

# Recent Trends and Patterns in FCPA Enforcement

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(as of October 21, 2008)

## Recent Trends and Patterns in FCPA Enforcement

In addition to a general increase in FCPA enforcement activity in recent years, four distinctive new trends can be seen. First, both the frequency and severity of enforcement have increased in recent years. While there are fluctuations over short periods, over the past five years there is clearly the trend toward more aggressive investigations and enforcement proceedings by the DOJ and the SEC, including a steady increase in proceedings brought against individuals. These proceedings are also resulting in more severe punishments in the form of fines for corporations and jail time for individuals.

The second trend is the use of more creative methods in resolution of criminal cases. In recent years, the DOJ has increasingly used non-prosecution (or deferred prosecution) agreements in FCPA matters apparently to provide a reward to defendants who voluntarily disclose and cooperate in the DOJ's investigation and, of course, to provide an incentive to other companies to do likewise.

Third, the DOJ and the SEC have increasingly included a requirement that a company retain an independent compliance monitor as part of any settlement – whether it be a plea, deferred prosecution, or civil settlement. In the past year, however, the DOJ has issued guidance on the circumstances in which a monitor is appropriate and the manner in which one should be selected. In addition, in several recent cases, the DOJ has chosen *not* to impose a monitor apparently in recognition of the company's own credible remedial steps.

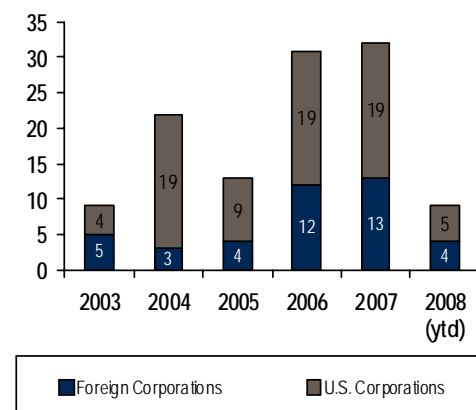
The final development is a spike in enforcement actions resulting from self-reporting of FCPA problems discovered as part of merger or acquisition activity. This may be somewhat of a self-fulfilling prophecy as more parties are worried about successor liability arising from prior corrupt conduct by the acquired company.

Time may show each of these trends to be mere anomalies in a larger anti-corruption movement, but at this point, one thing is clear: this is a period of rapid change in anti-corruption enforcement activity.

### **I. Aggressive Enforcement and Larger Penalties**

**Growth in New Investigations and Focus on Foreign Corporations:** One of the most important recent trends in FCPA enforcement is the increased aggressiveness of government enforcement of the FCPA. In

Reported Corporate Investigations: 2003-present

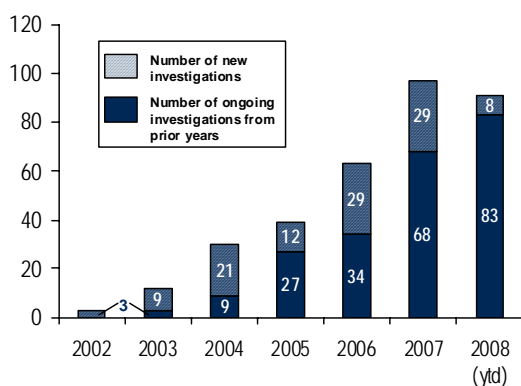


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2003, there were only nine reported investigations involving corporations. Over the past several years, this number has steadily increased, with new investigations launched involving 31 corporations in 2006 and 32 corporations in 2007. To date, in 2008, new investigations against 9 corporations have been reported.

U.S. law enforcement authorities are increasingly focusing on foreign corporations. In 2004 and 2005, there were 28 new investigations against U.S. corporations compared to 7 against foreign corporations. In 2006 and 2007, the ratio of new investigations against foreign corporations *vis a vis* U.S. corporations increased significantly with 19 new investigations of U.S. corporations in each of those years compared to 12 new investigations of foreign corporations in 2006 and 13 new investigations of foreign corporations in 2007. In

Total Reported Corporate Open Investigations: 2002-2008



2008, to date, the number of new reported corporate investigations have been almost equally divided between foreign and U.S. corporations with 4 new investigations reported by foreign corporations and 5 new investigations reported by U.S. corporations.

Accounting for closed investigations, those moved to prosecutions, and combining multiple investigations involving the same corporation, there are at present reported open investigations involving 91 corporations. Of course, as these numbers include only those investigations that have been reported by corporations and do not include investigations against individuals, the total number of ongoing investigations is undoubtedly higher.

***Increase in Consolidated Investigations:*** While the majority of disclosed investigations deal with a single company's activities in generally a handful of countries, the DOJ and SEC have also launched several consolidated investigations involving the activities of multiple companies in multiple jurisdictions. Perhaps the most prominent and thus far productive involves the investigations surrounding the now defunct U.N. Iraq oil-for-food program. Most recently, a number of companies and individuals have either been indicted or reached resolutions with the government in connection with these investigations in which the companies were charged with violations of the FCPA's books and records and internal controls provisions, mail or wire fraud, or violations of U.S. securities laws.

Similarly, in 2007, following the prosecution of the Vetco Gray companies for payments to Nigerian customs officials through a global freight-forwarding company, the DOJ and SEC launched investigations into at least a dozen oil companies in connection with customs payments in Nigeria and elsewhere. For some companies, the scope of that investigation has expanded to cover other types of payments. Also in 2007, the DOJ and SEC

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launched a new investigation into medical device manufacturers for sales activities in foreign countries and six corporations have disclosed that they are a part of that investigation.

***Aggressive Prosecution:*** Alongside the growth in new reported investigations, the last five years have also seen a significant increase in overall prosecution of FCPA violations. Between 2003 and present, the average number of new DOJ proceedings was nearly three times the average number in the preceding five years. Between 1993 and present, the majority of new proceedings occurred in the latter part of this time period, between 2001 and present. It is worth noting that, of the new criminal proceedings brought by the DOJ between 2001 and present, 29 involved charges against a corporation. Of those 29 proceedings against corporations, seven occurred to date in 2008, twelve occurred in 2007, three in 2006, four in 2005, two in 2004, and one in 2002. Additionally, 13 of the 29 proceedings against companies involved foreign companies. In the cases of Vetco and ABB, the prosecution was of both foreign and domestic subsidiaries of a foreign parent corporation.

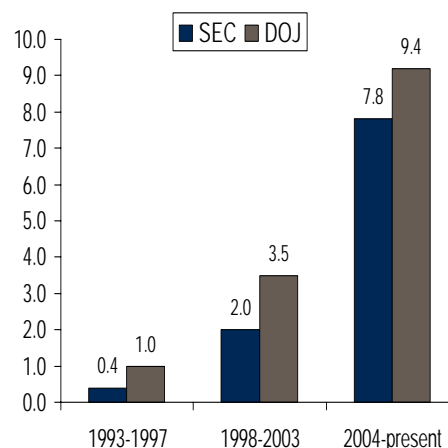
In addition to the DOJ, the SEC has shown a greater degree of aggressiveness in enforcement in the recent past. Between the years 1990 and 1995, the SEC did not bring any formal proceedings for violations of the FCPA. The number of proceedings brought between 1995 and 2000 increased slightly to less than one case per year. From 2001 to the end of 2006, however, the SEC averaged over four formal proceedings a year. In 2007, the SEC brought 16 new proceedings and to date in 2008, it has brought 7 new proceedings.

Of the SEC proceedings brought since 1990, the vast majority was of U.S. corporations. Resolution of SEC proceedings during this period usually involved an injunction, a fine, or both. In the case of ABB, the SEC once again used its enforcement power to impose liability on the parent company for the actions of its subsidiaries. In addition, FCPA enforcement against supervisory issuers, as in ABB, was extended to an action against a company because of its distributors' conduct (InVision).

In addition to cases charging actual bribery, the SEC generally enforces the record-keeping and accounting provisions of the FCPA (mostly through injunctive actions). The recent SEC settlement with Bristow Group Inc. reinforces the message that the SEC will bring books and records charges in cases where it may not feel that anti-bribery charges can be brought, for example if the business purpose requirement is not satisfied.

***Prosecutions of Individuals:*** The burden of responsibility continues to be borne by individuals alongside companies, as evident in the most recent 2005 to present DOJ actions against a number of individuals. Since 1990, the DOJ has brought more prosecutions against individuals than against corporations, with a steady

Average SEC/DOJ Proceedings: 1993-present



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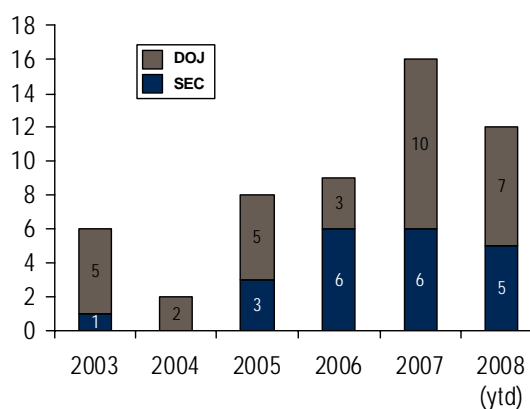
increase in the number of prosecutions against individuals since 2003. These include *U.S. v. Shu*, *U.S. v. Nam Quoc Nguyen et al.*, *U.S. v. Stanley*, *U.S. v. Self*, *U.S. v. Green & Green*, *U.S. v. Steph*, *U.S. v. Ott & Young*, *U.S. v. Wooh*, *U.S. v. Jefferson*, *U.S. v. Smith*, *U.S. v. Amoako*, *U.S. v. Salam*, *U.S. v. Sapsizian & Acosta*, *U.S. v. Novak*, *U.S. v. Head*, *U.S. v. Brown* and *U.S. v. Kozeny, Bourke, & Pinkerton*. Notably, in June 2007, FCPA charges were brought against a U.S. government official for the first time when the government charged Congressman William Jefferson of Louisiana with offering bribes to senior Nigerian government officials, along with soliciting bribes and other charges.

The DOJ and the SEC have publicly proclaimed that the prosecution of individuals remains a top priority. In connection with a recent plea agreement, the DOJ and SEC stated respectively that “corporate executives who bribe foreign government officials in return for lucrative business deals can expect to face prosecution” and that the SEC “is committed to holding violators accountable when they engage in illegal conduct to obtain business in foreign countries.” Individuals also face increasingly severe jail terms. Notably, in 2008, Albert Jack Stanley accepted a plea deal including 7 years imprisonment and payment of \$10.8 million in restitution. Once he is sentenced, Stanley will be serving the longest jail sentence imposed under the FCPA to date.

Two recent SEC cases demonstrate the considerable reach of the jurisdiction of the SEC over individuals in FCPA cases. In one case, David M. Pillor, the former Senior Vice President for Sales and Marketing at InVision, without admitting or denying the allegations against him, agreed to pay a civil penalty simply for failing to maintain a system of internal controls adequate to detect actual violations of the FCPA. In another case, John Samson, John Munro and Ian Campbell, three British citizens who were employees of foreign subsidiaries of ABB, itself a non-U.S. entity, recently consented to the entry of judgments against them for violations of the FCPA.

***Larger Penalties:*** In addition, this increased aggressiveness has also taken the form of larger penalties imposed by the SEC and DOJ and the insistence by the SEC that settling companies disgorge profits obtained through the violation. In April 2007, Baker Hughes agreed to pay the largest FCPA penalty in history – \$44 million. The agreement with the DOJ and SEC included a criminal fine of \$11 million and a civil penalty and disgorgement of approximately \$33 million in connection with Baker Hughes’s improper business practices in a number of countries.

Proceedings Against Individuals: 2003-present



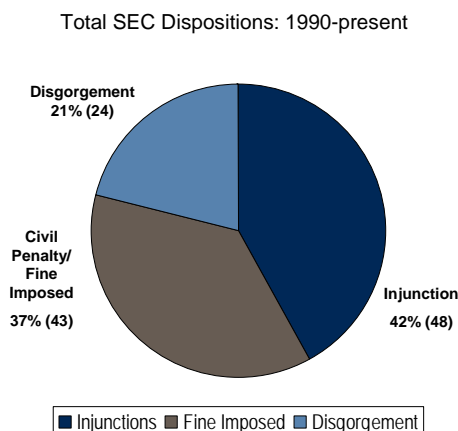
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The past three years have also seen similarly unprecedented penalties in FCPA history. In 2008, Willbros Group and Willbros International agreed to pay a combined DOJ and SEC penalty and disgorgement of \$32.3 million. In 2007, three subsidiaries of Vetco International agreed to pay \$26 million in fines and disgorgement, York International agreed to combined DOJ and SEC penalties and disgorgement of \$22 million, Statoil ASA agreed to combined penalties and disgorgement of \$21 million, and Schnitzer Steel and one of its subsidiaries agreed to a combined penalty of \$15.2 million.

These recent penalties appear to be continuing the trend of large fines begun in the last several years. Moreover, while 2004 marked the first time that the SEC required a company to disgorge the profits of the unlawful FCPA activities, the practice appears to have become routine, as evident in recent examples from 2006 to present.

***Parallel International Investigations:*** In addition to FCPA enforcement in the United States, companies are increasingly facing parallel investigations in foreign jurisdictions under other nations' anti-corruption laws. The FCPA is part of a broader international agenda to combat bribery, that includes the European Union's Convention on the Protection of European Communities' Financial Interests, the Organization of American States' Inter-American Convention Against Corruption, the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions, the United Nations' Convention Against Corruption, the African Union's Convention on Preventing and Combating Corruption, as well as policies instituted by the World Bank and the International Monetary Fund allowing for the investigation of corruption committed by companies and governments.

Among recent FCPA investigations by the United States government, parallel investigations in the following foreign jurisdictions were reported: Brazil (Gtech); China (Siemens); Costa Rica (Alcatel Lucent); France (Halliburton, Total SA); Germany (Bristol Meyers, DaimlerChrysler, Siemens); Greece (Siemens); Hungary (Siemens); India (Xerox); Indonesia (Freeport, Monsanto, Siemens); Israel (Siemens); Italy (Immucor, UDI, Siemens); Korea (IBM); Liechtenstein (Siemens); Nigeria (Halliburton, Siemens); Norway (Siemens, NorskHydro); Russia (Siemens); and Switzerland (Siemens). In addition, investigations into the defunct U.N. Iraq oil-for-food program by the governments of Australia, France, Denmark, India, South Africa, Sweden, and the United Kingdom have also been reported. While the level of coordination between various governments and agencies currently conducting investigations is not



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fully apparent, the investigative and prosecutorial demands presented by these alleged violations are significant opportunities for the creation of an international standard of business propriety, casting aside any doubts about the strength of the international anti-corruption effort.

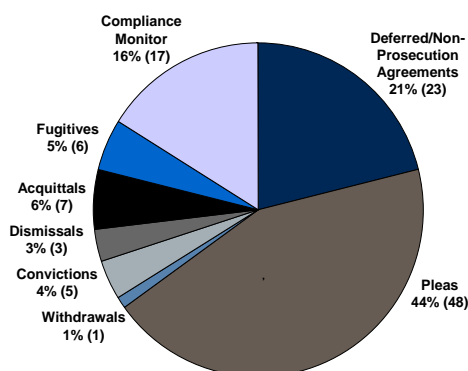
***Parallel Litigation:*** In addition to growing domestic and international enforcement by governments, parallel litigation related to the FCPA is also increasing in frequency, particularly in the area of securities litigation. Even before a company settles FCPA allegations with the government, but particularly if it has admitted responsibility, it may be sued under securities laws by shareholders claiming to have purchased their shares at inflated prices, under ERISA by employees whose pensions include company shares, and as a nominal defendant in derivative actions brought by shareholders to recover for alleged wrongdoing by officers and directors. Competitors have also brought suits charging companies under various legal theories for having obtained business through bribes, and in at least one case, a foreign sales agent brought suit after its contract was terminated, allegedly for refusal to violate the FCPA. Finally, former employees have sued for unlawful termination, alleging that they were fired for “blowing the whistle” on bribery or for refusal to violate the FCPA. The number of such suits should grow as more companies face prosecution by the DOJ and SEC.

Another type of parallel proceeding that is beginning to appear is suits involving foreign sovereigns, either in U.S. courts or in arbitration fora, such as the ICSID, against companies accused of bribing officials of those countries. According to at least one tribunal, a contract procured through bribery is unenforceable as it violates international public policy, notwithstanding the foreign country’s failure to prosecute the foreign official. In that case, the government of Kenya conceded that the bribe had been paid and used this fact as a complete defense to the contract. In another notable case filed in February 2008, Aluminum Bahrain B.S.C., a company majority-owned by the government of Bahrain, filed suit in U.S. federal court against Alcoa Inc. alleging a wide-reaching pattern of bribery of Bahraini government officials. The day before the suit was commenced, Alcoa informed the DOJ and SEC of the imminent suit, and the DOJ subsequently initiated a formal investigation of the matter. The suit has been stayed pending the outcome of that investigation.

## II. Varied Dispositions

To date, the vast majority of cases brought by the DOJ are resolved through plea agreements. Since 1990, 72 DOJ proceedings under the FCPA against individual defendants and corporations have been resolved as to some or all defendants. Of those 72, plea agreements were entered in 48 of those cases. In only

Total Criminal Dispositions: 1990-present



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five of those cases were there convictions after trial. In the cases where a plea was taken or a defendant was convicted, defendants were sentenced to a term in prison, fined, or both. Sentences have been imposed in 24 of those cases, and sentencing is pending in 8 others. Recently, the defendants in *U.S. v. David Kay and Douglas Murphy* received terms of 37 months and 63 months, respectively. In 2008, Albert Jack Stanley accepted a plea deal including a prison term of 7 years.

In 1990 and 1991, seven prosecutions ended in acquittals or dismissals of the charges. Since then, one case (in 2004) has been dismissed, one case has been withdrawn (in 2008), and two persons were acquitted in one other case (in 2005). In addition, at least six individuals have failed to appear in court to answer the charges against them and are deemed fugitives by the U.S. authorities.

With respect to corporations, most cases have been resolved through settlements. In recent years, the DOJ settlements have largely, but not exclusively, taken the form of deferred prosecution agreements, with guilty plea agreements reserved for the most egregious cases. From December 2004 to the present, the DOJ has entered into several deferred-prosecution (or non-prosecution) agreements involving the anti-bribery provisions or, in the case of the Oil-for-Food cases, the books-and-records provisions of the FCPA with the companies Westinghouse Air Brake Technologies, Flowserve, AB Volvo, Willbros, AGA Medical, Faro Technologies, Lucent Technologies, Ingersoll-Rand, Akzo Nobel, York International, Chevron, Paradigm B.V., Textron, Omega Advisors, Baker Hughes, Aibel Group, Schnitzer Steel, Statoil, Monsanto, InVision, and the Micrus Corporation. In 2008, all six resolved DOJ actions against corporations resulted in deferred-prosecution agreements.

The DOJ agreed not to prosecute the companies listed above in exchange for, among other things, proof of continuing compliance. Deferred-prosecution agreements contain elements similar to plea agreements, including fines and monitoring. For example, in the agreement with Faro Technologies, dated June 3, 2008, the company agreed to pay a fine of \$1.1 million, to accept responsibility for the misconduct, to adopt an FCPA compliance program and internal controls designed to prevent future violations, and to retain an independent compliance monitor for a period of two years. The SEC also appears to be experimenting with leniency. In April 2006, the SEC settled its administrative proceeding against Oil States International simply by issuing a cease-and-desist order prohibiting future violations of the FCPA by Oil States. The company was not required to admit or deny the findings of the order.

### III. Appointment of Monitors and Consultants

A clear trend has recently developed of appointing monitors or consultants to companies to ensure FCPA compliance, as part of settlement agreements with the SEC and DOJ. Such appointments have not only become more common but have been for longer terms. The following companies have all agreed to such appointments in the recent past: Willbros, AGA Medical, Faro Technologies, Ingersoll-Rand, York International, Paradigm B.V., Baker Hughes, Vetco International, Schnitzer Steel, Statoil, ABB,

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Diagnostic Products Corporation, DPC (Tianjin) Ltd., InVision, Micrus, Monsanto, and Titan. In ten of those cases, Willbros, AGA Medical, Ingersoll-Rand, York International, Baker Hughes, Vetco International, Schnitzer Steel, Statoil, Monsanto and Micrus, the monitors and compliance experts were appointed for terms of three years. Some commentators have voiced concern over the wide latitude given to such monitors and consultants in reviewing a company's business activities as well as over the implications for confidentiality and the waiver of attorney-client privilege implicated with the presence of such third-parties within the companies. On March 10, 2008, the DOJ released a memorandum providing internal guidance on the selection and use of monitors. The DOJ memorandum sets forth principles governing the selection, scope, and duration of monitor appointments. For example, a monitor's "responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct," and generally, there should be provision for both the extension and the early termination of a monitor. The DOJ memorandum advises prosecutors to consider both the potential benefits of a monitor to the corporation and the public and the cost of a monitor and its impact on corporate operations. While the memorandum provides only internal guidance and does not confer any rights, it does offer some criteria for the use of prosecutorial discretion, and therefore some basis for negotiations with prosecutors.

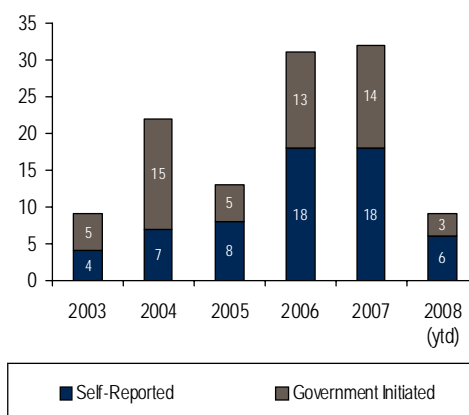
### IV. Discovery and Voluntary Disclosure

Fifty of the 85 newly disclosed FCPA investigations in 2005 to present were voluntarily disclosed to the SEC or the DOJ

following internal investigations by the companies. By contrast, the government initiated the majority of the reported investigations in both 2003 and 2004. These facts underscore the trend toward companies taking on the onus of reporting and accountability and may indicate that companies now perceive the act of self-reporting to be favorable to the ultimate outcome of the investigation. The high number of corporations subject to government initiated investigations in 2006 and 2007 were mainly driven by the three consolidated investigations (U.N. Oil for Food, customs, and medical devices).

Indeed, as in the case of ABB, a company that immediately self-reports a potential violation and continues to cooperate at every stage of the investigation may well receive favorable treatment when reaching a final resolution of the matter. In the case of Monsanto, a company that discovered alleged violations of the

Reported Corporate Investigations: 2003-present



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FCPA following an internal review, the investigation was resolved through a favorable deferred-prosecution agreement. Monsanto had discovered the violations, disclosed them immediately and fully to the SEC and DOJ, and had cooperated fully with the investigations. The use of a deferred-prosecution agreement as a resolution to an investigation could be seen as a potential benefit of voluntary disclosure.

***Disclosures and M&A Due Diligence:*** There is also an emerging trend concerning the manner in which FCPA violations are discovered and disclosed – namely during the course of a merger or acquisition. The violations that resulted in three of the most significant FCPA prosecutions (ABB, InVision, and Titan Corporation) came to light during the course of M&A due diligence. In all three, information disclosed to the SEC and the DOJ was a result of various company investigations conducted in the course of diligence proceedings and the assessment of potential liabilities. In the case of Titan, information about Titan’s FCPA violations was disclosed during the course of due diligence conducted by Lockheed Martin Corporation for the purposes of a merger, which was ultimately not consummated. Lockheed required in negotiations that Titan resolve the FCPA issues as a condition to finalizing the merger.

These three instances of discovery and self-reporting seem to indicate a correlation between the disclosure of FCPA violations and the process of due diligence in mergers and acquisitions. However, it is important to recognize that recent dramatic swell in the overall number of mergers and acquisitions increased the overall likelihood that violations discovered in the course of due diligence will be specifically FCPA-related.

### V. Department of Justice FCPA Review Releases

Through the use of the Opinion Procedure Release process, corporations obtain limited assurance that their proposed conduct conforms to current enforcement policy. Over the years, these releases have provided corporations with guidance on a wide range of activities. In the ABB case, the DOJ issued an opinion relating to the tricky issue of successor liability that served to reinforce a 2002 opinion.

In ABB, the parent corporation sought to sell a group of subsidiaries to a consortium of third parties. During the negotiations, FCPA problems came to light. Internal investigations were conducted, the two subsidiaries later pled guilty to violating the FCPA, and the parent company agreed to settle the SEC proceeding. After the plea, the consortium seeking to purchase the subsidiaries sought, and received, an opinion procedure release assuring them that they would not be held responsible for the past conduct of the subsidiaries. The DOJ stated that they would not seek to prosecute the consortium for the prior illegal acts of ABB’s subsidiaries so long as certain compliance-related obligations were met going forward.

While this new way of approaching a potentially hazardous transaction permits the acquirer to complete the acquisition with a reduced fear of future prosecution, the February 2007 guilty pleas of the subsidiaries involved in the deal highlights the ever-present risk of FCPA liability in successor enterprises and the need for ongoing compliance. The underlying corrupt activity in the three Vetco subsidiaries that pleaded

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guilty in February 2007 began before the sale from ABB in 2004 and continued for at least nine months after the closing of the deal in July 2005. The lack of an effective compliance program was cited by the DOJ as one of the factors in levying the largest criminal fine to date against the Vetco subsidiaries.

In 2008, the DOJ has also issued two lengthy opinion releases involving due diligence in the M&A context. In the first, the Requestor sought to purchase a majority interest in a foreign target from an entity that could potentially have been considered a foreign official. The DOJ relied on the Requestor's fulsome due diligence and disclosures to the foreign government, as well as the representations and warranties included in the proposed transaction, including termination rights, and declined to take enforcement action. Notably, the DOJ responded to the company's request to expedite the opinion release due to the time-sensitive nature of the transaction and issued its 13-page opinion release within two weeks from the date of the request.

In the second, Halliburton requested the DOJ opinion for a post-closing due diligence plan when U.K. law would not allow it to complete due diligence before closing without the risk of losing its bid to a competitor. The DOJ stated its intention not to take any enforcement action with respect to the acquisition itself, any pre-closing acts of the target disclosed by Halliburton within 180 days, or any post-closing acts of the target disclosed by Halliburton within 180 days of closing that did not then continue. The DOJ opinion was based on the purchase amount not being used by the target for improper purposes and on satisfactory completion of the post-closing plan, which included, among other things, a risk-based due diligence work plan, a review with outside counsel and forensic accountants, reports to the government of any results, remediation of any issues identified within a year of closing, new agent contracts, and training for employees.

## VI. Conclusion

In the last five years of FCPA enforcement by the SEC and DOJ, several significant trends have emerged. FCPA enforcement has become increasingly more aggressive in all stages, from investigation to prosecution. In response, companies are shouldering more responsibility in the investigatory aspects of enforcement.

Over the last two years, several significant dispositions of cases (Willbros, AB Volvo, Ingersoll-Rand, Chevron, York International, Baker Hughes, Vetco International, El Paso, Schnitzer Steel, Statoil, Titan, ABB, InVision, Monsanto, and Schering-Plough) highlighted new and emerging trends. While fines and penalties continue to be a common aspect of enforcement, they appear to be increasing in amounts, as indicated by the fines levied against Willbros, AB Volvo, Baker Hughes, Titan, Vetco, Chevron and others. Disgorgement of profits from the corrupt payments, first used in 2004, has become a well-established component of enforcement actions. Enforcement actions against individuals, resulting in fines and terms of imprisonment, have also become increasingly common, highlighted in the recent guilty plea of Albert Jack Stanley which includes a 7 year term of imprisonment. In addition, there has been an explosion in the implementation of monitors and consultants to ensure FCPA compliance in connection with

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settlements. In the meantime, non-prosecution (or deferred prosecution) agreements have been used more widely, often in instances in which the parties have voluntarily disclosed potential FCPA violations. The practice of voluntary disclosure has also increased due to the apparent link between discovery and disclosure of potential violations of the FCPA and the process of due diligence conducted during a merger or acquisition.

While the FCPA enforcement landscape is constantly evolving, all signs continue to point to a heightened degree of scrutiny of and graver consequences for FCPA violators in the future.

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.

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