defendants in 2013 were those against four former executives of BizJet International Sales and Support, Inc.—**Peter DuBois**, **Jald Jensen**, **Bernd Kowalewski**, and **Neal Uhl**. As discussed in our [2013 Mid-Year FCPA Update](#), DuBois and Uhl each pleaded guilty and received probationary sentences for their role in the alleged bribery of government officials in Brazil, Mexico, and Panama to secure maintenance and repair contracts for their employer, which resolved its FCPA charges in March 2012. Jensen and Kowalewski are not before the court and are believed by DOJ to be residing abroad.

Notably, the charges against all four defendants were filed in 2011 and 2012, but not announced until 2013 due to efforts by DOJ to obtain custody over the two fugitive defendants before publicizing the charges. This illustrates a point frequently made by DOJ in discussing FCPA enforcement statistics—the numbers are actually understated because, at any given time, there are likely individual defendants with charges against them sitting under the seal of one or more federal district courts.

DOJ's purpose for keeping charges under seal can be deduced from this year's case against **Frederic Pierucci**. As discussed in our [2013 Mid-Year FCPA Update](#), the 2012 indictment of the French national and executive of Alstom Power, Inc. was unsealed and Pierucci was arrested after stepping off a plane at New York's JFK Airport. Pierucci is not the first defendant to find an FCPA arrest warrant waiting for him or her at the arrival gate—examples from the past several years include Paul Novak (IAH, 2008), Gerald and Linda Green (LAX, 2007), and Christian Sapsizian (MIA, 2007). Further, in a late-breaking development that underscores this trend, on January 6, 2014 DOJ announced FCPA, wire fraud, money laundering, and related conspiracy charges against three individuals—Knut Hammarskjold, Joseph Sigelman, and Gregory Weisman, respectively the former Co-Chief Executive Officers and General Counsel of British Virgin Islands oil and gas company PetroTiger Ltd.—in connection with an alleged scheme to bribe an official of Ecopetrol S.A., Columbia's national oil company. Weisman reportedly pleaded guilty to his charges on November 8, 2013, but the charges remained under seal until Hammarskjold was arrested at Newark Liberty International Airport on November 20, 2013 and Sigelman was arrested in the Philippines on January 3, 2014. We will provide an in-depth analysis of this case and its most recent developments in our [2014 Mid-Year FCPA Update](#).

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On July 29, 2013, Pierucci pleaded guilty to one count each of FCPA bribery and conspiracy to do the same in connection with corrupt payments to senior Indonesian officials—including a member of parliament and high-ranking officials of the state-controlled electricity company—to obtain a \$118 million equipment and services contract at the Tarahan power plant. Of note, the charges list Japanese trading company Marubeni Corporation—which pleaded guilty to separate FCPA charges involving the Bonny Island Nigeria matter as detailed in our 2012 Mid-Year FCPA Update—as an unindicted coconspirator in the Tarahan project scheme.

A second Alstom executive, **David Rothschild**, pleaded guilty to FCPA conspiracy charges in November 2012, but the charges were kept under seal until Pierucci's April 2013 arrest. Still two more Alstom executives—**William Pomponi** and **Lawrence Hoskins**—were indicted on FCPA bribery, conspiracy, and money laundering charges on April 30 and July 30, 2013, respectively. Sentencing dates have not yet been set for Pierucci or Rothschild. Hoskins is not before the court and a warrant remains outstanding for his arrest. Pomponi surrendered after the announcement of his indictment and is currently free on bond. His trial is currently scheduled to begin in the U.S. District Court for the District of Connecticut on June 16, 2014. The most recent court filings indicate that DOJ intends to introduce expert testimony that the state-owned electricity company was an “agency” and “instrumentality” of a foreign government for purposes of the FCPA, as well as evidence of uncharged misconduct involving additional projects in Indonesia, China, and India, to demonstrate knowledge, intent, absence of mistaken, and *modus operandi* pursuant to Federal Rule of Evidence 404(b).

The fourth FCPA fugitive of 2013—joining Hoskins, Jenkins, and Kowalewski—is Swiss citizen and former General Manager of Maxwell Technologies S.A. **Alain Riedo**. On October 15, 2013, nearly three years after the U.S. parent of Riedo's former employer—Maxwell Technologies, Inc.—paid \$14.3 million to resolve its FCPA charges, DOJ announced Riedo's indictment on nine counts of FCPA bribery, conspiracy, books-and-records, and internal controls charges. According to the indictment, between 2002 and 2009 Riedo conspired with Maxwell's third-party agents and others to make corrupt payments to employees of state-owned companies in China in return for the award of energy storage and power delivery contracts to Maxwell's Swiss subsidiary. DOJ also alleges that Riedo caused Maxwell's SEC filings and financial statements to falsely reflect the bribe payments as commissions, consulting fees, or sales expenses and that Riedo made false subcertifications that he was complying with, and had no knowledge of violations of, the FCPA.

Riedo, who currently serves as the director of the Fribourg Chapter of the Swiss Chamber of Commerce and Industry, reportedly remains in Switzerland with a warrant for his arrest outstanding in the United States.

The last group of individual FCPA defendants charged (publicly) in 2013 consists of three employees of New York broker-dealer Direct Access Partners LLC—**Tomas Alberto Clarke Bethancourt**, **Ernest Lujan**, and **Jose Alejandro Hurtado**. As described in our 2013 Mid-Year FCPA Update, the three were charged with FCPA bribery, Travel Act, and money laundering offenses, as well as conspiracy to commit the same unlawful acts, in connection with a scheme to pay kickbacks to a senior official of Venezuela's state economic development bank, Banco de Desarrollo Económico y Social de Venezuela (“BANDES”) in return for BANDES's investment business. The three Direct Access Partners employees each entered guilty pleas on August 29 and 30, 2013. Of further note, the alleged BANDES bribe recipient—Maria de Los Angeles Gonzalez de Hernandez—pleaded guilty on November 18, 2013 to substantive and conspiracy Travel Act and money laundering offenses, but not FCPA charges as the FCPA does not apply to foreign government officials. All defendants are awaiting 2014 sentencing dates.

One more 2013 FCPA-related case against an individual that is not (presently) an FCPA case is an obstruction of justice and witness tampering prosecution that arises out of an FCPA investigation. As reported in our 2013 Mid-Year FCPA Update, on April 15, 2013 DOJ announced the arrest of Frederic Cilins, a French citizen acting on behalf of Israeli mining company BSG Resources Ltd (“BSGR”). According to the

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charging documents, Cilins offered the widow of former Guinean President Lansana Conté \$1 million to destroy contracts that allegedly evidence a prior corrupt scheme concerning the award of the concession rights to BSGR and to induce the widow to sign an affidavit falsely attesting, among other things, that no such contracts exist. Cilins allegedly further offered the widow an additional \$5 million if BSGR were to retain its interest in the Guinean concession. Unbeknownst to Cilins, the widow was cooperating with the Federal Bureau of Investigation (“FBI”) and secretly recorded the meetings and several related phone calls. A translation of Cilins’ recorded statements (made in French) allegedly include his exhortation that the documents “must be destroyed – urgent-urgent-urgent ... You must destroy this – very urgent –very, very urgent.”

The proactive investigative techniques employed by DOJ and the FBI in the Cilins case (e.g., surreptitious recordings by a cooperating witness) have been touted by DOJ as an important part of its FCPA playbook. DOJ’s FCPA Unit Chief recently said, “[W]e continue to do proactive cases. The idea that we would stop doing that, it just doesn’t make any sense to me. As a prosecutor, we have a tool kit of different things to use and whether that’s body recordings or consensual recordings, or stings, or wire taps, or any of those kinds of things, we will consider using all of those where appropriate.”

Cilins has pleaded not guilty to three counts of witness tampering and two counts of obstruction of justice and is being held in pretrial custody pending a March 31, 2014 trial date. Two collateral issues have been or are being litigated in this case. First, after two magistrate judges reached opposite decisions on the subject, the Honorable William H. Pauley III of the U.S. District Court for the Southern District of New York denied Cilins’ bid for pretrial release finding that Cilins is “a serious risk of flight and there are no conditions that can assure his appearance in court.” Specifically, Judge Pauley held that Cilins’ French citizenship coupled with the fact that France will not extradite its citizens, his substantial financial resources about which he was less than forthcoming with Pretrial Services, and the alleged efforts by Cilins to interfere with the underlying grand jury investigation all weighed against pretrial release. Second, Cilins has filed a motion seeking inspection of the allegedly corrupt contracts that he purportedly sought to destroy on the grounds that his defense centers around the contention “that these documents are not genuine contracts, but rather these are false ‘contracts’ created to extort monies from BSGR, Mr. Cilins, and others.” The Government has opposed this motion, arguing that the documents are in the possession of Guinean authorities and have never been in the possession of U.S. authorities. Further, DOJ has moved to preclude Cilins from raising at trial the “collateral issue” of whether these contracts are indeed false because, according to DOJ, even if the documents were false (a contention it disputes), that would not authorize Cilins to procure their destruction once they were under grand jury subpoena. This motion remains pending.

Cilins is not the first person to face obstruction charges arising out of an FCPA investigation. Prior examples include Gerald Green (2008) (allegedly falsified budgetary documents to disguise bribe payments as bona fide expenses in connection with the investigation of his film company, although the jury did not convict on this charge), Hong “Rose” Carson (2009) (allegedly tore up documents and flushed them down a toilet in connection with the Control Components, Inc. FCPA investigation, although this charge was ultimately dismissed by DOJ), and a Veraz Networks Inc. executive (2010) (allegedly deleted records from his computer in connection with the company’s FCPA investigation, although the individual was never charged with a substantive FCPA violation).

## 2013 FCPA ENFORCEMENT LITIGATION

### **Eleventh Circuit Hears Oral Argument in *U.S. v. Joel Esquenazi & Carlos Rodriguez***

On October 11, 2013, the U.S. Court of Appeals for the Eleventh Circuit heard oral arguments in the case of *United States v. Joel Esquenazi & Carlos Rodriguez*, making it the first appellate court to consider the critical issue of whether employees of state-owned or -controlled enterprises constitute “foreign officials” under the FCPA. As discussed in each of our FCPA updates since 2011, DOJ and the SEC have developed a theory

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that state-owned or -controlled entities qualify as “instrumentalities” of a foreign government under the FCPA, making all of their employees (regardless of title or position) “foreign officials.” Esquenazi and Rodriguez argued that in drafting the FCPA, Congress considered, but intentionally excluded, state-owned enterprises from the definition of “instrumentality.” According to Esquenazi, an entity must perform “traditional” governmental functions to qualify as an instrumentality. Rodriguez made the slightly different argument that the entity must be a formal “unit of government” in order to qualify. In opposition, DOJ argued that defendants’ proposed constructions overlook other important factors indicative of instrumentality status, including government ownership and the degree of control that the government exercises over the entity. Though admitting the difficulty in drawing a bright line at a particular level of ownership, DOJ told the appellate panel that governmental ownership of as little as 10% of an entity (in conjunction with other factors) could satisfy DOJ’s definition of “instrumentality.”

While the FCPA Bar eagerly awaits a decision from the Eleventh Circuit, hopefully clarifying the contours of the statute’s coverage, at stake for the two defendants is the potential reversal of their convictions and sentences, including the longest sentence ever imposed against an FCPA defendant— 15 years for Esquenazi.

## **Ninth Circuit Affirms Restitution Order Against Gerald and Patricia Green**

On July 11, 2013, the U.S. Court of Appeals for the Ninth Circuit affirmed the restitution order imposed upon Gerald and Patricia Green after a jury found them guilty of FCPA, money laundering, and conspiracy offenses. Following their convictions, the Honorable George H. Wu of the U.S. District Court for the Central District of California sentenced each defendant to six months’ imprisonment, three years’ supervised release, and ordered \$250,000 in restitution.

The Greens appealed only the restitution order, arguing that the district court violated *Apprendi v. New Jersey* and its progeny when it ordered them to pay restitution without a jury’s finding that there was an identifiable victim who suffered a pecuniary loss. Established Ninth Circuit precedent held that the *Apprendi* dictate that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt” does not apply to restitution. The Greens asked the Ninth Circuit to break from this precedent in light of the Supreme Court’s 2012 decision in *Southern Union Co. v. United States*, but the Circuit, in an opinion authored by Chief Judge Alex Kozinski, declined to do so.

The Greens filed a petition for a writ of certiorari with the Supreme Court, but the petition was denied on November 18, 2013.

## **SEC v. Elek Straub, et al. (Magyar Telekom Defendants)**

In our 2013 Mid-Year FCPA Update, we discussed at length the February 2013 decision by the Honorable Richard J. Sullivan of the U.S. District Court for the Southern District of New York denying motions to dismiss civil FCPA charges against three former executives of Magyar Telekom, Plc.—**Andras Balogh**, **Tamas Morvai**, and **Elek Straub**. Since that time, Judge Sullivan has further denied the defendants’ request to certify his decision for interlocutory appeal to the Second Circuit. Specifically, in an August 5, 2013 Memorandum Opinion, Judge Sullivan rejected the argument that there was inconsistency between his decision and one issued only weeks later in a separate FCPA case against a foreign defendant pending before Judge Sullivan’s Southern District colleague, the Honorable Shira A. Scheindlin. Judge Scheindlin found there was no personal jurisdiction and dismissed the charges in the case before her, *SEC v. Sharef*. But Judge Sullivan saw no tension between his ruling and Judge Scheindlin’s because in the *Straub* case, unlike *Sharef*, the foreign defendants are alleged to have “signed off on misleading management representations to the company’s auditors and signed false SEC filings,” thus making their scheme one directed at U.S. investors.

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With the issue of jurisdiction resolved, at least for the time being, the *Straub* case has proceeded into fact discovery. But the foreign nature of the case against three Hungarian citizens accused of bribing officials of the Macedonian and Montenegrin governments continues to create challenges. When the parties could not agree on the location for the defendants' depositions, Judge Sullivan ordered them to proceed in the compromise location of London. Recently defendants asked the Court for authority to issue letters rogatory and requests pursuant to the Hague Convention in connection with depositions of 42 witnesses located in Hungary, Germany, Greece, Macedonia, and Montenegro. Discovery is not scheduled to be completed until 2015 and no trial date is on the calendar.

## ***SEC v. Sharef, et al. (Siemens Defendants)***

As noted above, and described in our 2013 Mid-Year FCPA Update, Judge Scheindlin dismissed FCPA charges in her February 2013 *Sharef* opinion. But the motion at issue there concerned only one of seven Siemens representatives charged in the SEC's December 2011 complaint—**Herbert Steffen**. Defendant **Bernd Regendantz** settled his charges upon the SEC's filing with the payment of a \$40,000 civil penalty. With respect to the other five defendants, the SEC has spent much of the last two years attempting to effect service and obtain jurisdiction for the entry of judgment.

On April 16, 2013, the SEC announced that it had reached settlement with defendant **Uriel Sharef**. Sharef consented to the entry of an order enjoining him from future violations of the FCPA's anti-bribery and internal controls provisions and agreed to pay a \$275,000 civil penalty—the second highest ever assessed against an individual defendant in an SEC FCPA case. With respect to defendants **Ulrich Bock**, **Stephan Signer**, and **Andres Truppel**, the SEC moved for default judgments against all three on October 25, 2013. On the same day, the SEC without explanation moved to dismiss the charges against defendant **Carlos Sergi**, which motion was granted by the Court. Then, on November 16, the SEC withdrew the motion against Truppel because the parties had reportedly reached an agreement in principle to resolve the charges (the agreement is still reportedly subject to supervisory and Commission approval).

Notably, six of the seven Siemens defendants listed above remain under criminal indictment in the Southern District of New York—all except Regendantz who was never charged criminally. With the exception of a recent notice of appearance by counsel for Truppel, there has been no movement in the criminal case against these six, plus **Miguel Czysch** and **Eberhard Reichert** who were charged criminally but not civilly, since the indictments were filed in December 2011.

Of further note, as discussed below, on December 27, 2013, Bock, Czysch, Reichert, Regendantz, Sharef, and Truppel were indicted on criminal corruption charges in Argentina.

## ***SEC v. Ruehlen, et al. (Noble Corp. Defendants)***

In our 2013 Mid-Year FCPA Update, we reported on the SEC's narrowing of the FCPA charges against Gibson Dunn client **James J. Ruehlen** and co-defendant **Mark A. Jackson** following a motion to dismiss the charges on, among other things, statute-of-limitations grounds. Although the Honorable Keith P. Ellison of the U.S. District Court for the Southern District of Texas initially denied the SEC's request to delay the April 2014 trial date on these February 2012 charges, the SEC recently renewed its request for an extension of the trial date and various other deadlines in light of the withdrawal from the case by lead SEC counsel. The Court's decision on scheduling is pending.

## **Final Approval of the 2011 IBM Settlement**

On July 25, 2013, the Honorable Richard J. Leon of the U.S. District Court for the District of Columbia finally approved the March 2011 settlement of civil FCPA books-and-records and internal controls charges between the SEC and **International Business Machines Corp.** ("IBM"). As we reported in our 2012 Year-End FCPA

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Update, Judge Leon refused to “rubber stamp” the settlement in its original form and insisted that any final judgment require regular reports to the Court on any suspected FCPA violations (including non-corruption related violations of the books-and-records provision). As reported in our [2013 Mid-Year FCPA Update](#), Judge Leon subsequently relaxed the scope of his proposed reporting requirement to books-and-records violations that were reasonably likely to be connected to bribery or those that could show the company’s books and records to be fraudulent. Pursuant to the final judgment, for a period of two years IBM is required to “immediately” report to both the SEC and the Court “upon learning it is reasonably likely that IBM has violated the FCPA in connection with either (1) any improper payment to foreign officials to obtain or retain business or (2) any fraudulent books and records entry.” IBM also must submit annual reports to the SEC and the Court “describing its efforts to comply with” the FCPA. During the July 25 hearing, Judge Leon stated that he was “amenable” to the revised reporting requirements because he was convinced that IBM “not only has learned its lesson but has moved in the right direction and is trying to make sure this never happens again.” Judge Leon cautioned, however, that it would not be a “happy day” for IBM if “there is a problem in the next two years.” Meanwhile, IBM has disclosed in its public filings that it is currently under investigation by the SEC, DOJ, and Polish Central Anti-Corruption Bureau concerning “allegations of illegal activity by a former IBM Poland employee in connection with sales to the Polish government.” DOJ also is reportedly investigating allegations relating to transactions in Argentina, Bangladesh, and Ukraine.

## **2013 FCPA-RELATED PRIVATE CIVIL LITIGATION**

As if contending with a DOJ and/or SEC investigation into suspected FCPA violations was not enough, corporations and their executives are increasingly finding themselves enmeshed in private civil litigation at the same time. Whether the private lawsuit follows announcement of the government investigation, as in a shareholder derivative or 10b-5 stock drop class action, or drive the government investigation, as often happens with an employee whistleblower retaliation or customer/competitor Racketeer Influenced and Corrupt Organizations (“RICO”) lawsuit, these matters must be navigated with care to ensure that actions taken on the government side do not have unforeseen consequences on the civil side, and vice versa.

### **Dodd-Frank Employee Whistleblower Lawsuits**

The legislative action of the last 10 years likely to have the greatest impact on civil (and potentially even criminal) FCPA enforcement over the next 10 years is the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”). Among other things, Dodd-Frank established the SEC Office of the Whistleblower to administer a framework pursuant to which whistleblowers can receive substantial “bounty” payments for reporting original information to the SEC that results in a qualifying enforcement action. Separately, Dodd-Frank also established a new private right of action enabling employees to bring federal lawsuits against their employers if they believe the employer took adverse employment action or discriminated against the employee for engaging in certain lawful whistleblower activities.

Although neither the whistleblower incentive nor anti-retaliation provision of Dodd-Frank is specific to the FCPA, U.S. government officials have expressed great interest in their potential to further anticorruption enforcement agendas. For example, SEC Co-Director of Enforcement Ceresney, speaking at the ACI FCPA Conference, stated that he “expect[s] FCPA violations to become an increasingly fertile ground for Dodd-Frank whistleblowing” and that for companies subject to SEC jurisdiction “the risk of not coming forward grows by the day as our whistleblower program continues to pick up steam.” And DOJ Fraud Section Chief Jeffrey Knox recently commented that DOJ also is seeing the benefit of the SEC’s whistleblower program, noting that whistleblowers are now frequently represented by experienced counsel who prepare binders of evidence to assist investigators in their review and evaluation of the whistleblower reports. For more on this developing area of the law, and its intersection with FCPA enforcement, please view our recent webcast, [“Navigating the Minefield of Dodd-Frank’s Whistleblower Provisions and the FCPA.”](#)

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On the anti-retaliation front, two of the most important Dodd-Frank cases litigated in 2013 involve allegations of FCPA misconduct.

First, as reported in our [2013 Mid-Year FCPA Update](#), former **Siemens AG** compliance officer **MengLin Liu** filed a Dodd-Frank anti-retaliation suit against his former employer in the U.S. District Court for the Southern District of New York on January 15, 2013. Liu alleges that he was wrongfully terminated after reporting attempts by Siemens' Chinese subsidiary to evade internal controls put in place pursuant to the company's 2008 FCPA settlement. On October 21, 2013, Judge Pauley granted Siemens' motion to dismiss, holding that pursuant to the Supreme Court's 2010 *Morrison v. National Australia Bank Limited* decision, the court did not have jurisdiction over this action by a Taiwanese citizen alleging wrongdoing by a Chinese subsidiary of a German company involving alleged corruption in China and South Korea. Specifically, under *Morrison*, there is a strong presumption against extraterritorial application of U.S. laws unless Congress clearly expresses its intent to have the statute apply outside of the United States, and Dodd-Frank's anti-retaliation provision is silent on the subject. Judge Pauley applied the same interpretation of *Morrison* and Dodd-Frank's anti-retaliation provision as did the Honorable Nancy F. Atlas of the U.S. District Court for the Southern District of Texas in *Asadi v. G.E. Energy (USA), LLC*, covered in our [2012 Mid-Year FCPA Update](#). Liu has sought review of Judge Pauley's decision in the Second Circuit Court of Appeals.

Second, in the first interpretation of Dodd-Frank's anti-retaliation provision by a federal appellate court, on July 17, 2013 the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of the *Asadi* whistleblower suit referenced above. But rather than go to the merits of the jurisdictional question as Judge Atlas did below, the Fifth Circuit addressed the ancillary question of whether the plaintiff qualified as a "whistleblower" under Dodd-Frank. Upon review of this question, the Honorable Jennifer Walker Elrod writing for the court held that *Asadi* did not qualify because he did not report the alleged corruption to the SEC prior to the adverse employment action, and Dodd-Frank defines a "whistleblower" as one "who provides ... information relating to a violation of the securities laws to the Commission." Due to what some courts have found to be internal tension and ambiguity within the Dodd-Frank statute, as well as SEC implementing regulations that clearly state that one does not have to report information to the SEC in order to qualify as a "whistleblower" for purposes of the anti-retaliation provision, several district courts have come out the other way and held that SEC reporting is not required to bring a retaliation lawsuit so long as the violation complained of (most often internally) is subject to the SEC's jurisdiction. This issue is certain to be the subject of substantial litigation in the year to come.

## **Class Action Stock Drop and Shareholder Derivative Lawsuits**

On December 26, 2013, a disgruntled shareholder of network technology company **Net 1 Technologies, Inc.** filed a class action lawsuit in the U.S. District Court for the Southern District of New York accusing the company, its Chairman and Chief Executive Officer, and Chief Financial Officer of engaging in a scheme to mislead investors—and thus induce them to purchase securities at inflated prices—by making false statements and material omissions concerning the company's internal controls and violations of the FCPA. Net 1 disclosed in December 2012 that DOJ and the SEC were investigating a recent contract award made to the company by the South African Social Security Agency ("SASSA"), and specifically whether there had been corrupt payments to government officials in connection with that award. On news of this investigation, Net 1's stock price allegedly dropped nearly 59%. Then, on November 29, 2013, the Constitutional Court—the highest court in South Africa for matters involving constitutional interpretation—invalidated the SASSA contract award, purportedly based on irregularities in the tender process. On news of this court ruling, the company's shares allegedly fell an additional 28%. In addition to making claims under Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, plaintiff also claims that the individual defendants are liable as "control persons" under Exchange Act Section 20(a).

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Yet another network technology company, **Juniper Networks, Inc.**, has found itself embroiled in the unfortunate trifecta of government investigations, a class action stock drop lawsuit, and a shareholder derivative action—all within the last year. In the embodiment of every in-house counsel's nightmare, less than 24-hours after issuing a 52-word disclosure in its 10-Q filing concerning a DOJ/SEC FCPA investigation, Juniper saw its share price dip 5.6%. Several days later, on August 12, 2013, the company and four of its senior executives found themselves defendants in a stock drop class action lawsuit filed in the U.S. District Court for the Northern District of California. The plaintiff purports to act on behalf of a class of shareholders whom he contends were misled by false and misleading statements regarding revenues that Juniper allegedly derived in part from violations of the FCPA and a deficient system of internal controls. Similar to the Net 1 lawsuit, the plaintiff alleges violations of Exchange Act Section 10(b), Rule 10b-5 thereunder, and Exchange Act Section 20(a). Lead class counsel has been appointed and Juniper has filed its initial disclosures. The company's motion to dismiss is due in March 2014.

But government investigations and a shareholder class action are not the only fronts on which Juniper has been forced to engage. On August 28, 2013, a shareholder derivative suit for purported corporate waste and abuse arising out of the same alleged facts was filed against one dozen company directors and officers in Santa Clara Superior Court. This action was removed to the U.S. District Court for the Northern District of California in October and recently has been administratively related to the stock drop lawsuit.

We have been following the shareholder derivative woes that have befallen **Avon Products, Inc.**, as well as its directors and officers, since the cosmetics and perfume manufacturer disclosed a DOJ/SEC FCPA investigation in 2011. As reported most recently in our [2012 Mid-Year FCPA Update](#), defendants have to date been successful in beating back claims filed in multiple venues that they failed to establish sufficient anti-corruption controls, thereby enabling company representatives to make improper payments to government officials in numerous foreign countries. But like Groundhog Day, on November 22, 2013, another disgruntled shareholder filed another derivative action in the U.S. District Court for the Southern District of New York parroting largely the same allegations against largely the same cast of defendants. Defendants have until February 2014 to answer or otherwise respond to the complaint.

## Lawsuits Brought by Foreign Sovereigns

In our [2012 Year-End FCPA Update](#), we reported on a RICO suit filed by state-owned Mexican oil company **Petróleos Mexicanos** ("Pemex") against joint venture **CONPROCA S.A. de C.V.** and its two partner companies, **Siemens AG** and **SK Engineering & Construction Co. Ltd.** The \$500 million suit alleges that the defendants made improper payments to several Pemex officials while bidding on a refinery modernization project and, after winning the bid, continued to make improper payments to Pemex officials to retain the contract in the face of numerous budget overruns and related disputes.

On July 30, 2013, the Honorable Louis L. Stanton of the U.S. District Court for the Southern District of New York dismissed the RICO suit, ruling that Pemex failed to show that the alleged acts underlying, and parties to, the RICO claims had sufficient contacts with the United States. Judge Stanton found that the claims "allege[d] a foreign conspiracy against a foreign victim conducted by foreign defendants participating in foreign enterprises." Specifically, he was not convinced by Pemex's argument that the transfer of illicit payments through a New York entity was sufficient to demonstrate that a "pattern of racketeering activity" took place in the United States. Pemex has noted an appeal to the Second Circuit.

## Employee Defamation Lawsuits

In our [2013 Mid-Year FCPA Update](#), we covered what is likely the most significant ongoing collateral FCPA lawsuit, a state defamation action by **Robert Writt** against his former employer **Shell Oil Co.** Writt alleges that Shell defamed his character by reporting to DOJ that he "engag[ed] in unethical conduct" by approving certain payments to third parties. The report was made during one of the company's presentations to DOJ



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in connection with the investigation that led to Shell's November 2010 FCPA settlement, which we reported on in our [2010 Year-End FCPA Update](#). On June 25, 2013, the Texas First District Court of Appeals reversed a trial court ruling that Shell had an "absolute privilege" to make statements to DOJ during the investigation because, the appellate court held, a DOJ investigation is not a "judicial proceeding."

Shell has petitioned the Supreme Court of Texas for review, which petition is currently pending. Demonstrating the importance of this issue, six former U.S. Attorneys General have filed an *amicus* letter in support of Shell's petition. Among other points, *amici* note that "[i]f absolute privilege is to be denied for statements to law-enforcement authorities unless a judicial proceeding has been commenced or 'proposed,' valuable evidence likely will be denied to law-enforcement authorities, or its production seriously impeded, at the investigative stage of cases, when it is most valuable."

## FCPA OPINION PROCEDURE RELEASES

By statute, DOJ is obligated to provide a written opinion on the request of an "issuer" or "domestic concern" concerning whether DOJ would prosecute the requestor under the FCPA's anti-bribery provisions for prospective (not hypothetical) conduct that it is considering taking. DOJ publishes these opinions on its [FCPA website](#), which was revamped last year to quite helpfully organize the releases into 18 subject matter areas, from "Audit Rights" to the "Written Laws Affirmative Defense."

Although only parties who join in the requests may authoritatively rely upon them, these releases provide valuable insights into how DOJ interprets the statute. And although the SEC does not itself issue these releases, it has opted as a matter of policy not to prosecute issuers that obtain clean opinions from DOJ.

### FCPA Opinion Procedure Release 2013-01

In the 59th FCPA opinion procedure release in the statute's history, and the first since DOJ coauthored the *2012 Resource Guide to the U.S. Foreign Corrupt Practices Act*, DOJ tackled a request from a U.S. law firm partner (a domestic concern) with a decidedly humanitarian bent. The requestor represents the government of a foreign nation in a number of international arbitrations. Over the years of representing his client, requestor has become personal friends of a foreign official in the client nation's Office of the Attorney General. The foreign official's daughter suffers from a severe medical condition that reportedly cannot effectively be treated in the foreign nation and the official does not have the financial means to pay both for her transport to a facility where she would receive appropriate treatment and for the medical procedure itself. Requestor therefore sought DOJ clearance to pay an estimated \$13,500 to \$20,500 for her treatment.

DOJ confirmed that it would not pursue criminal prosecution for such a payment. Among the factors it relied upon in reaching this conclusion were the following: (1) requestor's intentions are "purely humanitarian" and not borne of an intent to influence the official; (2) foreign official has not in the past and will not in the future play a role in the decision to retain requestor's law firm; (3) requestor will pay for the procedure out of his own personal funds, and will not be reimbursed by his firm; (4) payment for the procedure will be made directly to the medical facility and the foreign official will pay for his daughter's travel; (5) although foreign country expects to retain the requestor's law firm for at least one new matter in the near future, under the foreign country's law it must publish a public decision justifying its engagement and requestor's act will play no role in that process; and (6) importantly, both foreign official and requestor "discussed this matter transparently with their respective employers."

## GOVERNMENT PERSONNEL CHANGES

In our [2013 Mid-Year FCPA Update](#), we reported on new leadership installed at both DOJ and the SEC during the first half of the year. The second six months has seen the departure for private practice and in-house law departments of several talented prosecutors from the dynamic DOJ FCPA Unit. At least four prosecutors

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have left already, another is scheduled to leave this month, and others are in the final stages of assessing their options. Given the seasoning of the remaining prosecutors, we do not expect any break in the drumbeat of further prosecutions. The inventory of investigations is rich and the phalanx of additional prosecutorial troops is unrelenting.

## 2013 INTERNATIONAL ANTI-CORRUPTION DEVELOPMENTS

### Multi-Jurisdictional Anti-Corruption Enforcement

Speaking at the ABA FCPA Conference, DOJ's FCPA Unit Chief observed that multiple-sovereign resolutions are increasingly going to become "a fact of life" in resolving anti-corruption matters: "[It has been] the DOJ and U.S. government policy for years to encourage foreign jurisdictions to increase their involvement. They are now doing it, and so we've invited them to the party, and now we have to deal with those things going forward." SEC Co-Director of Enforcement Ceresney, speaking at the ACI FCPA Conference, observed that in this respect "the world is becoming a smaller place for corrupt actors."

Those subject to multi-jurisdictional anti-corruption investigations would undoubtedly agree. What began in earnest only a few years ago as increased international cooperation in U.S.-centric investigations—through Mutual Legal Assistance Treaty responses and other evidentiary sharing techniques—has rapidly grown into a rash of concurrent investigations by multiple, independent sovereigns. For example, the BSGR investigation described above began as a Republic of Guinea investigation and has reportedly grown to include French, Swiss, U.K., and U.S. authorities.

For companies that find themselves in this cross-border investigative thicket, the question becomes how to resolve the matters in a coordinated and orderly fashion, without being required to make multiple, successive payments for the same alleged misconduct. The Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), adopted in 1997 and now ratified by 40 nations including the United States, anticipates trans-national coordination. For example, Article 4.3 of the Convention explicitly instructs member states that whenever "more than one Party has jurisdiction over an alleged offence," the members should "consult with a view to determining the most appropriate jurisdiction for prosecution." However, at least according to a 2010 decision by the U.S. Court of Appeals for the Fifth Circuit, *United States v. Jeong*, the OECD AntiBribery Convention does not bar multiple prosecutions for the same conduct in different nations subject to the treaty. In other words, the United States does not recognize the concept of "international double jeopardy."

Notwithstanding *Jeong*, U.S. prosecutors have demonstrated willingness to work with companies to mitigate the impact of duplicative prosecutions. This year's ADM case presents the latest example. As noted above, DOJ credited the amount ADM's German subsidiary paid to German law enforcement authorities in a related anti-corruption investigation as an offset to the DOJ fine. This offset approach has been employed by DOJ, to varying degrees, in a host of cases we have covered in prior updates, including *Aon Corp.* (U.K. Financial Services Authority, 2011), *Johnson & Johnson* (U.K. Serious Fraud Office, 2011), *Alcatel-Lucent, S.A.* (Costa Rican Attorney General, 2010), *Innospec Inc.* (U.K. Serious Fraud Office, 2010), *Siemens AG* (Munich Public Prosecutor's Office, 2008), *Akzo Nobel N.V.* (Dutch National Public Prosecutor's Office for Financial, Economic and Environmental Offenses, 2007), and *Statoil, ASA* (Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime, 2006).

Although multi-jurisdictional resolutions are seldom ideal, coordinating these actions so as to offset duplicative payments is far preferable to resolving an FCPA matter publicly with U.S. authorities, only to later suffer new investigative requests by the country in which the alleged corruption occurred. That appears to be what happened this year to Enesco plc, the successor in interest to *Pride International Inc.* As described

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in our [2010 Year-End FCPA Update](#), Pride resolved FCPA charges with DOJ and the SEC in November 2010, admitting that employees agreed to pay bribes to government officials in India, Mexico, and Venezuela. Now years later, new owner Enesco has disclosed that the company “has received preliminary inquiries from governmental authorities of certain of the countries referenced in [Pride’s] settlements with the DOJ and SEC,” which could result in additional penalties. As reported in our [2010 Year-End FCPA Update](#), this phenomenon of foreign anticorruption authorities seeking to impose new penalties after the announcement of FCPA resolutions has also occurred in Nigeria.

## **World Bank Enforcement**

The World Bank is a consortium of two international banking institutions that together provide loans to developing countries for capital programs with the official goal of eradicating extreme poverty and hunger worldwide. In Fiscal Year 2013, the World Bank’s two member institutions committed \$31.5 billion in loans, grants, and guarantees. With the mammoth size of its international footprint, the World Bank has the ability to wield, and has wielded, its influence to become a leader in the global fight against corruption. As stated recently by World Bank Group President Jim Yong Kim, “Let’s not mince words: in the developing world, corruption is Public Enemy Number 1. We will never tolerate corruption and I pledge to do all in our power to build upon our strong fight against it.”

The World Bank’s commitment to fighting corruption has been more than just rhetoric. In Fiscal Year 2013, the World Bank publicly debarred 47 entities (and their affiliates) found to have engaged in prohibited practices. The impact of a World Bank debarment can be significant and long-lasting—as long as 10 years as demonstrated by the recent high-profile sanctions against a Canadian engineering company for alleged corruption in Algeria, Bangladesh, Cambodia, and Libya. Beyond the bar on participating in Bank-financed projects, a World Bank debarment can lead to significant collateral consequences, including cross-debarment by other multilateral development banks, government contracting authorities, and referrals to law enforcement authorities. Indeed, according to the 2013 annual report from the Integrity Vice Presidency (“INT”), the World Bank’s investigatory arm, 10 referrals from the Bank in the past fiscal year led to criminal investigations by national authorities. In addition, to get out of the debarment “penalty box,” the Bank routinely requires companies to strengthen their compliance programs and to engage compliance monitors.

In light of the significant impact of its debarment processes on international businesses, the Work Bank has taken the laudable step of evaluating its sanctions system for potential refinement. The first phase of this “stock-taking” exercise, which ran from July through October 2013, involved consultations with multiple external stakeholders, including academics, debarment officials, and law firms that participate in World Bank proceedings, including Gibson Dunn. Notable reforms under consideration based on the recommendations of the U.S. defense bar included the following:

- Ensuring that legal counsel are able to participate in INT witness interviews;
- Ensuring that exculpatory and mitigating evidence is made available to the defense in sanctions proceedings;
- Increasing the proportionality between penalties and the underlying misconduct, and relying more on non-debarment sanctions, such as letters of reprimand;
- Considering collateral consequences in the sanctioning process;
- Using a more targeted approach to sanctioning corporate groups;
- Articulating standards by which the Bank will determine the need for external monitors, and establishing criteria for selecting monitors;

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- Permitting settlements on a “no contest” basis rather than requiring an admission of wrongdoing; and
- Incentivizing voluntary disclosure and cooperation.

The feedback from these consultations will factor into a final report that the World Bank’s Legal Department is expected to present to the Bank’s Audit Committee in the near future. We welcome this effort and are eagerly looking forward to participating in the second round of external consultations in 2014.

In another World Bank-related development of 2013, on November 27 the Stolen Asset Recovery Initiative, a partnership between the World Bank Group and the United Nations Office on Drugs and Crime, released a detailed report analyzing 395 settled foreign bribery cases between 1999 and mid-2012. Among the report’s key findings is that only a small amount of the monetary sanctions imposed in foreign bribery settlements ended up with the countries whose foreign officials were bribed. Of approximately \$5.9 billion in monetary sanctions, including FCPA settlements, imposed in settlements by a country different from that of the corrupt official, just 3.3%, or about \$197 million, was returned or ordered returned to the countries whose officials were bribed. According to the report, “[I]n the majority of settlements, the countries whose officials were allegedly bribed have not been involved in the settlements and have not found any other means to obtain redress.” To help address this disparity, which disproportionately impacts developing countries, the report calls on enforcing countries to more proactively share information with affected countries, and urges those affected countries to intensify their own law enforcement efforts to recover funds.

## Anti-Corruption Developments in the United Kingdom

The *U.K. Bribery Act 2010* has yet to generate the large-scale international corruption prosecutions anticipated upon its passage, resulting thus far in only a handful of largely small-dollar value domestic corruption cases of cash for modest spoils such as taxi driver licenses and inflated grades on University exams. Answering “those who are impatient for the first prosecution,” U.K. Serious Fraud Office (“SFO”) Director David Green QC observed both that the *Bribery Act* applies only to conduct that post-dates its July 2011 coming into force and that it took U.S. enforcers decades after passage of the FCPA to “hit their stride.” Further, Director Green rightfully pointed out that foreign anti-corruption cases under the old U.K. anti-corruption statutes, including the *Prevention of Corruption Act 1906* and *Public Bodies Corrupt Practices Act 1889*, continue to move forward.

On October 23, 2013, the SFO announced *Prevention of Corruption Act 1906* charges against printing company **Smith & Ouzman Ltd.**, as well as two of its directors (**Chris** and **Nick Smith**), one of its employees (**Tim Forrester**), and one of its agents (**Abdirahman Omar**). The charges allege corrupt payments totaling more than £413,000, made between 2006 and 2010, in order to obtain business in Ghana, Kenya, Mauritania, and Somaliland. Defendants have yet to enter formal pleas and trial is currently listed for November 2014.

On December 19, 2013, the U.K. Financial Conduct Authority (“FCA”) (the successor to the U.K. Financial Services Authority, as reported in our [2013 Mid-Year FCPA Update](#)) announced a Final Notice fining insurance brokerage and risk management company **JLT Specialty Ltd.** £1,876,000 for its allegedly “unacceptable” approach to controlling for bribery and corruption risks associated with its international transactions. Notably, JLT had a robust set of anti-bribery and corruption policies, approved by external counsel, but according to the FCA the company’s violation stemmed from its failure to adhere to its own policies. Said FCA Director of Enforcement Tracey McDermott of the settlement: “Bribery and corruption from overseas payments is an issue we expect all firms to do everything they can to tackle. Firms cannot be complacent about their controls—when we take enforcement action we expect the industry to sit up and take notice.” This action followed a £4,200,000 fine imposed on April 1, 2013 upon **EFG Private Bank Ltd.** for alleged control systems failures, as reported in our [2013 Mid-Year FCPA Update](#).

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But the year ended on a sour note for U.K. anti-corruption enforcers, with the high-profile disintegration of the *Prevention of Corruption Act 1906* prosecution of **Victor Dahdaleh**, the Londonbased businessman charged with bribing officials of Bahraini state-owned smelting company Aluminum Bahrain B.S.C. (“Alba”) on behalf of U.S. aluminum producer Alcoa Inc. One month into the trial, on December 10, 2013, the SFO announced that it was dismissing the charges against Dahdaleh in light of “two principal issues”: (1) two partners of a U.S. law firm representing Alba, who conducted the internal investigation that ultimately led to the U.K. charges, “attempted to place limits on the extent to which they [would] be cross-examined”; and (2) co-defendant **Bruce Hall**, who previously pleaded guilty to U.K. corruption charges for allegedly receiving bribes from Dahdaleh, purportedly gave courtroom testimony that “differed markedly from the [pre-trial] witness statement he had provided to the SFO.” In light of these developments, the SFO, in consultation with the U.K. Attorney-General, “concluded that there [was] no longer a realistic prospect of conviction on [the] case and accordingly [decided to] offer no evidence.”

We would be remiss to leave our discussion of U.K. anti-corruption enforcement without noting SFO Director Green’s recent commentary on voluntary disclosure and corporate criminality. Reflecting upon his decision to move away from the SFO guidance he inherited from his predecessor, which he described as creating “an implied presumption that self-reported misconduct would be dealt with by civil settlement rather than prosecution,” Director Green stated that the current SFO position is simply to ask, “is there sufficient evidence to prosecute, and if so, is a prosecution in the public interest?” Elaborating on the second part of this test, Director Green explained that if a company makes a “genuine self-report” (*i.e.*, reporting something not already known to the SFO “in an openhanded, unspun way”), fully cooperates in the SFO’s investigation, and then takes steps to prevent the recurrence of the misconduct, “it is difficult to see that the public interest would require a prosecution of the corporate.” In the same speech, Director Green continued to advocate for legislation that would remove the current “controlling mind and will” test for corporate prosecutions—which requires the SFO to prove that board-level senior management was complicit in the criminality in order to hold the company liable—with more strict liability offenses coupled with an affirmative defense of “adequate procedures.” More on this law reform movement, and on the related introduction of DPAs to U.K. criminal practice, is described in our *2013 Mid-Year FCPA Update*.

## Anti-Corruption Developments in Algeria

On August 12, 2013, Algerian prosecutors unveiled an indictment against former Energy Minister **Chekib Khelil**, as well as his wife and two sons, on corruption, money laundering, and related charges arising from the “Sonatrach 2” scandal—named for the Algerian state-owned oil company. This indictment brought the number of individuals charged in the case to 20, in addition to two corporate entities, Italy’s **Saipem SpA** and Egypt’s **Orascom Industries**. Khelil, a U.S. citizen, allegedly fled to the United States after learning of the probe. An international arrest warrant has been issued for Khelil’s arrest, however, there is no extradition treaty between Algeria and the United States.

## Anti-Corruption Developments in Argentina

In a late-breaking 2013 development, on December 27 an Argentinian magistrate judge indicted 18 individuals in connection with the **Siemens AG** national identity card scandal that made up a significant part of the company’s 2008 FCPA resolution, as described in our *2008 Year-End FCPA Update*. Among the 18 are nine former Siemens directors and officers, three Siemens third-party representatives, and five employees of a competitor to Siemens who reportedly accepted payments not to contest the decision to award the national identity card contract to Siemens. No Argentinian government officials have been charged, although it is reported that the alleged bribes went all the way up to former President Carlos Menem, Interior Minister Carlos Corach, and Immigration Office Head Hugo Franco.

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As noted above, many of the Siemens representatives have already been charged criminally and/or civilly with FCPA offenses in the United States.

## **Anti-Corruption Developments in Brazil and the Rest of Latin America**

In our [2013 Mid-Year FCPA Update](#), we covered a groundbreaking anti-corruption legislative movement taking hold in the Brazilian Senate. On August 1, 2013, President Dilma Rousseff approved the new Brazilian anti-corruption law, commonly referred to as the Clean Companies Act, but only after exercising her line-item veto powers to further strengthen the law in accordance with recommendations from Brazil's federal anti-corruption regulator. The new law takes effect on January 29, 2014, and companies and attorneys alike eagerly anticipate publication of its implementing regulations.

According to the statute, the regulations should set forth standards for effective compliance programs and controls, which will serve as a mitigating factor to strict-liability violations of the new law. In addition, the regulations may help clarify ambiguous provisions of the statute, including what constitutes "representation" in Brazil (which subjects a foreign company to the law) and who is to be considered a Brazilian government official.

Already Brazilian anti-corruption enforcers are out on the speaking circuit promoting the new law. In an interview given at a recent OECD Working Group meeting, Hamilton Cruz, the Director of Integrity, Agreements, and International Cooperation for Brazil's Office of the Comptroller-General, noted that even if it takes time to build the complex cases that will ultimately become anti-corruption prosecutions, a more immediate effect of the law will be to open up deeper international cooperation with countries like the United States. Director Cruz also began what undoubtedly will be a steady drumroll of encouragement for companies to self-report suspected violations of the new law, stating that "if you pay bribes and tell the government, we will give recognition to companies that behave well."

While developments in Brazil have dominated the anti-corruption news cycle in South America of late, developments in other Latin American countries should not be overlooked. In April 2013, Chilean authorities secured a \$2.4 million corporate settlement for alleged bribes paid to obtain construction permits, the largest since Chile's Corporate Criminal Liability Law came into force. Also in 2013, Colombia became the fifth Latin American country to commit to the OECD Anti-Bribery Convention's provisions prohibiting foreign bribery, Peru applied to become a signatory of the Convention, and Costa Rica was invited to become a member of the OECD and has joined a series of OECD instruments related to integrity and transparency in international business conduct, although it is not yet a member of the OECD Anti-Bribery Convention.

## **Anti-Corruption Developments in Canada**

The uptick in enforcement of Canada's *Corruption of Foreign Public Officials Act* ("CFPOA") noted in prior updates has continued through 2013. Most notably, on August 15, 2013, Canadian prosecutors secured their first CFPOA conviction of an individual and the first reported decision under the statute in the prosecution of **Nazir Karigar**. Karigar, an agent of technology company Cryptometrics Canada, was convicted of conspiring to bribe officials of the state-owned Air India and India's Minister of Civil Aviation in an effort to win a biometric security systems tender.

In convicting Karigar, the Ontario Superior Court adopted a liberal interpretation of the CFPOA's former territoriality requirement (which has since been loosened, as discussed in our [2013 Mid-Year FCPA Update](#)), holding that no substantial element of an offense need occur in Canada in order to satisfy the then-effective requirement that the conduct at issue have a "real and substantial connection" to Canada. Instead, the court considered the totality of the business relationship, and not merely the alleged corrupt activities, between Cryptometrics and Air India. Further, the Court held that the mere agreement to pay a bribe (without proof

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of the identity of the foreign official to be bribed, or that the bribe was paid or even offered) is sufficient to constitute a violation of the CFPOA. Finally, the Court confirmed that employees of state-owned enterprises qualify as “foreign public officials” under the CFPOA.

A cautionary tale arising from the Karigar prosecution is that Karigar was convicted based, in part, upon his own evidence. The evidence adduced at trial established that it was Karigar who made the anonymous whistleblower report to DOJ that was referred to Canadian authorities and ultimately led to his prosecution. Karigar is not the first anti-corruption whistleblower to be hoisted upon his own petard—**Frederic Bourke** famously was convicted on FCPA conspiracy charges in 2009 after he approached U.S. prosecutors to report an investment scam by which he believed he was victimized.

Further evidencing the ramp-up of CFPOA enforcement in 2013 is the prosecution of **Griffiths Energy International Inc.** On January 22, 2013, oil and gas company Griffiths entered a guilty plea and paid a CAD\$10.35 million fine in connection with the alleged bribery of Chad’s ambassador to Canada and his wife.

## Anti-Corruption Developments in China

After several years of increased domestic anti-corruption enforcement, in 2013 China grabbed the global business community’s attention for its international anti-corruption enforcement activities. In July 2013, Chinese authorities detained 22 GlaxoSmithKline plc executives and employees in an expanding corruption investigation reportedly involving as many as 60 domestic and multinational pharmaceutical companies operating in China. The People’s Daily, China’s top state newspaper, even penned an editorial critiquing multi-nationals for exploiting the country’s regulatory gaps (much as multi-nationals have for years critiqued the corruption endemic across Chinese government agencies). Whether China’s recent crackdown represents a true desire to root out corruption, or a blunt tool to exert enormous pressure on foreign businesses and their executives, remains to be seen. But there can be no question that Chinese regulators have the attention of the global business community.

Robust domestic corruption enforcement continued in 2013. Media reports indicate that nearly 17,000 government functionaries have been punished under President Xi Jinping’s 2013 “austerity measures,” a series of prohibitions targeting official bribery and the use of public funds for lavish government entertainment and unnecessary travel. The nation’s top anti-graft agency also launched cross-country “shock and awe” anti-graft inspection tours in the summer of 2013, and announced in November 2013 that China will launch a pilot program requiring newly promoted officials to disclose their private assets.

## Anti-Corruption Developments in France

On July 8, 2013, a Paris regional criminal court acquitted **Total, S.A.** and 18 individual defendants for foreign corruption charges arising out of the U.N. Oil-for-Food Program administered in Iraq during the late 1990s and early 2000s. As adduced at trial, and confirmed by the now 18 FCPA settlements to arise from the ill-fated program, the allegedly corrupt payments were demanded by and submitted for the benefit of the Government of Iraq as a sovereign entity and not for the personal benefit of any Iraqi official. According to the court, “Corruption involves the personal enrichment of the corrupt, but in this case it was not proven that any foreign public official or private individual was personally enriched.”

French prosecutors have lodged an appeal. It should be noted that this case is separate from the proceedings initiated against the company, a senior executive, and two agents arising out of the Iranian corruption charges described in our [2013 Mid-Year FCPA Update](#), which proceedings are ongoing.

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## Anti-Corruption Developments in Germany

German anti-corruption efforts have continued to advance at a robust pace in 2013, both on the enforcement and legislative fronts.

The most noteworthy enforcement case has to be the unprecedented corruption charge against the former Federal President of Germany, **Christian Wulff**, discussed in our 2013 Mid-Year FCPA Update. While the criminal court of Hanover accepted the charges, and opened public trial proceedings in November 2013, by the end of the year it suggested dismissing the case due to a lack of evidence. Subject to the hearing of new evidence, pleadings are now scheduled for January 16, 2014, and a final court decision is tentatively expected for January 22, 2014.

On the legislative front, we reported in our 2013 Mid-Year FCPA Update on significant amendments to the *German Administrative Offences Act (OWiG)* that went into force in June 2013. And on November 14, 2013, a majority of the justice ministers of the German states resolved to eventually introduce a bill for a *Corporate Criminal Code (Verbandsstrafgesetzbuch)* into the legislative process via the German Federal Assembly (*Bundesrat*). According to the draft bill, which could for the first time provide for criminal sanctions against organizational defendants, prosecutors would be legally obliged to open investigations into allegations of corporate misconduct. Possible corporate sanctions would include monetary penalties, a warning with suspended sentence, the publication of criminal convictions, debarment from public subsidies or public tenders, and, as last resort, the compulsory liquidation of the corporation. Monetary penalties would no longer be limited to a statutory maximum, but could rise to up to 10% of the average total revenue of the corporation. The bill proposes that the court may refrain from sanctions, if the corporation has adopted or installed adequate organizational measures or resources to prevent similar corporate misconduct in the future, and (i) no significant damage has occurred or such damage has been retrieved, or (ii) the corporation has materially contributed to have the corporate misconduct uncovered by voluntary disclosure and providing evidence to the enforcement authorities, provided, however, that such voluntary disclosure was made prior to the opening of criminal proceedings.

## Anti-Corruption Developments in India

Corruption is among the hottest of political topics in India, where the anti-corruption movement has grown in size and strength over recent years. The latter half of 2013 saw a number of high-profile corruption scandals, including political activists stepping up their calls for Prime Minister Manmohan Singh's resignation over alleged corruption involving the allocation of coal mining rights, former Bihar State Chief Minister Lalu Prasad being sentenced to five years in jail for his role in a scandal involving fraudulent withdrawals of public funds, and the Central Bureau of Investigation's continued focus on the private sector with high-profile cases including the conviction of three executives of an Indian contractor for making improper payments to win a government water pipeline renovation contract.

Indian lawmakers have made significant progress in anti-corruption legislative reforms, enacting or proposing bills with broad implications for the private sector. In December 2013, India's lower house of Parliament (the Lok Sabha) passed the *Lokpal and Lokayuktas Bill (2011)*, commonly referred to as the "Lokpal Bill." The bill creates an independent body (the "Lokpal") with broad powers to investigate and prosecute violations of the *Prevention of Corruption Act*, including violations by private companies doing business in India. The bill will now proceed to President Mukherjee for notification.

In addition, the new *Companies Act (2013)*, which received Presidential assent on August 29, 2013, requires directors to certify annually that their company has implemented internal financial controls and "proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively." This Act provides for significant penalties for fraud and non-compliance,



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including fines and imprisonment for individuals involved. It also directs the Central Government to create a new “Serious Fraud Investigation Office,” with broad powers to investigate violations of the Act.

Last but not least, companies doing business in India must also take note of the *Prevention of Corruption (Amendment) Bill (2013)*, a recent bill introduced into the Rajya Sabha that would substantially alter the country’s 25-year old anti-corruption law, the *Prevention of Corruption Act*. The amendments would provide for fines for commercial organizations where any person associated with the organization “offers, promises or gives a financial or other advantage to a public servant intending to obtain or retain business or some advantage in the conduct of business of [a] commercial organization.” “Commercial organization” is broadly defined to include any organization, wherever incorporated, that “carries on a business, or part of a business” in India. The bill also provides that, where a commercial organization is guilty of an offense, every person who, at the time of the offense, “was in charge of” the conduct of the business shall be deemed guilty unless that person proves he or she did not know (or should not have known) about the conduct at issue. Notably, the bill provides a defense where a commercial organization can show that it “had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.” **Anti-Corruption Developments in Japan**

It has been some years since we last checked in on Japan and the enforcement of its *Unfair Competition Prevention Law* (“UCPL”). But on September 11, 2013, a former senior managing director of auto parts supplier Futaba Industrial Co., **Takehisa Terada**, was arrested on charges that he paid more than \$500,000 in bribes to Chinese customs officials as well as to halt an investigation into irregularities at the company’s plant in China. This prosecution is reportedly only the fourth ever foreign bribery case brought under the UCPL since it was amended to cover such offenses in 1998, and the first case of which we are aware since the Pacific Consultants International case described in our 2008 Year-End FCPA Update.

## Anti-Corruption Developments in Korea

In October 2013, Korean authorities indicted 100 individuals on corruption charges stemming from a months’-long investigation into alleged collusion between officials at Korean state-run energy companies and parts suppliers. Korean authorities reportedly discovered more than 2,000 forged safety certifications at Korean nuclear power plants, leading to a series of shutdowns of nuclear reactors and the replacement of 7,733 nuclear reactor parts. Among the indicted were a vice president at Korea Electric Power Corp., **Lee Jong-chan**, and a former chief executive at Korea Hydro and Nuclear Power Co., **Kim Jong-shin**, both of whom face bribery charges.

In other news, in September 2013, a Seoul appellate court sentenced former Korean prime minister and opposition leader **Han Myeong-sook** to two years in prison for bribery. The appellate court found Han guilty of receiving 880 million won (approximately \$832,500) in political funds from a local businessman between 2006 and 2007, while serving as prime minister. Han has been on the receiving end of a number of bribery charges, which some deem politically motivated, and was in 2010 cleared by Korea’s Supreme Court of unrelated bribery charges filed in connection with the alleged acceptance of 50 million won (approximately \$47,450). Han has called the most recent charges “unacceptable and politically motivated,” vowing to appeal again to the Supreme Court.

Against the backdrop of these developments, Korea’s National Assembly has yet to adopt the anticorruption legislation proposed in April 2013 by the Korean Anti-Corruption and Civil Rights Commission. As described in our 2013 Mid-Year FCPA Update, the proposed *Act on the Prevention of Illegal Solicitations and Conflicts of Interest* (formerly, *Anti-Corruption and Conflicts of Interest Act*) would increase penalties applicable to civil servants convicted of accepting bribes, bar them from performing public duties involving potential conflicts of interest, and require officials to disclose financial activities in the private sector.

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## Anti-Corruption Developments in Russia

The anti-corruption landscape in Russia saw several important developments during the second half of 2013. Most notably, on July 9, the Supreme Court of the Russian Federation issued Resolution No. 24, containing extensive guidance to the lower courts on the application of new Russian anti-corruption legislation described in our [2013 Mid-Year FCPA Update](#).

Among other things, the Supreme Court Resolution provides a definition of “foreign officials” and clarifies that the term “bribe” includes not only money and tangible property, but also the provision of services and property rights. Bribery is defined under the Resolution as any situation in which a government official receives money, property, or other things of value in exchange for (i) taking or refraining from taking an action that falls within his or her authority or facilitating an action (or inaction) by virtue of his or her authority; (ii) providing general patronage or overlooking inadequate performance or misconduct at work or in government service; or (iii) committing unlawful acts by abusing the official’s authority. On the other hand, lower courts are instructed not to qualify as bribery the provision of a thing of value in exchange for an official’s use of personal connections unrelated to his or her authority to influence a decision, or where an official or a commercial manager (in the case of commercial bribery) receives a thing of value in exchange for an action or inaction that relates to professional responsibilities that fall outside his or her governmental, managerial, or administrative functions. Further, the Supreme Court Resolution does not qualify as bribery a situation where a thing of value provided to a third party at an official’s request in exchange for the official’s action or inaction is not intended to and does not provide any monetary or property benefits to the official or the official’s relatives. Although we have yet to see how these distinctions will be applied in practice, there appears to be substantial potential for confusion, which could lead to inconsistent application of the law and/or a significant amount of misconduct falling outside of its scope.

The Supreme Court Resolution also provides for a defense to bribery charges if the provider of the bribe voluntarily discloses the bribery to the relevant enforcement agency and actively assists in the ensuing investigation. Active assistance requires the briber to cooperate in identifying the bribery participants and recovering the bribe. Bribes provided under mental duress or in extreme emergency will not be qualified as bribery, unless the threatened harm could be avoided by legal means. In all bribery cases, the Supreme Court Resolution encourages courts to issue orders instructing organizations and officials to remove conditions promoting corruption. These orders may include requirements that organizations establish adequate anti-corruption compliance programs.

We also reported in our [2013 Mid-Year FCPA Update](#) that, as of January 1, 2013, companies operating in Russia are required by law to take affirmative compliance measures to prevent corruption in their business operations. In November 2013, pursuant to an earlier presidential decree, the Russian Ministry of Labor and Social Protection issued standard recommendations for organizations on how to meet their statutory anti-corruption compliance requirements. Although not *de jure* binding, the recommendations serve as a persuasive authority for organizations. Most notably, the recommendations specify the elements of an effective corruption-prevention program that are consistent with compliance program principles accepted by the OECD, the United States, and the United Kingdom. These include (i) adopting clear anti-corruption compliance policies, (ii) establishing an appropriate tone from the top, (iii) ensuring sufficient autonomy and resources for compliance personnel, including direct access to the organization’s management, (iv) involving employees in anti-corruption prevention activities through communications, consultations, training, access to reporting mechanisms, and incorporation of corruption-prevention obligations in employee contracts, (v) tailoring corruption-prevention measures to an organization’s risks, (vi) conducting regular corruption risk assessments, (vii) ensuring the effectiveness of corruption-prevention measures, (viii) ensuring consistent discipline of employees, regardless of rank, for misconduct, (ix) promoting transparency of business through external compliance communication and due diligence on third parties, (x) establishing policies for detection and reporting of conflicts of interest, (xi) conducting regular reviews of internal controls and audits of

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transactions exposed to corruption risk, (xii) cooperating with law enforcement agencies, and (xiii) engaging in collective action initiatives.

Recent domestic enforcement activities—including the two largest fines ever imposed by Russian courts for bribery, \$29 million and \$15 million upon a Moscow Region official and his accomplice for demanding a \$500,000 bribe to issue a construction permit for a new apartment block—appear to bear out President Vladimir Putin’s announced commitment to clamping down on corruption. But some commentators in Russia claim that the government’s domestic corruption enforcement efforts are insufficient and overshadowed by the lack of overt government reaction to media reports of rampant corruption in the preparation for the Sochi Olympics.

Along these lines, in October 2013, approximately 18 months after Russia became a party to the OECD Anti-Bribery Convention, the OECD Working Group on Bribery completed its second report on Russia’s implementation status. The report acknowledged that Russian authorities actively investigated and prosecuted instances of domestic bribery, but it noted that Russia failed to implement the Working Group’s earlier recommendation to step up investigation and prosecution of foreign bribery offenses. Accordingly, the report urged Russia to adopt appropriate legislation to expand and to intensify its enforcement of the foreign bribery offense.

## **Anti-Corruption Developments in Turkey**

The Turkish government is in the midst of a rapidly-unfolding and wide-ranging corruption scandal that some say has the potential to unseat the ruling government party. There were at least 24 arrests in the closing days of 2013 in a corruption probe that centers on real estate deals in and around Gezi Park, the announced development of which led to a massive uprising and clashes between police and protesters this summer. The arrests go all the way to Prime Minister Recep Tayyip Erdogan’s inner circle, including the sons of three cabinet ministers and the brother of an Istanbul district mayor. Substantial controversy surrounds the investigation, which many perceive as being orchestrated by the influential expatriate preacher and former Erdogan ally Fethullah Gulen, leading one journalist to refer to the investigation (and retaliatory Erdogan dismissal of Gulen-sympathizers in the Turkish police force) as “a forced marriage [that has become] an ugly divorce proceeding.” This is a matter sure to spawn events with significant geopolitical consequences in 2014.

## **A Look in the Mirror: Corruption of U.S. Government Officials**

The paradigm of international anti-corruption enforcement is frequently viewed, at least in the United States, through the prism of U.S. enforcers determined to root out the illicit dealings of corrupt foreign officials. We speak of sovereign nations as “risky neighborhoods” in which to do business, denoted by dark shades of red on the ubiquitous Transparency International Corruption Perceptions Index (“CPI”). So the authors frequently note the quizzical looks on the faces of audience members in training sessions when we reveal that the United States barely qualifies as a Top 20 country on the CPI, tied at 19 with South America’s Uruguay. To be sure, the less-than-stellar CPI ranking of the United States has as much to do with an unparalleled domestic enforcement regime as any other factor, but the sad truth is that corruption is not a problem unique to government officials outside our borders.

For years now, DOJ’s Public Integrity Section, working with a range of U.S. Attorney’s Offices and other sections and divisions of “Main Justice,” has been bringing a host of corruption prosecutions against U.S. military officials arising out of contracting operations, particularly in the war theatres of Afghanistan and Iraq. As these investigations typically do not involve bribery of foreign government officials (a notable exception being the prosecution of U.S. Army civilian translator **Faheem Mousa Salam** for alleged bribery of a senior Iraqi police official, as described in our [2006 Year-End FCPA Update](#)), the prosecutions are not brought under the FCPA, but instead under a myriad of statutes available for prosecuting the bribery of domestic officials.

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Most recently, the U.S. Navy has been rocked by a headlines-grabbing bribery scheme focused on Singapore-based defense contractor Glenn Defense Marine (Asia) (“GDMA”) and its interactions with numerous high-level Navy officials, including two Admirals and a senior special agent with the Naval Criminal Investigative Service (“NCIS”). The lurid allegations are still unfolding in the San Diego federal courthouse, but thus far Malaysian national and GDMA President **Leonard Glenn Francis** (aka “Fat Leonard”), together with GDMA General Manager **Alex J. Wisidagama**, is alleged to have bribed Naval commanders **Michael Misiewicz** and **Jose Sanchez** with kickbacks ranging from cash payments, to luxury travel, to prostitutes, to tickets to a Lady Gaga concert. In return, the GDMA defendants allegedly received classified information regarding Naval ship movements that gave GDMA a competitive edge as well as the approval of falsified invoices. Further, Francis is alleged to have provided similar benefits to NCIS agent **John Beliveau** in exchange for NCIS investigative reports on the GDMA investigation as well as tips on how to evade NCIS’s law enforcement techniques.

The investigation is continuing and we expect to see additional charges in 2014.

## CONCLUSION

As has become our semi-annual tradition, over the following two weeks Gibson Dunn will be publishing a series of enforcement updates for the benefit of our clients and friends as follows:

Tuesday, January 7 – 2013 Year-End Update on Corporate NPAs and DPAs;

Wednesday, January 8 – 2013 Year-End False Claims Act Update;

Thursday, January 9 – 2013 Year-End Criminal Antitrust and Competition Law Update;

Monday, January 13 – 2013 Year-End Securities Enforcement Update;

Tuesday, January 14 – 2013 Year-End E-Discovery Update;

Monday, January 20 – 2013 Year-End Criminal Environmental Update; and Tuesday,

January 21 – 2013 Year-End Securities Litigation Update.

And for more analysis on the year in anti-corruption enforcement, please join us for one or both of our upcoming webcast presentations: FCPA Trends in the Emerging Markets of China, India, Russia, the Middle East and Africa on January 13 (to register, [click here](#)) and FCPA Year-in-Review on February 3 (to register, [click here](#)).

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*Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. We have more than 110 attorneys with FCPA and other international anti-corruption experience, including a number of former federal prosecutors, spread throughout the firm’s domestic and international offices. Joe Warin, a former Assistant U.S. Attorney, served as FCPA counsel to the first non-U.S. compliance monitor and as compliance monitor for another company that settled FCPA charges during 2010. In 2009, he completed his compliance consultancy for Statoil A.S.A. pursuant to its DOJ and SEC FCPA settlements. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following:*

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