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January 3, 2012

2011 YEAR-END FCPA UPDATE

To Our Clients and Friends:

2011 marked yet another dynamic year for the Foreign Corrupt Practices Act ("FCPA"), including numerous significant enforcement actions, more trials than in any other year in the history of the statute, and a growing public debate about the policy ramifications of a U.S.-dominated international anti-corruption enforcement field. Those close to the statute can feel the unmatched pace at which the 34-year-old law is now developing. With more litigated decisions, more bills pending in Congress, and more interplay between the FCPA and other international laws prohibiting cross-border bribery, there is a growing sense of urgency amongst FCPA practitioners as to the direction the statute will take in the coming years.

Perhaps sensing these dynamics, Assistant Attorney General Lanny A. Breuer recently invoked Mohammed Bouazizi, the Tunisian fruit vendor whose self-immolation after his electric scales were confiscated by corrupt police officers is credited as the spark that lit the Arab Spring. Doubling down against calls from the business community to soften the FCPA's hard edges, Breuer proclaimed that, "at this crucial moment in history, watering down the Act . . . would send exactly the wrong message." For, continued Breuer, "we may together have no greater mission than to work toward eradicating corruption across the globe."

There can be no dispute about it--these are interesting times for the FCPA.

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" that 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, the approximately 1,500 foreign issuers 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.

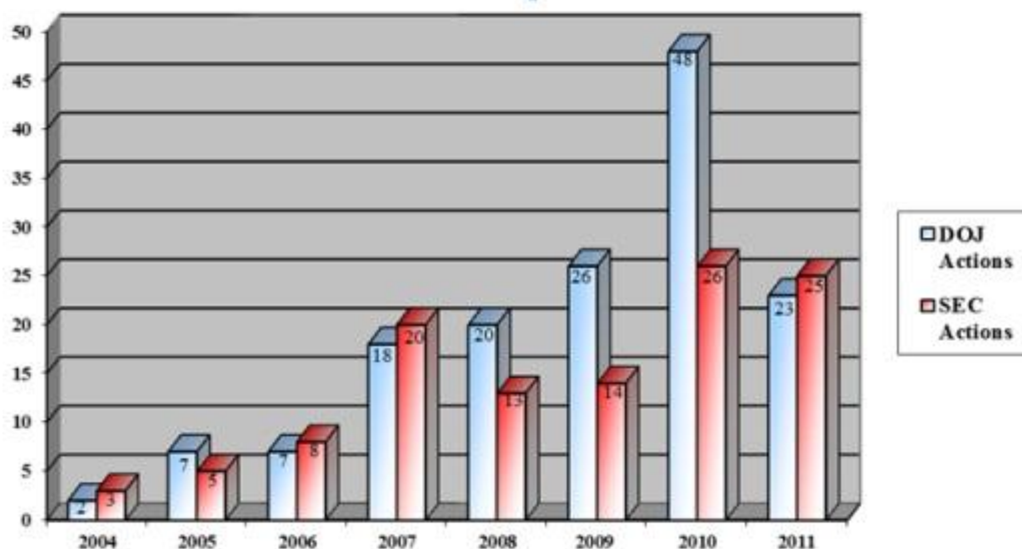
In addition to the anti-bribery provisions, the FCPA's books-and-records provision requires issuers to make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Finally, the FCPA's internal controls 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 the anti-bribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

2011 FCPA ENFORCEMENT STATISTICS

The following table and graph detail the number of FCPA enforcement actions initiated by the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") during the past eight years.

2004		2005		2006		2007		2008		2009		2010		2011	
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



2011 was the second most prolific year in the history of FCPA enforcement, outmatched only by the juggernaut that was 2010. Of course, 2010's statistics were elevated substantially by the 22-defendant SHOT Show sweep of arrests; cases that DOJ prosecutors were left to try in 2011.

2011 ENFORCEMENT TRENDS

DOJ and the SEC follow corporate settlements with individual prosecutions

For several years now, we have been reporting on the practice of U.S. regulators bringing enforcement actions against individual defendants after (indeed, sometimes years after) entering into negotiated settlements with the individuals' former employers. This past year, in particular, demonstrates this practice, as confirmed by DOJ's top FCPA prosecutor, Fraud Section Deputy Chief Charles E. Duross, IV, in a recent speech: "Just because a case against a company is resolved and it has been a few years does not mean we are done."

Exhibit A came on December 13, 2011, when DOJ and the SEC collectively announced FCPA charges against seven former executives and two former third-party agents of ***Siemens AG*** stemming from conduct covered in Siemens's 2008 FCPA settlement. According to the charging documents, the nine individual defendants participated in a decade-long scheme in which they allegedly provided more than $100 million in bribes to senior officials of the Argentine government to secure, implement, and enforce a $1 billion contract to produce national identity cards for every Argentinian citizen. Specifically, the Government alleges that these former executives and agents made and approved improper payments to officials up to and including the then-president of Argentina and his cabinet ministers to win the national identity card contract. Then, when a new president was elected and immediately suspended the contract to renegotiate its terms, these representatives of Siemens allegedly agreed to make additional corrupt payments to the new president and key members of his administration. Finally, after the national identity card project was canceled, these representatives allegedly paid even more bribes in connection with an international arbitration to recover Siemens's costs and lost profits arising from the cancellation.

Only one of the former Siemens representatives has settled the charges lodged against him. ***Bernd Regendantz*** agreed to pay a $40,000 civil penalty to the SEC (which was deemed satisfied by a €30,000 administrative fine that he previously paid to the Public Prosecutor General in Munich) to resolve civil anti-bribery, books-and-records, and internal controls charges, as well as an alleged violation of Exchange Act Rule 13b2-1 arising from his allegedly false SOX certifications. The remaining eight defendants (***Ulrich Bock***, ***Miguel Czysch***, ***Eberhard Reichert***, ***Carlos Sergi***, ***Stephan Signer***, ***Uriel Sharef***, ***Herbert Steffen***, ***and Andres Truppel***) all were indicted by a grand jury sitting in the Southern District of New York on criminal charges of conspiracy to violate the FCPA (anti-bribery, books-and-records, and internal controls provisions), conspiracy to commit money laundering, and wire fraud. Six of these eight defendants (all except Reichart and Czysch) were also charged by the SEC with civil anti-bribery, books-and-records, and internal controls violations.

Announcing the charges, Breuer proclaimed that "[t]his indictment reflects our commitment to holding individuals, as well as companies, accountable for violations of the FCPA." Seconding that notion, U.S. Attorney for the Southern District of New York Preet Bharara stated, "It is critical that we hold individuals as well as corporations accountable for such corruption as we are doing today." It is noteworthy that these individual enforcement actions made good on promises that senior DOJ officials made to Congress in response to pointed criticism that DOJ was not doing enough to hold individuals accountable for FCPA violations, specifically in the context of the Siemens case.

Regarding the company, DOJ officials praised "the laudable actions of Siemens AG and its audit committee" in disclosing the Argentinian scheme, the company's implementation of "a sophisticated compliance program and organization," and Siemens's agreement to voluntarily forego more than $217 million (plus interest) awarded to the company in connection with the identity card arbitration.

Another significant aspect of the Siemens representatives' prosecution is that all nine defendants are foreign nationals. The case at once affirms the U.S. government's willingness to police conduct beyond its borders that it perceives as affecting U.S. markets (here, the defendants are citizens and residents of Argentina, Germany, Israel, and Switzerland, associated with a German company, accused of bribing government officials in Argentina) and exemplifies the difficulties associated with such an

expansive jurisdictional approach. According to a letter from prosecutors to U.S. District Court Judge Denise L. Cote, who will be presiding over the criminal case, "none of the defendants is currently in custody [and] none of the defendants will be arraigned in the immediate future." Extradition efforts reportedly are underway.

Other individual defendants charged with FCPA violations in 2011, after their former employer settled in prior years, include ***Paul W. Jennings*** (former CEO of Innospec, Inc.) and ***Manuel Salvoch*** and ***Juan Vasquez*** (former CFO and Chief Commercial Officer, respectively, of Latin Node, Inc.). Their cases were discussed in our 2011 Mid-Year FCPA Update.

SEC files 10 unsettled cases, signaling more aggressive enforcement stance

The SEC has not been known to file many FCPA cases absent an advance agreement to settle the matter. Usually, the putative defendant and the Division of Enforcement staff negotiate a mutually acceptable (if not always palatable from the defendant's perspective) resolution or the case is never brought. But in 2011, the SEC, led by new FCPA Unit Chief Kara N. Brockmeyer, stepped away from this historical model in a big way, bringing 10 unsettled FCPA enforcement actions, more than in the previous 33 years of FCPA enforcement combined.

The first seven cases were filed against the Siemens representatives described above. The remaining three stem from the SEC's investigation of Magyar Telekom plc, Hungary's largest telecommunications provider and formerly an ADR issuer on the New York Stock Exchange.

On December 29, 2011, the SEC filed an unsettled civil complaint against ***Elek Straub***, ***Andras Balogh***, and ***Tamas Morvai***, Magyar Telekom's former CEO, Director of Central Strategic Organization, and Director of Business Development, respectively. The SEC alleges that the defendants entered into secret agreements--dubbed "Protocol of Cooperation"--with officials of the Macedonian government to delay or defeat key provisions of pending legislation in Macedonia that were unfavorable to Magyar Telekom. In return, Straub, Balogh, and Morvai allegedly arranged for €4.875 million in payments to a third-party intermediary with the corrupt intent that some or all of these payments be forwarded to Macedonian officials. And in a separate scheme, the SEC alleges that the defendants authorized the payment of €7.35 million in bribes to government officials in Montenegro to facilitate Magyar Telekom's acquisition of a state-owned telecommunications company.

The SEC accuses Straub, Balogh, and Morvai of violating the FCPA's anti-bribery, books-and-records, and internal controls provisions and of making false statements to Magyar Telekom's auditors. It seeks disgorgement of illicit profits, civil penalties, and an order enjoining them from future Exchange Act violations.

Also on December 29, 2011, ***Magyar Telekom*** and its parent company, ***Deutsche Telekom AG*** (also an ADR issuer during the relevant period), settled their own FCPA cases with both DOJ and the SEC arising from the alleged bribery schemes in Macedonia and Montenegro. In connection with the SEC settlement, Magyar Telekom agreed to pay more than $31.2 million in disgorgement and prejudgment interest for alleged violations of the anti-bribery, books-and-records, and internal controls provisions, and Deutsche Telekom agreed to cease and desist from future violations of the FCPA's accounting

provisions. In the criminal settlements, Magyar Telekom agreed to pay a $59.6 million fine in connection with a two-year deferred prosecution agreement, and Deutsche Telekom agreed to pay $4.36 million in connection with a non-prosecution agreement. The DOJ agreements acknowledge the companies' voluntary disclosure of the illicit conduct to U.S. authorities, their "thorough global internal investigation," and the extensive remedial measures already taken through implementation of an enhanced compliance program.

The Magyar/Deutsche Telekom enforcement actions highlight the risk to foreign issuers whose ADRs trade on U.S. exchanges. Some commentators have suggested that the rigorous pace of FCPA enforcement, coupled with Dodd-Frank Act reforms, is driving such companies to delist from U.S. exchanges. Indeed, these defendants did just that while this investigation was pending.

FCPA successor liability arising from acquisitions

For years, we have been preaching about the too-often latent danger of acquiring FCPA liability in a business acquisition, either on a successor liability basis for pre-acquisition misconduct by the target or for post-acquisition misconduct enabled by deficiencies in the acquired company's control environment. FCPA enforcement actions in 2011 only reinforce the imperative that acquisitive companies conduct thorough pre-acquisition due diligence and equally robust post-acquisition compliance integration. (In 2008, DOJ issued guidance on what it expects from FCPA-regulated acquirors, both pre- and post-acquisition, in FCPA Op. Proc. Rel. 2008-02, discussed in our 2008 Mid-Year FCPA Update.) Cases in point follow.

On July 13, 2011, DOJ and the SEC announced coordinated FCPA settlements with ***Armor Holdings, Inc.***, a manufacturer of military and law enforcement products that was acquired by BAE Systems plc in 2007. According to the charging documents, between 2001 and 2006, Armor representatives (including former Vice President of International Sales Richard T. Bistrong) made at least 92 payments, totaling more than $222,000, to a third party with the understanding that a portion of that money would be forwarded to a United Nations procurement official to induce the official to steer body armor contracts to Armor. In addition, Armor representatives allegedly concealed from its books millions of dollars in sales commissions paid to third parties by creating false invoices that folded the commissions into the "gross" sales prices reflected in the company's records.

To settle the SEC's charges, which alleged violations of the FCPA's anti-bribery, books-and-records, and internal controls provisions, Armor agreed to disgorge $1,552,306 in allegedly illicit profits, plus prejudgment interest on these profits of $458,438, and to pay a $3.68 million civil penalty. To resolve the criminal investigation, Armor entered into a non-prosecution agreement with DOJ and agreed to pay a $10.29 million criminal fine.

All of the conduct at issue in this case occurred prior to BAE's July 2007 acquisition of Armor. According to the non-prosecution agreement, BAE voluntarily disclosed the conduct to DOJ in a series of meetings beginning in March 2007, suggesting that BAE uncovered the information during pre-acquisition due diligence and made the decision to self-report before closing the deal. Although BAE was not able to resolve the Armor investigation prior to the deal's closing (likely due, at least in part, to Bistrong's involvement in a several-year undercover sting operation orchestrated by DOJ and the FBI,

as discussed below), ferretting this information out during due diligence likely placed BAE in the best possible position to coordinate the government resolutions. DOJ cited Armor's "complete voluntary disclosure," the fact that all of the conduct occurred pre-acquisition, and the "extensive remedial efforts undertaken before and after [the] acquisition" as factors that warranted resolution of the criminal investigation by a non-prosecution agreement that did not require a compliance monitor.

On July 27, 2011, in another acquisition-related FCPA case, ADR issuer ***Diageo plc*** consented to the entry of an SEC cease-and-desist order against it. The SEC alleged that the U.K. producer of premium alcoholic beverages (including Guinness, Johnnie Walker, and Smirnoff) paid more than $2.7 million to various government officials in India, South Korea, and Thailand through its subsidiaries and their third-party representatives. Specifically, according to the order, cash payments were made to nearly 1,000 employees of government-owned liquor stores in India to increase purchases of Diageo products and to secure favorable product placement and promotion within the stores, a corrupt consulting relationship was established with a Thai political party official, rewards for favorable tax treatment were given to South Korean customs officials through cash and travel and entertainment expenditures, and hundreds of improper gifts were provided to South Korean military officials to secure sales of Diageo products in military canteens.

The SEC alleged that "Diageo's history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs." All three of the implicated Diageo subsidiaries were relatively recent acquisitions at the time of the allegedly corrupt payments, and the order contended that, although Diageo recognized that these new businesses had "weak compliance policies, procedures, and controls," it nevertheless failed to address those weaknesses until the corrupt payments were discovered.

Without admitting or denying the SEC's allegations, Diageo agreed to disgorge $11,306,081 in profits plus prejudgment interest of $2,067,739 and to pay a $3 million civil penalty. Despite the breadth of the allegations, there are thus far no indications that DOJ intends to weigh in with its own enforcement action.

In yet another FCPA enforcement action arising out of an acquired business with a deficient control environment, on October 13, 2011, the SEC issued a cease-and-desist order against ***Watts Water Technologies, Inc.***, alleging improper payments by sales personnel at its Chinese subsidiary, Watts Valve (Changsha) Co., Ltd. ("CWV"). According to the order, CWV sales personnel made improper payments to employees of Chinese state-owned design institutes to induce them to recommend CWV products to government entities and development design specifications that favored CWV products. These payments allegedly were encouraged by CWV's sales policy, which explicitly permitted sales personnel to make payments of up to 3% of a contract's value to design institute employees.

Watts Water acquired the business that became CWV in 2006. It implemented its FCPA compliance policy at CWV shortly after the acquisition, but failed to conduct FCPA training for CWV employees until 2009. In fact, it was only when Watts Water's General Counsel decided to implement FCPA training for these employees (after he learned of an unrelated FCPA enforcement action involving Chinese design institutes) that the improper payments scheme described above surfaced.

Without admitting or denying the alleged books-and-records and internal controls violations, Watts Water agreed to disgorge $2,755,815 in profits plus $820,791 in prejudgment interest and to pay a $200,000 civil penalty.

Leesen Chang, the former interim general manager of CWV and a U.S. citizen, was also named in the SEC's order and agreed to pay a $25,000 civil penalty. According to the order, Chang not only knew about and approved of the corrupt payments, but he resisted an attempt to have the CWV sales policy translated into English for Watts Water management, stating that "China sale policy should stay in control within China regional operation," lest CWV "lose many flexibility on working with sale, sale agent and end buyer."

The SEC commended Watts Water for taking prompt remedial actions upon learning of the misconduct, including by making a voluntary disclosure to the SEC. It also appears that DOJ will not be prosecuting Watts Water, as the company's public filings state that the SEC settlement "resolves all government investigations concerning CWV's sales practices and potential FCPA violations." Shortly after the misconduct surfaced, and after only four years of ownership, Watts Water divested the CWV business in 2010.

Other examples of FCPA enforcement actions initiated in 2011 that arose out of very recent acquisitions are discussed in our 2011 Mid-Year FCPA Update, including cases against ***Johnson & Johnson***, ***Maxwell Technologies, Inc.***, and ***Ball Corp.***

DOJ clamps down on the demand side of foreign bribery

In our 2009 Year-End FCPA Update, we reported on a new initiative by DOJ to pursue the foreign government officials who receive the bribes paid by FCPA defendants. Although the FCPA does not criminalize the receipt of bribes by foreign officials, DOJ has employed two tools to reach these recipients and their illicitly derived assets: (1) criminal prosecutions under the U.S. money laundering statute; and (2) civil forfeiture actions against corruptly derived assets located in the United States. This year we saw a continuation of both efforts by DOJ, as well as legal challenges that may ultimately determine how far DOJ may go down these paths.

In 2010, DOJ unsealed a criminal money laundering indictment against ***Juthamas Siriwan***, the former Governor of the Tourism Authority of Thailand ("TAT"), and her daughter, ***Jittisopa Siriwan***. DOJ alleges that the Siriwans received approximately $1.8 million in corrupt payments from husband and wife film producers Gerald and Patricia Green in return for awarding the Greens' businesses up to $14 million in TAT contracts. The Greens were successfully prosecuted under the FCPA, with a federal jury in the Central District of California returning guilty verdicts in 2009. Now, in 2011, DOJ is seeking extradition of the Siriwans from Thailand on the money laundering indictment.

The Siriwans have fought back vigorously against the creeping long arm of U.S. law. In an initial victory for the defense, the Siriwans have been allowed to seek dismissal of their indictment through the special appearance of their counsel, even as they technically remain fugitives in Thailand. On July 28, 2011, U.S. District Court Judge George H. Wu (who presided over the Greens' FCPA trial) issued a preliminary ruling finding that the "fugitive disentitlement doctrine" does not apply in this instance, where the Siriwans did not flee the United States post-indictment (indeed, there is no evidence that

Jittisopa has ever set foot in the United States) and are facing criminal proceedings for the same conduct in Thailand. Judge Wu wrote: "Under these circumstances, it is not at all clear that this Court should play what role it can in attempting to dissuade foreign nationals from staying in their home country and to instead submit themselves to prosecution in a country where they have no other reason to visit." Rather than contest Judge Wu's preliminary ruling, DOJ stipulated to the case's proceeding to the defendants' substantive motion to dismiss the indictment.

In their motion to dismiss the indictment, the Siriwans argue, among other things, that DOJ should not be able to prosecute under the money laundering statute the very same acts that it cannot prosecute under the FCPA. DOJ responds that this argument is "irrelevant," because the defendants have not been charged under the FCPA. Noting the complexity of the legal issues, which are of first impression, Judge Wu has requested supplemental briefing (including a sur-sur-reply) in advance of a hearing on the Siriwans' motion, which is currently set for January 26, 2012.

The other foreign official money laundering prosecution that saw developments in 2011 is DOJ's continuing investigation of allegedly corrupt relationships between U.S. telecommunications providers and officials of Télécommunications d'Haiti ("Haiti Teleco"). In addition to the 2011 FCPA trial convictions of U.S. defendants ***Joel Esquenazi*** and ***Carlos Rodriguez***, discussed below, on July 13, 2011, a grand jury sitting in the Southern District of Florida returned a superseding indictment charging ***Patrick Joseph***, former Director General of Haiti Teleco, with one count of conspiracy to commit money laundering. Indicted on substantive FCPA, FCPA conspiracy, and wire fraud charges along with Joseph were ***Cinergy Telecommunications, Inc.***, its President ***Washington Vasconez Cruz***, and its former Director ***Amadeus Richers***. Finally, the superseding indictment added new money laundering charges against former Haiti Teleco Director of International Relations ***Jean René Duperval*** and his sister, ***Marguerite Grandison***, both of whom were initially indicted in 2009.

The superseding Haiti Teleco indictment alleges a scheme whereby, between 2001 and 2006, Cinergy (through Cruz and Richers) paid more than $1.4 million to various shell companies (including one operated by Grandison) for the benefit of Haiti Teleco officials (including Joseph and Duperval) in return for the rights to sell calling cards that would connect to residents of Haiti. The relative ease with which DOJ has exercised jurisdiction over Joseph, who was arrested without incident shortly after the indictment was handed down, and other Haiti Teleco officials is undoubtedly a function of the close geographic ties between Miami and the island nation. But one cannot discount the cooperation provided by the current Haitian regime. As noted in our 2009 Year-End FCPA Update, DOJ's criminal investigation into Haiti Teleco officials followed a 2005 civil suit brought in the Southern District of Florida by the Republic of Haiti against its deposed president, Jean-Bertrand Aristide, and several other former Haitian officials, including Duperval, alleging corrupt dealings between the officials and U.S. telecommunications companies. By contrast, the Government of Thailand has resisted ceding jurisdiction over its public officials in the Siriwans' case, announcing that it has gathered its own evidence that is "even more convincing than that collected by the U.S. authorities."

In tandem with its efforts to utilize the criminal money laundering statute to prosecute foreign officials who receive bribes, DOJ has reinvigorated its efforts to recover the proceeds of foreign corruption held in the United States. On the legislative front, DOJ has proposed a new law, which borrows its name--the Proceeds of Crime Act--from the United Kingdom's expansive money laundering statute, to update

U.S. money laundering laws and enhance DOJ's civil forfeiture capabilities. Describing the proposed legislation during testimony before the Senate Judiciary Subcommittee on Crime and Terrorism, Breuer proclaimed that with this proposed statute as a tool, "corrupt foreign officials not present in the United States [would not be able to] elude the reach of [DOJ's] enforcement entirely."

On the enforcement front, DOJ has in recent years routinely included criminal forfeiture counts in its FCPA/money laundering indictments. But particularly noteworthy are the *in rem* civil forfeiture complaints the agency's Asset Forfeiture and Money Laundering Section has begun bringing as part of DOJ's Kleptocracy Asset Recovery Initiative. Breuer describes the initiative's purpose as targeting and recovering "the proceeds of foreign official corruption that have been laundered into or through the United States . . . for the benefit of the people of the country from which it was taken." DOJ brought at least two such actions in 2011.

On October 27, 2011, DOJ announced parallel civil forfeiture complaints unsealed in the U.S. district courts for the District of Columbia and the Central District of California against more than $70.8 million worth of real and personal property held by ***Teodoro Nguema Obiang Mangue***, the Minister of Forestry and Agriculture and the son of the president of the Republic of Equatorial Guinea. DOJ's complaints recite jaw-dropping extravagances purchased by Nguema on his $100,000 *per annum* government salary, alleging that he and others in his father's "Inner Circle" extracted illegal "taxes" for their personal benefit from oil and timber concessions, overcharged their own government for sole source contracts awarded to their personal companies, and stole public funds outright, including plundering donations that were to be used to convert the roofs of dilapidated homes from palm fronds to metal. The property DOJ seeks to seize from Nguema includes a Gulfstream jet, a Malibu mansion, a Ferrari automobile, and memorabilia from the estate of the late Michael Jackson (including one item that led to the unforgettable case caption, *United States v. One White Crystal-Covered "Bad Tour" Glove and Other Michael Jackson Memorabilia*). Nguema has entered a special, limited appearance through counsel and his answer is due on January 20, 2012.

On March 11, 2011, DOJ filed a civil *in rem* complaint in the U.S. District Court for the District of Maryland seeking forfeiture of a house in the King Farm Estates neighborhood of Montgomery County, Maryland. According to the complaint, the house belongs to ***Diepreye Solomon Peter Alamieyeseigha*** ("DSP"), the former governor of the oil-producing Bayelsa state in Nigeria, and is a spoil of DSP's corruption in office that helped him amass $12.7 million in assets on an annual salary of less than $54,000. In 2005, DSP was arrested on suspicion of money laundering in the United Kingdom and $1.6 million in cash was seized in an ensuing search of his London residence. DSP subsequently absconded from the United Kingdom and remains a fugitive, but he has since pleaded guilty to filing false financial disclosure forms in his native Nigeria. In his answer to the U.S. civil forfeiture complaint, DSP claims that a "family friend" and "businessman with interest in various sectors of the Nigeria[n] economy" loaned DSP the money to purchase the house "[a]s a gesture of goodwill." The case has been stayed temporarily pending notification of additional "persons located in Nigeria who may have an interest in the Defendant Property," but a status conference is scheduled for January 12, 2012.

Rounding out the 2011 enforcement docket

In addition to those cases profiled above and in our 2011 Mid-Year FCPA Update, DOJ and the SEC brought the following FCPA enforcement actions in 2011:

- ***Aon Corp.*** – On December 20, 2011, DOJ and the SEC announced criminal and civil FCPA settlements with Aon, one of the world's largest providers of risk management services. According to the charging documents, Aon subsidiaries made over $3.6 million in improper payments over a 14-year period to secure insurance and reinsurance contracts in Bangladesh, Costa Rica, Egypt, Indonesia, Myanmar, the United Arab Emirates, and Vietnam. The improper payments allegedly were provided in the form of improper travel and entertainment expenditures and disbursements to third-party representatives with knowledge that the money would be passed on to foreign government officials.

  To resolve the alleged books-and-records and internal controls violations, Aon entered into a non-prosecution agreement with DOJ pursuant to which it will pay a $1.76 million criminal fine, and consented to the filing of a settled civil complaint by the SEC obligating Aon to pay combined disgorgement and prejudgment interest of $14,545,020. In explaining its decision to enter into a non-prosecution agreement with Aon, DOJ cited the company's "extraordinary cooperation," "thorough investigation of its global operations," and prior settlement of related charges with the U.K. Financial Services Authority (as described in our 2009 Mid-Year FCPA Update).

- ***Bridgestone Corp.*** – On September 15, 2011, the world's largest tire and rubber company agreed to plead guilty to criminal antitrust and FCPA charges arising from its alleged role in conspiracies to rig bids, allocate markets, fix prices, and make corrupt payments in connection with its sale of marine hose to state-owned entities in Latin America. Bridgestone agreed to pay a $28 million criminal fine in connection with its guilty plea.

  Bridgestone was the fifth company charged in the Antitrust Division's marine hose bid-rigging investigation, in addition to the nine individual defendants who have been convicted and sentenced to a total of 4,557 days in prison for their roles in the scheme. One of these individuals, Misao Hioki, was the former general manager of Bridgestone's International Engineered Products Department. We reported on his December 2008 guilty plea to criminal antitrust and FCPA charges in our 2008 Year-End FCPA Update, together with an excerpt from a 1999 speech given by then-Deputy Assistant Attorney General (now Gibson Dunn partner) Gary Spratling predicting the increased intersection of criminal antitrust and FCPA prosecutions in years to come.

2011 CRIMINAL TRIALS

When DOJ racked up a perfect record in what then were the first three FCPA cases to go to trial in five years, Breuer declared 2009 "the year of the FCPA trial." In 2011, we saw a new all-time high of four

FCPA trials. But this year, not unlike the second episode in the original Star Wars trilogy, FCPA defendants fared somewhat better.

Setbacks for the Government in the SHOT Show trials

This year saw the first two trials stemming from DOJ's groundbreaking sweep of the military and law enforcement products industry nearly two years ago. As reported in our 2010 Mid-Year FCPA Update, on January 18, 2010, FBI agents simultaneously arrested 22 industry participants (21 at the Las Vegas SHOT Show Conference) in connection with what prosecutors allege was a conspiracy to corruptly pay $1.5 million to the Gabonese Minister of Defense to secure what the defendants believed were $15 million in defense equipment contracts. In reality, the contracts and the corrupt overtures were just fictitious figments of a creative DOJ/FBI sting operation.

Three of the 22 SHOT Show defendants (***Jonathan Spiller***, ***Daniel Alvirez***, and ***Haim Geri***) pleaded guilty in 2011, joining the Government's key cooperating witness, Bistrong, who pleaded guilty to unrelated FCPA charges in 2010 after helping the Government design and execute the sting operation. The remaining 19 defendants have been divided into four trial groupings to defend against a 44-count indictment pending in the U.S. District Court for the District of Columbia.

In May and June 2011, the defendants in the first trial group went before a D.C. jury. After three weeks of testimony, described in our 2011 Mid-Year FCPA Update, the jury deadlocked, forcing Judge Richard J. Leon to declare a mistrial. DOJ has vowed to retry these defendants, although it appears that their group has now been pushed to the end of this series of cases. Most notable from this first trial is a ruling by Judge Leon on the jurisdictional scope of 15 U.S.C. § 78dd-3 (the FCPA anti-bribery provision applying to "persons other than issuers and domestic concerns"). Judge Leon held that this provision requires that a corrupt act be taken while in the territory of the United States, a requirement not satisfied by U.K. citizen Patel's mailing of an allegedly corrupt purchase agreement from the United Kingdom to the United States.

Undeterred by the temporary setback in Round 1, DOJ pressed forward with its prosecution of the second trial grouping consisting of ***R. Patrick Caldwell***, ***Stephen Giordanella***, ***John G. Godsey***, ***Marc F. Morales***, ***Jeana Mushriqui***, and ***John M. Mushriqui***. Prosecutors revised their tactical approach in this trial, nearly doubling the length of their case to 12 weeks and this time presenting the testimony of Bistrong, who did not testify in the first trial. Taking Bistrong's baggage head on, the Government walked him through his extensive history of moral and legal transgressions, including a sordid history of his own bribery and export control violations, substance abuse, and relations with prostitutes. The point was to show that Bistrong's unsavory past did not undermine the integrity of the investigation, which was largely caught on tape in literally thousands of recorded communications between Bistrong, undercover FBI agents, and the SHOT Show defendants.

Rather than focus on Bistrong's personal shortcomings, defense counsel launched a broadside attack on the integrity of the entire sting operation, including the FBI agents' failure to keep records of each communication with Bistrong as required by FBI policy and their seemingly chummy and occasionally lewd dialogue with their informant. Simultaneously, defendants highlighted the failure by Bistrong and the undercover FBI agents to use clear terminology (*i.e.*, "bribe") in referring to the payments that

were to be made to the Gabonese Minister of Defense, claiming that the repeated use of the term "commission" was obtuse by design and did not adequately convey the illegality of the payment. Finally, the defendants established a factual foundation to support their legal argument that design flaws in the sting operation made it impossible for the defendants to have engaged in the overarching conspiracy alleged by DOJ.

At the close of the Government's case, just before the year-end Holiday break, the Court granted the defendants' Rule 29 motion for judgment of acquittal on the first count of the indictment, which charged the over-arching conspiracy. In doing so, Judge Leon, who has tirelessly managed these cases for nearly two years now, ruled that no reasonable juror could conclude beyond a reasonable doubt that the defendants were engaged in a global conspiracy, because the proposals were pitched to the suppliers independently, the suppliers viewed each other as competitors, and there was insufficient evidence of interdependence, common goal, and overlap.

Defendants Caldwell, Godsey, Morales, Jeana Mushriqui, and John Mushriqui still face substantive FCPA counts and will continue to put on their defense cases in 2012. But for Giordanella, who faced only the conspiracy charge, Judge Leon announced: "Mr. Giordanella, you are excused . . . you are free to go." Quite a holiday present for Mr. Giordanella and his family.

Two Haiti Teleco defendants convicted; record sentence imposed

On August 4, 2011, after a 14-day trial in the Southern District of Florida followed by only five hours of deliberation, a federal jury returned guilty verdicts against telecommunications company executives ***Joel Esquenazi*** and ***Carlos Rodriguez*** for their involvement in the above-described scheme to bribe officials of Haiti Teleco. The defendants were each found guilty of seven substantive FCPA violations, conspiring to violate the FCPA, 12 substantive money laundering violations, and conspiring to violate the money laundering and wire fraud statutes.

Judge Jose E. Martinez sentenced Esquenazi and Rodriguez to 15 and seven years in prison, respectively. As noted by Breuer in a recent speech, Esquenazi's prison sentence is "the longest sentence ever imposed in an FCPA case" and "a stark reminder to executives that bribing government officials to secure business advantages is a serious crime with serious consequences."

In a bizarre post-trial development, Rodriguez and Esquenazi filed a motion to set aside the jury's verdicts based on newly discovered evidence that they claim demonstrates that Haiti Teleco was not a state-owned enterprise. In support of their motion, the defendants attached a declaration executed by Haitian Prime Minister Jean Max Bellerive on July 26, 2011--while the trial was ongoing--that they received only on August 10, nearly one week after the jury returned its guilty verdicts. As characterized by Rodriguez and Esquenazi, the declaration confirmed that Haiti Teleco was not an instrumentality of the Haitian government. The defendants argued that if they had this declaration during trial, they could have used it to impeach the Government's expert witness on Haitian law, who opined that Haiti Teleco was a government instrumentality because, among other reasons, 97% of its shares were held by Haiti's National Bank, its directors were appointed by Haiti's Prime Minister, and it performed a public service for the people of Haiti. (Judge Martinez had previously ruled that whether Haiti Teleco is an instrumentality of the Haitian government for purposes of the FCPA is a

question of fact and instructed the jury to consider factors similar to those described below in connection with the CCI case.)

In response, the Government noted that it received the Bellerive declaration on August 9, after the trial and only one day before turning the declaration over to defendants. The Government also provided a second declaration from Prime Minister Bellerive, clarifying that he did not intend for his first declaration to be used in a U.S. criminal proceeding, that his first declaration had been misconstrued by the defendants, and that the Haitian government's position continued to be that Haiti Teleco was part of the public administration during the relevant period.

Judge Martinez denied Esquenazi and Rodriguez's motion, holding that the first Bellerive declaration only stated facts that were open to interpretation, subsequently clarified in the second declaration, and which were, in any event, known to the defendants before trial. Esquenazi and Rodriguez have noted appeals to the Eleventh Circuit.

Lindsey defendants convicted by jury; but guilty verdicts set aside by judge

In our 2011 Mid-Year FCPA Update, we detailed DOJ's (initially) successful trial prosecution of ***Lindsey Manufacturing Company***, its CEO ***Keith E. Lindsey***, its CFO ***Steve K. Lee***, and one of its third-party intermediaries ***Angela Aguilar***. After a five-week trial, it took the jury just seven hours to return guilty verdicts on all charges arising from an alleged scheme whereby Lindsey Manufacturing paid inflated commissions to its agents with knowledge that the agents would pass a portion of these commissions to officials of Mexico's Comisión Federal de Electricidad ("CFE") in return for steering contracts to the company. After the May 10, 2011, verdicts, sentencing was scheduled for September 16. But it was not to be.

On December 1, 2011, Judge A. Howard Matz of the U.S. District Court for the Central District of California threw out the convictions against Lindsey Manufacturing and its executives on grounds of prosecutorial misconduct. This ruling did not affect Aguilar's conviction, as she previously reached a deal with DOJ by which she received a "time served" sentence in return for her agreement not to challenge her conviction.

Throughout pre-trial motion practice and the trial itself, defendants repeatedly filed prosecutorial misconduct motions and, just as frequently, Judge Matz denied them. But the one straw too many came when, seven weeks after the jury returned its guilty verdicts, the Government notified the Court that it had not turned over to the defense the transcript from one of the FBI case agent's appearances before the grand jury. The Government explained that the omission was an oversight, but, nevertheless, it was a critical one, for in this testimony the case agent made significant misstatements concerning the evidence against the defendants.

In a 41-page opinion, Judge Matz recited what he found to be an extensive laundry list of missteps by the prosecution team and its agents, including

> allow[ing] a key FBI agent to testify untruthfully before the grand jury, insert[ing] material falsehoods into affidavits submitted to magistrate judges in support of applications for search warrants and seizure warrants, improperly review[ing] e-mail communications between one

> Defendant and her lawyer, recklessly fail[ing] to comply with its discovery obligations, pos[ing] questions to certain witnesses in violation of the Court's rulings, engag[ing] in questionable behavior during closing argument and even ma[king] misrepresentations to the Court.

Judge Matz held that these actions affected the jury's verdicts and thereby substantially prejudiced the defendants. The Court found dismissal of the indictment to be an appropriate remedy both under the Due Process Clause and pursuant to the Court's supervisory powers. One of the factors that the Court cited in support of its analysis was what it termed "the weakness of the Government's case." Unimpressed by the jury's speedy verdict, Judge Matz observed that there was no direct evidence that the Lindsey defendants knew that the funds that they paid to their agents as commissions would be passed to CFE officials as bribes (*e.g.*, no oral admissions, no writings, and very little evidence of furtive conduct). Judge Matz further held that, regardless of what the Lindsey defendants knew or believed, "there was no clear evidence that if [the agents] bribed [the CFE officials] it was with [Lindsey Manufacturing's] funds."

The very same day that Judge Matz issued his opinion dismissing the indictments against Lindsey Manufacturing and its executives, DOJ noted its appeal to the Ninth Circuit. Aguilar also is challenging her conviction collaterally via an 28 U.S.C. § 2255 habeas petition, which she and the Government have agreed should be stayed pending resolution of DOJ's appeal. Gibson Dunn has interacted regularly with the Lindsey trial prosecutors in other matters and has always found them to be straight forward and honest brokers.

2011 FCPA SENTENCING DOCKET

As noted above, 2011 saw the longest prison sentence (by far) ever imposed in an FCPA case--15 years for Joel Esquenazi. Pertinent details for this and other sentences handed down in 2011 criminal FCPA cases follow:

Defendant	Sentence	Date	Court (Judge)	Comments
Jorge Granados	46 months	09/08/11	S.D. Fla. (Lenard)	DOJ sought 60 months
Joel Esquenazi	180 months	10/26/11	S.D. Fla. (Martinez)	Jury trial conviction; longest FCPA sentence ever imposed
Carlos Rodriguez	84 months	10/26/11	S.D. Fla. (Martinez)	Jury trial conviction
Ousama M. Naaman	30 months	12/22/11	D. D.C. (Huvelle)	DOJ sought 90 months
Antonio L. Perez	10 months	12/27/11	S.D. Fla. (Martinez)	Originally sentenced to 24 months; reduced to 10 months on DOJ motion

ADDITIONAL FCPA ENFORCEMENT DEVELOPMENTS IN 2011

Second Circuit affirms Frederic Bourke's conviction; Bourke remains free on bail

On December 14, 2011, the U.S. Court of Appeals for the Second Circuit affirmed the Dooney & Bourke co-founder's 2009 conviction for conspiracy to violate the FCPA and the Travel Act and for making false statements to the FBI during the investigation. As described in our 2009 Year-End FCPA Update, Bourke's conviction stems from an $8 million investment that he made in a business venture that sought to gain control of Azerbaijan's state oil company, allegedly with knowledge that one of his business partners (current FCPA fugitive Victor Kozeny) had paid millions of dollars in bribes to senior Azeri officials to encourage the privatization effort. Specifically, the evidence at trial established that Bourke

- knew that Kozeny had a history of corrupt dealings in connection with a similar privatization effort in the Czech Republic, which caused *Fortune* magazine to dub Kozeny the "Pirate of Prague";
- was told by one of his co-conspirators that Azeri officials would be gifted an ownership interest in the privatized oil company if the privatization went through;
- sought counsel from his attorneys about the limits of investor liability under the FCPA, including by asking them what he was supposed to do if he learned that Kozeny was paying bribes; and
- after consulting with his attorneys, sought to shield himself by setting up a separate company through which he would funnel his investments.

Most pertinent from an FCPA perspective, the Second Circuit affirmed U.S. District Court Judge Shira Scheindlin's "ostrich instruction" to the jury. According to this instruction, "[w]hen knowledge of [the] existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact." Second Circuit Judge Rosemary S. Pooler concluded that "[t]aken together, a rational juror could conclude that Bourke deliberately avoided confirming his suspicions that Kozeny and his cohorts may be paying bribes."

The weeks following the release of the Second Circuit's opinion affirming Bourke's convictions have seen a whirlwind of activity. First, on December 15, the day after the appellate affirmance, Judge Scheindlin denied Bourke's Rule 33 motion for a new trial, which was based on allegedly late-produced evidence impeaching the credibility of one of the Government's key witnesses. The next day, the Court ordered Bourke to report to prison as early as January 3, 2012. But then, on December 28, Judge Scheindlin reversed course and ordered that Bourke be permitted to remain free on bail pending final resolution of Bourke's appeal (up to and including resolution of certiorari to the U.S. Supreme Court). The letter submissions of Bourke's appellate counsel make clear that he hopes Bourke's case will be the first in the Supreme Court to address usage of a so-called ostrich instruction in a criminal case.

DOJ Dismisses Si Chan Wooh's 2007 Guilty Plea

Citing "prosecutorial discretion," the "interests of justice," and "efficient use of government resources," on October 14, 2011, DOJ moved to dismiss the criminal information pursuant to which Wooh pleaded guilty back in 2007. Wooh's plea agreement provided that DOJ would recommend that he serve a probationary, non-jail sentence. But, according to court documents, an FBI agent involved in the investigation expressed concerns about the Government's prosecution of Wooh in light of his "whistleblower" posture in the case, his lack of knowledge of the illegality of the payments in question, and DOJ's failure to bring charges against more senior officers of Wooh's former employer who allegedly approved the payments.

On October 17, 2011, Judge Garr M. King of the U.S. District Court for the District of Oregon granted DOJ's unopposed motion to dismiss the guilty plea.

2012 TRIAL DOCKET

John Joseph O'Shea

Trial on the 2009 indictment against O'Shea, the former general manager of a Texas-based subsidiary of ABB Ltd., is scheduled to begin on January 11, 2012. O'Shea is alleged to have participated in a conspiracy to corruptly induce the very same CFE officials implicated in the Lindsey case to award contracts to ABB in return for 10% kickbacks on those contracts. O'Shea and his co-conspirators allegedly referred to these kickbacks as the "Third World Tax."

U.S. District Court Judge Lynn N. Hughes of the Southern District of Texas has already denied O'Shea's motion to dismiss the indictment on statute-of-limitations grounds, finding that DOJ properly tolled the limitations period pursuant to 18 U.S.C. § 3292, a statute that affords DOJ additional time to seek indictment while pursuing evidence abroad pursuant to Mutual Legal Assistance Treaty requests. Judge Hughes also denied a defense motion claiming that the Government improperly withheld exculpatory *Brady* material. Still pending is O'Shea's motion to dismiss the indictment on the grounds that CFE employees are not "foreign officials" under the FCPA (although, as described in our 2011 Mid-Year FCPA Update, a very similar motion was resolved in DOJ's favor in the *Lindsey* case). Also outstanding is a motion by O'Shea to preclude the Government from introducing evidence concerning a Ferrari and a luxury yacht allegedly purchased for one of the corrupt CFE officials on the grounds that DOJ already attributed those extravagant gifts to the Lindsey defendants in their prosecution.

CCI Defendants

Another 2009 FCPA indictment slated for trial in 2012--this one currently set to begin on June 5--charges five former executives of ***Control Components, Inc.*** ("CCI") with engaging in a wide-ranging conspiracy to make corrupt payments to induce the recipients to award contracts to CCI or to skew technical specifications of competitive tenders in CCI's favor. The key issue litigated in 2011 was the defendants' first-of-its-kind motion to dismiss the indictment, filed by Gibson Dunn, on the grounds that the recipients of the alleged bribes--employees of foreign state-owned enterprises ("SOEs")--do not qualify as "foreign officials" as that term is defined in the FCPA.

As noted in our 2011 Mid-Year FCPA Update, on May 18, 2011, Judge James V. Selna of the U.S. District Court for the Central District of California ruled that whether SOE employees qualify as foreign officials under the FCPA is a question of fact for the jury, leading to the submission of competing jury instructions. On September 2, Judge Selna issued a tentative ruling largely adopting the Government's proposed seven-factor test for determining whether the alleged recipients of a bribe worked for an instrumentality of a foreign government and thus constitute foreign officials for purposes of the FCPA. Refusing to embrace a bright-line approach based on established criteria, the Court ruled that the jury may consider the following list of non-exclusive factors (though it need not find that all, or even a majority, of these factors are present to reach the conclusion that the entity is a foreign government instrumentality):

1. "the circumstances surrounding the entity's creation;
2. "the foreign government's characterization of the entity, and whether the entity is widely perceived and understood to be performing official (i.e., governmental) functions;
3. "the degree of the foreign government's control over the entity, including the foreign government's power to appoint key directors or officers of the entity;
4. "the purpose of the entity's activities, including whether the entity provides a service to the citizens of the jurisdiction;
5. "the entity's obligations and privileges under the foreign country's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
6. "the status of the employees under the foreign government's law, including whether the employees are considered public employees or civil servants[; and]
7. "the extent of the foreign government's ownership of the entity, including the level of financial support by the foreign government (e.g., subsidies, special tax treatment, and loans)[.]"

On September 6, 2011, Judge Selna requested supplemental briefing to address the FCPA's knowledge requirement for the jury instructions. Although the Court has not yet made a final ruling, both parties agree that the FCPA requires that the defendant know or believe that the intended recipient of a bribe was, in fact, a foreign government official. DOJ, however, proposes that the defendant need not know whether the recipient of a bribe would have fallen within the FCPA's legal definition of a "foreign official" or in what specific capacity the intended recipient was acting.

If Judge Selna were to accept the Government's proposed knowledge requirement, a curious situation would arise. On the one hand, DOJ would need to show that the employer of a bribe recipient met the legal definition of an instrumentally as outlined above. On the other hand, the defendants themselves would not necessarily need to have known all of the legal facts relevant to finding that the recipient's employer was a foreign government instrumentality. How the Court will rule remains to be seen.

FCPA-RELATED CIVIL LITIGATION

The FCPA does not provide for a private right of action, but one would never know that from the steady stream of shareholder-, competitor-, employee-, and even foreign government-initiated lawsuits filed in federal and state courts across the United States seeking to capitalize on allegations of FCPA misconduct. In recent years, enterprising plaintiffs have circumvented the FCPA's lack of a private redress mechanism by filing derivative lawsuits, securities fraud actions, tort and contract law claims, employment lawsuits, and private actions under the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

Selected shareholder derivative suits

- ***Avon Products, Inc.*** – On July 21, 2010, shareholders filed a derivative action in the Southern District of New York against the cosmetics and perfume manufacturer, its board of directors, and certain corporate officers (one of whom Gibson Dunn represents) alleging that the officers and directors failed to establish sufficient anti-corruption compliance controls, thereby enabling company employees to make improper payments to Chinese government officials. On May 16, 2011, plaintiffs filed an amended complaint to incorporate additional facts disclosed in Avon's public filings and in a *Wall Street Journal* article, including that the company had expanded its internal investigation to assess "questionable payments" potentially made to government officials in Argentina, Brazil, India, Japan, Mexico, and elsewhere and had fired four executives implicated in suspected improper payments to Chinese officials. Defendants moved to dismiss the consolidated complaint, but the motion was denied without prejudice in light of plaintiffs' stated intent to file a second consolidated amended complaint, which was filed on December 12. Defendants have until January 10, 2012 to refile their motion to dismiss.

- ***Bio-Rad Laboratories, Inc.*** – On April 13, 2011, shareholder plaintiff City of Riviera Beach General Employees' Retirement System filed a derivative action in California state court against the life sciences research firm and its directors alleging breaches of fiduciary duty stemming from the company's purported failure to implement internal controls sufficient to ensure compliance with the FCPA. The derivative action followed the filing of Bio-Rad's 2010 10-K, in which Bio-Rad stated that it had likely violated the FCPA's accounting provisions, may have violated the statute's anti-bribery provisions, and was under investigation by both DOJ and the SEC. In response, defendants filed a demurrer requesting dismissal of the derivative complaint, as well as a motion to dismiss the complaint and a motion to stay the matter pending resolution of the DOJ and SEC investigations. Following a hearing on September 30, 2011, the Court granted defendants' motion to dismiss the complaint without prejudice and gave the plaintiff until February 29, 2012, to file an amended complaint.

- ***Tidewater, Inc.*** – On February 16, 2011, the global oil services provider and its directors found themselves embroiled in a shareholder derivative suit filed in the U.S. District Court for the Eastern District of Louisiana. Relying, in substantial part, on Tidewater's November

2010 FCPA settlements with DOJ and the SEC, the plaintiff alleges that the defendant directors breached their fiduciary duties by knowingly or recklessly disregarding improper payments made or offered by the company's representatives to government officials in Azerbaijan and Nigeria and by failing to maintain proper anti-corruption compliance controls. Defendants filed a motion to dismiss the lawsuit on September 1, 2011, arguing that the complaint lacks the particularity required by the Federal Rules of Civil Procedure and was filed prior to making a formal demand on Tidewater's board of directors as required by Delaware law. The Court has not yet ruled on the motion.

- ***Johnson & Johnson*** – Johnson & Johnson and its directors also found themselves named as defendants in a derivative suit shortly after resolving criminal and civil FCPA enforcement actions with DOJ and the SEC, when shareholders filed an action in the U.S. District Court for the District of New Jersey on May 2, 2011. Plaintiffs are seeking damages for breaches of fiduciary duty stemming from an alleged failure to implement internal controls sufficient to detect and prevent bribery of administrators, doctors, and pharmacists who worked at public hospitals in Greece, Poland, and Romania, as well as a failure to disclose the full extent of the company's potential FCPA liability for making improper payments to Iraqi officials in connection with the United Nations Oil-for-Food Program. Defendants' motion to dismiss, which was filed on October 28, argues that plaintiffs have failed to satisfy the heightened pleading standard of Federal Rule of Civil Procedure 23.1, which applies because the plaintiffs made no demand to the board of directors prior to filing their derivative action. The Court has yet to rule on the motion.

- ***Maxwell Technologies, Inc.*** – In August 2010, several months before Maxwell settled its government enforcement actions stemming from alleged bribery of officials of a Chinese state-owned electric utility, shareholders filed two derivative lawsuits (which have now been consolidated) in California state court against the company and various of its current and former officers and directors. Plaintiffs allege, among other things, that the defendant directors breached their fiduciary duties by failing to ensure that the company maintained adequate anti-corruption controls. The Court grant granted-in-part and denied-in part the defendants' demurrer on August 12, 2011, and the case has been referred to mediation.

- ***SciClone Pharmaceuticals, Inc.*** – On December 1, 2011, Judge James S. Ware of the U.S. District Court for the Northern District of California approved plaintiffs' notice of dismissal, thereby ending this derivative action, which was filed in the wake of SciClone's August 2010 announcement that it was under investigation for potential violations of the FCPA stemming from the company's operations in China. As part this highly unusual settlement, SciClone agreed to an extensive list of undertakings relating to the implementation of an enhanced compliance program over the next three years, including the retention of a "compliance coordinator" to oversee the process. This is particularly noteworthy because compliance undertakings are typically features of settlements in government enforcement actions, not private shareholder litigation. Moreover, the level of detail set forth in the undertakings is remarkable, including a requirement that certain types of expenses exceeding $2,500 receive pre-approval.

Selected tort claims

- ***Siemens AG*** – On January 11, 2011, Argentine citizen Carlos A. Morán Hidalgo and his family sued Siemens in the U.S. District Court for the Southern District of Florida under the Alien Tort Claims Act, the Torture Victims Protection Act, and the RICO Act. Plaintiffs alleged that Siemens conspired with Argentine government officials to bribe Hidalgo's former employer and an independent government watchdog organization to ignore bribery and corruption committed by Siemens in Argentina. They further claimed that Siemens violated Hidalgo's human rights in that Hidalgo was purportedly threatened and beaten by several attackers when he threatened to expose the bribery scheme. On July 28, 2011, Judge Patricia A. Seitz dismissed the lawsuit without prejudice for failure to serve the complaint.

Selected employment litigation

- ***Abu Dhabi National Energy Company PJSC ("TAQA")*** – On September 28, 2011, the U.S. District Court for the Eastern District of Michigan dismissed breach of contract, retaliation, and tort claims against the government-owned energy holding company of the United Arab Emirates, which were first brought in August 2010 by TAQA's former CEO, Peter Barker-Homek. Barker-Homek alleged in the suit that he was forced to resign from the company after attempting to end corrupt practices, including bribery of government officials, accounting fraud, and other unethical business practices at TAQA New World, Inc., a subsidiary formerly based in Michigan. But Judge John Corbett O'Meara dismissed the case for lack of jurisdiction, finding that Barker-Homek's claimed connection to the Michigan subsidiary was substantially overstated and that the Court did not have general or specific jurisdiction over the UAE parent company. Further, the Court ruled that the case could not proceed against TAQA New World because TAQA, over which there is no jurisdiction, would be an indispensible party pursuant to Rule 19 of the Federal Rules of Civil Procedure. Barker-Homek's recourse, Judge O'Meara wrote, "is to pursue his claims against TAQA in Abu Dhabi"; "[t]he court is not free to substitute [the subsidiary] for TAQA so that Plaintiff may pursue his claims in the United States." Barker-Homek has noted an appeal to the Sixth Circuit.

Selected competitor lawsuits

- ***Innospec, Inc.*** – On January 27, 2011, NewMarket Corporation filed a second amended complaint in connection with its 2010 lawsuit against its competitor Innospec, alleging that Innospec conspired to restrain trade and engage in commercial bribery in violation of federal and state laws by bribing Indonesian and Iraqi government officials to favor Innospec's products over its own. This is the same conduct that led to Innospec's bi-continental settlements in 2010 with DOJ, the SEC, and the U.K. Serious Fraud Office. On September 13, 2011, after Judge Henry E. Hudson of the U.S. District Court for the Eastern District of Virginia denied the bulk of Innospec's motion to dismiss, the parties agreed to settle the matter for a $45 million payment by Innospec.

Selected lawsuits brought by foreign sovereigns

- ***Alcoa, Inc.*** – In our 2008 Mid-Year FCPA Update, we reported on a February 2008 RICO lawsuit filed by the Kingdom of Bahrain's state-owned aluminum smelter, Aluminum Bahrain ("Alba"), against Alcoa in the U.S. District Court for the Western District of Pennsylvania. The complaint, which alleges that Alcoa and its affiliates conspired to corruptly influence senior Alba officials to pay inflated prices for Alcoa products, had been stayed for the past three years at DOJ's request. But, on November 8, 2011, Judge Donetta W. Ambrose granted Alcoa's motion to reopen the lawsuit so that it could file a motion to dismiss the case. DOJ did not oppose the motion to reopen the civil case for the limited purpose of addressing legal issues, but noted that it would oppose any attempt to develop facts through civil discovery. Alba filed an amended complaint and a RICO case statement on November 28 and December 28, respectively. Alcoa's motion to dismiss is currently due by January 28, 2012. As noted below, Alba's former CEO, Bruce Hall, and Alcoa's third-party representative, Victor Dahdaleh, were recently arrested in connection with a U.K. Serious Fraud Office investigation into Alcoa's dealings with Alba.

2011 LEGISLATIVE AND POLICY DEVELOPMENTS

2011 witnessed significantly more congressional interest in the FCPA than has been seen in recent years. From well-organized lobbying efforts to committee hearings to proposed legislation, there is a groundswell of activity that--although it has not resulted in any meaningful change yet--is likely to boil over at some point in the near future.

Public debate on FCPA reform

As reported in our 2010 Year-End FCPA Update, the U.S. Chamber of Commerce is actively pushing an agenda of pro-business amendments to the FCPA. Its efforts in 2011 included retaining a former U.S. Attorney General to lead its lobbying efforts before Congress. The Chamber's proposed statutory reforms, which stem from an October 2010 report commissioned by the U.S. Chamber Institute for Legal Reform, include

1. adding an affirmative defense for companies with robust compliance programs;
2. adding a "willfulness" element for the imposition of corporate criminal liability;
3. clarifying the definition of "foreign official";
4. limiting a company's liability for acts of its foreign subsidiaries; and
5. limiting a company's successor liability for prior acts of an acquired company.

Coming to the defense of the FCPA as currently formulated, in September 2011, Open Society Foundations, an organization created and funded by billionaire investor and philanthropist George Soros, produced a report authored by law professors David W. Kennedy of Harvard Law School and Dan Danielsen of Northeastern University School of Law. Kennedy and Danielsen blast the

Chamber's proposed reforms as "far-reaching amendments [that would] significantly reduce the scope and efficacy of the FCPA while substantially undermining more than 30 years of successful U.S. leadership in promoting global anti-corruption standards." They also critiqued the Chamber's claims of overzealous FCPA enforcement by DOJ and the SEC as a "myth."

If there were any doubt as to DOJ's position, Breuer stated it explicitly in his annual address at the ACI National Conference on the FCPA: "[W]e have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery. . . . Having come this far, on what I believe is a noble journey, we cannot, and should not, start going backwards."

The American Bar Association ("ABA") is contemplating its position in this debate. On October 29, 2011, a co-chair of the ABA's Global Anti-Corruption Task Force presented a resolution to approximately 40 council members from the ABA's Criminal Justice Section, calling for a reform of textual ambiguities in the FCPA. The resolution (which echoes, in some respects, the Chamber's positions) seeks to increase transparency by (1) defining the term "instrumentality [of a foreign government]"; (2) considering a compliance defense similar to that provided by the U.K. Bribery Act; and (3) limiting successor liability. Following a spirited debate on the merits of the proposed resolution, the Council tabled the vote until 2012.

More prepared to cast its lot in this debate, the New York City Bar Association ("NYCBA") has weighed in decidedly in favor of the reformist agenda. On December 9, 2011, the NYCBA's Committee on International Business Transactions issued a report calling for a reassessment of the U.S. Government's "continued unilateral and zealous enforcement" of the FCPA in light of the disproportionate burden it places on U.S.-regulated entities in international business transactions. Among the timeliest of the NYCBA's insights, given the year's enforcement developments as discussed above, are: (1) that U.S.-regulated companies are at a competitive disadvantage in the cross-border transactions market because of their need to devote more time and resources to conducting a "deeper dive" into the business practices of potential counterparties; and (2) foreign ADR issuers are reconsidering their participation in the U.S. financial markets in light of the attendant burdens of FCPA compliance this secondary listing entails.

These prominent voices have garnered the attention of congressional leaders. As summarized in our 2011 Mid-Year FCPA Update, on June 14, 2011, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing to examine these proposals, including testimony on behalf of the Chamber and by Acting Assistant Attorney General Greg Andres for DOJ. The hearing principally focused on two of the Chamber's proposals: (1) adding a compliance defense to the FCPA; and (2) clarifying the FCPA's definition of "foreign official." No resolutions were reached at this hearing, but Chairman F. James Sensenbrenner (R-WI) declared at the close that the FCPA is in need of reform and that his Subcommittee would draft a bill to accomplish this.

Additional guidance forthcoming from DOJ?

In addition to calls to amend the FCPA, many have been clamoring for DOJ to provide more guidance on how it interprets the existing statute. There is currently a procedure in place pursuant to which an "issuer" or "domestic concern" may request the enforcement opinion of DOJ on a specific prospective

(not hypothetical) fact pattern, but most have found this process difficult to navigate and generally impractical for the real-time decision-making that drives international business. Indeed, only one FCPA opinion procedure release was issued in all of 2011 (described in our 2011 Mid-Year FCPA Update).

Although Breuer has been unequivocal in rejecting calls to, as he sees it, "water down" the FCPA, he extended an olive branch to those calling for more transparency in FCPA enforcement during a November 2011 speech. After consultation with numerous industry groups, Breuer announced that DOJ will be updating its *Lay-Person's Guide to the FCPA* in 2012 to provide "useful," "detailed," and "transparent" guidance on the statute's criminal and civil enforcement provisions.

Dodd-Frank whistleblower provisions revisited? (Unlikely)

In our 2011 Mid-Year FCPA Update, we noted the SEC's approval on May 25, 2011, of rules implementing the whistleblower award program established by the Dodd-Frank Act. Just six weeks later, on July 11, Representative Michael Grimm (R-NY) introduced the ***Whistleblower Improvement Act of 2011 (H.R. 2483)***, which features a series of proposed amendments to the program that would address much of industry's criticism of the rules, including by (1) requiring whistleblowers to first report misconduct internally to their employers; (2) excluding from eligibility for an award any whistleblower found to be "civilly liable" or otherwise determined by the SEC to have "committed, facilitated, participated in, or otherwise been complicit in misconduct" relating to the reported allegation; and (3) requiring the SEC to inform any entity that has become the target of an investigation due to a whistleblower tip of that fact prior to the commencement of an enforcement action, unless such notification would jeopardize necessary investigative measures and impede the fact-gathering process. The bill has been referred to the House Subcommittee on Capital Markets and Government Sponsored Enterprises for consideration.

In the meantime, the SEC's first report on the whistleblower program, released on November 15, 2011, noted that the SEC received 334 whistleblower tips during the seven-week period following the effective date of the implementing rules. Of these tips, only 4% (13) involved FCPA allegations, although the report noted that "it is too early to identify any specific trends or conclusions" from this limited data set.

Legislative bills to amend the FCPA

Two bills to amend the FCPA, both of which were previously introduced during the 111th Congress, were reintroduced by their former sponsors this year.

- ***Overseas Contractor Reform Act (H.R. 3588)*** – On December 7, 2011, Representative Peter Welch (D-VT) reintroduced his bill (this time with a co-sponsor, Representative Jason Chaffetz (R-UT)) to require automatic debarment from federal government contracts for any issuer or domestic concern "found to be in violation" of the FCPA's anti-bribery provisions. Although very similar to the prior version of the bill, Representative Welch made two noteworthy changes. First, the revised version closes a gap that would have exempted from debarment foreign concerns that violated the FCPA through the use of the U.S. wires, mails, or other instrumentalities of U.S. commerce to further their foreign

bribery schemes. Second, the current version includes a provision that would allow federal agency heads the discretion to exempt from debarment entities that voluntarily self-report their violation. It remains unclear how the "found to be in violation" language would be applied (*e.g.*, in the case of no-admit-no-deny settlements with the SEC or deferred and non-prosecution agreements with DOJ).

The bill has been referred to the House Committee on Oversight and Government Reform. In the last Congress, the prior version of the bill passed the House without opposition before stalling in the Senate. If passed, this legislation could potentially have a dramatic impact on how FCPA cases are resolved.

- ***Foreign Business Bribery Prohibition Act of 2011 (H.R. 3531)*** – On November 30, 2011, Representative Ed Perlmutter (D-CO) reintroduced a bill identical to the one he proposed in 2009 (and before that, in 2008), which would create a private right of action under the FCPA for "violations by foreign concerns that damage domestic businesses." Essentially, the bill would give U.S. companies the ability to sue foreign companies for treble damages if they can establish that the foreign entity used the U.S. wires, mails, or other instrumentalities of U.S. commerce in furtherance of an FCPA anti-bribery violation that resulted in the offending foreign company stealing business from the plaintiff U.S. company.

  The bill has been referred to the House Committee on Energy and Commerce and the House Judiciary Committee's Subcommittee on Courts, Commercial and Administrative Law.

GLOBAL ANTI-CORRUPTION ENFORCEMENT DEVELOPMENTS

Spotlight on China

While 2011 marked yet another active year in terms of U.S. prosecutions of corrupt activity in China--with six FCPA enforcement actions, including ***Watts Water*** and ***Leesen Chang*** (both SEC) described above and ***International Business Machines Corp.*** (SEC), ***Maxwell Technologies, Inc.*** (DOJ and SEC), and ***Rockwell Automation, Inc.*** (SEC) described in our 2011 Mid-Year FCPA Update--the Chinese government has also been active in pursuing an anti-corruption agenda this year. As we noted in our 2011 Mid-Year FCPA Update, in February 2011, the Chinese government approved an amendment to the Chinese Criminal Law prohibiting Chinese citizens from giving any "property to any foreign public official or official of an international public organization" to obtain any "illegitimate commercial benefit."

In addition, on December 21, 2011, the Supreme People's Court released a domestic corruption-related decision amongst its first batch of "guiding cases," or decisions meant to establish key principles that will serve as guides to the lower courts. According to the decision, the city officials leveraged their official positions to obtain benefits from a third party in exchange for a share of the "profits" from a company to which they had no meaningful connection. Although this decision relates to the corruption

of two Nanjing city officials, not international corruption, its principles and, perhaps more importantly, its focus on corruption and the rule of law, will be important moving forward.

The Supreme People's Court announced the following principles:

1. State workers who use the position of their office to seek benefits for a requester of favor, and who in name "go into business" with the requestor and earn "profits" without actually contributing capital to the company or participating in its operation or management, shall be treated as having accepted bribes;

2. State workers who, knowing that a party is requesting favors, accept money or property from that party, shall be deemed as having promised to "seek benefits for another" whether or not they actually seek or succeed in seeking benefits for another;

3. State workers who use the position of their office to seek benefits for a requester of favor, and who purchase houses and other property from the requester at prices clearly below market value, shall be treated as having accepted bribes, and the value of the bribes shall be calculated by the difference between the local market price at the time of the transaction and the actual price paid; and

4. A determination that bribes were accepted shall not be affected if, having accepted money or property, state workers return the money or property in order to cover up the crime after learning that the matter is under investigation.

Spotlight on the United Kingdom

Bribery Act 2010

The U.K. Bribery Act 2010 came into force only on July 1, 2011, but the Crown Prosecution Service has already secured its first conviction under the new law (albeit for a domestic corruption offense). On November 18, ***Munir Patel*** was sentenced to three-years' imprisonment for the section 2 offence of receiving a bribe, a sentence that was reduced by one-third due to his pleading guilty at the first opportunity. Patel was a court clerk in London who was caught in a sting by *The Sun* newspaper accepting £500 to not record penalties on a person's driving license. At sentencing, the judge remarked that the prosecutors had identified 53 instances where Patel had tampered with records.

The discretion that will be exercised by U.K. prosecutors pursuant to the Bribery Act has been the subject of extensive commentary by Richard Alderman, the highly-regarded Head of the U.K.'s Serious Fraud Office ("SFO"). For example, describing his work since the Bribery Act came into force, Alderman recently stated the following in a blog post:

> We're actively looking for cases to take up – but these cases are the difficult ones. For example, we have been examining the activities of a number of foreign companies with a UK business presence who are involved in bribery in other countries. We have found a number of these. But what we are looking for in particular is evidence that they have undermined ethical UK businesses. If they have not, then although there may be a technical Bribery Act offence, it is

> not the type of case where I would want to use our scarce resources, or take up the valuable time of UK courts and juries. So we have seen instances of bribery involving foreign companies where we have decided <u>not</u> to take them forward for a full investigation, because we cannot see that a UK company lost out. Other authorities might choose to take action, but it is not a priority for the SFO.

In other public statements, Alderman has stressed the SFO's willingness to engage with companies subject to the Bribery Act:

> What we have been doing in a few instances is inviting the corporation to come and talk to us and explaining to them that we believe they may have a problem. We are giving them the opportunity to work with us on how this problem is going to be remedied and indeed what is needed in order to ensure that there is a proper anti-corruption culture. We are giving them the opportunity to work with us and I believe that that is the right approach. . . . There will also be instances of alleged bribery where we decide that an approach to the corporation would not be right and that we must start to develop the investigation ourselves.

On November 1, 2011, the SFO launched a new whistleblower initiative called "SFO Confidential." This initiative allows whistleblowers to make confidential reports via a telephone hotline or the Internet, with the option of remaining anonymous. If the informant chooses to self-identify, the SFO has stated that it will only reveal the informant's identity on a need-to-know basis or under court order.

A new bobbie on the beat

On December 16, 2011, the SFO announced that Alderman will be stepping down from his position in April 2012. He will be succeeded by David Green, a Queen's Counsel and former Director of the Crown Prosecution Service's Central Fraud Group.

Enforcement of pre-Bribery Act anti-corruption legislation

2011 saw a continuation of the trend of the SFO commencing prosecutions and securing convictions under pre-Bribery Act legislation. In public remarks made in July 2011, Alderman mentioned 26 ongoing corruption investigations under the old statutes. By October, this number had risen to 50 ongoing investigations. Interestingly, one of the key motivations for passing the Bribery Act was that the existing anti-corruption laws were very old (1889, 1906, and 1916, respectively) and of uncertain ambit due to a paucity of case law. But this new rash of cases may yield a clearer understanding of the old legislation as well as the new. That these prosecutions are being brought is part-and-parcel of the renewed impetus on anti-corruption enforcement in the United Kingdom, and it means that there is no bright line divide between activities before and after July 1, 2011.

For example, on October 24, 2011, businessman ***Victor Dahdaleh*** was charged under the Prevention of Corruption Act 1906 for allegedly paying bribes to officials of Alba on behalf of Alcoa. The SFO's press release states that the investigation commenced in 2009 and involved co-operation with Swiss and U.S. authorities. Press reports also indicate that Alba's former CEO, ***Bruce Hall***, was arrested by Australian authorities at the behest of the SFO.

And on September 8, 2011, the SFO charged ***Bill Lowther***, the former deputy chairman of ***Securency International Pty Ltd***, with violating pre-Bribery Act legislation by improperly securing a university place in the United Kingdom for the son of a Vietnamese state bank governor. According to the charges, the Vietnamese official then awarded a contract to Securency to switch its currency notes from paper to polymer. Lowther's arrest followed co-ordinated raids across Australia, Spain, and the United Kingdom in 2010 and criminal charges in July of this year brought by Australian authorities against Securency, its sister company, and six of its former executives. Two additional alleged co-conspirators have been charged in Malaysia. These cases demonstrate the unprecedented level of international cooperation and coordination now shared between foreign corruption prosecutors.

Proceeds of Crime Act 2002: An alternative to criminal prosecution for cooperating companies

In July 2011, the SFO secured a civil recovery order against ***Macmillan Publishers Ltd.*** The order requires Macmillan to pay £11.2 million under the Proceeds of Crime Act 2002 to disgorge profits improperly won through payments to government officials in various African countries. The SFO's press release states that it proceeded by this route, rather than criminal prosecution, because of the level of cooperation by Macmillan, including self-reporting and an internal investigation. The settlement also involved the appointment of an independent corporate monitor who will report to the SFO. This continues the practice of pursuing civil recoveries rather than criminal prosecutions for cooperating companies, which we also saw in the February 2011 order requiring ***M.W. Kellogg Ltd.*** to pay £7.02 million for foreign bribery offenses.

Financial Services Authority enforcement actions

Also in July 2011, the Financial Services Authority ("FSA") fined global insurance company ***Willis Ltd.*** £6.895 million for failings in its anti-bribery and corruption systems and controls. This is the highest such fine imposed by the FSA to date, eclipsing the £5.25 million penalty levied against Aon Ltd. in 2010. Further, the FSA made clear that but for an early settlement by Willis, the fine would have been 30% larger.

According to the FSA, Willis made payments to third-party sales agents in high-risk jurisdictions without maintaining appropriate records to document proper commercial purposes for the payments. In particular, the FSA alleged the following control deficiencies: (1) failure to establish and record an adequate commercial rationale to support payments to overseas third parties; (2) failure to carry out adequate due diligence on the overseas third parties; (3) failure to review the basis of the commission payments made; and (4) failure to monitor Willis' staff to ensure the recording of the commercial rationale and the carrying out of due diligence. These were described as breaches of Principle 3 of the FSA's Principles for Business, which requires firms to "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems," and Rule SYSC 3.2.6R of the FSA's Senior Management Arrangements, Systems and Controls Handbook, which requires firms to "take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime."

The fine levied against Willis relates purely to alleged failures in the company's control systems, a salutary reminder of the powers of the FSA. Indeed, a noteworthy feature of the FSA's Final Notice to Willis is the statement that the "FSA did not seek to determine as part of its investigation whether any of this business was corrupt." There was no allegation of actual corruption or criminal impropriety. Rather, the fines were imposed merely because the failings in systems and controls "increased the risk" that improper payments would be made.

In early December 2011, the FSA published revised guidance on how to comply with its financial crime rules, including those relating to anti-corruption. The guidance is non-binding, but nonetheless gives examples of good and bad practices in relation to governance and the role of senior management, risk assessment, policies and procedures, and dealings with third parties. In the guidance, the FSA makes the point that "financial crime risk includes the risk of corruption as well as bribery, and so is wider than the Bribery Act's scope. And we may take action against a firm with deficient anti-bribery and corruption systems and controls regardless of whether or not bribery or corruption has taken place."

FCPA INSIGHTS: DOJ PROVIDES GUIDANCE ON CORPORATE DECLINATION DECISIONS

It is no secret that FCPA practitioners spend many hours laboring over DOJ and SEC charging documents in an effort to tease out guiding principles that can be applied to future cases. But the ever-elusive element in these efforts is the cases that are not brought and for which the facts and motivating factors are never made public. In 2011, we were given a very helpful peek behind the curtain.

Following up on DOJ testimony before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, on August 3, 2011, DOJ Assistant Attorney General for Legislative Affairs Ronald H. Weich wrote Representative Sandy Adams (R-FL) to provide examples from the past two years in which DOJ has declined prosecution of corporate entities. Although Weich did not name names in his letter, citing privacy concerns, he described the following circumstances, some or all of which existed in these declined matters:

- "A corporation voluntarily and fully self-disclosed potential misconduct;
- "Corporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct;
- "A parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries;
- "A parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries;
- "A company provided information to the Department about the parent's extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;

- "A company agreed to a civil resolution with the Securities and Exchange Commission, while also demonstrating that a declination was appropriate for additional reasons;
- "A single employee, and no other employee, was involved in the provision of improper payments; and
- "The improper payments involved minimal funds compared to the overall business revenues."

Echoing some of these same factors during a panel discussion at ACI's National Conference on the FCPA, DOJ Fraud Section Chief Denis J. McInerney explained that corporate declinations are more common than many would guess and are generally based on three factors: (1) the adequacy of the company's compliance program; (2) the thoroughness of the company's cooperation with DOJ's investigation; and (3) whether the company self-disclosed the conduct to DOJ. Speaking at the same conference, SEC FCPA Unit Assistant Directors Charles E. Cain and Tracy L. Price expressed similar viewpoints.

As noted above, DOJ is planning to revamp its *Lay-Person's Guide to the FCPA* in 2012. We applaud DOJ's decision to release the information described above and respectfully suggest that anonymous, factors-based guidance such as that set forth in the Weich letter would be a useful feature of the revised guidance (as well as any guidance that the SEC may choose to publish).

CONCLUSION

Perhaps the most intriguing current development in the FCPA is that everything that made 2011 such a fascinating year promises only to increase in the years to come, as there will only be more litigation, more legislation, and more international coordination in the near future. Companies and their executives doing business in an increasingly global marketplace are well advised to stay abreast of these developments.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these issues. We have more than 65 attorneys with FCPA 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, currently serves 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 attorney with whom you work, or any of the following:

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