Shearman & Sterling LLP

FCPA DIGEST

Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act

MARCH 2010

SHEARMAN & STERLING LLP

Recent Trends and Patterns in FCPA Enforcement

(March 4, 2010)

Philip Urofsky & Danforth Newcomb

Shearman & Sterling LLP

Recent Trends and Patterns in FCPA Enforcement

TABLE OF CONTENTS

Page

I. Enforcement Actions....2

The Year of the Individual....2

Corporations....2

Enforcement Involving Foreign Companies....4

Penalties....7

II. Enforcement Initiatives....8

III. Enforcement Resources....9

IV. Aggressive Prosecution Theories....10

Prosecution of Corrupt Foreign Officials....10

Enforcement Against Foreign Nationals....11

Aggressive Enforcement Tactics....13

V. A Flexible Approach to Enforcement....14

Expansion of Cooperation Incentives....15

Monitors and Alternatives to Monitors....16

Negotiated Settlements to Avoid or Minimize Collateral Consequences....17

VI. Focus on the Role of Finance and Legal Personnel....18

Copyright © 2010 Shearman & Sterling LLP

Recent Trends and Patterns in FCPA Enforcement

After the groundbreaking corporate prosecutions of *Siemens* and *Halliburton/KBR* in late 2008 and early 2009, the nature of FCPA enforcement appeared to significantly change in 2009. Although, in overall numbers the DOJ and the SEC continued to bring a significant number of cases, particularly with respect to individuals, many of the corporate cases brought in 2009 involved smaller companies and smaller fines in comparison to recent years. One might have been tempted to argue that this represented at least the beginning of a trend – that the DOJ and the SEC had exhausted the pipeline of post-Sarbanes Oxley voluntary disclosures by big companies and were now focused on smaller companies without basic compliance structures – but this would have been a mistake. Indeed, large companies are hardly out of the woods, and the first months of 2010 saw the announcements by *BAE*, *Technip*, *Daimler*, and *Alcatel-Lucent* that they had settled or were close to settling long-running FCPA investigations with a combination of guilty pleas and SEC settlements. In addition, a number of other companies, including *Innospec*, *Pride International*, and *ENSCO*, have announced they expect to complete their negotiations with the government in the near term.

Senior DOJ and SEC officials of the Obama Administration have repeatedly promised a robust program of enforcement, including proactive initiatives focusing on specific business sectors, particularly the pharmaceutical industry. Nevertheless, the DOJ's focus on individuals will undoubtedly have an impact on enforcement in the coming year. As of March 1, the DOJ has 38 individuals awaiting trial; some, such as the six *Control Components* defendants charged with a single conspiracy, will potentially be tried together, while others, such as the 22 defendants in the law enforcement supply cases, are likely to stand trial separately. Trials drain resources, and although we expect that the DOJ's Fraud Section will call upon other parts of the Department for assistance, it is likely to be stretched thin in the near future.

As we report the developments since our last report in October, and the overall enforcement patterns over the last few years, we have noted the following new and continuing trends and patterns:

- The DOJ's announced intention of focusing on individuals as well as corporations has clearly been manifested in the indictment of eight executives of *Control Components* and the undercover sting against 22 individuals in the military and law enforcement supply industry.
- Existing enforcement initiatives concerning specific industries or types of conduct continue to bear fruit, while the U.S. authorities have announced their intention to commence additional such initiatives, particularly with respect to the pharmaceutical industry.
- The risk of investigations and prosecutions in some OECD countries continues to rise, and the U.S. approach to encouraging voluntary disclosures and permitting private internal investigations is beginning to take hold overseas.
- However, foreign corporations remain squarely in U.S. enforcement authorities' sights, with the U.S. authorities apparently pushing and prodding their foreign counterparts to be more active or see their companies prosecuted in the United States.
- The SEC is increasingly and vocally focusing on the role of the finance department in FCPA compliance.

Recent Trends and Patterns in FCPA Enforcement

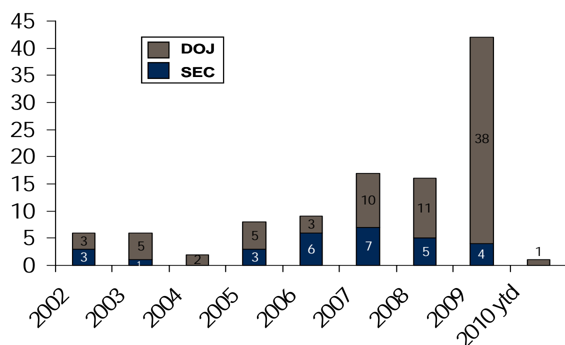
I. Enforcement Actions

The Year of the Individual

In the past few years, we have noted that, amongst the many publicized prosecutions of corporations, there have been an increased number of prosecutions of individuals. The past year has confirmed that trend, and disclosed perhaps an even more interesting trend – the DOJ's determination to indict *groups* of individuals, both within a single company (CCI) and within a single industry (the gun cases).

Such a strategy obviously generates a great deal of attention, and the authorities clearly hope that these cases will have a significant deterrent effect. As Lanny Breuer, the new head of the DOJ's Criminal Division, stated recently, "Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations." However, as we have previously noted, cases against individuals can pose significant risks for the government. Unlike corporations, individuals are likely to force the government to take its case to trial, where its legal theories will be examined by a judge and its factual theories by a jury. Even if the government's legal and factual theories stand up, at times its case may run into difficulties unrelated to the FCPA, such as the district court's dismissal of most of the counts in the *Bourke* case on statute of limitations grounds or the district court's failure to issue a final CIPA order in *Giffen*, which has delayed the trial in that matter for over six years. That said, the government has been substantively successful to date in virtually every case that went to trial, and it set a record for trials in 2009, with the *Greens*, *Bourke*, and *Jefferson* cases.

Individuals Charged: 2002-2010

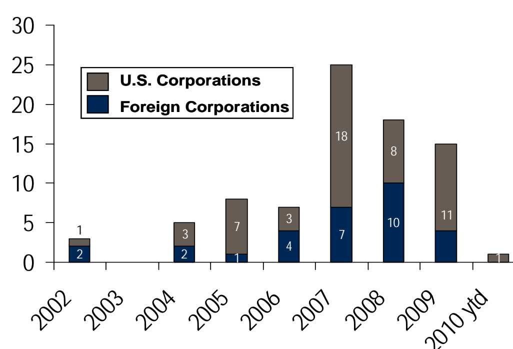


Corporations

Prosecutions under the FCPA appear to be breaking down into two categories. In the first are the more run-of-the-mill opportunistic cases in which the government learned of specific conduct within a specific company and brought a prosecution. Each of these cases may be instructive in reflecting how the government investigates and prosecutes corporate crime and provide important guidance on the pitfalls of

FCPA compliance – or the lack thereof. For example, the *Latin Node* case demonstrates the risks a buyer faces when relying on a seller's representations in an M&A matter rather than conducting thorough pre-acquisition due diligence. The *Nature's Sunshine Products* case demonstrates the SEC's willingness to reach beyond the FCPA to use other sections of the securities laws to hold senior executives individually liable for failure to ensure compliance by their subordinates.

In the second are those where the DOJ and the SEC clearly intend to send specific messages to foreign companies and, as importantly, foreign law enforcement authorities, or to effect change in specific industries. As discussed below, it seems fairly clear that despite some foreign enforcement activity, the U.S. authorities have grown somewhat impatient with some of their foreign counterparts and are flexing their jurisdictional muscles to reach foreign companies, sometimes with the cooperation of those foreign authorities and sometimes, we suspect, without it. Similarly, it appears that the government has identified particular industries where it believes improper payments are rampant and where it is not satisfied that FCPA compliance has taken hold. The recent "sting" against 22 dealers in the law enforcement supply industry may be one example of this strategy. The DOJ's announced pharmaceutical initiative is another.

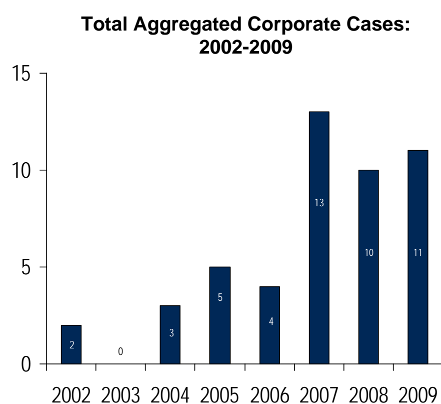


Despite the increased focus on individuals, there is no reason to believe that the historical trend toward prosecution of corporations is ebbing. Indeed, the *Principles of Federal Prosecution of Business Organizations*, first issued in the Clinton Administration under the signature of Eric Holder, now the Attorney General, states clearly: "The prosecution of corporate crime is a high priority for the Department of Justice. . . . Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes." Thus, although the overall number of cases brought against corporations has declined from its peak in 2007, we do not interpret this as an indication that the government is deliberately bringing fewer corporate cases.

We should note here that the counting of cases in the corporate context is particularly difficult, and the number of cases can be depicted in different ways. For example, in our chart we counted each company prosecuted as a separate enforcement action, much as we do when counting individuals. To us, this makes sense because each corporate "person" has been identified by the government as an individual actor. To some extent, this also addresses the difficulties posed by parallel enforcement actions by the DOJ and the SEC, since in many cases – but not all – the SEC reaches a civil settlement with the parent issuer while the DOJ brings a criminal charge against a subsidiary (albeit often with some form of agreement with parent as well).

It would also, however, make sense to aggregate actions against families of corporations, on the theory that the decision of which entities to charge and how many is often negotiated between the government and the parent. To further focus on how many corporations found themselves in the government's crosshairs, we could also group actions brought by both the DOJ and the SEC, counting an SEC or DOJ action separately only if the other agency did *not* bring a case against a related entity. If we approached the matter in this way, the *Siemens* matter would have counted as one case rather than five, and the total number of corporate "cases" brought over the past several years would be 48.

Finally, we should note that we are missing one critical statistic – the number of corporations that were *not* prosecuted by either the DOJ or the SEC. Both agencies have prosecutorial discretion and both have publicly announced that they will reward corporations who voluntarily disclose and cooperate. As discussed below, in many cases, this reward takes the form of a deferred or non-prosecution agreement. There are, however, very likely cases where the government chose not to bring any action. The authorities have acknowledged as much in various public statements, but we have not been able to identify any specific matter, and, as reflected in the "pending investigations" section of the *Digest*, many cases have lingered for many years without any formal closure.



Further, under U.S. law, a corporation is criminally liable whenever a employee or agent violates the law while acting within the scope of his or her duties and at least in part on behalf of the corporation. We have noted a number of matters in which individuals have been charged without any charges being brought against their employer or principal. It is not clear whether the government has chosen not to charge the corporation or is simply not ready to proceed. In some cases, it may be because the corporation was essentially an alter-ego of the defendant, as is the case with some of the defendants in the law enforcement supply case. On the other hand, in others it may be because the government has not completed its investigation or is still negotiating a settlement. For example, in August 2008, the government obtained an indictment against *Ousama Naaman*, an agent of *Innospec*; in February 2010, the company announced that it was establishing an accrual of $40.2 million to cover the costs of an anticipated settlement with the SEC, the DOJ, and the U.K.'s Serious Fraud Office (SFO).

Enforcement Involving Foreign Companies

In previous *Trends & Patterns*, we have identified as a trend the practice of U.S. enforcement authorities seeking opportunities to bring actions against foreign companies, particularly those based in countries

with a poor track record of enforcing their own transnational bribery statute. The pace of such prosecutions appeared to slow in 2009, and, indeed, the *only* foreign corporation prosecuted in 2009 was *Novo Nordisk*, which was prosecuted for books-and-records violations related to the U.N. Oil-for-Food Program and not for FCPA bribery. Thus, one might have been tempted to say that the U.S. authorities were sitting back to observe whether the *Siemens* prosecutions in the United States and Germany effected any change of attitude or energy amongst their foreign counterparts.

Any lull in enforcement against foreign corporations, however, came to a noisy end at the beginning of 2010. The cascade of disclosures of settlements involving foreign corporations in early 2010 demonstrates that the U.S. has no intention of turning down the heat. Granted, all of these matters arise from investigations that started many years ago and it is possible that the sudden surge of settlements reflects an effort to clear the docket, but it is notable and probably not a coincidence that *all* of the FCPA enforcement actions announced to date in 2010 have involved non-U.S. companies.

As described in more detail in the *Digest,* the DOJ has reached negotiated settlements, some of which have yet to be approved by the courts, in the following cases:

- *BAE Systems Plc*. The history of the BAE investigation is tortured, with the U.K.'s SFO opening a number of investigations only to be directed in December 2006 by the then Prime Minister to close the largest of them – involving alleged bribery in connection with the "al-Yamanah" contract with Saudi Arabia. The U.S. authorities have long had their eye on BAE as well, as reflected in certain formal representations concerning compliance that BAE made to the U.S. government as early as 2000. In 2005, the DOJ formally opened an investigation and for many years aggressively pursued it, including detaining and subpoenaing BAE's executives when they traveled through U.S. airports. On March 1, 2010, BAE entered a guilty plea to conspiring to violate a number of U.S. laws, including making false statements and certifications to various U.S. agencies concerning its compliance with the FCPA. Although it did not plead guilty to FCPA bribery itself, the various pleadings clearly document a practice of making "suspicious payments" while "aware that there was a high probability that part of the funds would be passed on to a foreign government official to influence a decision" and "that there was a high probability that the payments would be used to influence government decision makers." The pleadings describe a compliance culture designed to facilitate and conceal these payments and explicitly refer to inappropriate payments in connection with sales in Saudi Arabia, the Czech Republic, and Hungary. The company agreed to pay a $400 million fine (calculated based on $200 million in suspicious payments) and to retain an independent monitor. At the same time, it announced a settlement with the SFO in which it agreed to pay a penalty of £30 million.
- *Alcatel-Lucent.* The *Alcatel* matter, which initially involved only payments to Costa Rican officials, began in October 2004. DOJ turned the heat up in late 2006 when it arrested an Alcatel executive, *Christian Sapsizian*, while he transited through the Miami airport. Sapsizian

subsequently pleaded guilty in June 2007, and we have waited for the other shoe to drop ever since. In February 2010, the company announced that it had reached an agreement in principle with the DOJ and the SEC in which the parent company, now Alcatel-Lucent, would be given a deferred prosecution agreement and SEC consent judgment, while three of its subsidiaries would plead guilty to FCPA violations in a number of countries including Costa Rica, Taiwan, and Kenya. The company announced that it will pay a total criminal and civil penalty of $137.4 million and will agree to retain a French independent monitor.

- *Daimler AG*. The *Daimler* matter first came to light in 2004 as a result of a whistleblower complaint by a U.S.-based internal auditor concerning slush funds maintained by various Daimler entities in South America. In its 2005 annual report, Daimler (then DaimlerChrysler) said its internal investigation found that "improper payments were made in a number of jurisdictions, primarily in Africa, Asia and Eastern Europe. These payments raise concerns under the U.S. FCPA, German law, and the laws of other jurisdictions." In addition, Daimler (then DaimlerChrysler) was named in the Volker Report on the Iraq Oil-for-Food scandal. On February 12, 2010, Daimler announced that it had agreed to pay approximately $200 million to settle the DOJ and SEC investigations and that two of its subsidiaries would enter guilty pleas. This agreement is currently pending approval by a U.S. district court.
- *Technip*. The *Halliburton/KBR* matter first began several years ago as a result of a French magistrate's investigation of Technip's participation in the TSKJ joint venture to construct natural gas "trains" at Bonny Island in Nigeria. After the French essentially dropped the investigation, the U.S. picked up it up and eventually prosecuted the U.S. partner in TSKJ, *Kellogg Brown & Root* and its parent, *Halliburton*. However, as we previously noted, the DOJ also gave notice that it had the foreign partners in its sights by naming them as unindicted co-conspirators and alleging correspondent account liability. On February 12, 2010, Technip announced that it was close enough to concluding agreements with the DOJ and the SEC – which it carefully noted did not include a criminal conviction for Technip itself[1] – that it was recording an exceptional charge of €245 million.

This is not to say, however, that there have not been any notable foreign enforcement actions. In the U.K., the Financial Services Authority fined *Aon Limited* £5.25 million in January 2009 for failing to take reasonable care to establish and maintain effective controls to counter the risks of bribery and corruption associated with making foreign payments. The British construction company *Mabey & Johnson* pleaded guilty in July 2009 to bribing foreign officials and violations of the U.N. Oil-for-Food program. *Mabey &*

[1] The phrasing of the announcement is almost certainly ambiguous. This could, of course, mean a purely civil settlement with the SEC, but that is unlikely. More likely, the final resolution will entail both a civil settlement with the SEC involving the parent issuer and some form of deferred prosecution with the DOJ involving the parent issuer. What is unknown is whether any subsidiary of Technip will, as in *ABB*, *Siemens*, *Daimler*, and *Alcatel-Lucent*, be required to enter a guilty plea.

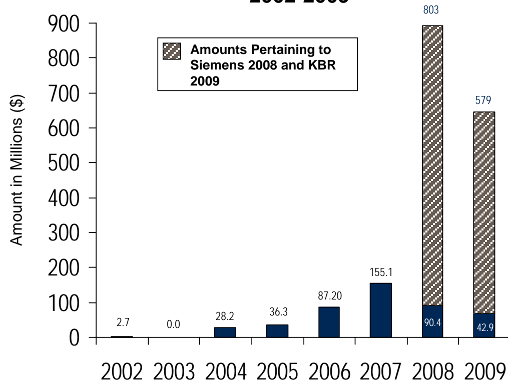
Recent Trends and Patterns in FCPA Enforcement

Johnson was sentenced to £6.6 million in fines and agreed to retain a compliance monitor approved by the SFO. In February 2010, the SFO brought charges against *Innospec*'s U.K. subsidiary alleging bribery in Indonesia. Further, close on the heels of the *Siemens* matter, the Munich prosecutor in Germany brought an action against *MAN*, one of the world's largest truck manufacturers, for bribes paid in a number of countries and imposed a fine of €150 million.

In another turn, in several matters, foreign law enforcement authorities have followed on FCPA investigations by opening investigations of their own. For example, following the U.S. enforcement action against two of *AB Volvo*'s subsidiaries for violations of the Oil-for-Food program, the Swedish prosecutors brought actions against two employees of Volvo's Swedish subsidiary, VCE. Similarly, following the announcement of U.S. FCPA investigations, the Indian authorities have announced investigations of *Xerox Modi* and *Dow Agro*. In the TSKJ matter, the DOJ acknowledged the assistance of the Italian authorities, suggesting that there may be an investigation of the Italian partner, and *Halliburton* announced in February 2010 that it was seeking to negotiate a plea agreement with the SFO in the U.K. Finally, of course, a number of countries have opened investigations of various *Siemens* projects.

Penalties

The enormous aggregate penalties paid by *Siemens* (approx. $1.5 billion) and *Halliburton/KBR* ($600 million) continue to be outliers. For FCPA bribery cases, the highest fine in 2009 apart from the *Halliburton/KBR* matter was the $18 million fine assessed against *Control Components*. Indeed, the corporate penalties assessed in 2009 were far less, with most of the corporate penalties falling between $1 million and $3 million (*Helmerich & Payne*, *UTStarcom*, *Latin Node*, and *ITT Corp.*). Several SEC matters came in even lower, with *United Industrial Corp.* paying approximately $340,000 in disgorgement and pre-judgment interest, *Avery Dennison* paying approximately $500,000 in fines, disgorgement, and pre-judgment interest, and *Nature's Sunshine Products* paying a civil fine of $600,000. On the other hand, the Oil-for-Food investigation continued to reap considerable dividends for the government, with *Novo Nordisk* and *AGCO* paying approximately $18 million and $20 million respectively in aggregate penalties (DOJ penalties, SEC fines, disgorgement, and pre-judgment interest).



The picture, however, promises to be much different in 2010. Each of the companies that have announced settlements so far have projected penalties of far more than the 2009 cases: *BAE* ($400

million), *Daimler* ($200 million), *Technip* ($400 million), and *Alcatel-Lucent* ($200 million). Several other companies have also announced that they believe they are close to settling long-standing investigations and some, such as *Innospec,* have announced accruals in the $40 million range.

On the individual side, the backlog of individuals convicted at trial or having pleaded guilty is beginning to clear as they are sentenced. In 2009 and early 2010, five individuals were sentenced to terms ranging from one year to five years. The lower end of the range (*Jim Bob Brown* and *Jason Edward Steph*) most likely represents credit for cooperation. The high end, (*William Jefferson*) represents the combination of offenses for which he was convicted at trial. As of today, there are 14 individuals with sentencing hearings scheduled in the remainder of 2010 and two who will not be scheduled until 2011.

II. Enforcement Initiatives

As we have noted in the past, the DOJ has a number of "industry initiatives," including investigations involving a number of medical device manufacturers and investigations involving payments to customs officials in the oil-and-gas sector, and, most recently, the law enforcement supply industry. These initiatives, however, have largely reactively focused on particular types of conduct or specific industries. For example, the medical device investigation spun off from a prior investigation into these manufacturers' domestic sales practices. Similarly, the customs payments investigation arose from the second *Vetco Gray* case, in which the company made payments to Nigerian customs officials through the Swiss global freight forwarder *Panalpina.* Similarly, the Volker Report on the U.N. Oil-for-Food scandal led to a number of investigations, some of which uncovered FCPA bribes in other countries.

More recently, both DOJ and SEC officials have indicated that they intend to be "proactive" in identifying industries and leveraging leads into broader investigations. For example, Lanny Breuer of the DOJ stated last year that the DOJ in the coming year would "continue to focus our attention on areas and on industries where we can have the biggest impact in reducing foreign corruption." Similarly, Cheryl Scarboro of the SEC stated recently that the SEC will be conducting "more targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both here and abroad." The recent arrests of law enforcement suppliers represents this new approach. In that case, the government used a standard law enforcement technique by proactively leveraging the evidence against one individual into a "sting" operation that snared 22 other individuals in the same industry. As a perverse practice tip, had the defendants followed FCPA matters more closely (and read the *Digest*), they might have realized that the apparent cooperator, *Richard Bistrong*, was a former employee of *Armor Holdings*, which had disclosed in 2007 that it had initiated an internal FCPA investigation and was cooperating with the DOJ and the SEC!

Finally, the pharmaceutical industry seems to be squarely in the DOJ's sights. The DOJ has already brought several actions against relatively small companies (*Syncor*, *Micrus*, *Diagnostic Products*) and several of the larger ones were caught up in the Oil-for-Food scandal (*Novo Nordisk*, *Akzo Nobel*). Further, as noted in the *FCPA Digest*'s list of ongoing investigations, several international pharmaceutical companies, including *Eli Lilly*, *Pfizer*, *Bristol-Myers Squibb*, *Millipore*, and *AstraZeneca*, have all announced FCPA investigations over the past several years. More recently, however, the DOJ seems to be suggesting that it is considering a more "proactive" inquiry into the sales practices of international pharma companies. For example, in one of his first major speeches as Assistant Attorney General, Lanny Breuer stated, "One area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead . . . [is] the application of the Foreign Corrupt Practices Act to the pharmaceutical industry. . . . Our focus and resolve in the FCPA area will not abate, and we will be intensely focused on rooting out foreign bribery in your industry. That will mean investigation and, if warranted, prosecution of corporations to be sure, but also investigation and prosecution of senior executives." In another speech, Mr. Breuer emphasized the importance the DOJ was putting on this issue, stating, "The depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates, in our view, a significant risk that corrupt payments will infect the process." What form this initiative will take is not clear, but we expect to see some action in the coming year.

III. Enforcement Resources

In previous years, we have noted the increased resources dedicated to FCPA enforcement by the DOJ, including more prosecutors and a squad of FBI agents dedicated to FCPA investigations. The recent "sting" involving military and law enforcement suppliers well demonstrates the DOJ's ability to mobilize even greater resources, as the "take-down" involved over 150 agents to make 22 arrests and execute 14 search warrants around the country.

In the past year, there have been significant changes in personnel at the DOJ, with new Obama Administration appointees in senior positions in the DOJ's Criminal Division and a new Chief of the Criminal Division's Fraud Section. Even more significantly, Mark Mendelsohn, the Deputy Chief of the Fraud Section responsible for FCPA enforcement, has announced that he will be leaving for private practice in 2010. Mendelsohn had large shoes to fill in replacing Peter Clark five years ago, and he has done so admirably by bringing significant prosecutions, increasing institutional resources, and expanding cooperative efforts with foreign prosecutors. Mr. Mendelsohn's replacement has not yet been named, and we do not know whether he or she will come from within the Fraud Section, from one of the U.S. Attorney's offices, or outside.

Changes are afoot at the SEC as well. In early 2009, Rob Khuzami, the new head of the SEC's Division of Enforcement, announced a reorganization of the Division to align it with the Commission's enforcement priorities. One of those priorities is FCPA enforcement, and, in January 2010, Khuzami announced the appointment of Cheryl Scarboro to be the SEC's head of FCPA enforcement. In her first speech in her new position, Ms. Scarboro identified the goals of the new unit as (i) to "gain in-depth knowledge of industries and regional practices so we can uncover corrupt practices that might otherwise go undetected;" (ii) bring cases that will "set[] important precedent and serve[] as a guide to the corporate world;" and (iii) "raise the Commission's profile on the global stage by playing a more active role in international regulatory working groups and building closer relationships with our regulatory counterparts in other countries."

IV. Aggressive Prosecution Theories

In past *Trends & Patterns*, we have noted a number of aggressive theories embraced by the government in various pleadings. These included allegations of territorial jurisdiction over U.S. dollar transfers between foreign banks based on the use of correspondent accounts in the United States, a claim that may be repeated in the forthcoming settlement with *Technip*. In addition, we have noted, the government's expansive interpretation of the statute's "business nexus" element and the SEC's willingness to impute knowledge to the parent of acts by its subsidiaries. Nothing in the recent cases indicates any intention by either agency to back away from these theories, and it is not clear that they will be at issue in any of the upcoming trials.

We think it worthwhile to point out several developments under this topic that we have noted in the most recent cases.

Prosecution of Corrupt Foreign Officials

First, having previously expanded its palette of statutes, particularly in the *Giffen* and *Green* cases, in which it charged, in addition to the FCPA counts, counts alleging money laundering, tax evasion, obstruction of justice, wire fraud, and honest services fraud,[2] the government is now seeking ways in which to hold the foreign officials accountable under U.S. law. This is a significant development, which both builds on and is contrary to previous FCPA practice.

Some history is appropriate to understand the significance of this trend. On its face, the FCPA applies only to the "supply side" of bribery – the person offering or paying the bribe and not the official receiving it. In the earliest days of FCPA enforcement, the DOJ nevertheless occasionally sought to apply the FCPA

[2] The *Giffen* case has not, of course, yet gone to trial. In the *Green*'s trial, the government voluntarily dropped the money laundering count during the trial and the jury was unable to reach a verdict on the obstruction of justice count.

to foreign officials. For example, in 1990, the DOJ charged two Canadian officials, *Castle* and *Lowry*, with *conspiring* to violate the FCPA, but the courts rejected this theory, holding that a foreign official could not be held liable for conspiring to violate a statute that he could not be charged with violating directly. Subsequently, in 1994 in the *GE* case, the U.S. charged *Rami Dotan*, the Israeli general who received the bribes, with conspiracy to violate the FCPA's *books and records* provisions as well as diversion of U.S. funds into his personal bank account. Dotan was subsequently prosecuted in Israel and never stood trial in the United States.

Since then, until last year, there have been no FCPA cases involving foreign officials.[3] In 2009, in two separate cases, the DOJ charged the foreign officials who allegedly received bribes from U.S. individuals with assorted crimes other than the FCPA. For example, in the *Green* case, the government charged Gerald and Patricia Green with bribing an official of the Tourism Authority of Thailand (TAT). Following their conviction, in January 2010 the government unsealed an indictment against *Juthamas Siriwan*, the former TAT official, and her daughter, charging them with money laundering and conspiracy relating to the transportation of the bribes across state lines. Similarly, the government charged *Jean Rene Duperval* and *Robert Antoine*, both former officials of Telecommunications D'Haiti, with money laundering in an indictment that charged several U.S. citizens and residents with FCPA violations. Although these individuals, if they stand trial (only Duperval is in U.S. custody at this time) will likely raise the *Castle and Lowry* case, it is not clear how successful they will be as the money laundering statute explicitly includes foreign corruption laws as predicate offenses.

Both of these cases seek forfeiture of the bribes allegedly paid to these officials. This is consistent with the U.S. effort in the *Siemens* matter to compel forfeiture of the amounts paid to the son of the former prime minister of Bangladesh and other officials. In that *in rem* action, the U.S. has apparently successfully "served" the funds in the Singapore bank and has announced that it will seek a default judgment in the U.S. court.

Enforcement Against Foreign Nationals

Over the years, the DOJ and the SEC have occasionally charged foreign nationals. With some exceptions, such as the employees of *ABB Vetco Gray (UK)*, most of these nationals were residents of the United States. In recent years, however, the DOJ in particular has aggressively pursued foreign nationals in a number of contexts.

The most spectacular example is, of course, the case of *Christian Sapsizian*, a French national working for a French company (*Alcatel*), living in France, being paid in France, etc. Sapsizian, whose responsibility involved Alcatel's Latin American business, had the misfortune of being arrested while transiting through

[3] In a non-FCPA case, the U.S. prosecuted Pavlo Lazarenko, the former prime minister of Ukraine, for laundering corrupt payments through U.S. accounts and honest services fraud. There were no allegations in that case, however, that any individual had violated the FCPA by paying bribes.

the Miami airport and, relevant to the actual offense, of having authorized payments to Costa Rican officials through a U.S. bank account. Sapsizian subsequently pleaded guilty to FCPA violations. In the same case, however, the U.S. indicted a Costa Rican national, *Edgar Valverde Acosta*, Alcatel's country manager in Costa Rica, presumably using the same jurisdictional grounds, but he has not come within their reach.

In the past few years, the DOJ has charged a number of other foreign nationals. For example, in 2008 it charged *Ousama Naaman*, a Lebanese/Canadian dual national with an office in the U.A.E., who acted as the agent of *Innospec*, a U.K. company, in Iraq. In March 2009, it charged Jeffery Tesler, a U.K.-based solicitor, who acted as the agent of TSKJ, and *Wojciech Chodan*, another U.K. national, who was a former employee of *M.W. Kellogg*, the predecessor to *KBR.* In November 2009, the U.S. charged *Fernando Maya Basurto*, a Mexican national who acted as the Mexican sales representative for a Mexican unit of ABB.

One "sub-trend" that bears watching is the difficulty the U.S. authorities have encountered in bringing individuals back to the United States for prosecution. For U.S. citizens, the U.S. authorities have a number of tools. For example, in 2008, the U.S. revoked *Paul Novak*'s passport, which forced him to return from South Africa to the U.S. where he was arrested on a sealed indictment. For non-U.S. citizens, however, the record is much more mixed. Of course, if the U.S. is able to catch the non-U.S. citizen in the United States, it can arrest him, as it has done in a number of cases ranging from *David Mead,* a U.K. national employed in the U.S., to *Basurto*, the Mexican national who was arrested in Texas last year, to the several Israeli nationals arrested at the Las Vegas gun show this year. Similarly, as noted, the authorities were able to arrest *Sapsizian* when they found him transiting through the Miami airport. In some cases, the U.S. authorities have even had the informal assistance of foreign governments, as, for example, in the case of *Jean Rene Duperval*, a former executive of Telecommunications D'Haiti, who was transferred to U.S. custody in Miami after a special unit of the Haitian police first arrested him in Haiti and "expelled" him.

When the defendant cannot be found within the United States, however, the U.S. has often encountered difficulties. In the *Lockheed* matter in 1994, the U.S. successfully sought the extradition of *Suleiman Nassar* from, of all places, Syria. We have not, however, been able to identify any successful extradition of a FCPA defendant since then. In some cases, such as *Harold Katz* of the *General Electric* matter, it may be because his whereabouts is unknown. In other cases, such as those of *Pablo Barquero* and *Edgar Valverde Acosta*, both Costa Rican nationals, it is likely due to Costa Rica's rule, similar to that of some other countries, that it will not extradite its own nationals. (Countries that invoke such a rule are supposedly then obligated to prosecute their nationals, something that has not occurred in Costa Rica.)

Most significantly, the U.S. has run into delays and difficulties in [almost] every instance in which it has made a formal extradition request. Perhaps the longest-running example is that of *Frerik Pluimers* who was indicted as part of the *Saybolt* matter in 1998. In that matter, although the Dutch Supreme Court

rejected Pluimers' challenge to the extradition request several years ago, the Dutch Attorney General has thus far refused to execute the extradition order.

In more recent days, on January 26, 2010, the Bahamas Court of Appeals, its highest court, rejected the U.S. request for extradition of *Viktor Kozeny,* first indicted in 2005. In that case, the Court acknowledged that the lower courts had found that there was sufficient evidence, including his own admissions, that Kozeny had paid bribes to Azeri officials. It found, however, that, despite the Bahamas having ratified the 1996 Inter-American Convention against Corruption and the 2003 U.N. Convention against Corruption, such bribes were *not* illegal under Bahamian law, which prohibited only bribery of Bahamian officials. We expect that the U.S. will now appeal this decision to the Judicial Committee of the Privy Council in the United Kingdom. However, given that Bahamian law is presumably premised on the very English statutes that were criticized by the OECD Working Group on Bribery, it is difficult to estimate their likelihood of success.

In addition to these cases, the U.S. has a number of outstanding extradition requests. These include a request to Germany for the extradition of *Naaman* and to the U.K. for the extradition of *Tesler* and *Chodan*.

The SEC appears to have had more success in bringing civil actions against non-U.S. executives of issuers. For example, in the *ABB Vetco Gray* case, it charged four executives of *ABB Vetco Gray (UK) Ltd.*, three of whom are foreign nationals. It is worth noting, however, that all of the cases brought by the SEC against foreign nationals were settled before they were filed. Whether the SEC will have more success than the DOJ in forcing uncooperative non-U.S. nationals into court is yet to be seen.

Aggressive Enforcement Tactics

In previous *Trends & Patterns*, we noted that the expansion of resources and the creation of a "FCPA Squad" of FBI agents had led to more frequent use of traditional law enforcement tactics, such as informants, undercover agents, and border watches and detention of individuals entering the United States, in the investigation of FCPA matters. The takedown in January 2010 of 22 individuals following a two-and-a-half-year-long "sting" operation – in which two FBI agents posing as representatives of a foreign government official were introduced to the subjects by a confidential informant and then persuaded, as in a typical money laundering investigation, to show their good faith by making "test" transfer of funds to the official – amply demonstrates this trend, as does the splashy simultaneous arrest of the individuals and the execution of search warrants in at least 12 locations around the United States and also in the United Kingdom. Further, this case was initiated when the government unearthed evidence against one individual who thereafter cooperated as a confidential informant, persuading one individual after another to meet with the undercover agent. Although it might be difficult to repeat this trick with the individuals it so publicly "outed" by the arrests, it would be normal procedure for the DOJ and the FBI to offer the defendants lenient treatment in exchange for their cooperation and information concerning other players in the industry.

It is, however, too early to fully understand whether this case is truly significant. Certainly, as discussed above, the arrest of a large number of defendants will highlight the risk of individual liability and the government's willingness to use traditional law enforcement tools. However, despite the statements by DOJ officials that that their actions are a "turning point" in "the fight to erase foreign bribery from the corporate playbook," it is also clear that the vast majority of these defendants operated small businesses, even sole proprietorships, that lacked even rudimentary compliance controls. It is questionable whether the compliance controls present in most companies doing business abroad – even ones well short of state-of-the-art – would have allowed the "test" transaction so easily. Thus, we will have to see whether the DOJ is willing to mobilize sufficient resources to construct more elaborate and more sophisticated undercover schemes to target executives of larger corporations.

In addition, the ultimate success of this case is still unknown. By adopting the techniques of drug and money laundering investigations, the DOJ exposes itself to the same types of defense tactics used by defendants in those cases. Thus, although in most cases the taped conversations of a defendant are damning, as they may well be in these cases, it is clear that some of the defendants intend to raise an entrapment defense. Presumably one of the purposes of the search warrants was to develop evidence of the defendants' prior disposition to rebut such claims. Since, in the absence of a global overarching conspiracy, the DOJ charged the defendants in 16 separate indictments, it faces the possibility of having to try the defendants in at least 16 separate trials. For that reason, many of the defendants will have the opportunity of evaluating the success of an entrapment defense in earlier trials before committing to a plea and cooperation or forcing the government to trial in all of the cases.

V. A Flexible Approach to Enforcement

Perhaps as a flip side to aggressive theories and tactics, the government has shown some flexibility in approaching enforcement against corporations. Recently, the several enforcement agencies in the United States and elsewhere have announced policies or guidelines that provide for rewarding voluntary disclosure and cooperation. In addition, the U.S. authorities have recently shown more flexibility in determining when an independent monitor is necessary and in mitigating collateral consequences through imaginative charging structures.

Expansion of Cooperation Incentives

In 1999, the DOJ first announced the *Principles of Federal Prosecution of Corporations*. These *Principles*, together with the long-standing *Principles of Federal Prosecution* relating to individuals, identified a corporation's (or an individual's) cooperation as one factor that the Department would consider in determining whether to bring charges. In addition, the *Principles* suggested that, in appropriate circumstances, the Department would consider various forms of alternative enforcement

actions that would not result in a conviction. These alternative enforcement actions, beginning with *InVision* and *Monsanto* in late 2004/early 2005, are, of course, deferred prosecution and non-prosecution agreements (each having similar characteristics, except that the former involves a filed charging pleading).

This year, the SEC and the U.K.'s Serious Fraud Office have adopted their own versions of the *Principles*. On January 13, 2010, the SEC announced various changes in how the Enforcement Division will reward corporate cooperation, aligning the Division more closely with the approach taken by the DOJ. Thus, although there certainly have been instances in which the Enforcement Division closed an investigation without bringing an enforcement action, now, for the first time, the Enforcement Division has formally taken the position that a corporation may, through disclosure and cooperation, earn a resolution short of a formal enforcement action. Such resolutions include:

- cooperation agreements, in which the Division will recommend to the Commission that the corporation's cooperation be taken into account in determining the sanction;
- deferred prosecution agreements, in which the Commission will agree to defer any enforcement prosecution for a period of time in exchange for various compliance and cooperation undertakings by the corporation; and
- non-prosecution agreements, in which the Commission agrees not to bring any enforcement prosecution in exchange for various compliance and cooperation undertakings by the corporation (this is expected to be used in only limited circumstances).

This marks a significant departure from previous practice and represents Mr. Khuzami's previous experience as a federal prosecutor in New York.

In addition, the DOJ approach is also reflected in the July 2009 "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" white paper issued by the U.K.'s SFO. In that paper, the SFO encourages self reporting and provides guidelines for reporting, investigation, and settlement. The SFO notes that it expects to be notified at the same time as the DOJ if a matter is within the SFO's jurisdiction. Wherever possible, the investigation will be carried out by a corporation's professional advisors, at the expense of the corporation, and the SFO will participate in regular update discussions. If there is no self referral, the SFO states that the prospect of a criminal investigation followed by prosecution and a confiscation order is much greater, and the SFO will use all investigative tools at their disposal.

Monitors and Alternatives to Monitors

Since late 2004 and until very recently, virtually every FCPA corporate case resulted in the imposition of a monitor. (The exceptions largely being Oil-for-Food cases not involving bribery where the conduct involved a program no longer in existence.) In some recent cases, the U.S. authorities have not insisted on a monitor or have agreed to a "monitor-lite" of some sort. It is difficult to describe this as a "trend," as each determination was likely extremely fact-based.

Of the FCPA matters concluded in 2009, the DOJ or the SEC required the company to retain monitors in *Halliburton/KBR* and *CCI*. *Halliburton*, however, indicates the more flexible approach. In that matter, Halliburton's agreement was with the SEC only and focused on books-and-records and internal controls issues, while KBR, its former subsidiary, entered a plea to bribery. The SEC required Halliburton to retain an independent consultant to review its policies and procedures as they relate to compliance with the FCPA and then to adopt any recommendations. KBR's monitor, on the other hand, was the more standard three-year monitor with a mandate to report on KBR's compliance program as implemented. In the *Latin Node* case, the DOJ did not impose a monitor on the parent company, *eLandia*, perhaps because the conduct took place entirely within Latin Node, a company that eLandia had only recently acquired and had essentially liquidated upon learning of the unlawful conduct. On the other hand, in the *Control Components* case, the DOJ did impose a standard monitorship on the company. This decision is not surprising given that it had charged eight of the company's senior executives; it is notable, however, that the monitor's scope does not extend to CCI's English parent company.

The strongest examples of the DOJ's new approach is *Helmerich & Payne* and *UTStarcom*. In those cases, each company was permitted to essentially "self monitor." Pursuant to their agreements, the companies were to review their own compliance programs as well as to disclose any additional questionable or corrupt payments they discover. Thereafter, as with independent monitors, they are to submit two follow-up reports during the terms of their agreements on whether their programs are properly designed to detect and deter improper payments.

The picture on the SEC's side is murkier because the actual agreement is often not made public. Thus, it is often not clear whether the SEC required a monitor. In *Nature's Sunshine Products*, the SEC did not appear to require *any* compliance follow-up even though the company retained one of the implicated individuals as its CEO; it is possible, however, that given the matter's origination in alleged false statements to its auditors the SEC felt that the new auditors would be sufficiently vigilant to make a monitor unnecessary.

As noted, in the four corporate cases announced in 2010, the government has insisted on monitors in at least two of them (the details of the other two agreements have not been disclosed). All four companies are foreign corporations, and it appears that the DOJ may be following its approach in *Siemens* of allowing the company to retain a monitor of its own nationality. For example, in the *BAE* plea agreement, it states that the company will retain "an individual, a U.K. citizen who is eligible for the appropriate national security clearances and acceptable to [BAE] and the Department." Similarly, *Alcatel-Lucent* has announced that part of its agreement will include the retention of a "French monitor." It is not clear whether the DOJ will require, as it did in *Siemens*, that the foreign monitor retain a U.S. law firm to advise and assist it in its duties.

For those matters in which monitors were required, as noted in previous *Trends & Patterns*, in 2008, the DOJ announced a procedure in which the selection of monitors would be reviewed and approved by the

Deputy Attorney General's office. As a practical matter, it is not clear how this mandate will fit with the language of FCPA DPAs and NPAs. Pursuant to these agreements, the companies, not the DOJ, select the monitor after first submitting a list of candidates to the DOJ. Under this procedure, the DOJ vets the candidates, and the company, not the DOJ, selects and retains the monitor from those deemed acceptable by the DOJ. Only if none of the company's candidates are acceptable and the company does not then nominate additional candidates acceptable to the DOJ does the DOJ select the monitor.

The DOJ's decision to establish a formal procedure for selecting monitors was a response to criticisms and allegations of cronyism in the selection of monitors outside the FCPA area. A November 19, 2009 report by the Government Accountability Office about monitors provides some interesting hints as the possibility of cronyism on the other side. The GAO Report notes that although 48 agreements required the appointment of a monitor, in two of those matters no monitor had yet been appointed "due to challenges in identifying candidates with proper experience and resources and without potential conflicts of interests with the companies." This strongly suggests that either the company or its lawyers sought to select as a monitor lawyers deemed by the DOJ to be either too close to the company (or its lawyers) to be independent or unqualified to conduct the rigorous monitoring the DOJ expects.

Negotiated Settlements to Avoid or Minimize Collateral Consequences

Any enforcement action, but particularly criminal corruption prosecutions, may have significant collateral consequences. In the U.S., the simple return of an indictment charging a company with violation of the FCPA may result in suspension from federal contracting. A conviction will likely result in debarment and possible revocation of export privileges. These extra-legal consequences may be echoed at the state level as well. Similarly, in Europe, the EU's European Union Directive 2004/l8/EC, which has recently been enacted in all EU countries through implementing legislation, provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts. Other countries have similar debarment regimes.

For this reason, many companies negotiating a settlement with the government seek to have the parent company, if an issuer, enter into a civil settlement with the SEC and, at most, some form of agreement with the DOJ that does not result in a criminal conviction. The DOJ may insist on a plea from a subsidiary, but that would not result in automatic debarment of the parent company throughout all of its global operations.

In two recent cases, the DOJ has either explicitly or implicitly been sensitive to this issue. In *Siemens*, although the pleadings explicitly addressed pervasive corruption within the company, the DOJ allowed the parent company and one of its subsidiaries to plead only to violations of the books and records and internal controls provisions of the FCPA while two other subsidiaries pleaded guilty to violations of the anti-bribery provisions with respect to specific projects. The government did not explicitly explain this charging decision, but it was likely related to the risk of debarment faced by Siemens, a company that participates in a vast amount of government projects.

In *BAE*, a company whose customers were *entirely* foreign governments, the DOJ explicitly took debarment as a collateral consequence into account. In its sentencing memorandum to the court, the DOJ explained, "Mandatory exclusion under EU debarment regulations is unlikely in light of the nature of the charge to which [BAE] is pleading. Discretionary debarment will presumably be considered and determined by various suspension and debarment officials. . . . The Department will communicate with U.S. debarment and regulatory authorities, and relevant foreign authorities, if requested to do so, regarding the nature of the offense of which [BAE] has been convicted, the conduct engaged in by [BAE], its remediation efforts, and the facts relevant to an assessment of whether [BAE] is presently a responsible government contractor." Further, in the criminal information itself, the DOJ explicitly stated, "This Information and the facts set out herein do not relate to or represent any conduct of BAE Systems, Inc.," thus helping to protect BAE's U.S. subsidiary which had various contracts and security agreements with the U.S. government.

It is too early, of course, to determine whether this tactic is ultimately successful, given that many debarment authorities do have discretionary authority. However, it is worth noting that Siemens has not, in fact, been debarred from federal contracting and it negotiated limited voluntary debarment terms of one and two years with the U.N. and the World Bank. On the other hand, although *Siemens Argentina* pleaded guilty only to conspiracy to falsify Siemens' books and records and not to bribery, the company nevertheless withdrew its claim for damages in its arbitration action against Argentina, which had defended in part by alleging that the project in question – the subject of the U.S. enforcement action – had been obtained by bribery.

VI. Focus on the Role of Finance and Legal Personnel

The DOJ and the SEC have long held that the absence of a FCPA compliance program constitutes a failure to implement "reasonable *financial* controls" as required by the FCPA's books and records provisions. The natural consequence of this is that finance personnel are viewed as having a role in FCPA compliance and must demonstrate a reasonable degree of sensitivity to FCPA red flags and exercise judgment in maintaining the company's books and processing financial records, such as payment requests. Similarly, the legal department ought to be proactive in identifying and responding to red flags.

The SEC hammered these points home in the recent enforcement action against *AGCO* for books and records violations related to the U.N. Oil-for-Food program. In that matter, the marketing group at a U.K. subsidiary created a "fictional account" for "Ministry accruals" to cover payments to an agent to make unlawful payments to the Iraqi government. This account was purportedly to cover certain legitimate expenses of the agent that were already being recorded in another account. In its complaint, the SEC sharply criticized the company's finance department for permitting the payments to proceed, noting the following specific controls failures: (i) the accrual account was created with "virtually no oversight" from

the subsidiary's finance department; (ii) no one questioned why there were two accounts; (iii) no one questioned that nothing in the contract required an accrual of such an amount in proportion to the contract itself; (iv) the finance department "did not ask for or receive any proof of service to warrant the payments"; (v) no one questioned that the payments were made in a different manner and currency than previous payments to the agent; and (vi) no one questioned why the payments were greater than those normally and previously paid the agent. The SEC also noted that the sales and marketing group was able to enter into contracts "without review from the legal or finance department," and, indeed, some AGCO personnel viewed the finance department as a "blind loader" that failed to exercise any oversight in processing payments. Even more damning, the corporate audit department noted several issues relating to the subsidiary's practice of allowing the marketing department to establish accounts without input from the finance department, but the parent corporation failed to follow up on internal audit's concerns.

The SEC similarly expressed concerns about the fairly passive role of AGCO's legal department. For example, the SEC noted that, in addition to allowing the Iraqi contracts to be executed without legal review, the legal department was aware that the company was doing business in Iraq, a country then subject to U.S. economic sanctions, yet it "failed to ensure that the sanctions or the U.N. rules and regulations were followed." Further, the company did not conduct any due diligence on the agent nor did it provide or require the agent to take FCPA training nor did its agreement with the agent accurately describe his services and payment terms or include FCPA language.

As we noted, the SEC was similarly critical of the lack of due diligence and oversight conducted by *Halliburton*'s legal department concerning the TSKJ agents. We expect that both the SEC and the DOJ will continue to call out compliance failures in their effort to cast the finance and legal departments as "gatekeepers" of compliance.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

For more information on the topics covered in this issue, please contact:

Danforth Newcomb
New York
+1 212.848.4184
dnewcomb@shearman.com

Philip Urofsky
Washington, DC
+1.202.508.8060
purofsky@shearman.com

Stephen Fishbein
New York
+1.212.848.4424
sfishbein@shearman.com

Patrick D. Robbins
San Francisco
+1.415.616.1210
probbins@shearman.com

Josanne Rickard
Europe
+44.20.7655.5781
jrickard@shearman.com

Richard H. Kreindler
Europe
+49.69.9711.1420
rkreindler@shearman.com

Markus S. Rieder
Europe
+49.89.23888.2119
markus.rieder@shearman.com

Richard Kelly
London
+44.20.7655.5788
richard.kelly@shearman.com

Amanda Kosonen and Jill Aberbach, members of the FCPA team in Washington, D.C. and New York respectively, provided substantial assistance in preparing this memorandum.

ABU DHABI
BEIJING
BRUSSELS
DÜSSELDORF
FRANKFURT
HONG KONG
LONDON
MENLO PARK
MILAN
MUNICH
NEW YORK
PARIS
ROME
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SINGAPORE
TOKYO
TORONTO
WASHINGTON, DC

www.shearman.com