Director Notes

FCPA Enforcement Trends

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This report provides an overview of the Foreign Corrupt Practices Act (FCPA) and a survey of FCPA enforcement, litigation, and policy developments during 2012. It also analyzes recent trends and offers practical guidance to help companies and their executives and directors avoid or minimize liability under the FCPA.

When compared to the blistering pace set by U.S. authorities over the last several years, 2012 brought a relative decline in FCPA enforcement. Companies subject to the law would be ill advised to relax their vigilance, however, as the number of FCPA enforcement actions in 2012 is still far higher than any seen in the first 30 years of the statute's existence. As Lanny A. Breuer, assistant attorney general for the U.S. Department of Justice Criminal Division, recently commented, "Robust FCPA enforcement has become part of the fabric of the Justice Department: Our global anticorruption mission has seeped into the Criminal Division's core. And there is no turning back."[1]

In our view, the relative downtick in FCPA enforcement is a slight blip on the radar, attributable to, among other things, vast government resources being poured into the comprehensive FCPA Resource Guide released in November—the signature FCPA development of 2012—and team-intensive trial and pretrial trench warfare being waged by both the DOJ and the U.S. Securities and Exchange Commission in numerous venues across the country. This is a marathon, not a sprint, and as the statute celebrates its 35th birthday, both the DOJ and the SEC appear to have hit their stride.

FCPA Overview

The FCPA's antibribery 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 antibribery provisions apply to "issuers," "domestic concerns," and "agents" acting on behalf of issuers and domestic concerns, as well as to "any person" who violates the FCPA while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 78o(d). In this context, foreign issuers whose American depositary 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

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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 antibribery 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. Prosecutors and regulators frequently invoke these latter two sections—collectively known as the accounting provisions—when they cannot establish the elements for an antibribery 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 antibribery provisions can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

2012 FCPA Enforcement Trends

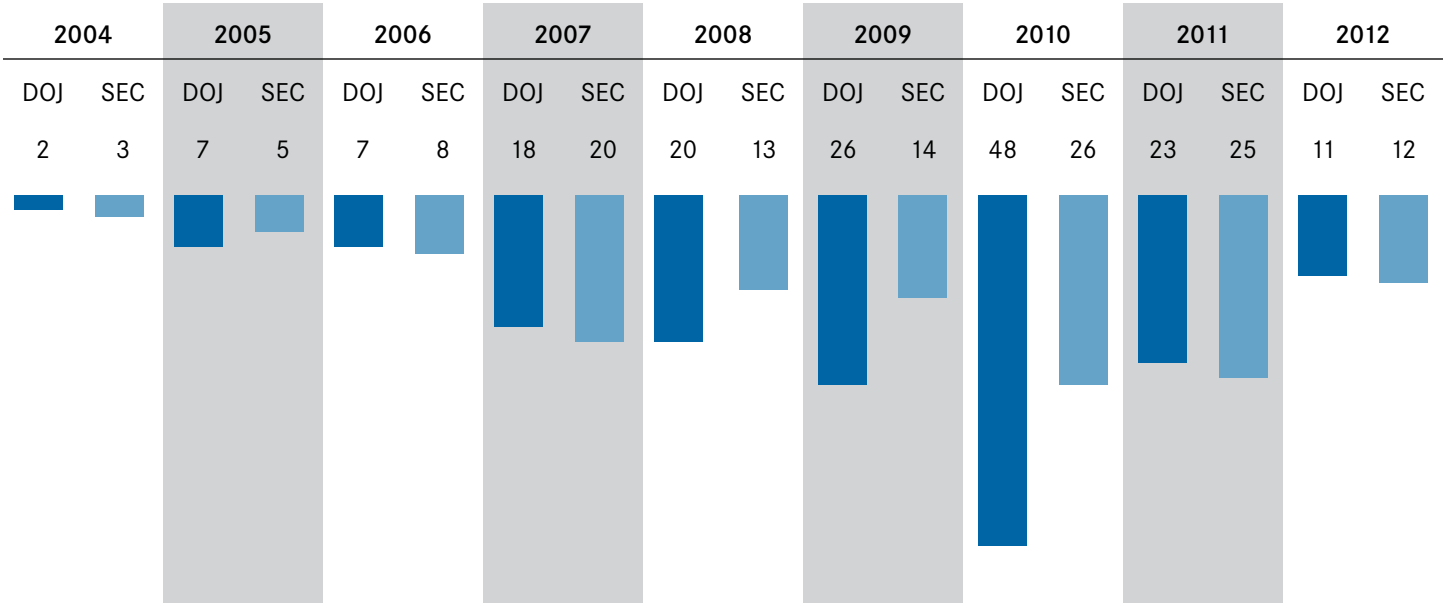
Three key enforcement trends from 2012 stand out:

1 **Corporate FCPA settlements encompass a broad range of conduct** The attention to FCPA compliance at most U.S. companies in 2012 is light years ahead of where it was circa the mid-to-late 1990s. As FCPA enforcement activity surged, corporate America responded by implementing more rigorous and sophisticated compliance protocols. This evolution has not been without its measure of pain, as many companies must contend with the legacy of conduct that predates their improved controls.

The DOJ and the SEC together have approximately 60 lawyers dedicated to the investigation and prosecution of FCPA cases. Both organizations are capable of enlisting substantial additional resources, including U.S. Attorney's Offices and the SEC's Enforcement Division. It is now routine for FCPA investigations to combine prosecutors from both the Fraud Section and U.S. Attorney's Offices.

As a result, corporate FCPA investigations are seldom short lived. To track the time it takes to resolve FCPA matters from inception of the government's investigation to resolution, we studied nearly 100 corporate FCPA settlements from 2004 to 2012. The results of that analysis confirm that investigations involving multicountry settlements are often protracted.

Table 1: **FCPA enforcement actions initiated by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") 2004-2012**



Source: Gibson Dunn, 2013.

The final FCPA enforcement action of 2012 also reached back the furthest and took the longest to resolve. On December 20, 2012, pharmaceutical company Eli Lilly and Company settled civil FCPA antibribery, books-and-records, and internal controls charges with the SEC stemming from allegedly illicit payments in Brazil, China, Poland, and Russia.[2] The SEC's complaint contended that between 1994 and 2009, Eli Lilly's foreign subsidiaries made corrupt payments to influence pharmaceutical sales in Brazil and Russia, falsified expense reports to fund the provision of improper gifts—including free cigarettes, cosmetics, spa treatments, bathhouse and karaoke bar visits, and jade bracelets—to state-employed physicians in China, and contributed to a charitable foundation administered by the head of a government health authority in Poland. FCPA historians will recognize the Polish charity, the Chudow Castle Foundation, and the foreign official at its helm from Schering-Plough's 2004 FCPA settlement with the SEC.[3]

Eli Lilly neither admitted nor denied the SEC's allegations, but to settle the charges, the company agreed to disgorge $13,955,196 in profits plus $6,743,538 in prejudgment interest and to pay a civil penalty of $8.7 million. Eli Lilly also agreed to retain an independent compliance consultant—the same consultant overseeing its compliance with a 2009 corporate integrity agreement with the U.S. Department of Health and Human Services. The terms of the consultancy are tailored, requiring only an initial 60-day review of the company's internal controls and compliance program, followed by a 30-day review one year later. The DOJ has not filed a criminal case in connection with this matter, and Eli Lilly's press release announcing the SEC settlement states that the company "believes that this civil settlement brings resolution to issues from the past."

On September 24, 2012, Tyco International Ltd. agreed to pay more than $26 million to the DOJ and the SEC to resolve FCPA charges.[4] Tyco, a leading global provider of security and fire detection and suppression products and services, agreed to pay $13.68 million as part of a three-year nonprosecution agreement with the DOJ. In settling with the SEC, Tyco agreed to pay $10,564,992 in disgorgement and $2,566,517 in prejudgment interest for alleged FCPA antibribery, books-and-records, and internal controls violations. Finally, a wholly owned, U.S.-incorporated subsidiary of Tyco pleaded guilty to conspiring to violate the FCPA's antibribery provisions and agreed to pay a $2.1 million criminal fine, which is included in Tyco's $13.68 million obligation pursuant to its nonprosecution agreement.

Tyco's 2012 FCPA settlement was unusual because it was the company's second FCPA settlement arising from the same investigation. In 2006, the company paid a $50 million penalty (plus $1 in disgorgement) to the SEC to resolve civil charges that primarily related to accounting fraud, but which also included allegations that Brazilian and South Korean subsidiaries of Tyco had made improper payments to foreign government officials. According to the 2012 settlement papers, Tyco had agreed as part of the 2006 settlement to conduct a worldwide FCPA review extending to 454 entities operating in 50 separate countries. The company uncovered suspected improper payments in a number of countries, but then undertook significant remedial measures, including quarterly FCPA training conducted by more than 4,000 managers, terminating more than 90 employees, and exiting from several business operations in high-risk areas. The 2012 SEC settlement was limited to conduct that postdated the 2006 SEC settlement. The DOJ settlement, however, included allegations stretching back to 1999. Tyco was not required to retain an external compliance monitor as part of the settlement. Instead, Tyco agreed to continue self-monitoring its compliance with the FCPA and to submit annual reports on its progress to the DOJ. This more favorable arrangement is surely due to the extraordinary compliance remediation efforts Tyco has already undertaken.

2 **The health care industry continues to be a focus of FCPA enforcement** Half of the 12 corporate enforcement actions of 2012 involved allegations against health care companies or health care units of companies, which have long been a focus of the DOJ and the SEC. One of the first documented FCPA industry sweeps involved the September 2007 issuance of investigative letters to a number of medical device manufacturers.

On July 10, 2012, Orthofix International N.V., an orthopedic device company based in Texas, agreed to settle FCPA enforcement actions brought by the DOJ and the SEC.[5] The settlement documents allege that, between 2003 and 2010, a wholly owned Mexican subsidiary of Orthofix made approximately $317,000 in improper payments—colloquially referred to as "chocolates" by employees of the subsidiary—and provided gifts and travel benefits to employees of a Mexican state-owned health care and social services institution.

To resolve the charges, Orthofix entered into a deferred prosecution agreement with the DOJ under which it agreed to pay a $2.22 million fine, and consented to the entry of a final judgment in response to a civil complaint filed by the SEC, under which it agreed to disgorge $4,983,644 in profits and $242,000 in prejudgment interest. Both the criminal information and the civil complaint charged violations of the FCPA's internal controls provision. The SEC complaint also included a books-and-records charge.

With respect to the company's internal controls, although Orthofix disseminated English-language FCPA training to its employees, the government claimed that the lack of Spanish-language materials made that training of limited use to the majority of employees at the Mexican subsidiary. The government further alleged that the relevant subsidiary's travel and promotional expenses were substantially over budget—because that is how many of the purportedly corrupt payments were accounted for—yet Orthofix did little to investigate or diminish this spending. Both the DOJ and the SEC commented favorably on Orthofix's substantial remediation efforts and voluntary disclosure to the government after the company identified the improper payments.

In another 2012 health care settlement, on August 7, 2012, the DOJ and the SEC announced a joint FCPA resolution with pharma giant Pfizer, Inc. and a New York-based subsidiary.[6] According to the settlement documents, between 1996 and 2006, Pfizer subsidiaries provided more than $2 million in allegedly corrupt payments, travel expenditures, and gifts to government officials in Bulgaria, China, Croatia, the Czech Republic, Italy, Kazakhstan, Russia, and Serbia to influence these officials in connection with the sale or registration of Pfizer products. In addition, Wyeth LLC, a pharmaceutical company that Pfizer acquired in 2009, entered into a settlement with the SEC for alleged corrupt payments in China, Indonesia, Pakistan, and Saudi Arabia made principally (but not entirely) prior to the acquisition. The DOJ opted not to prosecute Pfizer for Wyeth's conduct, citing Pfizer's extensive compliance remediation effort.

To settle the allegations, both Pfizer and Wyeth consented to the filing of civil complaints charging each with FCPA books-and-records and internal controls violations. Separately, the New York-based Pfizer subsidiary entered into a two-year deferred prosecution agreement charging one count of conspiracy to violate the FCPA's antibribery and books-and-records provisions, as well as a second, substantive antibribery count. Pfizer paid $16,032,676 in disgorgement plus $10,307,268 in prejudgment interest to the SEC. Wyeth paid $17,217,831 million in disgorgement plus $1,658,793 in prejudgment interest to the SEC, and the Pfizer subsidiary entering into the deferred prosecution agreement paid a $15 million criminal fine.

According to the charging documents, the Pfizer investigation dates back to May 2004. The company voluntarily disclosed to the government an internal review of its Croatian operations in October of that same year. After the disclosure, Pfizer undertook a global internal investigation that spanned no fewer than 19 countries. As in the Tyco matter, the DOJ and the SEC credited Pfizer's extensive cooperation and remediation efforts, and in this case expressly cited those efforts as the reason Pfizer was able to conduct its own postsettlement compliance reviews rather than retaining an external compliance monitor.

Other health care-related FCPA settlements in 2012 include the Eli Lilly and Tyco (partially health care, related to a business unit that has since been spun off) settlements, as well as the Smith & Nephew PLC and Biomet, Inc. matters.[7]

3 **The tipping point from external compliance monitors to corporate self-assessments?** In the early days of the FCPA enforcement surge, the DOJ or the SEC or both imposed external compliance monitors in more than half of corporate FCPA resolutions, and they used monitors as a bargaining chip in the other half. In 2009, there was a trend away from the use of external compliance monitors and toward corporate compliance self-assessments. Companies conduct these self-assessments internally and submit their findings to the government for a certain period following their FCPA resolution.

Self-assessments are now becoming the norm in corporate FCPA resolutions, appearing in half of the 12 settlements last year. External monitors were imposed on four companies: Marubeni Corporation, which entered into a deferred prosecution agreement with the DOJ to resolve charges related to the TSKJ Bonny Island joint venture investigation; Smith & Nephew; Biomet; and Eli Lilly. Eli Lilly was permitted to use an existing compliance consultant previously imposed as part of a separate, non-FCPA resolution.

The fact that companies are being allowed to conduct self-assessments is the good news. The bad news is that the DOJ and the SEC now impose some sort of continuing reporting requirements as a condition of nearly all FCPA settlements. Before the proliferation of corporate self-assessments, companies that were not required to retain an external compliance monitor often avoided reporting obligations altogether, except perhaps as they related to violations of law discovered during the term of a deferred or nonprosecution agreement. Now it is rare for a company resolving FCPA charges to escape an annual reporting obligation. Indeed, only two of the 12 companies that resolved FCPA investigations in 2012 were not required to report periodically to U.S. regulators.

Table 2, on page 5 provides a summary of the corporate compliance monitoring obligations imposed by the DOJ and/or the SEC in 2012.

Rounding Out the 2012 Enforcement Docket

On December 17, 2012, the SEC filed a settled administrative cease-and-desist proceeding against Allianz SE, a Munich-based insurance and asset management company and former ADR issuer.[8] According to the charging document, a majority-owned Indonesian subsidiary of Allianz made approximately $650,000 in purportedly corrupt payments to employees of state-owned entities in Indonesia.

Without admitting or denying the charges, Allianz agreed to pay a penalty of $5,315,649, disgorge the same amount in profits, plus pay prejudgment interest of $1,765,125. Allianz also agreed to cease and desist from future violations of the FCPA's accounting provisions. Interestingly, the company delisted from the New York Stock Exchange in 2009, but the SEC opened its investigation after receiving an anonymous complaint in April 2010, six months after Allianz ceased its SEC reporting obligations.

The SEC noted Allianz's cooperation in the investigation and its remedial measures, particularly the retention of new FCPA counsel (Allianz was represented in this matter by Gibson Dunn). The DOJ has reportedly closed its investigation of the matter without charging Allianz.[9]

On August 16, 2012, the SEC charged enterprise software provider Oracle Corporation with FCPA books-and-records and internal controls violations stemming from the alleged misconduct of an Indian subsidiary.[10] According to the civil complaint, the Indian subsidiary "parked" a portion of the proceeds from certain government sales in an off-book account to which its distributors had access and then directed these distributors to make payments to

Table 2: **Corporate compliance monitoring obligations imposed by DOJ and/or the SEC in 2012**

Company	Compliance Monitoring	Notes
Marubeni	External	• Two-year term reporting to Marubeni's board of directors • External monitor imposed on four of the five companies that resolved FCPA charges stemming from the TSKJ Bonny Island joint venture
Smith & Nephew	External	• 18-month term reporting to DOJ and the SEC
BizJet	Self-assessments	• Three-year term reporting to DOJ
Biomet	External	• 18-month term reporting to DOJ and the SEC
Data Systems & Solutions	Self-assessments	• Two-year term reporting to DOJ
NORDAM Group	Self-assessments	• Three-year term reporting to DOJ
Orthofix	Self-assessments	• Three-year term reporting to DOJ and the SEC
Pfizer/Wyeth	Self-assessments	• Two-year term reporting to DOJ and the SEC
Oracle	None	• N/A
Tyco	Self-assessments	• Three-year term reporting to DOJ
Allianz	None	• No longer an SEC registrant
Eli Lilly	External	• 14-month term reporting to the SEC • Able to use existing consultant from non-FCPA resolution

Sources: U.S. Department of Justice website (www.justice.gov), U.S. Securities and Exchange Commission website (www.sec.gov), and Gibson Dunn, 2013.

various third parties, including some that were "merely storefronts." The SEC does not allege any corrupt payments but contends that this practice "creat[ed] the potential for bribery or embezzlement."

To settle these charges, Oracle agreed to pay a $2 million civil penalty and to accept an injunction against future violations of the accounting provisions. The SEC cited Oracle's voluntary disclosure, cooperation with SEC investigators, termination of employees involved in the wrongdoing, and enhancement of its FCPA compliance program as factors favoring the settlement agreement. There is no indication that the DOJ will pursue an enforcement action based on this matter.

On July 17, 2012, The NORDAM Group, Inc., a Tulsa-based aircraft maintenance, repair, and overhaul company, entered into a nonprosecution agreement with the DOJ to resolve allegations that it made $1.5 million in corrupt payments to employees of state-owned airlines in China.[11] As a nonissuer, NORDAM did not settle parallel charges with the SEC.

Citing NORDAM's financial position, as well as the company's cooperation in the investigation and voluntary disclosure, the DOJ agreed to accept a $2 million fine (substantially below the Federal Sentencing Guidelines-recommended range) to resolve the charges. This discount was applied pursuant to Section 8C3.3 of the Sentencing Guidelines, which provides for reduced penalties where an organization is unlikely, even with the use of a reasonable installment schedule, to become able to pay the guidelines fine. The DOJ and NORDAM retained an independent accounting expert to verify that the fine discount was not more than necessary to avoid substantially jeopardizing the company's continued viability.

Other 2012 FCPA enforcement actions included[12]:

- Data Systems & Solutions LLC (DOJ settlement, announced June 18, 2012);
- Garth R. Petersen (DOJ & SEC settlements, announced April 25, 2012);
- Biomet, Inc. (DOJ & SEC settlements, announced March 26, 2012);
- BizJet International Sales & Support, Inc. (DOJ settlement, announced March 14, 2012);
- Mark A. Jackson (SEC contested charges, announced February 24, 2012);
- Thomas F. O'Rourke (SEC settlement, announced February 24, 2012);
- James J. Ruehlen (SEC contested charges, announced February 24, 2012);
- Smith & Nephew PLC (DOJ & SEC settlements, announced February 6, 2012);
- Cecilia Zurita (DOJ indictment, returned January 19, 2012); and
- Marubeni Corporation (DOJ settlement, announced January 17, 2012).

2012 FCPA Enforcement Litigation

SEC v. Ruehlen et al. On December 11, 2012, U.S. District Judge Keith P. Ellison for the Southern District of Texas issued a 61-page decision granting, in part, motions to dismiss FCPA charges pending against James J. Ruehlen (a Gibson Dunn client) and his codefendant, Mark A. Jackson.[13] On February 24, 2012, the SEC charged Ruehlen and Jackson, current and former employees of Noble Corporation, with alleged FCPA violations arising from Noble's alleged payment of monies to Nigerian customs officials, purportedly for the purpose of extending temporary oil rig importation permits. A third Noble employee, Thomas O'Rourke, settled FCPA charges with the SEC on that same day, agreeing to pay a $35,000 civil penalty. The company also settled its own FCPA charges in 2010, agreeing to pay more than $8 million to the DOJ and the SEC in criminal and civil fines, disgorgement, and prejudgment interest.

The defendants' motions to dismiss argued, among other things, that the SEC's charges were time barred under the applicable statute of limitations and that the SEC's complaint failed to adequately plead the identities of the foreign officials involved. The defendants also argued that the SEC's complaint failed to adequately plead that the payments in question were bribes rather than "facilitating payments," which are payments outside the scope of the FCPA's antibribery provision. Judge Ellison held that the FCPA does not require the SEC to plead in all cases the precise identity of each foreign official who receives a corrupt payment. The court reasoned that such specific allegations were not required in this case in light of the SEC's allegations that payments were made to induce government officials "to violate the very laws [they are] charged with implementing," which were sufficient to plead a civil FCPA antibribery offense regardless of whether the official receiving the payment was "the most junior staff member or the official who[se] name appears at the top of the organizational chart." Although the court did not rule out the possibility that, in some cases, the government

might be required to plead "details about the foreign official's identity, duties, and responsibilities" to establish that the payment was made for an unlawful purpose, the court declined to adopt "a bright-line rule of detailed pleadings about a foreign official's particular duties."

Judge Ellison acknowledged tension between his holding and a ruling by Judge Lynn N. Hughes of the Southern District of Texas. Judge Hughes had dismissed criminal FCPA charges against John Joseph O'Shea because, among other things, he found that one cannot be convicted under the FCPA for "promising to pay unless you have [evidence of] a particular promise to a particular person for a particular benefit." Contrary to Judge Ellison, Judge Hughes found that an instruction to a third party to "bribe somebody" would not be sufficient to meet the FCPA's threshold.

With respect to defendants' arguments on the facilitating payments exception, Judge Ellison held that because the legislative history of the FCPA ties the facilitating payments exception so closely to the "corruptly" element, it is the SEC's burden to negate applicability of the exception just as it is the SEC's burden to establish that the defendants acted with a corrupt intent. The court then held that the SEC's complaint had negated the facilitating payments exception with respect to payments allegedly made to induce officials to grant import permits based on false paperwork because creating, validating, and processing knowingly false documents do not qualify as routine governmental actions. But the SEC did not meet its burden to defeat the exception with respect to summary allegations that said no more than payments were made to influence officials in discretionary acts relating to import permits. The court granted the SEC leave to amend its complaint to attempt to remedy this pleading deficiency.

On the related issue of corrupt intent, Judge Ellison interpreted the FCPA's usage of the term "corruptly" to mean "an act done with an evil motive or wrongful purpose of influencing a foreign official to misuse his position." This does not, the court held, require allegations that a defendant knew that his actions would violate the FCPA. Further, and contrary to criminal FCPA actions, Judge Ellison stated that in civil FCPA actions the SEC need not even allege that the defendant knew that his actions violated any law because knowing that an action is unlawful is a requirement of "willfulness," which is an element of the criminal but not civil FCPA antibribery offense. The court held that the SEC's allegations that the payments were made to induce foreign officials to approve permits based on documents the officials knew to be false satisfied the "corruptly" element at the pleading stage.

With respect to defendants' statute-of-limitations arguments, Judge Ellison noted that the vast majority of the SEC's allegations took place more than five years before the complaint was filed and were thus presumptively outside of the governing five-year statute of limitations. Nonetheless, because it was undisputed that agreements had been executed during the course of the investigation to toll the statute of limitations for some unspecified period, the court granted the SEC leave to amend and plead the existence and extent of those tolling agreements. Further, Judge Ellison held that although the SEC had pleaded sufficient facts to establish that the defendants concealed their alleged wrongdoing by virtue of improper payments being falsely booked as legitimate expenses, the SEC had failed to plead any facts to demonstrate that it acted diligently in bringing its complaint, a necessary element for arguing fraudulent concealment. Nevertheless, the court granted the SEC leave to amend to plead diligence as well. Finally, Judge Ellison applied these statute-of-limitations findings only to the SEC's claims seeking monetary penalties. Although the injunctive relief sought by the SEC against both defendants may, under the facts, ultimately be deemed punitive in nature as well, and thus subject to the same five-year statute of limitations as monetary penalties, the court held that it was too early in the proceeding to make that determination.

In the end, Judge Ellison granted the defendants' motions to dismiss for all claims seeking monetary damages based on alleged violations taking place prior to February 24, 2007, and otherwise denied the motions with respect to the remaining claims. The SEC amended its complaint in an attempt to cure several deficiencies identified in Judge Ellison's order on January 25, 2013.

SEC v. Steffen et al. In December 2011, criminal and civil FCPA charges were brought against seven former employees and two former third-party agents of Siemens AG arising from an alleged decadelong scheme to provide 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.[14] Only one former company representative, Bernd Regendantz, settled the charges at the time they were filed. Thus, in 2012, the DOJ and the SEC began the complex process of attempting to gain jurisdiction over the remaining eight defendants, all of whom are foreign nationals residing abroad.

The criminal case saw no movement on the public court docket in 2012, although extradition efforts are reportedly under way. There has been movement in the SEC's civil enforcement case, likely due to the comparatively flexible service options available in a civil case, coupled with the availability of default judgments for even foreign nationals who do not respond. After the SEC obtained permission from the Honorable Shira Scheindlin of the U.S. District Court for the Southern District of New York to effect service on the four outstanding German defendants via "alternative means," including via publication in the *International Herald Tribune* and a bilingual letter and e-mail to the defendants' counsel in Germany, two defendants retained U.S. counsel and contacted the SEC.

According to court filings, defendant Uriel Sharef is finalizing a settlement with the SEC. Meanwhile, defendant Herbert Steffen has filed a motion to dismiss the complaint, arguing that the court lacks personal jurisdiction over him because, among other things, he took no actions in the United States outside of several telephone conversations with Sharef, who was in the United States when he called Steffen. Steffen also argues that the applicable statute of limitations has expired. The SEC argues in response that Steffen's actions caused Siemens to file false and misleading financial statements in the United States and that the statute of limitations should be tolled for the period that Steffen was outside of the United States. Steffen's motion has been fully briefed and will likely be resolved in 2013.

SEC v. Balogh et al. In the third FCPA case currently being litigated by the SEC in federal district court, on December 29, 2011, the SEC filed an unsettled FCPA complaint against three former executives of Magyar Telekom—Andras Balogh, Tamas Morvai, and Elek Straub—pertaining to alleged corruption of Macedonian government officials. As in the case against the former Siemens representatives, the Magyar Telekom defendants are all foreign nationals, in this instance Hungarian. After the SEC was able to effect service on these defendants via the Hague Convention, the three defendants filed a consolidated motion to dismiss on November 5, 2012, raising much the same personal jurisdiction and statute-of-limitations arguments raised in *SEC v. Steffen*. The SEC's responses to these arguments were much the same as they were in the Steffen case. This motion is also fully briefed and, together with the Steffen case, should provide some useful guidance for FCPA practitioners, particularly those representing foreign nationals, in 2013.

CCI sentences Four individual defendants in the Control Components, Inc. (CCI) prosecution pleaded guilty to FCPA charges during the first half of 2012 and were sentenced during the second half of the year by U.S. District Judge James V. Selna of the Central District of California. Stuart Carson (a Gibson Dunn client) received four months' imprisonment, followed by eight months of home detention (versus a six-month prison term sought by the DOJ); Hong Carson received six months of home detention (in line with the DOJ's recommendation); Paul Cosgrove received 13 months of home detention (versus a 15-month prison term sought by the DOJ); and David Edmonds received four months' imprisonment, followed by four months of home detention (versus a 14-month prison term sought by the DOJ). Among other reasons, Judge Selna cited the age and health of several of the defendants, as well as the uncertainty of certain legal issues implicated in the case as factors militating against lengthier prison terms. Notably, however, the court rejected Hong Carson's argument that her sentence should account for the fact that she was born and received her business training in China, with different cultural norms, finding that "[t]here is no cultural defense to the [FCPA] or any other [crime] under black letter law."

Three more CCI defendants—Mario Covino, Richard Morlok, and Flavio Ricotti—are still awaiting sentencing. Another, Han Yong Kim, remains in his home country of South Korea and is not yet before the court.

SHOT Show trial and Bistrong's sentencing The dismissal of all charges against all 22 "SHOT Show" defendants in early 2012 marked the closing of the government's two-year criminal case stemming from an elaborate undercover investigation and dramatic raid at the Las Vegas SHOT industry trade show in January 2010.[15] In an ironic twist, the only defendant associated with the matter to be sentenced in 2012 was the DOJ's key cooperating informant, Richard T. Bistrong. On July 31, 2012, the Honorable Richard J. Leon of the U.S. District Court for the District of Columbia sentenced Bistrong to an 18-month prison term, concluding that, even crediting Bistrong's cooperation, the sentence had to reflect the severity of Bistrong's crimes. Judge Leon noted, "We certainly don't want the moral of the story to be: Steal big. Violate the law big. Cooperate big. Probation."[16]

Haiti Teleco appeals and sentencing 2012 brought closure, at least for now, to the district court proceedings in the DOJ's long-running and wide-ranging prosecution of foreign government officials from Telecommunications D'Haiti (Haiti Teleco), Haiti's state-owned telecommunications company, and the U.S.-based executives and intermediaries who allegedly bribed them. On July 9, 2012, the Honorable Jose E. Martinez of the U.S. District Court for

the Southern District of Florida sentenced former Haiti Teleco Director General Patrick Joseph to 12 months and a day for conspiracy to commit money laundering. This sentence reflected a 75 percent reduction off of the low end of the recommended Sentencing Guidelines range, which Judge Martinez found was warranted in light of Joseph's substantial cooperation and the "ultimate sacrifice" paid for that cooperation—a sad recognition of the fact that just two days after media reports of Joseph's cooperation surfaced, his 85-year-old father was assassinated on the streets of Port-au-Prince. Three defendants indicted in connection with the Haiti Teleco investigation—Washington Vasconez Cruz, Amadeus Richers, and Cecelia Zuringa—remain outside of the United States and have yet to be brought before the court.

The only live prong of the Haiti Teleco investigation involves appeals to the Eleventh Circuit by Joel Esquenazi and Carlos Rodriguez, both of whom were convicted at trial on multiple counts of FCPA and FCPA-related money laundering and wire fraud violations, and Jean Rene Duperval, who was convicted of 21 FCPA-related money laundering counts after a March 2012 trial. The consolidated Esquenazi and Rodriguez appeals are fully briefed and awaiting oral argument. The Duperval appeal trails—given the later trial date and several extensions sought by his counsel—but should be briefed in 2013.

The thorny issue of whether state-owned entities qualify as "instrumentalities" under the FCPA (thus making their employees "foreign officials") has been percolating through the federal district courts for close to two years now, including the CCI and Lindsey cases in the Central District of California,[17] the O'Shea case in the Southern District of Texas, and the Haiti Teleco case in the Southern District of Florida. The Esquenazi/Rodriguez and then Duperval cases will be the first to place this issue squarely before a federal court of appeals.

Among other things, Esquenazi and Rodriguez argue that in drafting the FCPA, Congress considered, but intentionally excluded, state-owned enterprises from the definition of "instrumentality." The DOJ responds that Haiti Teleco was 97 percent owned by the Haitian government and was headed by government-appointed leadership. The department also argues that the 1998 amendments to the FCPA were designed to implement the Organisation for Economic Co-operation and Development's 1997 Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention), a treaty that defines a "foreign public official" to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise." In reply, Rodriguez and Esquenazi contest the Justice Department's characterization of the extent of Haitian government ownership and control and argue that a 1998 amendment cannot clarify Congress's intent in drafting the statutory definition of "instrumentality" two decades and 10 sessions of Congress earlier.

Judicial oversight of the IBM case International Business Machines Corporation (IBM) settled civil FCPA books-and-records and internal controls charges with the SEC on March 18, 2011. Like all FCPA enforcement actions filed in federal district court, the settlement was subject to court approval, which is typically an uneventful proceeding.

After a series of mostly off-the-record proceedings, the reasons behind the 19-month delay in finalizing the settlement were aired in open court on December 20, 2012. Refusing to "rubber stamp" the settlement, Judge Leon requested new reporting terms for IBM that were not part of the agreement reached with the SEC, such as a requirement that IBM report annually to the court on any future violations of the FCPA, including any inaccuracies in the company's corporate books and records. IBM agreed to report on any improper payments and inaccurate books and records related to such payments, but contended that tracking and reporting all ledger inaccuracies of any kind across the 430,000-employee company would be overly burdensome. The SEC backed IBM's position and urged Judge Leon to accept the original proposed settlement.

Noting "a growing number of district judges who are increasingly concerned" with the SEC's settlement policies, an apparent tip of the hat to Judge Jed Rakoff's prominent refusal to approve Citigroup's 2011 securities fraud settlement with the SEC, Judge Leon expressed bewilderment that the company would be unable to track this information or that the SEC would endorse this response.[18] Judge Leon gave the parties until February 4, 2013, to provide evidence, potentially including affidavits, documents, and courtroom testimony, in support of their burden arguments.

Bourke appellate proceedings The U.S. Court of Appeals for the Second Circuit has turned back two separate challenges by Dooney & Bourke cofounder Frederic Bourke to his 2009 FCPA trial conviction: one arguing that the district court's "ostrich instruction" concerning Bourke's alleged "willful blindness" to the corrupt payments in question is inconsistent with the 2011 Supreme Court decision, *Global-Tech Appliances, Inc. v. SEB S.A.*, and a second arguing that the government failed to produce key impeachment evidence pretrial and potentially sponsored

false testimony at trial. The Second Circuit rejected the first argument in a December 14, 2011, decision; denied the request for a rehearing en banc on July 27, 2012; and rejected Bourke's second argument in a summary order dated November 28, 2012. Bourke has filed a petition of certiorari with the U.S. Supreme Court on the willful blindness issue and sought rehearing en banc at the Second Circuit on the false testimony issue, both of which are still pending as of February 2013.

2012 FCPA-Related Litigation

What follows is a summary of developments in several related cases arising from FCPA investigations in 2012.

Former Siemens consultant indicted on tax evasion charges The 2008 Siemens FCPA settlement continues to spawn collateral litigation some four years later. One example is the October 4, 2012, indictment of Mizanur Rahman on charges of filing false tax returns with the Internal Revenue Service. The indictment alleges that between 2004 and 2006, Rahman was a consultant to the subsidiary of an international corporation operating in Bangladesh and that in connection with this work he received approximately $1.7 million. But Rahman allegedly reported less than $67,000 on his federal income tax returns for 2005 and 2006 combined and also purportedly failed to report the foreign bank account in which he held the consulting payments. There is currently an arrest warrant outstanding for Rahman, who has yet to make an appearance before the court. Although the indictment does not expressly identify the international corporation for which Rahman worked, the case is listed as "related" to the 2008 criminal information filed against Siemens Bangladesh on the DOJ's FCPA website. Also of note, on January 8, 2009, the DOJ filed a forfeiture in rem action against nearly $3 million held in a foreign bank account that was purportedly used for bribes paid by a Siemens Bangladesh "business consultant" to Arafat "Koko" Rahman, son of the former Bangladeshi prime minister. According to the 2009 forfeiture complaint, the sole function of these "business consultants" was to launder bribe money to Bangladeshi government officials, including Koko Rahman.

DOJ continues to wield the civil forfeiture weapon in foreign corruption cases In at least three actions in 2012, the DOJ announced forfeiture judgments obtained under its Kleptocracy Asset Recovery Initiative, an effort to target and recover 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."

First, on June 28, 2012, U.S. District Judge Rya W. Zobel of the District of Massachusetts entered an order directing the forfeiture of $401,931 in alleged corruption proceeds held in an investment account for the benefit of Diepreye Solomon Peter Alamieyeseigha, a former governor of Bayelsa State in Nigeria. The DOJ alleged that during a six-year period in which Alamieyeseigha had a combined declared income of less than $250,000, he accumulated $12.7 million in assets around the world through corruption and other illegal activities. Alamieyeseigha ultimately pleaded guilty in Nigeria for failing to disclose these assets and, on behalf of his shell companies, for money laundering offenses. He contested a separate in rem action seeking the forfeiture of a house in Montgomery County, Maryland, in an action pending in the U.S. District Court for the District of Maryland. In early January 2013, the court granted the U.S. government's motion to strike Alamieyeseigha's claim in the property, citing Alamieyeseigha's statements disclaiming ownership, failure to file a claim within the time required, and failure to provide the court with any other basis for standing.

Then, on July 23, 2012, the DOJ announced that it had secured a restraining order against more than $3 million in alleged corruption proceeds found in the United States that belonged to James Onanefe Ibori, the former governor of Nigeria's Delta State, and his English solicitor Bhadresh Gohil. These proceedings were initiated at the request of the UK courts, which convicted Ibori and Gohil of money laundering charges in 2012 and 2010, respectively. The DOJ then supplemented its action on October 4, 2012, adding more than $4 million in additional proceeds to the forfeiture complaint. The total proceeds sought to be seized include a mansion in Houston, a luxury condominium unit in the exclusive Residences at the Ritz-Carlton complex in Washington, D.C., and multiple brokerage accounts.

Finally, on November 14, 2012, the DOJ announced forfeiture orders entered by two separate U.S. district courts against residences belonging to the former first family of Taiwan in Manhattan and in Keswick, Virginia. The DOJ alleged that these homes were purchased with the proceeds of bribes accepted by Taiwan's first lady at the time, Wu Shu-Jen, to influence her husband, then-President Chen Shui-Bian, not to oppose the 2004 merger of two financial holding companies. Chen and Wu were each convicted in 2009 of bribery, embezzlement, and money laundering offenses by the Taiwanese courts.

Siriwan litigation still pending A 2010 money laundering case against Juthamas and Jittisopa Siriwan, the former governor of the Tourism Authority of Thailand and her

daughter, respectively, remains unresolved. The purported bribe payers in this matter, husband and wife film producers Gerald and Patricia Green, were each convicted of FCPA charges in 2009.

U.S. District Judge George H. Wu heard argument on the Siriwans' motion to dismiss the money laundering indictment on January 30, 2012. The defendants, who remain in Thailand and, with the permission of the court (over the DOJ's objection), have entered a special appearance through counsel, argue that the DOJ is impermissibly attempting to make an end run around precedent establishing that the FCPA does not criminalize the receipt of bribes and thus foreign officials are not covered by the FCPA. The DOJ responded by focusing on the allegedly illicit financial transfers through the U.S. banking system, which it argues is plainly covered by the federal anti–money laundering statute. Judge Wu has not yet resolved this dispute, staying the motion to dismiss until Thailand decides whether to grant or deny the DOJ's renewed request to extradite the Siriwans. Another hearing on the motion, following supplemental briefing, is scheduled for February 21, 2013. Thus far, the Government of Thailand has given no indication that it intends to extradite either defendant, making clear in its communications with the U.S. Department of State that it is gathering evidence to prosecute the Siriwans at home.

FCPA-Related Civil Litigation

The FCPA provides for no private right of action, a legal nuance that has failed to deter any number of plaintiffs in recent years from fashioning civil claims premised on what amount to alleged violations of the FCPA. The statute has spawned a continuing stream of FCPA-inspired civil actions, including derivative suits, claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act, securities fraud actions, tort and contract law claims, and employment lawsuits.

Selected shareholder derivative lawsuits Two trends have emerged with respect to FCPA-related derivative actions: 1) many are disposed of on a motion to dismiss based on the plaintiff shareholders' failure to make a presuit demand on the board or, alternatively, establish that such a demand would be futile; and 2) the model for cases that do settle is for the company to agree to effect corporate governance changes that enhance anticorruption controls, but not to pay any financial damages beyond attorneys' fees.

Derivative cases falling in the first category, dismissed in 2012, include cases in state and federal court in Texas against Parker Drilling Company and a federal action in Massachusetts against Smith & Wesson Holding Corporation. The plaintiff in the Parker Drilling case recently appealed the dismissal to the Fifth Circuit Court of Appeals. Cases falling in the latter category, resolved in 2012 for corporate governance changes plus attorneys' fees, include a federal case in New Jersey against Johnson & Johnson and a Texas state court action against Halliburton Company. A dissenting shareholder has appealed the Johnson & Johnson settlement to the Third Circuit Court of Appeals.

New derivative actions arising or percolating in 2012 included a Nevada federal district court case against Wynn Resorts, Ltd., and what looks to be a forthcoming case against Poland-based liquor distiller/distributor Central European Distribution Corporation (CEDC). The former case is now pending a motion to dismiss. The latter matter relates to CEDC's October 2012 disclosure of a breach of the FCPA's books-and-records provision and other potential FCPA violations. CEDC already has a derivative action pending against it in the U.S. District Court for the District of New Jersey based on non-FCPA claims, but after this SEC disclosure, the company's two largest shareholders filed public letters with the SEC voicing consternation over CEDC's "stunning and inexcusable setbacks" and demanding that the board "entirely reconstitute its membership." These new allegations have not yet found their way into the federal court derivative action.

Lawsuits brought by foreign sovereigns Chief Judge Donetta W. Ambrose of the U.S. District Court for the Western District of Pennsylvania denied Alcoa, Inc.'s motion to dismiss the 2008 RICO complaint filed by Aluminum Bahrain B.S.C. (Alba), which claimed $1 billion in damages arising from Alcoa's alleged payment of bribes to Alba officials to allow Alcoa to overcharge Alba for raw materials. The court rejected Alcoa's argument that the alleged misconduct took place in Bahrain and therefore should not be litigated in the United States, finding Alcoa's Pittsburgh headquarters to be the "nerve center" controlling the behavior in question and therefore sufficient to confer U.S. jurisdiction. On October 9, 2012, Alcoa announced an $85 million settlement with Alba. Two days later, the court dismissed the case as to the Alcoa defendants. In a move that illustrates the complexity of litigating FCPA-related allegations with an ongoing customer, Alcoa reported that the parties had entered into a long-term supply agreement coincident with execution of the settlement agreement.

The case against the Alcoa defendants is over, but litigation with the third-party representative who allegedly passed along the illicit payments at issue, Victor Dahdaleh,

continues. Judge Ambrose denied his motion to dismiss in June 2012, then, on October 25, granted Dahdaleh some limited relief by agreeing to stay discovery until June 2013. Dahdaleh requested the stay due to the prejudice he would suffer by engaging in civil discovery in the United States ahead of his criminal trial in the United Kingdom, which is predicated upon the same operative facts and currently scheduled for April 2013. Judge Ambrose agreed, finding that the prejudice to Dahdaleh from turning over evidence in the United States that he is not obligated to turn over pretrial in the United Kingdom outweighed the minimal harm to Alba from an additional seven-month delay, particularly after the case was earlier stayed, at the DOJ's request and unopposed by Alba, for 3.5 years. Also on October 25, 2012, Judge Ambrose granted Dahdaleh's motion for a certificate of appealability, permitting him to take an interlocutory appeal to the Third Circuit on the district court's finding that it could exercise personal jurisdiction over Dahdaleh based on the "absent coconspirator" doctrine.

On December 12, 2012, Mexico's state-owned oil company, Petróleos Mexicanos (Pemex), filed a RICO suit in the U.S. District Court for the Southern District of New York against South Korea-based SK Engineering & Construction Co. Ltd., Siemens AG, and their joint venture, CONPROCA S.A. de C.V. The suit claims that the defendants made improper payments to Pemex officials in exchange for the award of a refinery modernization project to CONPROCA in 1997, and then subsequently paid additional bribes to retain the contract even after significant cost overruns and other disputes. Pemex seeks $500 million in damages, which under RICO's trebling provision could bring the amount in controversy to $1.5 billion.

On December 24, Pemex moved to stay the RICO proceeding in favor of a separate 2011 action filed in the Southern District of New York by CONPROCA to confirm and collect upon a $530 million arbitration award CONPROCA received against Pemex, or yet another proceeding brought by Pemex in Mexico to annul the arbitration award. Pemex contends that it only recently discovered the alleged improper payments and filed the RICO suit to preserve the timeliness of its claim. Pemex alleges that the arbitration award was premised upon documents filed by Pemex officials stating that CONPROCA's cost overruns were approved and that these same Pemex officials were the recipients of defendants' purported improper payments. Pemex thus intends to use this evidence as a basis to annul the arbitration award.

On December 10, 2012, the U.S. Supreme Court denied a cert petition filed by Costa Rican state-owned electric and telecommunications company Instituto Costarricense de Electricidad (ICE), thereby ending the entity's bid to intervene in the 2010 FCPA settlement between the DOJ and Alcatel-Lucent S.A. ICE filed a petition to intervene in the criminal proceeding, arguing that the DOJ had failed to comply with the Mandatory Victims Restitution Act (MVRA) by neglecting to ensure that the agency receive restitution as part of the settlement. The Honorable Marcia G. Cooke of the U.S. District Court for the Southern District of Florida denied the petition, holding that ICE did not qualify as a "victim" under the MVRA because, among other reasons, officials at the highest levels of ICE were engaged in the alleged corruption. The Eleventh Circuit affirmed Judge Cook's decision on June 17, 2011, leading to the unsuccessful cert petition.

DOJ/SEC FCPA Resource Guide

The biggest FCPA event of 2012 was the November 14 issuance of the much-anticipated joint DOJ/SEC document, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.[19] The Resource Guide is mandatory reading for any counsel, compliance professional, or executive seeking to understand the U.S. government's views on the FCPA. While the authoring agencies are careful to note that the Resource Guide is "nonbinding, informal, and summary in nature" and "does not in any way limit the enforcement intentions or litigating positions" of U.S. authorities, Jeffrey Knox, principal deputy chief of the DOJ's Fraud Section, explained that the Resource Guide will be treated like the U.S. Attorneys' Manual and that enforcement officials will act consistent with the Resource Guide.

Areas of FCPA interest covered in significant detail in the Resource Guide include:

- the credit given for voluntary disclosure;
- the hallmarks of an effective FCPA compliance program;
- third-party due diligence;
- preacquisition FCPA due diligence and postacquisition compliance integration;
- corporate successor liability;
- the jurisdictional scope of the antibribery provisions;
- gifts, travel costs, and entertainment expenses;
- related U.S. laws that may apply to a given course of conduct, even if the FCPA does not;
- the definition of "foreign official";
- facilitating payments; and
- charitable contributions.

Early criticism of the guide has generally expressed disappointment with the positions taken by the DOJ and the SEC for being "unsupported" or "one-sided." In our view, such critiques miss the mark because they do not recognize the guide for what it is: an interpretation of a statute by sophisticated prosecutors and regulators who are providing their considered judgment of key issues under the FCPA. The Resource Guide arms companies and their counsel with ammunition to analogize their real-life situations to hypothetical scenarios and other discussions set forth in the government's own words.

2012 DOJ FCPA Opinion Procedure Releases

By statute, the DOJ is obligated to provide a written opinion on the request of an "issuer" or "domestic concern" regarding whether the department would prosecute it under the FCPA's antibribery provisions for prospective (not hypothetical) conduct that the requestor is considering taking. The DOJ publishes these opinions on its FCPA website, which was revamped to organize them into 18 subject matter areas, from "Audit Rights" to the "Written Laws Affirmative Defense." Although only parties who join in the requests may authoritatively rely upon them, the releases provide valuable insights into how the DOJ interprets the statute. Although the SEC does not itself issue these releases, it has opted as a matter of policy not to prosecute issuers that obtain clean opinions from the DOJ.

FCPA Opinion Procedure Release 2012-01 The 57th release in the statute's 35-year history, issued on September 18, 2012, addressed the issue of who qualifies as a "foreign official" under the FCPA. The requestor, a U.S. lobbying firm, reported that it intended to retain a consulting company to help it obtain business from a foreign country's embassy and foreign ministry, including by making introductions to key officials, advising on local customs, and assisting in the setup of a local office in the foreign country. One of the three partners of the consulting company is a member of the foreign country's royal family. The requestor asked the DOJ to opine as to whether, based on the facts presented, the royal family member would be considered a "foreign official" under the FCPA. The department answered the question in the negative, with the caveat that the royal family member must not "directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family" during the course of the consulting engagement.

The Justice Department noted that a person's "mere membership" in the royal family of a foreign country "does not automatically qualify that person as a 'foreign official.' Rather, the question requires a fact-intensive, case-by-case determination." Analogizing this issue to the recently litigated question of whether a state-owned entity may be an "instrumentality" of a foreign government, the DOJ said it would consider, among "numerous other factors":

> The structure and distribution of power within a country's government; a royal family's current and historical legal status and powers; the individual's position within the royal family; an individual's present and past positions within the government; the mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, for example, royal succession); the likelihood that an individual would come to hold such a position; [and] an individual's ability, directly or indirectly, to affect governmental decision making.

None of these factors, the DOJ said, is dispositive. As a result of the facts presented in the request, including that the royal family member "holds no title or position in the government, has no governmental duties or responsibilities, is a member of the royal family through custom and tradition rather than blood relation, and…[is not] in line [by virtue of membership in the royal family] to ascend to any governmental post," the DOJ stated that it did not intend to initiate an enforcement action if the requestor moved forward with the engagement. This is an extremely helpful release that provides guidance for companies now operating in countries with royal families.

FCPA Opinion Procedure Release 2012-02 The DOJ issued its second FCPA opinion procedure release of 2012, and 58th overall, on October 18, 2012. This request and opinion cover the well-trodden path of "reasonable and bona fide expenses" incurred while sponsoring foreign official travel and does not materially add to the corpus of authority set forth in prior releases. Here, a number of adoption agencies sought to host a trip to the United States for 18 officials from a foreign government who are involved, to varying degrees, in overseeing the adoption process in the foreign country. Because the expenses proposed (including business-class airfare for several of the higher-ranking officials, business-class hotel rooms for all, and entertainment events of nominal cost) were reasonable and directly related to a legitimate purpose—allowing the government officials to interview the requestors' staff members, to inspect the requestors' files, and to meet with families who had adopted children from the officials' home country—the DOJ found no indications of corrupt intent. It concluded that the proposed travel sponsorship fell within the FCPA's affirmative defense covering "reasonable and bona

fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official…directly related to…the promotion, demonstration, or explanation of products or services…." 15 U.S.C. § 78dd-2(c)(2)(A).

UK Anticorruption Developments in 2012

The Bribery Act 2012 saw only the second conviction in the brief, 18-month history of the United Kingdom Bribery Act 2010 (UKBA), neither of which related to international bribery. The 2012 case involved a taxi driver prosecuted for offering a £300 bribe to obtain a taxi license. Given the nature of international corruption investigations, which typically take at least several years to complete, it is unsurprising that UKBA prosecutions are taking some time to get out of the gate. But the slow pace of enforcement will not last: the UK Serious Fraud Office (SFO) noted in a March 2012 OECD report that it had 11 active foreign bribery investigations and a further 18 cases under active consideration.[20]

Pre-UKBA foreign anticorruption enforcement: individual defendants UK prosecutors obtained six foreign corruption convictions of individual defendants in 2012 under pre-UKBA statutes, including the Prevention of Corruption Act 1906 and Public Bodies Corrupt Practices Act 1889. These convictions included Paul Jennings and David Turner, former executives of Innospec Limited who have previously settled civil FCPA charges with the SEC in relation to the same alleged bribery of public officials in Indonesia and Iraq (both await sentencing), and Philip Hammond, Andrew Rybak, Ronald Saunders, and Barry Smith, in relation to engineering and construction projects in Abu Dhabi, Egypt, Iran, Russia, and Singapore (they were sentenced to 36, 60, 42, and 12 months' incarceration, respectively). A seventh individual defendant, Bill Lowther, former nonexecutive director of bank note printing company Securency International Pty Ltd., was acquitted at trial of charges that he attempted to corruptly secure currency printing contracts in Vietnam. Finally, at least eight individuals are awaiting trial for alleged foreign corruption violations of pre-UKBA statutes, including:

- Trevor Bruce, Paul Jacobs, Bharat Sodha, and Nidhi Vyas, all former executives of a Nigerian subsidiary of the Swift Group of companies, a UK-based provider of manpower services to the oil and gas industry, arrested on December 17, 2012, on charges of paying bribes to Nigerian revenue officials to avoid or reduce employment taxes;
- former Innospec Limited executives Dennis Kerrison and Miltiades Papachristos, each of whom pleaded not guilty to a charge of conspiracy to corrupt public officials in Indonesia; and
- Bruce Hall and Victor Dahdaleh, the former CEO of Alba and a third-party agent employed by Alcoa, respectively.

Pre-UKBA foreign anticorruption enforcement: corporate defendants On November 23, 2012, the Scottish Crown Office (SCO), Scotland's counterpart to the SFO, announced a £5.6 million civil recovery against drilling company Abbot Group Ltd. The SCO's press release provides little detail in light of expected further charges against individual defendants, stating only that Abbot "admitted that it had benefited from corrupt payments made in connection with a contract entered into by one of its overseas subsidiaries and an overseas oil and gas company." The activity came to light after an internal investigation resulting from an inquiry by an overseas tax authority. Abbot self-reported under the SCO's amnesty program.

On July 3, 2012, the SFO announced a civil recovery order of nearly £1.9 million against Oxford Publishing Ltd., a subsidiary of Oxford University Press. The order related to profits from public contracts for the supply of educational materials that Oxford subsidiaries allegedly improperly obtained in East Africa between 2007 and 2010. The company launched an internal investigation and self-reported to the SFO in November 2011. In addition to the civil recovery order, Oxford agreed to the imposition of an independent compliance monitor. Oxford also settled with the World Bank. In response to OECD criticism that the UK civil recovery process is not sufficiently transparent, the SFO published a list of eight reasons it had pursued a civil recovery, rather than criminal prosecution, in the Oxford case, including:

1. the higher evidentiary threshold for criminal prosecution would not likely be met in a contested criminal action;
2. the difficulty of obtaining foreign-based evidence and testimony for a contested criminal action;
3. Oxford self-reported the matter and cooperated in the SFO's investigation;
4. there was no evidence of board-level involvement in the alleged corruption;
5. the products provided by Oxford were of a good standard and supplied at "open market" values, thus the agencies victimized by the corruption did not overpay for substandard products;
6. resolving the matter civilly was a better deployment of scarce agency resources than litigating the matter criminally;
7. Oxford will fully disgorge profits from all tainted contracts; and

8 the two Oxford subsidiaries implicated in the corruption will be subject to parallel World Bank debarment proceedings.

UK authorities brought a third corporate enforcement action for foreign corruption in 2012 against Mabey Engineering (Holdings) Ltd.[21]

FSA inspections continue The UK Financial Services Authority (FSA) reviewed the antibribery and corruption systems and controls at a number of investment banks in March 2012, identifying numerous shortfalls in the controls and compliance infrastructures. The FSA also signaled that its review would result in enforcement actions against some of the individual banks reviewed, but these have not yet been made public.

In December, the FSA launched a review of 22 asset managers for their compliance with the FSA's antibribery and corruption requirements. A final report is due in the third quarter of 2013.

UK legal/regulatory developments The DOJ has long made frequent and effective use of deferred and nonprosecution agreements as vehicles for corporate FCPA settlements, a practice recently adopted by the SEC. In 2012, the United Kingdom began a public consultation process to consider the implementation of such a practice. On October 23, the Ministry of Justice published its consultation response and announced that it would introduce the practice of deferred prosecution agreements in England and Wales. Schedule 16 of the Crime and Courts Bill, which is currently passing through Parliament, will provide the legislative framework, including a provision calling for the issuance of a code of practice for prosecutors providing procedural guidance on deferred prosecution agreements. The bill is expected to be passed into law in the spring of 2013, but it is currently unclear when Schedule 16 will come into force.

As currently drafted, a key difference between the current use of deferred prosecution agreements in the United States and their prospective use in the United Kingdom is the role of the judiciary. Namely, UK courts are set to play a more active role in the process of creating and monitoring deferred prosecution agreements, from early negotiations to the determination of whether a breach has occurred. Deferred prosecution agreements will likely only be available to corporate entities, partnerships, and unincorporated associations (individuals excluded) and only for specific offenses, including the Section 1, 2, 6, and 7 offenses under the UKBA.

Other significant regulatory developments in the United Kingdom during 2012 include:

- Revised SFO guidance on corporate self-reporting and hospitality/facilitating payments reflects a change in tone and emphasis rather than content. Prosecuting authorities will continue to apply the Code for Crown Prosecutors when determining whether to commence a prosecution, and the fact that a company self-reported will be one of several factors weighed as part of that decision. On December 6, 2012, the SFO published an open letter regarding facilitation payments, which reiterates its policy of prosecuting facilitation payments and calls on corporations to report any requests for such payments to local British consulates or embassies that can then work with the SFO and local law enforcement.[22]
- On October 25, 2012, the Crown Prosecution Service published *Interim Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* as part of a consultation process. Final Guidelines will be published after the consultation responses have been reviewed, but for now the Interim Guidelines call for cooperation and information sharing between government agencies, before setting out the following six principles for determining the jurisdiction in which a prosecution should take place:

1 the prosecution should be brought in the jurisdiction where most of the criminality or harm occurred;

2 whether relevant evidence can be made available to prosecutors within England and Wales;

3 to the extent possible, all prosecutions should be brought in one jurisdiction;

4 the location of witnesses, suspects, and defendants;

5 where other factors are finely balanced, the time and cost of bringing a prosecution in one jurisdiction relative to another; and

6 ensuring that sentencing and asset recovery powers are sufficient in the prosecuting jurisdiction relative to the seriousness of the crime.[23]

Beyond England and Wales

Scotland When the UKBA came into force, the SCO instituted an amnesty program for companies that self-reported violations within the first 12 months. That program was extended for a second year, until the end of June 2013. The civil recovery against Abbot Group was conducted under this amnesty program. In this context, it is worth noting that the current draft of the Crime and Courts Bill relates only to England and Wales and excludes Scotland from the operation of deferred prosecution agreements.

Scotland's Public Contracts (Scotland) Regulations 2012 and Utilities Contracts (Scotland) Regulations 2012 came into force on May 1, 2012. Under these regulations, a person or entity convicted of either a Section 1 or Section 6 offense under the UKBA can face mandatory exclusion from the tender process for the £9 billion in Scottish public contracts awarded annually.

Isle of Man The Isle of Man has published a draft Bribery Bill designed to replace the Corruption Act 2008. The bill is modeled closely on the UKBA and received its first reading in the island's Parliament on December 4, 2012.

Guernsey The Guernsey Financial Services Commission is introducing a new chapter on "Bribery and Corruption" to its *Handbook for Financial Services Business.* This is the Guernsey equivalent of the FSA Handbook. The new chapter, which broadly mirrors the FSA's requirements that firms put in place systems and controls designed to mitigate the risk of bribery and corruption, will come into force early in 2013.

British overseas territories On June 28, 2012, the UK government published a white paper on the British overseas territories, which include Gibraltar, the British Virgin Islands, Cayman Islands, Bermuda, and the Turks and Caicos Islands, calling on these territories to implement legislation giving effect to the OECD Convention. As yet, no implementing legislation has been published.

Other Global Anticorruption Enforcement Developments

Brazil The Brazilian Congress is currently considering new antibribery legislation that would significantly strengthen the country's anticorruption regime by establishing civil penalties for companies that engage in bribery of domestic or foreign government officials. Unlike the FCPA, the draft bill would not require Brazilian prosecutors to prove that payments were made with a corrupt intent; rather, it imposes strict liability on corporations once it is proven that a bribe was paid. Fines under the proposed law would also be quite harsh, potentially up to 20 percent of a defendant corporation's prior-year gross revenues (though there is a proposal to revise that to 20 percent of the allegedly corrupted contracts), as well as potential disbarment from public contracting for up to five years. The bill remains stalled in the House of Representatives after votes to take action on the bill were canceled several times.

Domestic corruption continues to present serious challenges to companies doing business in Brazil. In 2012, the Brazilian Federal Public Ministry initiated more than 5,000 investigations into allegations of corruption, embezzlement, influence peddling, and nepotism against domestic public officials. But in a glimmer of hope that the time of politicians engaging in corruption with impunity may be coming to an end, José Dirceu, a former top aide to Brazil's former President Luiz Inácio Lula da Silva, and dozens of other current and former government officials were recently convicted and sentenced for offering and paying bribes and committing other crimes as part of a massive congressional vote-buying scheme. This historic moment in Brazil's fledgling anticorruption effort has been hailed by the local media as the "trial of the century."[24]

China China is one of the most challenging jurisdictions in which multinational companies are doing business from a corruption standpoint, yet one of the most essential from an economic standpoint. Nearly one-third of the FCPA enforcement actions filed in 2012 involved allegations of corrupt payments in China, consistent with prior years. But it appears that, at least at the top levels of the Communist Party, there is a growing focus on tackling the country's corruption epidemic. For example, on November 18, 2012, Communist Party Chief Xi Jinping warned a group of party leaders that "[c]orruption could kill the party and ruin the country," while announcing a country-wide crackdown on corruption involving public officials.[25] In the ensuing weeks, the government began investigating potential misconduct involving numerous high-level officials, including a top provincial official in Guangdong, the former Shenzhen vice mayor, the mayor of Lanzhou, the Sichuan deputy party chief, and the director of the National Energy Administration. The investigations have alleged a wide variety of misconduct, including amassing wealth and luxury items disproportionate to known assets and income level, accepting improper gifts from property developers, acceptance of bribes in connection with official duties, and nepotism. China also has been active on the legislative and regulatory front, issuing a five-year plan to curb and punish corruption in August 2012. Changes to existing law included revised bribery offense rules issued by the Supreme People's Procuratorate and a pilot program in Guangdong Provision that requires all government officials to publicly declare their assets. Whether these reforms take root and make a difference in Chinese business culture remains to be seen. But if the current pipeline of FCPA investigations is any measure, do not expect the number of U.S. enforcement actions involving China-based conduct to drop off anytime soon.

France 2012 marked the first time that France held a corporation liable for public corruption. On September 5, 2012, a French court imposed a €500,000 fine on the Safran Group, an aeronautics and defense conglomerate partially owned by the French government, for allegedly making improper payments to Nigerian officials between 2000 and 2003 to secure a €170 million identity card contract. The court acquitted two Safran executives previously charged with bribery-related offenses. Safran has appealed the court's decision.

Further corporate prosecutions in France are forthcoming. At the time of this writing, French oil giant Total S.A. is standing trial, together with its Chairman and CEO Christophe de Margerie, for charges relating to alleged corruption in connection with the U.N. Oil-for-Food Program in Iraq.[26] Separately, Total recently announced in public filings that it has reserved $398 million for an upcoming FCPA settlement with the DOJ and the SEC to resolve allegations of bribery to retain Iranian gas field rights.[27]

France also continues to prosecute individual defendants who allegedly played a role in the decadelong Bonny Island-corruption scheme in Nigeria, which has led to more than $1.7 billion in penalties and forfeiture orders in the United States. On February 1, 2013, two former executives of French engineering and construction company Technip S.A., which settled FCPA charges with the DOJ and the SEC in 2010, were fined by a Paris court for their role in the scheme. French prosecutors also have charged UK solicitor Jeffrey Tesler, but his trial has been postponed until later in 2013 to await his release from federal prison in the United States, where he is serving a 21-month sentence on FCPA charges stemming from the same course of conduct.

Germany Germany continued to investigate and prosecute companies suspected of engaging in corrupt activities. On September 19, 2012, the Munich Regional Court sentenced Anton Weinmann, former head of MAN SE's Commercial Vehicles division and a member of MAN's management board, to a 10-month suspended jail sentence and a €100,000 fine for aiding and abetting bribery in connection with the sale of commercial vehicles in Slovenia. MAN's former chief executive officer and former head of finance reportedly remain under investigation. German prosecutors opened their corruption investigation into MAN's management after the onetime head of MAN's audit department testified in a related trial that both of these executives knew about potential corruption regarding the Slovenian business deals. On the legislative/policy front, in summer 2012, more than 30 leading German businesses, including Allianz, Daimler, Deutsche Bank, Deutsche Telekom, and Siemens, petitioned the German government to ratify the U.N. Convention against Corruption, arguing that Germany's failure to ratify the agreement "hurts the reputation of German businesses." The U.N. Convention against Corruption, which has been signed by 160 countries, commits signatory nations to take action against corrupt public officials within their own borders and calls on signatories to collectively combat corruption on an international level.

India In 2012, India saw another year of high-profile scandals, anticorruption protests led by hugely popular activists, and political wrangling over proposed anticorruption laws. On the domestic enforcement front, India's Central Bureau of Investigation filed corruption charges against five companies and 17 individuals in connection with the "Coalgate" scandal, a probe into alleged irregularities in the allocation of coal deposits.[28] On the international legislative front, Parliament continues to consider the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, which would prohibit bribery of foreign officials. And Prime Minister Manmohan Singh stated recently that his government is seeking to amend the Prevention of Corruption Act to include failure to prevent bribery by a corporation as an offense.

Mexico The number of recent FCPA enforcement actions involving Mexican government entities, together with the increasingly close cooperation between Mexican and U.S. regulators in pursuing potential corruption violations, has resulted in a growing number of domestic corruption investigations in Mexico. For example, following Bizjet's March 2012 FCPA settlement with the DOJ, Mexico's attorney general launched his own anticorruption investigation into Bizjet and the Mexican officials alleged to have accepted bribes in that matter. The heightened U.S. and Mexican anticorruption enforcement efforts have prompted several legislative developments aimed at reducing public corruption. Mexico's Ley Federal Anticorrupción en Contrataciones Públicas (Federal Law against Corruption in Public Contracting), which is designed to fill the gaps in Mexico's anticorruption legal framework to outlaw bribery of domestic and foreign government officials in public procurement, came into effect on June 12, 2012. The new law makes it illegal for any individual or company engaged in federal government contracting in Mexico to directly or indirectly offer money or gifts to a public official to obtain or maintain a business advantage in procurement. The law also outlaws other dishonest contracting practices, including evading federal contracting rules or requirements and participating in tenders in which an entity is not legally

entitled to participate. Sanctions under the new law include administrative fines of up to $10 million and debarment or suspension from participation in government contracts for up to 10 years. However, violators that self-report misconduct and cooperate with Mexican authorities may receive lesser penalties, including up to a 70 percent reduction of the amount of the fine.

Mexico's newly elected president, Enrique Peña Nieto, has made the fight against corruption one of the top priorities of his administration. Among other measures, he has placed the creation of a new National Anticorruption Commission—empowered to investigate corruption and prosecute government officials—at the top of his legislative agenda.

Russia In addition to the FCPA enforcement actions of 2012 involving activities in Russia, including Pfizer and Eli Lilly, 2012 witnessed several significant international anticorruption developments in Russia. In February, Russian President Dmitry Medvedev signed into law the OECD Convention and, 60 days later, Russia officially became a party to the convention. This moved Russia closer to joining the OECD and marked an important step in the country's efforts to uphold international antibribery standards. In March, the OECD Working Group on Bribery completed its phase 1 review of Russia's implementation and application of the OECD Convention, recommending, among other things, that Russia ensure that its foreign bribery offense cover nonpecuniary benefits, as well as promises and offers of bribes, and cover third-party beneficiaries under the bribery offense for legal entities. In another positive development, in August, after a long period of negotiations, Russia joined the World Trade Organization, a move likely to increase the transparency and openness of Russia's fast-growing economy.

Despite Russia's seemingly steady progress toward combating corruption in 2012, the year ended on a decidedly negative note. On December 14, 2012, U.S. President Barack Obama signed into law a bill commonly referred to as the Magnitsky Act, which allows the United States to impose sanctions in the form of visa bans and asset freezes on Russian officials believed to have been involved in gross violations of human rights. The law was triggered by the death of, and is named after, Russian lawyer Sergei Magnitsky, whose testimony to Russian enforcement agencies implicated Russian interior ministry and tax officials and members of the Russian judiciary in a scheme involving an unlawful takeover of several companies owned by a foreign investment firm and refund of $230 million in taxes previously paid by the investment firm. After his testimony, the lawyer was arrested on tax evasion charges allegedly perpetrated by the investment firm and died in prison, reportedly from untreated illness coupled with harsh treatment. On December 28, Russia retaliated, with President Putin signing a bill that conversely bans U.S. officials believed to have violated the rights of Russian citizens from entering Russia and allows the freezing of their assets in Russia, temporarily suspends the activities of nongovernmental organizations that receive foreign funding, and bans U.S citizens from adopting Russian children.

And in another 2012 setback, on September 11, President Putin issued a decree prohibiting strategic Russian companies from responding to investigative inquiries of foreign enforcement agencies without consent from the Russian government. The decree—reportedly issued to block the European Commission's inquiry into Gazprom's natural gas pricing and sales policies—is expected to hamper efforts to conduct internal investigations at Russian companies considered strategic enterprises under Russian law in response to requests of foreign enforcement agencies. Indeed, the Russian government may prohibit strategic Russian enterprises from cooperating with foreign enforcement agencies if doing so would harm Russia's economic interests.

Conclusion

As each year passes, the FCPA becomes a more nuanced and sophisticated area of law practice. With the 2012 Resource Guide by the DOJ and the SEC, and numerous litigated decisions by federal district courts across the country, 2012 fulfilled its promise in this respect. Companies, their executives, and their directors should expect and prepare for more of the same in 2013 and the years ahead.

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