Nine Lessons of 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement

By F. Joseph Warin, John W.F. Chesley, and Patrick F. Speice, Jr.[*]

Introduction

"One can say without exaggeration that this past year was probably the most dynamic single year in the more than thirty years since the FCPA was enacted."[1] So began Assistant Attorney General Lanny Breuer in a recent recap of 2009 Foreign Corrupt Practices Act ("FCPA") enforcement. Indeed, for the fourth time in the last five years, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), the statute's dual enforcers, set a record by bringing more FCPA prosecutions than in any prior year in the statute's history. Foreign anti-corruption enforcement activity has also reached unprecedented levels. Once an erratic enforcement priority, combating international corruption has now garnered attention at the highest levels of U.S. and foreign regulatory circles and with chief executive officers and board chairmen of multinational companies around the globe. Reflecting on this frenetic environment, this article describes and analyzes the following nine major developments in FCPA enforcement that emerged in 2009:

1. The SEC rolls out aggressive new enforcement theories;
2. DOJ expands its prosecutorial net to capture third parties and foreign government officials;
3. DOJ follows the money;
4. DOJ and the SEC permit corporate self-monitoring;
5. DOJ and the SEC emphasize the importance of individual prosecutions;
6. "The year of the FCPA trial";
7. Organizational changes are on the way at DOJ and the SEC;
8. The continuing prospect of FCPA successor liability; and

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9. The explosion of foreign anti-corruption enforcement and cross-border cooperation.

FCPA Overview

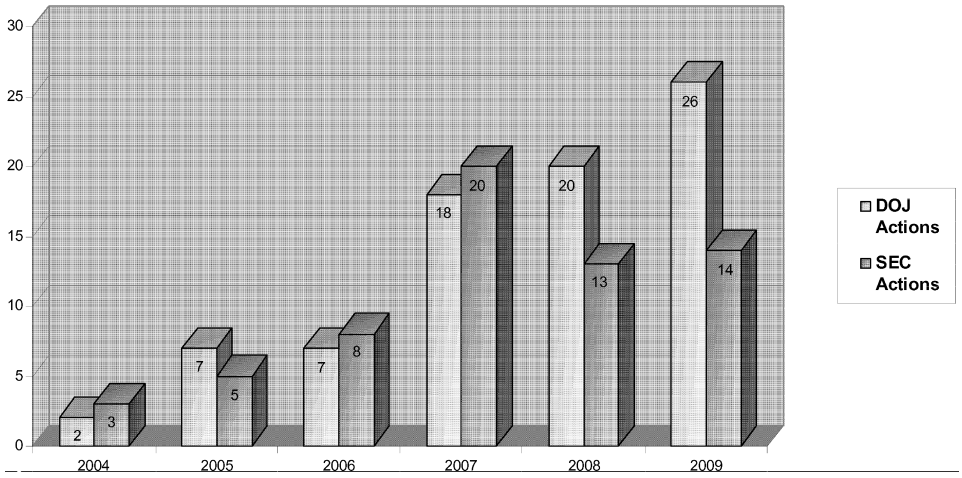
The FCPA's anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments or foreign political parties with the intent to obtain or retain business.[2] The anti-bribery provisions apply to "issuers," "domestic concerns," and "agents" acting on behalf of issuers and domestic concerns, as well as "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.A. § 78l or that is required to file reports under 15 U.S.C.A. § 78o(d). In this context, the approximately 1,500 foreign issuers whose American Depository Receipts ("ADRs") are traded 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 a 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.[3] Finally, the FCPA's internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.[4] Regulators have frequently invoked these latter two sections, collectively known as the accounting provisions, in recent years 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.

2009 Year-In-Review

In what is becoming an annual event, 2009 once again saw a record number of FCPA enforcement actions brought by DOJ and the SEC. Although it is fast becoming cliché to continuously hype this trend, the enduring explosion of FCPA prosecutions is best captured in the following table and graph, which each track the number of FCPA enforcement actions by DOJ and the SEC during the past six years.

2004		2005		2006		2007		2008		2009	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
2	3	7	5	7	8	18	20	20	13	26	14



It is clear that this trend of heightened enforcement activity will not soon subside. Mark Mendelsohn, the Deputy Chief of the Fraud Section in DOJ's Criminal Division and the government's top criminal FCPA enforcer, recently confirmed that DOJ has at least 130 open FCPA investigations.[5] The SEC also has a robust stock of FCPA matters under investigation, many of which it is running in tandem with DOJ. With so many active matters in the pipeline, the upswing in FCPA enforcement will likely continue for the foreseeable future.

2009's Top Nine Developments in FCPA Enforcement

1. The SEC Rolls Out Aggressive New Enforcement Theories

In a shot heard in corporate "C-suites" across the nation, on July 31, 2009, Utah-based nutritional product manufacturer Nature's Sunshine Products, Inc. ("NSP") and two of its former officers, Chief Executive Officer Douglas Faggioli and Chief Financial Officer Craig D. Huff, settled civil FCPA charges with the SEC arising from the alleged payment of bribes to customs officials in Brazil.[6] The complaint alleges that, in 2000 and 2001, after the Brazilian government reclassified NSP's products in a manner that subjected them to enhanced registration requirements, employees of NSP's Brazilian subsidiary used third-party brokers to funnel approximately $1 million to customs officials in an effort to circumvent those registration requirements. These payments were improperly classified in the books of NSP's Brazilian subsidiary as "importation advances," and those inaccurate books were then consolidated into NSP's ledger at the end of the year. An operations manager for the company's Brazilian subsidiary allegedly notified U.S.-based controllers that he had concerns that NSP products were being illegally imported into the country and that NSP was paying exorbitant fees to its customs brokers to facilitate this, but apparently the controllers did not investigate these alleged "red flags."

Although the fact pattern described above is largely standard FCPA fare, the cases against Faggioli and Huff are remarkable in that they represent the SEC's first use of a "control person" theory of liability to hold U.S.-based executives responsible for alleged corrupt payments made at the foreign subsidiary level when the U.S. officers did not authorize or even have knowledge of the payments. Section 20(a) of the Securities Exchange Act of 1934 provides that anyone "who, directly or indirectly, controls any person liable" for violating the Act is liable to the same extent as the violator.[7] Proceeding on this theory, the SEC charged Faggioli and Huff solely because of their alleged supervisory responsibilities over the people and processes implicated in the alleged payments. As Chief Executive Officer, Faggioli allegedly had supervisory responsibility over senior management and policies concerning the export and sales of NSP's products. Huff, as Chief

Financial Officer, allegedly had supervisory responsibility over senior management and policies regarding the making and keeping of the company's books and records, including those relating to the registration of NSP's products sold in Brazil. Therefore, the SEC concluded that both executives failed to supervise NSP personnel and failed to ensure that the company's books and records were accurately prepared and that an adequate system of internal controls was in place to monitor the registration of NSP products sold in Brazil. But, once again, the SEC did not allege that Faggioli or Huff had any involvement in the payment of bribes or any knowledge that corrupt activity was occurring in Brazil. Without admitting or denying the charges, Faggioli and Huff each agreed to pay $25,000 in civil penalties to settle the SEC's novel charges.

Although they have received less attention from FCPA commentators, the charges against NSP are themselves interesting. On facts such as those alleged in this case, a corporate defendant typically expects to find itself charged with violations of the FCPA's books-and-records, internal controls, and perhaps anti-bribery provisions. And NSP was charged with all of these. But NSP also was charged with engaging in a fraudulent scheme in connection with the sale of its securities, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and with filing materially inaccurate quarterly and annual reports that failed to accurately reflect the allegedly corrupt purpose and nature of the improper payments. Without admitting or denying the charges, NSP agreed to pay a $600,000 civil penalty.

Commenting on the "control person" aspects of the settlement, on September 24, 2009, SEC Assistant Director Kara N. Brockmeyer publicly opined that when the SEC invokes this theory of liability, it is "signaling that it believes there were red flags" to which the alleged control person "should have been paying more attention."[8] Relating these comments back to Faggioli and Huff, the silence of their response to the concerns voiced by the Brazilian operations manager is deafening.

Only time will tell how broadly the SEC will utilize control person liability in future FCPA enforcement actions. But U.S.-based corporate officers are now on notice of the SEC's expansive view of their responsibilities for ensuring FCPA compliance in foreign subsidiaries.[9]

Another 2009 FCPA enforcement action evidencing the SEC's increasingly aggressive enforcement agenda is that initiated against Bobby Benton, the former Vice President of Western Hemisphere Operations for Texas-based offshore oil rig operator Pride International, Inc. On December 11, 2009, the SEC charged Benton with FCPA violations arising from his alleged involvement in three sepa-

rate improper payment schemes occurring between 2003 and 2005.[10] One of the three schemes is rather unremarkable by FCPA standards: Benton allegedly authorized a $10,000 payment to a third-party agent with the expectation that the agent would tender all or a portion of the funds to a Mexican customs official in return for lenient treatment in connection with an inspection of port facilities leased by Pride's Mexican subsidiary. The other two schemes, however, are much more intriguing.

In one, Benton allegedly received a "draft action plan addressing internal control weaknesses," including approximately $384,000 in improper payments to officials of Venezuela's state-owned oil company that were uncovered as part of an audit of vendor practices in the country, from Pride's Venezuelan country manager. Benton is not alleged to have authorized or had contemporaneous knowledge of these payments, but he is charged with "redact[ing] all references" to the bribes in a revised, "cleaned up" version of the action plan that he returned to the country manager.

In the third scheme, Benton allegedly received a report regarding a $15,000 payment made by Pride's customs agent in Mexico to a Mexican customs official to ensure the timely export of an oil rig. Benton did not authorize the payment, but allegedly failed to inform the company's management, legal department, and internal auditors of the matter. Further, he is charged with allowing the false record created in connection with this payment to remain on Pride's books and records.

With knowledge of the improper payments described above, Benton allegedly falsely certified to Pride's accountants that he knew of no bribes or other FCPA violations by Pride and its subsidiaries. Benton tendered these certifications to Pride's accountants in connection with their review of the company's operations for its 2004 and 2005 annual reports. For all of this conduct, the SEC charged Benton with violating the FCPA's anti-bribery, books-and-records, and internal controls provisions, as well as with aiding and abetting Pride's violations of the same. Further, he is charged with making false or misleading statements to the company's accountants in connection with their review of a report to be filed with the SEC.

Charging Benton for apparently editing a document by deleting references to suspected improper payments and failing to inform the company's managers and lawyers of those suspected payments is a new theory of FCPA liability, and it will be interesting to watch how this theory develops. Additionally, the fact that Benton did not settle the charges against him is remarkable in and of itself. The last unsettled civil action filed by the SEC in an FCPA case was the April 2007 complaint against Baker Hughes employee Roy Fearnley.[11]

Benton has until February 2010 to file a response in his matter.

2. DOJ Expands Its Prosecutorial Net To Capture Third Parties and Foreign Government Officials

In his remarks at a recent FCPA conference, DOJ's Mendelsohn noted that a "number of intermediaries" were charged with FCPA violations in 2009, calling this "an interesting trend."[12] In all, five intermediaries, commonly referred to as third parties or agents, were charged with FCPA violations in 2009. But perhaps even more intriguing, 2009 saw DOJ's first attempt, using a novel legal theory, to prosecute the foreign government officials who received bribe payments.

The first third-party agent case in 2009 was the indictment of Jeffrey Tesler, a U.K. solicitor who acted as an agent for a four-party joint venture formed to bid on engineering, procurement, and construction contracts in connection with construction of a natural gas plant on Nigeria's Bonny Island. Tesler was indicted on February 17, 2009, along with Wojciech Chodan, a former sales vice president and consultant of Halliburton Co.[13] As described below, Halliburton and its former subsidiary, Kellogg, Brown & Root LLC, had resolved criminal and civil FCPA charges just one week earlier.[14]

According to the indictment, Tesler received $132 million from the joint venture participants from 1995 through 2004 and passed portions of those funds to top-level officials in the executive branch of the Nigerian government, in exchange for the award of more than $6 billion in contracts to the joint venture. Both Tesler and Chodan were arrested by London police, leading to extradition proceedings that are still ongoing. At a November 23, 2009 extradition hearing before the Horseferry Road Magistrates Court in London, Tesler argued that the alleged offenses were "directed against the country of Nigeria" and that the United States therefore lacks jurisdiction over him. Further, Tesler argued that it would be unfair to extradite him in light of a pending criminal investigation by Britain's own Serious Fraud Office ("SFO"). In response, the United States argued that the "SFO has ceded jurisdiction to the United States" and that the United States has jurisdiction because Tesler was an "agent" of a U.S. issuer under 15 U.S.C.A. § 78dd-1 and because the bribe payments were routed through a New York bank account.

Another third-party agent currently contesting FCPA extradition proceedings is Ousama M. Naaman, a dual citizen of Canada and Lebanon and resident of the United Arab Emirates, who, on July 30, 2009, was arrested by German authorities at DOJ's behest. With his arrest, a 2008 indictment was unsealed charging Naaman with a seven-year conspiracy to make improper payments to the Iraqi government and its officials.[15] The indictment alleges that, between 2001 and

2003, Naaman improperly funneled approximately €1.3 million to the Iraqi Ministry of Oil on behalf of his client in connection with three contracts under the United Nations Oil-for-Food Program ("OFFP") and agreed to make payments in connection with another two contracts. Naaman also allegedly paid $150,000 in bribes in 2006 and 2007 for the personal benefit of certain Iraqi officials within the Ministry of Oil to induce them to alter the results of a field test for a chemical in competition with his client's product at the Ministry, thereby ensuring that the competitor's product could not be sold in the Iraqi market.

Naaman is charged with violating the FCPA's anti-bribery provisions only with respect the 2006 and 2007 payments. Naaman could not be charged under the anti-bribery provision for the OFFP payments because they did not benefit any particular Iraqi official. With respect to the OFFP payments, Naaman is charged with a conspiracy to commit wire fraud and to falsify the books and records of the issuer for which he served as an agent.

In another example of a third-party intermediary being charged alongside an issuer's employee, on November 23, 2009, DOJ announced that Fernando Maya Basurto, a Mexican citizen and agent of Swiss ADR-issuer ABB Ltd., had pleaded guilty to FCPA conspiracy charges and that John Joseph O'Shea, the General Manager of ABB's Texas-based subsidiary, had been indicted and arrested on eighteen FCPA, money laundering, and record falsification counts. According to the charging documents, ABB's Texas subsidiary hired Basurto's company to act as its third-party representative in connection with contracts with the Comisión Federal de Electricidad ("CFE"), a Mexican state-owned electricity company. O'Shea, Basurto, and others thereafter allegedly conspired with CFE officials to kickback to the government officials 10% of CFE contracts awarded to ABB. In 2004 alone, these kickbacks, which were occasionally referred to by the co-conspirators as the "Third World Tax," exceeded $1.3 million.

ABB discovered the conspiracy in 2004, promptly stopped the transfer of an additional $900,000 in corrupt payments, and disclosed the activity to DOJ, the SEC, and Mexican authorities. O'Shea and Basurto thereafter allegedly continued to conspire with one another to conceal their corrupt arrangements with the CFE officials by creating "fake, back-dated correspondence that purported to show" legitimate services performed by Basurto's company.

The final case of 2009 involving third-party intermediaries charged with FCPA violations stems from an ongoing investigation of several Florida-based telecommunications companies and their allegedly corrupt arrangements with officials of Telecommunications D'Haiti ("Haiti Teleco"), Haiti's state-owned telecommunications company and

sole provider of landline telephone service to and from the island nation. The first charges in the investigation were filed in April 2009, when Antonio L. Perez, the former controller of Miami-based telecommunications company Terra Telecommunications, and Juan Diaz, the president of a shell company that served as an intermediary between Terra and Haiti Teleco, each pleaded guilty to a two-prong conspiracy count involving the FCPA and the money laundering statute.[16] Perez admitted that he personally authorized more than $36,000 in bribe payments to Haiti Teleco officials between 2001 and 2003 to reduce the amounts that Terra owed to the state entity, including by reducing per-minute rates and the number of minutes for which payment was owed. Diaz admitted to collecting more than $1 million in "commissions" and "vendor payments" from Terra and two other Miami-based telecommunications companies, keeping $73,824 for himself and passing the balance to Haiti Teleco officials.

The next charges in the investigation came more than six months later, when DOJ unsealed FCPA indictments against Joel Esquenazi and Carlos Rodriguez, respectively Terra's President and Executive Vice President, and Marguerite Grandison, the president of a second shell company allegedly used to funnel bribe payments from Terra to Haiti Teleco.[17] The indictment alleges that, between 2001 and 2005, Esquenazi and Rodriguez authorized more than $800,000 in bribes, including $70,000 channeled through the accounts of Grandison's company, to Haiti Teleco officials. Esquenazi, Rodriguez, and Grandison are all also charged with money laundering and wire fraud offenses.

What makes this case particularly noteworthy, however, is that the indictment also charges the Haitian government officials who allegedly received the improper payments. Although the FCPA does not criminalize the receipt of bribes by foreign officials, the grand jury charged Robert Antoine and Jean Rene Duperval, successive Directors of International Relations at Haiti Teleco, with participating in a money laundering conspiracy and, in Duperval's case, engaging in money laundering, all arising from the movement of the bribe payments through U.S. financial institutions. The requisite unlawful activities from which the proceeds allegedly derived include violations of the FCPA, the U.S. wire fraud statute, and Haiti's criminal bribery laws. This appears to be DOJ's first attempt to prosecute foreign government officials as part of an FCPA conspiracy, which demonstrates the U.S. government's increasingly aggressive stance in foreign corruption prosecutions and promises an intriguing legal challenge.

Whether DOJ's prosecution of foreign officials, such as Antoine and Duperval, will be replicated in other contexts remains to be seen. In most circumstances, foreign governments are unlikely to be so accom-

modating in the prosecution of their own government officials in U.S. courts. The Republic of Haiti's assistance, including Duperval's arrest by a specialized financial unit of the Haitian National Police, was crucial in this case.[18] Indeed, this investigation may have been set in motion several years ago by the Haitian government itself, with a 2005 civil suit filed in the U.S. District Court for the Southern District of Florida by the Republic of Haiti and Haiti Teleco against the nation's deposed President, Jean-Bertrand Aristide, and several other former Haitian officials, including Duperval.[19] In relevant part, Haiti's complaint, brought under the Racketeer Influenced and Corrupt Organizations Act, alleged that Duperval caused Haiti Teleco to grant U.S. and Canadian telecommunications companies, including Terra, artificially low service rates in return for kickbacks inuring to his personal benefit — essentially the scheme that would be alleged four years later in a grand jury indictment.

3. DOJ Follows the Money

In tandem with its efforts to prosecute foreign government officials who receive bribes from U.S. persons, DOJ has launched a new effort to recover the proceeds of foreign bribery. Under U.S. money laundering laws, DOJ is authorized to bring separate criminal counts seeking forfeiture of the proceeds of criminal offenses, including foreign bribery in violation of the FCPA, or separate civil *in rem* actions against the proceeds themselves.[20]

On November 7, 2009, speaking at the Opening Plenary of the Sixth Ministerial Global Corruption Forum on Fighting Corruption and Safeguarding Integrity in Doha, Qatar, Attorney General Eric Holder urged the other Global Forum members to "work together to ensure that corrupt officials do not retain the illicit proceeds of their corruption."[21] Referring to asset recovery as a "global imperative," Holder announced "a redoubled commitment on behalf of the United States Department of Justice to recover such funds."[22] Ten days later, Assistant Attorney General Lanny Breuer followed up on Holder's comments at an FCPA conference by announcing that he directed all Criminal Division prosecutors to determine in every case whether it is appropriate to seek forfeiture. He noted that FCPA prosecutors in DOJ's Fraud Section will be working with the agency's Asset Forfeiture and Money Laundering Section attorneys "to forfeit and recover the proceeds of foreign corruption offenses."[23]

DOJ prosecutors have clearly heeded the calls of their superiors. In ten of DOJ's twenty-six FCPA prosecutions in 2009, the charges included a forfeiture count. And, in one particularly interesting case, DOJ brought a freestanding civil *in rem* action against nearly $3 million in alleged bribes paid to Arafat Rahman, the son of former Bangladeshi Prime Minister Khaleda Zia, by Siemens Bangladesh

and China Harbor Engineering Company.[24] DOJ's complaint alleges that Siemens Bangladesh, which pleaded guilty to FCPA charges at the end of 2008, and China Harbor paid these bribes as "protection money" to ensure that Rahman did not obstruct the procurement process for the award of a digital cellular mobile phone network contract and a mooring container terminal contract, respectively. The bribe monies sought by DOJ allegedly moved through U.S. financial accounts, thereby affording DOJ jurisdiction, before coming to rest in the accounts of third-party intermediaries from whom DOJ seeks to recover the funds. This litigation is ongoing.

4. DOJ and the SEC Permit Corporate Self-Monitoring

Two settlements involving relatively mundane allegations of FCPA misconduct show that the news was not all bad for companies who found themselves the subject of FCPA enforcement actions in 2009. On July 30, 2009, Helmerich & Payne, Inc. ("H&P"), an Oklahoma-based provider of oil rig equipment and personnel, settled FCPA books-and-records and internal controls charges with DOJ and the SEC arising from alleged payments to customs officials in Argentina and Venezuela.[25] According to the charging documents, employees of H&P's Argentinean and Venezuelan subsidiaries authorized customs brokers to pay approximately $173,000 to customs officials in both countries between 2003 and 2008 to secure favorable treatment in connection with import and export decisions, inspections, and duty rate calculations. In addition to these allegedly corrupt payments, H&P employees authorized an additional $10,000 in payments to facilitate routine government action. Although these latter payments appear to have been lawful under the FCPA's facilitating payments exception, they were recorded inaccurately in H&P's accounts in violation of the books-and-records provision. H&P discovered these payments on its own, conducted a thorough internal investigation, and voluntarily disclosed its findings to DOJ and the SEC.

On December 31, 2009, UTStarcom, Inc., a California-based telecommunications company, settled FCPA anti-bribery, books-and-records, and internal controls charges with DOJ and the SEC arising from its operations in China, Mongolia, and Thailand.[26] In a case reminiscent of the 2007 FCPA settlement entered into by Lucent Technologies, Inc.,[27] the government alleged that, between 2001 and 2007, UTStarcom

- spent nearly $7 million on approximately 225 trips for employees of government-owned customers in China, purportedly for training, when there was little, if any, training actually provided on these trips, many of which were to popular tourist destinations where UTStarcom had no training facilities;
- sponsored executive training programs at U.S. universities for

senior managers of government-owned customers in China, which included paying for the officials' travel, tuition, room and board, and field trips to nearby tourist destinations, in addition to providing cash allowances of between $800 and $3,000 per person;
- provided full-time jobs in UTStarcom's U.S. operations for employees of government-owned customers and their family members, including paying salaries to several employees who never actually worked for UTStarcom;
- provided $10,000 in French wine (vintages not described) and $13,000 worth of entertainment to employees of a government-owned telecommunications customer in Thailand; and
- paid $1.5 million to its agent in Mongolia, ostensibly as a "license fee," when, in fact, the actual license fee was only $50,000, and the balance was used to make improper payments to a government official.

Both H&P and UTStarcom entered into non-prosecution agreements with DOJ[28] and settled enforcement actions brought by the SEC. H&P paid a $1 million criminal fine to DOJ and disgorged $375,681.22 in illicit profits and prejudgment interest to the SEC. UTStarcom paid a $1.5 million criminal fine to DOJ and a $1.5 million civil penalty to the SEC.

What makes the H&P and UTStarcom settlements so noteworthy is their forward-looking corporate compliance monitoring provisions. It has become common in recent years for DOJ and the SEC to require settling defendants to retain an external compliance monitor to supervise and evaluate the implementation of new compliance policies within the company. The government's imposition of these monitors has been a lightning rod of controversy — perhaps exemplified by the 2007 award of an eighteen-month consulting contract worth an estimated $28–$52 million to former Attorney General John Ashcroft in a non-FCPA matter — leading to legislative hearings and new DOJ policies on the use of monitors.[29] But in the H&P and UTStarcom resolutions, DOJ agreed to allow the companies to self-monitor and report on the implementation of their improved compliance policies without the oversight of an external compliance monitor.

Speaking at a recent FCPA conference, Mendelsohn cited the H&P self-monitoring arrangement as an example of DOJ's efforts to refine its usage of corporate compliance monitors.[30] At this same conference, Breuer echoed this sentiment, noting that self-monitoring was a direct result of H&P's voluntary disclosure of the allegedly improper payments and "forward leaning, pro-active, highly cooperative approach" to DOJ's investigation.[31] Although we certainly have not seen the end of external compliance monitors, corporations negotiating FCPA resolutions with monitoring components should aggressively advocate

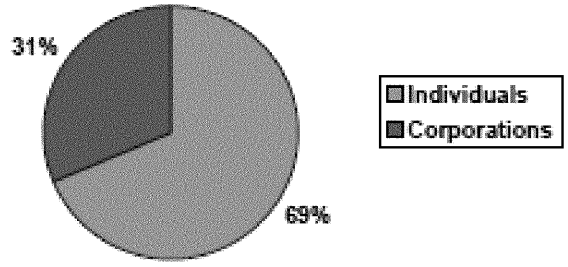
for self-monitoring as a way to minimize the collateral costs of the resolution while still providing the government with the monitoring benefits that it seeks.

5. DOJ and the SEC Emphasize the Importance of Individual Prosecutions

In the past year, the two agencies charged with FCPA enforcement have increasingly focused on the investigation and prosecution of individuals who participate in foreign bribery schemes, in addition to their corporate employers. Indeed, pursuit of individual offenders has become a "cornerstone" of DOJ's enforcement strategy,[32] with numerous senior executives currently facing FCPA charges.[33] At a recent FCPA conference, Assistant Attorney General Lanny Breuer explained the rationale behind this focus: "[F]or our enforcement efforts to have a real deterrent effect, culpable individuals must be prosecuted and go to jail where the facts and the law warrant."[34] Seconding this notion at the same conference, SEC Associate Director Cheryl Scarboro, who was recently named as the head of the SEC's specialized FCPA Unit, noted that 2009 also saw an "increased focus on the prosecution of individuals" by the SEC and that she "expects this trend to continue because it is [the SEC's] view that it's only part of the puzzle to prosecute the company."[35]

The year's enforcement statistics support the bold statements of these top-level FCPA enforcement officials: record twenty-four individuals found themselves on the wrong side of the "v" in 2009 FCPA actions. Indeed, more than two-thirds of FCPA defendants in 2009 were individuals, up from 60% in 2008 and less than 50% in 2007.

FCPA Enforcement Actions 2009



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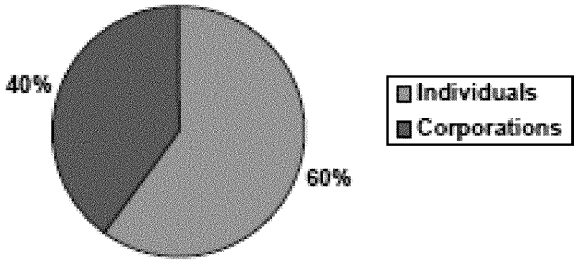

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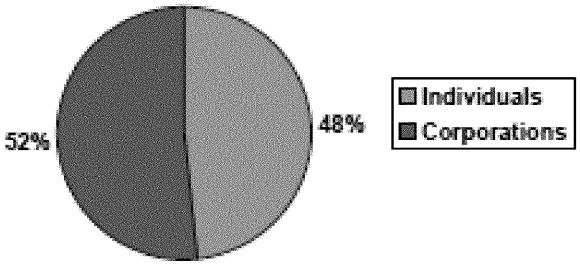

6. "The Year of the FCPA Trial"

In addition to more aggressively targeting individual defendants, DOJ, in particular, has been seeking increasingly severe sanctions in FCPA prosecutions, including those of very senior corporate executives. Perhaps the most prominent spillover effect of this more hardline enforcement posture is that individual defendants are increasingly opting not to plea bargain, but instead to put the government to its burden at trial. So, after nearly five years without a single FCPA trial, 2009 saw four individuals take their cases all the way to a jury of their peers, leading Breuer to declare it "the year of the FCPA trial."

Significantly, the recent uptick in FCPA litigation has resulted in a number of judicial rulings that are beginning to fill the relative void of judicial precedent defining the statute's contours. And as the prospect of harsh sentences continues to encourage more and more defendants to try their cases before a jury, additional rulings are likely to emerge that might assist the FCPA defense bar in representing clients charged with bribery of foreign officials.

United States v. Frederic Bourke

On July 10, 2009, Frederic Bourke was convicted by a jury in the Southern District of New York following a five-week trial.[36] Bourke's conviction stemmed from his $8 million investment in a business partnership that sought to gain control of the State Oil Company of Azerbaijan Republic ("SOCAR"). DOJ alleged that one of Bourke's co-conspirators, current fugitive Viktor Kozeny, masterminded a scheme to bribe Azeri government officials, including the then-president of Azerbaijan, in order to ensure the privatization of SOCAR, leading to substantial windfall profits for Kozeny and his investment partners. Bourke was not accused of paying any bribes himself or even directing others to pay bribes. Rather, he was charged with conspiring to violate the FCPA by investing and participating in a business partnership that he knew or strongly believed was engaged in a bribery scheme. Prosecutors summarized the government's theory of the case to the jury by stating that Bourke either knew that Kozeny was bribing Azeri officials or "had enough understanding to know that something . . . was occurring," yet "ke[pt] his head in the sand."

The jury found Bourke guilty of conspiracy to violate both the FCPA and the Travel Act and of making false statements to the Federal Bureau of Investigation ("FBI") during the government's investigation. He was acquitted of conspiring to commit money laundering. On November 10, 2009, Judge Shira Scheindlin sentenced Bourke to one year and one day in prison and ordered him to pay a $1 million fine. This sentence was substantially below the ten-year sentence sought by the government. Judge Scheindlin's relatively lenient treatment of

Bourke may have reflected her uncertainty regarding his guilt. At sentencing, she stated: "After years of supervising this case, it's still not entirely clear to me whether Mr. Bourke is a victim or a crook or a little bit of both." This remark highlights the central question in this case: Did Bourke know enough about Kozeny's bribery scheme or do enough to be held criminally liable?

The FCPA prohibits giving money or anything of value to a third party while "knowing" that the third party will make a corrupt payment.[37] In this context, "knowledge" means either being aware of such conduct, being substantially certain that such conduct will occur, or simply consciously disregarding a "high probability" that a corrupt payment or offer will be made.[38] When instructing the jury on "knowledge," Judge Scheindlin stated that the government need not prove that Bourke actually knew that Kozeny was bribing Azeri officials and provided a so-called "ostrich" instruction: Bourke's willful ignorance or conscious avoidance of the fact that Kozeny was paying bribes permitted the jury to conclude that Bourke knew about them. Judge Scheindlin explained:

> Knowledge may be established if a person is aware of a high probability [that corrupt payments are being offered or made, but] consciously and intentionally avoided confirming that fact . . . because he wanted to be able to deny knowledge . . . . [However,] knowledge is not established . . . if the person merely failed to learn the fact through negligence.[39]

The "ostrich instruction" was essential to Bourke's conviction because the government lacked clear evidence that Bourke knew that Kozeny was offering, facilitating, or paying bribes to Azeri government officials. Indeed, in a post-trial ruling affirming the jury's verdict, Judge Scheindlin concluded that sufficient evidence existed for a jury to conclude that Bourke either had knowledge of the bribes or consciously avoided learning about them, despite various red flags, including evidence that Bourke knew about rampant corruption in Azerbaijan, corruption tainting prior privatization efforts in other post-Communist states, and Kozeny's own past "exploits and misdeeds." The Court admitted this background evidence over a defense objection because it supported the government's contention that Bourke must have been aware of the high probability that the partnership was paying bribes. Other evidence supporting the conclusion that Bourke suspected that Kozeny was paying bribes included a tape-recorded conversation in which Bourke wondered aloud whether Kozeny was paying bribes to government officials in the region and expressed fear of discovering this fact. The jury foreman confirmed the significance of this evidence after the trial: "We thought the tape was damning."[40]

Judge Scheindlin's ostrich instruction, although frequently issued

in conspiracy cases, is becoming increasingly controversial. The distinction between guilt (actual knowledge or the purposeful avoidance thereof) and innocence (should have known) is an extraordinarily difficult one to parse and may have been lost on the jury, resulting in a conviction without the necessary finding of criminal intent. The jury foreman's post-verdict comments to reporters substantiate this concern: "We thought he knew. He definitely should have known. He's an investor. It's his job to know."[41] Clearly, from the jury's perspective, caveat emptor.

Look for Bourke to challenge the use of the ostrich instruction in his upcoming appeal to the U.S. Court of Appeals for the Second Circuit. Judge Scheindlin has ruled that Bourke may remain free while he appeals his conviction, making the rare finding that the appeal raises a "substantial question of law or fact likely to result in reversal, a new trial," or a lesser sentence.

The broader lesson of the Bourke case is that individuals and entities doing business in countries with a reputation for corruption or with partners with suspect backgrounds must undertake robust due diligence and make good faith efforts to ensure that their investment is not used to make improper payments to government officials. Bourke's conviction demonstrates that almost any inkling that a business partner is acting corruptly may be sufficient to impose liability and that failure to investigate such red flags is no defense.

United States v. William Jefferson

On August 5, 2009, after five days of deliberations, the trial of former Congressman William J. Jefferson in the Eastern District of Virginia concluded with the jury convicting Jefferson on eleven of sixteen counts charged in the indictment.[42] Jefferson was on trial for a number of alleged schemes in which he variously played the role of briber and bribee. Among the charges were one substantive count of violating the FCPA and one three-pronged conspiracy count alleging conspiracy to violate the FCPA, solicit bribes, and deprive U.S. citizens of their intangible right to his honest services as their congressman. The FCPA charges were based on allegations that Jefferson attempted to bribe then-Nigerian Vice President Atiku Abubakar to obtain favorable regulatory decisions for the Kentucky-based company for which he was serving as an agent. The government alleged that a cooperating witness gave Jefferson $100,000 in marked bills with which to bribe Abubakar and that the FBI recovered $90,000 of that money from a freezer in Jefferson's home (hidden in Pillsbury pie crust and Boca burger boxes).[43]

Jefferson was acquitted of the substantive FCPA count, but convicted of the three-pronged conspiracy count. Because the verdict form did not require the jury to specify which of the three alleged

objects of the conspiracy served as the basis for its guilty verdict, however, it is unclear whether Jefferson was actually convicted of an FCPA-related offense. The jury might have convicted him of the conspiracy count solely for conspiring to solicit bribes or deprive citizens of honest services.

On November 13, 2009, District Judge T.S. Ellis sentenced Jefferson to five years imprisonment for his conspiracy conviction, but ruled that the sentence should run concurrent with the thirteen-year sentence imposed for the other, non-FCPA corruption-related counts. Despite its harshness, this sentence was significantly less than the Sentencing Guidelines range of 262–327 months and the 27-year sentence sought by the government.

The Jefferson case highlights the difficulty of defense efforts to collect evidence located overseas. After a five-week case-in-chief put on by the government, the defense case was presented in only a few short hours, ninety minutes of which consisted of playing tape-recorded conversations. During pre-trial litigation, Jefferson unsuccessfully sought to obtain testimony from two alleged Nigerian co-conspirators. He requested that the Court order the U.S. government to invoke its rights under the U.S.-Nigeria Mutual Legal Assistance Treaty or issue a letter rogatory, but the request was denied. And although the District Court ultimately issued a limited letter rogatory requesting assistance from Nigerian judicial officials to determine whether the two potential witnesses would assert their Fifth Amendment rights against self-incrimination, the Nigerian government never responded, and the Court subsequently withdrew the letter. Because much of the evidence in FCPA cases is often located overseas, these types of issues will continue to plague defendants who seek exculpatory evidence that is beyond their reach.

United States v. Gerald and Patricia Green

The third FCPA trial of 2009 concluded with the convictions of husband and wife film producers Gerald and Patricia Green for bribing a Thai tourism official in exchange for Thai government contracts.[44] On September 11, 2009, after a trial lasting two-and-a-half weeks in the Central District of California, a jury found the Greens guilty of one count of conspiracy to violate the FCPA, nine substantive FCPA counts, and seven counts of money laundering. Patricia Green was also convicted of two counts of filing false tax returns, which stemmed from her mischaracterization of the bribes as tax-deductible "commissions." The government agreed to dismiss a substantive money laundering count during trial, and the jury could not reach a verdict on an obstruction of justice charge against Gerald Green.

The government's trial evidence showed that the Greens funneled approximately $1.8 million in bribes from their California-based film

production company to Juthamas Siriwan, then-governor of the Tourism Authority of Thailand ("TAT"), over the course of four years. In return, Siriwan caused the TAT to award the Greens $13.5 million in contracts, including a contract to operate and manage the Bangkok International Film Festival from 2002 until 2007. The Greens allegedly made the improper payments by entering into contracts with inflated budgets and then paying kickbacks disguised as sales commissions to Siriwan. The kickbacks were paid directly through in-person cash handoffs and indirectly through transfers into the overseas bank accounts of intermediaries, including Siriwan's daughter.

The prosecution of the Greens is noteworthy for at least three reasons. First, this case represents the government's first FCPA enforcement action involving the film industry. As the costs of domestic film production increase, and exotic overseas venues become more commonplace, payments made to obtain licenses for international film projects are likely to be scrutinized more carefully by U.S. enforcement agencies. In recent years, DOJ and the SEC have frequently leveraged an investigation concerning a single business into a more wide-ranging probe of an entire industry's business practices. As but one example, Assistant Attorney General Breuer warned attendees at a recent pharmaceutical industry compliance conference that "one area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead [will be] the application of the [FCPA] to the pharmaceutical industry."[45] Companies must therefore take careful notice when those that operate in the same space announce FCPA resolutions or even investigations.

Second, the government reportedly used several proactive investigative methods to obtain crucial evidence while investigating the Greens. FBI agents engaged the Greens' bookkeeper as a confidential informant and offered her immunity in exchange for surreptitiously recording conversations with the Greens. In addition, the government introduced Swiss bank account records of Siriwan's daughter to establish the financial connection between the Greens and Siriwan. The records were obtained through a Mutual Legal Assistance Treaty request issued to the Swiss government. Finally, the government attempted to introduce privileged documents prepared by the Greens' business attorney through the crime/fraud exception to the attorney-client privilege, although the District Court ultimately suppressed those documents after a detour to the Ninth Circuit Court of Appeals. Although these techniques are not particularly innovative as compared to the FBI's traditional investigative tactics, their use in the FCPA context is a recent development signifying increased FBI resources devoted to FCPA investigations. Indeed, Supervisory Special Agent Andrew Sekela, one of eleven special agents detailed to the

FBI's International Corruption Unit, recently noted at an FCPA conference that the FBI is constantly "look[ing] for opportunities to apply more proactive techniques" in the Bureau's ninety open FCPA investigations.[46]

Third, DOJ is seeking substantial prison terms for the Greens that have astonished FCPA practitioners everywhere. The government recently filed an objection to Gerald Green's Presentence Investigation Report, arguing that the proposed Sentencing Guidelines range of 235–293 months is not harsh enough. Due to his alleged role as the ringleader of the bribery scheme and the fact that he allegedly perjured himself during the trial, the government argued that Gerald Green should receive a life sentence.

Numerous Executives of Control Components, Inc.

In the wake of the three FCPA cases tried in 2009, additional individual defendants appear poised to litigate the criminal FCPA charges brought against them in 2010. Most notably, four executives of Control Components, Inc. ("CCI"), indicted on April 8, 2009, are scheduled for trial on November 2, 2010, in the Central District of California, for alleged violations of the FCPA's anti-bribery provision and the Travel Act.[47] According to the indictment, the defendants — Stuart Carson, Hong "Rose" Carson, Paul Cosgrove, and David Edmonds — conspired to make hundreds of corrupt payments to influence the recipients to award contracts to CCI or skew technical specifications of competitive tenders in CCI's favor. Two additional CCI employees, Flavio Ricotti and Han Yong Kim, who were charged in the same indictment, have yet to make an appearance.

On July 31, 2009, CCI itself pleaded guilty to substantive FCPA anti-bribery charges and to conspiring to violate both the FCPA and the Travel Act.[48] CCI admitted that, between 2003 and 2007, its employees made more than 150 corrupt payments, totaling approximately $4.9 million, to officials of state-owned enterprises in China, Korea, Malaysia, and the United Arab Emirates, and paid $1.95 million in bribes to officers and employees of foreign and domestic private companies in violation of the Travel Act. CCI agreed to pay a criminal fine of $18.2 million and to retain an independent compliance monitor for three years. CCI's former Director of Worldwide Factory Sales, Mario Covino, and former Finance Director, Richard Morlok, pleaded guilty to FCPA conspiracy charges in December 2008 and February 2009, respectively. Both are awaiting a February 2011 sentencing date.

One notable development highlighted by the CCI case is DOJ's use of the Travel Act to reach alleged corrupt payments to private, non-governmental customers — conduct beyond that prohibited by the FCPA. The Travel Act criminalizes the use of a facility of interstate or

foreign commerce for the purpose of violating a federal or state criminal statute, including the FCPA and state commercial bribery statutes, such as the California law invoked in the CCI case.[49] Arguments that the recipient of the improper payments was not a foreign government official were once a staple of the FCPA defense bar's repertoire. But, through the FCPA's accounting provisions applicable to issuers and the Travel Act and wire fraud statutes applicable to both issuers and non-issuers, federal prosecutors are attempting to broaden their reach beyond areas traditionally covered by the FCPA.

There have been two other developments of interest in the CCI cases. First, on May 18, 2009, Judge James Selna granted the remaining individual defendants' motion for a bill of particulars. The defendants argued that the indictment was inadequate because it made sweeping allegations about a worldwide scheme in which the defendants conspired to make 236 payments in more than thirty countries, totaling $6.85 million, but specifically identified only thirty of the payments. The Court granted the motion and ordered the government to identify each allegedly illegal payment by date, amount, and business affiliation of the recipient or intended beneficiary. The court concluded that each alleged bribe was itself a crime, meaning that all 236 payments "were not mere overt acts to be swept away along with nominally benign conduct in furtherance of the conspiracy." In other words, the government could not leave it to the defense to guess which transactions were allegedly corrupt.

The second development arose from the company's guilty plea. More than two years before the six executives currently under indictment were charged, CCI's outside counsel assembled a database of approximately 75 million pages of documents in support of CCI's internal investigation. In its plea agreement, CCI agreed to provide to the government, on request, any document related to an allegedly corrupt payment, including documents from the database. The individual defendants filed a motion requesting an order granting them access to CCI's database, arguing that DOJ's right to obtain the documents on request rendered the database within the government's "control" under Rule 16(e) of the Federal Rules of Criminal Procedure and the Brady doctrine. As such, defendants argued, DOJ was required to turn over exculpatory material and other documents material to the defense contained in the database. Judge Selna rejected this argument, and the defendants have submitted a petition to the U.S. Court of Appeals for the Ninth Circuit seeking review of the ruling.

7. Organizational Changes at DOJ and the SEC

DOJ

No summary of 2009's developments in the FCPA would be complete without mentioning the pending departure of DOJ's top FCPA

enforcer, Mark Mendelsohn. After four years as a Deputy Chief in the Criminal Division's Fraud Section and more than a decade as a federal prosecutor, Mendelsohn will leave government service and enter private practice in 2010. Confirming the widespread rumors of Mendelsohn's departure with glowing reflections, Breuer described Mendelsohn as "an exceptional public servant and a visionary steward of the FCPA program."[50]

Although Mendelsohn's successor has yet to be named, when he or she takes the post, they will find substantially greater resources at their disposal than when Mendelsohn arrived. Over the past several years, DOJ has added new prosecutors to work exclusively on FCPA investigations, aggressively cross-designated prosecutors from other working groups in the Fraud Section, and first created, then expanded, a squad of dedicated agents from the FBI. And with more than 130 open investigations, DOJ has sought to further leverage its resources by establishing partnerships with more than a dozen U.S. Attorney's Offices around the country, as well as with the National Criminal Enforcement Section of DOJ's Antitrust Division, and new investigative partnerships with agencies like the Internal Revenue Service's Criminal Investigations Division.

SEC

Even as the SEC continued its robust pace of FCPA enforcement in 2009, changes are afoot at the Commission. On August 5, 2009, in a speech marking his first 100 days in office, SEC Director of Enforcement Robert Khuzami outlined a plan to create a national specialized unit dedicated to FCPA enforcement.[51] Headed by Unit Chief Cheryl Scarboro, a consummate professional, the FCPA Unit will be "more proactive in investigations, work[] more closely with [the SEC's] foreign counterparts, and tak[e] a more global approach to [FCPA] violations."[52] Other initiatives unveiled by Khuzami include the following:

1. a streamlined internal review process for issuing formal orders of investigation and the subpoenas that accompany them;
2. a strong policy against routine use of tolling agreements;
3. the creation of a "Seaboard Memo" for individuals, designed to foster and incentivize the cooperation of corporate officers and employees; and
4. the use of DOJ-style deferred prosecution agreements, by which the SEC would agree to forego enforcement actions in return for compliance with certain terms.[53]

With the creation of a unit dedicated exclusively to FCPA inquiries, streamlined investigative processes, and new tools designed to foster cooperation and fashion creative resolutions, the pace of FCPA

enforcement at the SEC is unlikely to slow in 2010.

8. The Continuing Prospect of FCPA Successor Liability

Observers have long noted the perils associated with failure to conduct adequate pre-acquisition FCPA due diligence.[54] In recent years, senior officials at DOJ and the SEC have frequently addressed this topic in public speeches and initiated multiple enforcement actions against companies that merged with or acquired entities that allegedly paid bribes in their former corporate forms. Indeed, more than one-third of the corporate FCPA enforcement actions filed during 2009 implicate successor liability issues.

In the FCPA prosecution most likely to keep corporate due diligence lawyers up at night, on April 7, 2009, Miami-based telecommunications provider Latin Node pleaded guilty to criminal FCPA charges filed in connection with allegedly unlawful payments made to government officials in Honduras and Yemen in return for the award of new contracts and the negotiation of favorable terms on existing contracts, including reduced per-minute connectivity rates.[55] DOJ alleged that, between 2004 and 2007, Latin Node paid approximately $2.25 million in bribes, directly and through intermediaries, to officials at Hondutel and TeleYemen, the state-owned telecommunications companies in Honduras and Yemen, respectively. Latin Node's payments came to light after eLandia International, Inc., which acquired Latin Node in June 2007, discovered irregularities during its post-acquisition financial integration review. eLandia voluntarily disclosed the payments to DOJ and the SEC, conducted an extensive internal investigation, and took substantial remedial actions, most notably shutting down Latin Node's business operations at a cost to the company of millions of dollars. The entire value of eLandia's $20-plus million investment in the Latin Node business was wiped out following the discovery that sizeable portions of its operations were predicated upon business obtained through improper payments.

The Latin Node case is the first FCPA enforcement action ever filed based entirely on pre-acquisition conduct that was unknown to the acquirer when the transaction closed. Mendelsohn, speaking at an FCPA conference in November 2009, referred to this settlement as a "cautionary tale" of what can happen when an acquirer conducts "little, if any, [FCPA] due diligence."[56] Sufficient pre-acquisition due diligence could possibly have enabled eLandia to avoid purchasing an entity that it subsequently had to shut down, not to mention the attendant headache of the government enforcement action.

In another case that drives home the importance of pre-acquisition due diligence and post-integration FCPA reviews, on February 11, 2009, Kellogg, Brown & Root LLC pleaded guilty to criminal violations of the FCPA, and Halliburton Co. and KBR, Inc., its former and current parent companies, respectively, settled related civil FCPA

charges.[57] The road that led them there was long and winding, even by FCPA standards. In 1998, Halliburton acquired M.W. Kellogg Co. and merged it with an existing Halliburton subsidiary to form Kellogg, Brown & Root LLC. At the time of the acquisition, M.W. Kellogg was a member of a four-party joint venture that had allegedly been engaged for several years in the practice of bribing Nigerian officials, through purported consulting payments to two different third-party agents (including Jeffrey Tesler, whose own prosecution is described above), in return for the award of natural gas pipeline engineering, procurement, and construction contracts. Halliburton conducted minimal due diligence on the agents, and the payments continued for another six years. All told, between 1995 and 2004, the joint venture allegedly paid nearly $182 million in consulting fees to the two agents with the expectation that some or all of the payments would be passed along to Nigerian officials. These unlawful payments allegedly led to the award of $6 billion in contracts to the joint venture, netting approximately $235.5 million in profits to Kellogg, Brown & Root.

To settle the charges, Kellogg, Brown & Root LLC pleaded guilty, paid a $402 million criminal fine, and agreed to retain an independent compliance monitor for a term of three years. Both Halliburton and KBR settled civil FCPA charges filed by the SEC, agreeing to be held jointly liable for $177 million in disgorgement of ill-gotten gains. This resolution, both individually at DOJ and the SEC and in the aggregate, represents the second largest FCPA settlement in the statute's history, behind only the record-shattering Siemens settlement of 2008.

The Halliburton/KBR settlement highlights the substantial penalties that companies may face if they fail to conduct adequate pre-acquisition due diligence and then follow up with targeted post-integration FCPA reviews (which, in the Latin Node case, at least prevented the problem from growing on eLandia's watch). Halliburton did not know about M.W. Kellogg's participation in a joint venture that was making unlawful payments because it did not conduct FCPA due diligence prior to acquiring the company. Subsequently, it did not implement an effective compliance program in the newly formed subsidiary or conduct sufficient post-acquisition due diligence on M.W. Kellogg's legacy operations or agents. Consequently, the unlawful conduct continued long after the acquisition, and both Halliburton and KBR were subjected to FCPA enforcement actions and more than $575 million in fines and disgorgement.

United Industrial Corporation's ("UIC") 2009 civil settlement with the SEC also implicates the assessment of successor liability.[58] On May 29, 2009, UIC, an aerospace and defense systems contractor, settled administrative charges with the SEC alleging violations of the FCPA's anti-bribery, books-and-records, and internal controls

provisions. The SEC claimed that UIC subsidiary ACL Technologies, Inc. ("ACL"), made more than $100,000 in payments to an agent in 2001 and 2002 with the expectation that the agent would pass portions of those payments to officials of the Egyptian Air Force in order to influence the award of a contract to construct and staff a military aircraft depot in Cairo. The SEC noted several red flags in its allegations, including the agent's position as a retired Egyptian Air Force general, his friendship with a current high-level Air Force official, and the belief within ACL that "it's a very small community of high-level military people" in Egypt. The payments to the agent included $50,000 for "marketing services," which were unsupported by any marketing agreement, and $100,000 in "advance" payments to the agent that UIC later forgave through a fraudulent "repayment" plan involving inflated invoices. Taking UIC's remedial efforts into account, the SEC issued a cease-and-desist order that required UIC to pay $337,679.42 in disgorgement and prejudgment interest, but it did not assess a civil penalty. By the time of UIC's settlement, the company had been acquired by Textron, Inc. But Textron was on notice of the FCPA investigation due to UIC's pre-acquisition public filings, and thus was able to factor any attendant liability into the purchase price. Textron was then mentioned only as a footnote to the UIC settlement documents, making clear that the improper payments occurred entirely prior to the acquisition.

Rounding out the year in successor liability prosecutions, on July 28, 2009, Avery Dennison, a California-based label and reflective sign manufacturer, consented to the filing of a civil complaint and the initiation of an administrative proceeding by the SEC to resolve myriad improper payment concerns stretching from 2002 to 2007. According to the charging documents, employees and third-party representatives of Avery's Chinese subsidiary entered into a series of arrangements to provide approximately $85,000 in improper payments and other items of value to officials employed by Chinese state agencies. Avery discovered one of these corrupt arrangements, successfully stopped the payment before it was made, and voluntarily disclosed the findings of its internal investigation to DOJ and the SEC. After the voluntary disclosure, Avery received a whistleblower complaint pertaining to allegedly corrupt payments to customs and tax officials by employees of Paxar Corporation, a publicly traded company that Avery acquired during the course of its internal investigation. Avery subsequently undertook a comprehensive compliance review of Paxar's worldwide operations, including an intensive FCPA-focused review in ten "high risk" countries, and discovered that Paxar employees had made improper payments both before and after the acquisition, including approximately $51,000 in illicit "petty cash payments" to government officials in China, Indonesia, and Pakistan following the acquisition.

To settle the SEC investigation, Avery agreed to disgorge $318,470 in profits plus prejudgment interest and to pay a $200,000 civil penalty. DOJ closed its investigation without filing criminal charges. In addition to its successor liability lessons, this resolution demonstrates that companies that self-disclose potential FCPA violations in one country may later find themselves compelled to conduct a wider FCPA compliance review of their operations in other regions, potentially resulting in the discovery of new issues.

The topic of successor liability is one that U.S. authorities have often discussed publicly, providing some guidance to companies considering international mergers or acquisitions. In September 2008, Mendelsohn stated at an FCPA conference that the "nature and quality" of pre-acquisition due diligence is "one of the most critical factors" that DOJ considers when making charging decisions in the context of a merger or acquisition.[59] If a company is unable to conduct effective pre-merger due diligence, Mendelsohn noted that DOJ expects the acquirer to move "aggressively and quickly" post-acquisition to investigate high-risk areas. Although he declined to establish a specific timeline, he advised that waiting a full year to look for and remediate FCPA issues would be inadequate.

And in 2007, then-Assistant Attorney General Alice Fisher described the specific steps that DOJ expects companies to take when conducting effective pre-acquisition FCPA due diligence. In a speech delivered at a 2007 FCPA conference, Fisher set forth the following five pieces of information that an acquirer should know, at a minimum, about a potential target:

1. The extent to which the company's customers are government entities, including state owned companies;
2. Whether the company is involved in any joint ventures with government entities;
3. What government approvals and licenses the company needs to operate abroad, how it obtained them, and when they require renewal;
4. The company's requirements relating to Customs in foreign countries and how it fulfills those requirements; and
5. The company's relationships with third party agents or consultants who interact with foreign officials on the company's behalf, including how those agents were chosen and vetted by the company.[60]

Advising that "an acquiring company should be comfortable that it has assessed [these five] risks before closing a deal," Fisher further noted:

> If any of these due diligence exercises result in the discovery of a potential FCPA problem, we, of course, encourage the company to volun-

> tarily disclose that problem to the Department. If a company does not conduct some sort of due diligence, and it finds out a year later that the conduct has continued, the Department will want to know why there wasn't any effort to assess whether there had been criminal conduct?[61]

Accordingly, the quality of an acquirer's pre-acquisition due diligence efforts and voluntary disclosure of any potential FCPA issues uncovered during that process may influence the government's position regarding successor liability in the FCPA context.

9. The Explosion of Foreign Anti-Corruption Enforcement and Cross-Border Cooperation

As DOJ and the SEC have accelerated international anti-corruption enforcement domestically, authorities in a number of other countries have similarly stepped up their own efforts to combat the bribery of foreign officials. This internationalization of the fight against foreign graft has resulted in an increasing pace of prosecutions for violations of international anti-corruption laws and further fostered cooperation between U.S. regulators and their foreign counterparts. Indeed, Breuer recently cited the landmark Siemens prosecution as "but one example of [DOJ's] increase in coordination and cooperation with foreign law enforcement."[62] Similarly, Mendelsohn stated that DOJ issued at least twenty-five cooperation requests to foreign governments pursuant to mutual legal assistance treaties over the past twelve months.[63] This heightened level of international enforcement and cooperation suggests that the global fight against public corruption will continue to accelerate as law enforcement agencies worldwide share resources and join forces to combat foreign bribery.

Developments in Europe

Perhaps the most dramatic developments in 2009 anti-corruption enforcement outside of the United States have come from England, where anti-corruption efforts have long been viewed as weak and ineffective. But 2009 marked the introduction of robust new U.K. anti-bribery legislation, the official adoption of a U.S.-style approach toward enforcement of anti-corruption laws, and the first domestic conviction of a U.K. company for overseas bribery.

On March 25, 2009, the U.K. Ministry of Justice proposed draft legislation intended to overhaul the country's outmoded anti-bribery laws.[64] The draft bill was revised and then introduced in the House of Lords on November 19, 2009.[65] The most notable change in the revised bill is that the negligence element has been removed from the offense of failing to prevent bribery, effectively creating a strict liability standard for that crime. Also significant was the addition of a requirement for a jurisdictional nexus in order for an individual to be liable. Under the revised bill, for jurisdiction over an individual to lie, the executive

must have a sufficiently "close connection" with the U.K. Finally, under the "general offences" section of the revised bill, local customs may not be relied upon as a justification for an otherwise improper payment, unless written into local law, and even in that case, consistency with local customs does not function as an affirmative defense. The government announced its intention to publish guidance after the bill becomes law, but before it takes effect, in order to give businesses sufficient time to prepare for the changes and to ensure that they understand the new requirements. The bill is expected to be approved by Parliament during the first half of 2010.

On July 21, 2009, the U.K.'s Serious Fraud Office ("SFO") issued an "operational note" articulating its newly adopted approach toward anti-corruption enforcement.[66] The document presents the official SFO policy encouraging voluntary disclosure of violations and pledging to consider (but not guarantee) leniency to companies who self-report. It also outlines the circumstances under which the SFO might negotiate a civil resolution in lieu of criminal prosecution, and it spells out precisely what factors the SFO will consider when determining whether a compliance program is effective. Finally, the SFO presented a settlement model quite similar to the deferred and non-prosecution agreements commonly utilized by the U.S. DOJ, which includes restitution, remediation of the company's compliance framework, and, in some cases, the institution of an independent compliance monitor.

Then, on December 4, 2009, the SFO issued a communiqué clarifying five issues left open in the original guidance.[67] First, the SFO specified the factors to be considered in determining whether a civil settlement will be offered to a company that voluntarily discloses wrongdoing, including the severity of the violation, the systemic nature of the conduct, the existence of red flags, and the timeliness and completeness of the voluntary disclosure. Second, the SFO clarified the scope of internal investigations that it expects companies to undertake in response to suspected wrongdoing, noting that the scope will vary based on the nature and extent of the conduct and that the investigation's breadth should be proportionate to the alleged violation. Third, the SFO articulated a balancing approach for determining whether the appointment of an external compliance monitor is appropriate, stating that a monitor will not be required in all cases. Fourth, the SFO explained that it expects a self-reporting company to provide a full factual report on its internal investigation, including the facts uncovered by its lawyers, raising the prospect of a partial waiver of the attorney-client privilege and work product protection. And finally, the updated guidance states that in unspecified, limited circumstances, a voluntary disclosure may result in a

complete declination of prosecution.

The U.K.'s commitment to combating transnational corruption in 2009 was not limited to legislative and policy updates. In addition to a reported investigative caseload of more than eighty cases,[68] British authorities brought several enforcement actions over the course of the year, including the following:

- Aon Ltd. — On January 8, 2009, the British Financial Services Authority ("FSA") announced a settlement with London-based reinsurer Aon Ltd.[69] According to the FSA, between 2005 and 2007, Aon made nearly $7 million in payments to multiple firms and individuals as a consequence of the company's alleged failure "to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business." In announcing the £5.25 million fine, the highest ever imposed by the nongovernmental U.K. financial regulator, FSA Director Margaret Cole noted that the action "sends a clear message to the U.K. financial services industry that it is completely unacceptable for firms to conduct business overseas without having in place appropriate anti-bribery and corruption systems and controls." But the FSA was also clear in commending Aon's current management for identifying the past issues and substantially improving upon the firm's systems and controls, an approach that the regulator called "a model of best practice that other firms may wish to adopt." In accordance with FSA settlement procedures, the company's substantial cooperation and early agreement to settle qualified it for a 30% discount on what would otherwise have been a £7.5 million fine.
- Mabey & Johnson — On August 7, 2009, U.K.-based bridge-construction company Mabey & Johnson pleaded guilty to international corruption charges and to violating United Nations sanctions, admitting that it made improper payments in Ghana, Iraq, and Jamaica.[70] The company was sentenced to pay a total monetary penalty of approximately $10.5 million and to submit to a review of its compliance program by an independent SFO-approved monitor.[71] In receiving this sentence, Mabey & Johnson may have received some leniency under the new SFO policy encouraging voluntary disclosure, although the company reportedly disclosed the potentially unlawful conduct only after a whistleblower threatened to go to the government.
- Robert John Dougall — On December 1, 2009, the SFO issued a criminal summons to Dougall, the former Vice President of Market Development of British medical device manufacturer DePuy International Ltd., charging him with conspiracy to corrupt in connection with alleged payments to government physicians in

Greece between 2002 and 2005.[72] Dougall was released on bail and is scheduled to make his next court appearance in February 2010.

The U.K. was not alone among European nations in stepping up its efforts to combat international corruption over the past year. In May 2009, the Danish Prosecutor for Serious Economic Crime filed settled criminal forfeiture actions against seven companies on charges arising from the United Nations Oil-for-Food Program ("OFFP"). Among the settling companies was Novo Nordisk A/S,[73] a Danish pharmaceutical company and U.S. ADR issuer, that settled criminal and civil FCPA charges with DOJ and the SEC earlier that month arising from the same conduct.[74] Novo Nordisk agreed to disgorge $5.6 million in profits to the Danish enforcement agency, on top of more than $18 million in criminal and civil fines, disgorgement, and prejudgment interest paid in connection with its U.S. settlements. And in September 2009, AGCO Danmark A/S, the Danish subsidiary of U.S.-based agricultural equipment manufacturer AGCO Corp., settled its own OFFP criminal forfeiture action with the Danish State Prosecutor for Serious Economic Crime, agreeing to disgorge $630,000 in allegedly illicit profits in addition to a $19.9 million FCPA settlement with DOJ and the SEC.[75]

German authorities have not rested since their blockbuster settlements with Siemens AG in 2007 and 2008. Indeed, the Munich Public Prosecutor's Office resolved corruption charges against MAN AG in December 2009 by fining two of the company's subsidiaries €75.3 million each.[76] The unlawful conduct reportedly involved more than €75.3 million in bribes paid through third parties to obtain or retain business. MAN cooperated with German authorities, and prosecutors said that the investigation's relatively quick conclusion was made possible by MAN's "readiness to cooperate." Despite the resolution of the government's investigation of MAN, the company continues to investigate individual employees and is reportedly considering suing some culpable employees for damages. By the end of 2009, Chief Executive Officer Hakan Samuelsson, Chief Financial Officer Karlheinz Hornung, and the Chief Executive Officer for the company's commercial vehicle unit had all resigned.[77]

Developments in Asia

Not to be outdone by their counterparts in Europe, anti-corruption authorities in Asia have also recently stepped up their fight against international graft. On January 29, 2009, Tokyo-based consulting company Pacific Consultants International and three of its former executives, were convicted in a Japanese court of bribing a senior Vietnamese official to secure contracts for road projects backed by Japanese aid money.[78] The executives admitted at trial to paying

$820,000 in bribes to a senior transport official in Ho Chi Minh City. After the conviction and issuance of a ¥70 million fine, however, the judge suspended the sentences of all three convicted men, a common result for white-collar criminals in Japan who admit the allegations against them. The convictions represent Japan's first foreign bribery prosecution.

As a result of the Pacific Consultants investigation, Japan suspended all aid to Vietnam, including low-interest loans for infrastructure projects. In response, Vietnamese officials arrested the alleged recipient of the bribes for "abuse of power" and asked Japan, the country's largest source of aid, to resume the loan program. The Japanese Ministry of Foreign Affairs has announced its intention to do so.

In India, internal political wrangling has led to increased scrutiny of American companies for alleged corruption-related offenses. On May 12, 2009, Meera Shankar, the Indian Ambassador to the United States, sent a letter to the Prime Minister Manmohan Singh's principal secretary urging the Prime Minister's office to investigate allegations that several U.S. companies had paid bribes to Indian government officials. Specifically, Ambassador Shankar asked the Prime Minister to investigate a number of companies implicated in FCPA enforcement actions initiated by U.S. authorities over the past few years, including A.T. Kearney India Ltd., Control Components, Inc., Dow Chemical Co., Pride International, Textron, Inc., Wabtec Corporation, and York International Corporation, for their alleged roles in bribing Indian government officials. Ambassador Shankar's letter was made public by the Bharatiya Janata Party, which criticized Prime Minister Singh for not acting on the letter and for "shielding the corrupt."[79] According to media reports, Indian government ministries are now investigating the allegations in Ambassador Shankar's letter. This incident of foreign politicians seizing on FCPA prosecutions by U.S. enforcement agencies to apply pressure to their own domestic prosecutors potentially portends an interesting development in international corruption prosecutions.

Elsewhere, prosecutors in Bahrain are in the midst of an investigation concerning $8.7 million in bribes allegedly paid by the Sojitz Group, a Japanese commodities-trading firm, to employees of Bahrain's state-operated aluminum producer between August 1998 and April 2004, in exchange for negotiated discounts on the purchase of aluminum.[80] Bahraini prosecutors filed money laundering charges against two employees of the Bahraini aluminum producer in March 2009. DOJ reportedly has begun investigating the alleged bribery, and Bahraini authorities have shared their findings with DOJ.[81] This information sharing demonstrates the recent trend toward heightened international cooperation in the global fight against corruption.

And in a high-profile matter that caught the attention of all foreigners doing business in China, in July 2009, Chinese prosecutors detained four employees of the British-Australian mining company Rio Tinto, including one Australian citizen, on suspicion of espionage, theft of state secrets, and corruption-related offenses.[82] One month later, China reversed course and announced that it would not pursue the more politically explosive charges of espionage and stealing state secrets, opting instead to charge the four employees with commercial bribery and infringement of trade secrets.[83] The case has been closely watched by the international business community, as it raised significant concerns about the possibility that foreigners might get mired in China's vague, broad, and highly discretionary state secret laws. For now, however, China's retreat on the more combustible charges in the Rio Tinto case may bring some measure of reassurance to foreigners doing business there. But China's enigmatic regime of state secret laws and the ever-present possibility of their unexpected application remains an area of deep discomfort for many.

Other International Developments

In January 2009, Niko Resources Ltd., a Canadian oil and gas company, announced that the Royal Canadian Mounted Police had launched an investigation into alleged improper payments made to government officials in Bangladesh in violation of Canada's Corruption of Foreign Public Officials Act.[84] In 2005, Niko allegedly caused two explosions while drilling a gas well at the company's Tengratila field in northeastern Bangladesh and subsequently gave a gift to the former energy minister in charge of overseeing the compensation claims of the victims of the explosions.[85] The Bangladesh Anticorruption Commission first began investigating Niko in 2007, and in 2008, approximately twenty persons, including two former prime ministers, were charged with bribery in connection with agreements between Niko and Bangladeshi officials. The Bangladeshi government also has sued Niko for damages in lost gas and environmental damage. To date, Niko has reportedly paid CAN 625,000 to the victims of the explosions. This case is illustrative of the two-front battle that a company may need to fight when its allegedly corrupt activities spur charges, lawsuits, and a public relations quagmire in both the country in which the bribes were paid and the country in which the company is based.

South American nations have also recently increased their efforts to fight international corruption. On January 19, 2009, a former Chilean Air Force Chief, Ramon Vega, was arrested by Chilean authorities for allegedly receiving nearly $2.9 million in commissions from an unnamed Belgian company that was paid $39 million to recondition twenty-five Mirage attack aircraft purchased by Chile.[86] According to

the Santiago Court of Appeal, the money was deposited in the bank accounts of Vega's two daughters, his son, and a son-in-law. Three other senior military officials also were charged with receiving between $60,000 and $65,000 in illegal commissions. In addition, Chile continues to investigate allegations that Catler Uniservice paid bribes to officials at the Bolivian state-owned energy company Yacimientos Petrolferos Fiscales Bolivianos in order to obtain an $86 million contract to build a gas processing plant in Santa Cruz, Bolivia.[87]

Beyond the trend toward greater international enforcement, the above-described Halliburton case highlights the increasing role of international cooperation in the global fight against corruption. Following Halliburton's settlement with the U.S. authorities, the Nigerian Federal Government sent a letter to the U.S. government requesting information about the scheme to aid Nigeria in its investigation of the Nigerian companies and officials involved. Nigerian media reports indicate that DOJ replied that it could not grant Nigeria's request because doing so may interfere with its own ongoing criminal investigation. Although it is unclear when and how DOJ will ultimately respond to Nigeria's request for assistance, the Halliburton case highlights the trend towards increasing interaction between international anti-corruption enforcement authorities.[88]

Following the lead of the United States, the governments of a growing number of nation states around the globe took anti-corruption enforcement efforts to a new level in 2009. Indeed, a number of governments joined forces with the U.S. enforcement agencies, combining resources and sharing information to wage a more effective fight against public corruption. All signs point to a continuation of this trend in the year to come, and beyond.

Conclusion

Throughout 2009, U.S. authorities charged with enforcing the FCPA continued to step up their efforts to combat corruption by aggressively prosecuting individuals and entities that participated in schemes to bribe foreign officials. In doing so, they pursued innovative new approaches to enforcement, utilized forfeiture and self-monitoring in resolving enforcement actions, and held acquiring companies responsible for failure to conduct adequate due diligence in the acquisition process. This flurry of FCPA enforcement activity in the United States took place alongside an explosion of international anti-corruption enforcement activities, which opened the door to increased cooperation between U.S. regulators and their counterparts abroad. As this culture of aggressive enforcement in the United States and abroad becomes increasingly entrenched, new developments in FCPA enforcement will continue to emerge, spurred by the dynamic trends that marked the year 2009.

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[3]*See* 15 U.S.C.A. § 78m (2006).

[4]15 U.S.C.A. § 78m(b) (2006).

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