

SHEARMAN & STERLING^{LLP}

FCPA DIGEST

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

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Recent Trends and Patterns in FCPA Enforcement

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Recent Trends and Patterns in FCPA Enforcement

The past year has seen the announcement of a number of FCPA enforcement actions with unprecedented fines and penalties. However, while such major cases as *Siemens* and *Halliburton/KBR* have obviously dominated the news, it is hard to say whether they represent a trend toward large-scale high-penalty FCPA prosecutions although there are likely several cases with similarly substantial fines to come. More important than the size of the penalty are the multi-year trends of increasing numbers of enforcement investigations and enforcement actions against both corporations and individuals, which have been accompanied by expansive assertions of jurisdiction by the U.S. enforcement authorities and a rapidly growing body of interpretative guidance, both from the courts and the enforcement agencies themselves. The increased risk of investigation or enforcement action has resulted in increased sensitivity to FCPA concerns in M&A transactions, as well as in common commercial transactions and business relationships. Further, as demonstrated by the *Siemens* matter, non-U.S. enforcement agencies have begun to initiate investigations of their own, suggesting that, in the future, there is a greater likelihood that multinational corporations will have to respond to, defend, and possibly settle investigations and enforcement actions in multiple jurisdictions.

The past several years have seen an increase in FCPA prosecutions both as a result of voluntary reporting by corporations and as a result of a number of converging pressures:

- increased international law enforcement cooperation arising from implementation of the 1997 OECD Convention and similar treaties;
- government authorities' emphasis on rewarding cooperation and disclosure as reflected in the Department of Justice's promulgation in 1999 of the Federal Principles of Prosecution of Corporations (a/k/a the "Holder Memo" most recently revised in 2008 as the Principles of Federal Prosecution of Business Organizations) and the Securities & Exchange Commission's release in 2001 of the similar Seaboard Report;
- a renewed focus on internal controls and Sarbanes-Oxley's requirement of executive certifications; and
- the willingness of the Department to consider alternative dispositions of corporate cases, such as deferred or non-prosecution agreements accompanied by penalties and monitors.

The increasing flow of cases, together with the increased size, complexity, and prominence of these cases, has led the Department of Justice to assign more resources, including prosecutors and FBI agents, and, with the availability of these resources, to apply increasingly aggressive investigatory and prosecutorial strategies. Further, through its charging decisions and FCPA Opinions, the Department has clarified its position with respect to certain aspects of the FCPA, particularly in the area of successor liability, while the courts, in certain cases, have either blessed or rejected the Department's positions on the scope of the statute, providing further clarity to what appears to be an evolving area of law and enforcement.

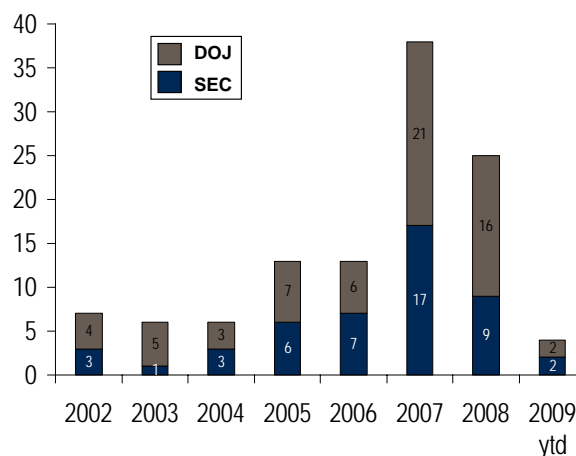
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I. More Cases and Larger Penalties

Charges Against Corporations and Individuals

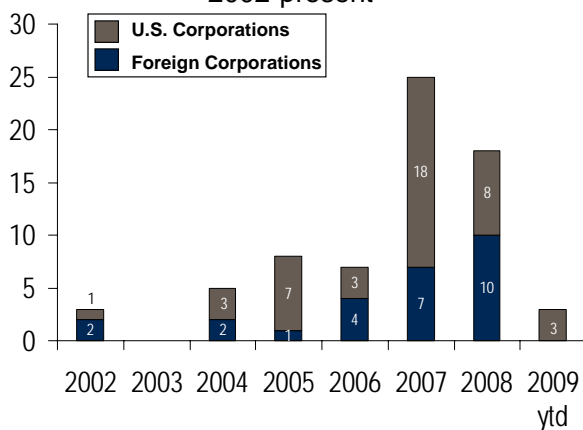
Over the past several years, the number of FCPA matters pursued by the Department of Justice (including deferred prosecutions and non-prosecution agreements) and the SEC has steadily increased. Although 2008 did not match the high-water mark of 2007, both years exceeded by far the previous years. In a continuing trend, foreign corporations continued to be in the U.S. authorities' sights in 2008, with foreign corporations charged in ten of the eighteen matters involving corporations (or 20 out of 29 total corporations involved).

Total SEC/DOJ Matters Initiated:
2002-present



In 2008, sixteen individuals were charged in criminal and civil matters, nearly equaling the record numbers of 2007. See *Individuals Charged* p. 3. In past *Trends & Patterns*, we have reported on the increasing numbers of cases brought against individuals. However, we are now seeing a change in the timing and sequencing of such cases. Whereas in early FCPA cases, the individuals and their employers were charged together and more recently the corporate charges preceded those against the individuals, in some recent cases we are now seeing individuals charged before the corporations.

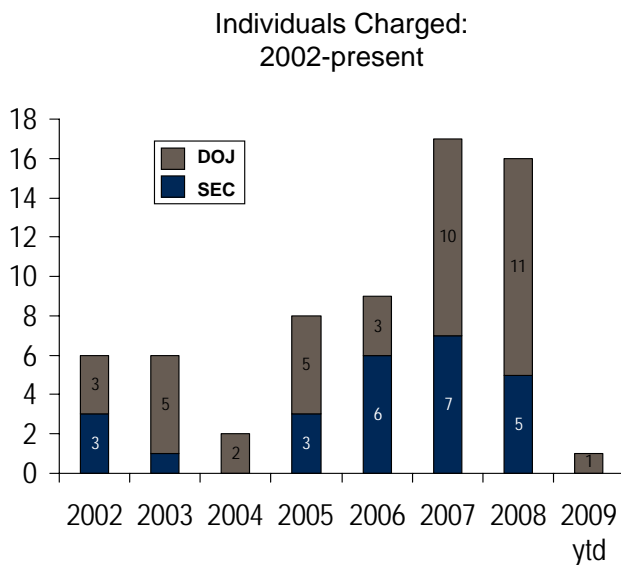
Total Corporate Matters Initiated:
2002-present



The earliest practice – charging everyone together – met with mixed results for the government. In 1990, *Harris Corp.* and two individual codefendants – managers in Harris Corp.'s digital telephone system division – were acquitted of charges related to bribing officials at a Columbian state-owned telecom. Of the five individuals charged in *Eagle Bus* in 1990, one pleaded, two were dismissed on legal grounds, and two were acquitted following trial. *Young & Rubicam* reached a plea in 1990 settling charges brought by the DOJ while FCPA and RICO charges against the five individual codefendants were ultimately dismissed.

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The more recent approach – charging individuals or the corporations separately and in sequence – allows the government to build a case by exacting cooperation from one party against the other. Some of the recent increase in charges against individuals reflects the normal delay between negotiating a resolution with a cooperating corporation and preparing a case against an individual, who is both more likely to contest criminal, or even civil, charges and who bears the burden of conviction or civil liability, *i.e.*, imprisonment and fines, in a direct and personal way. Thus, for example, although the DOJ and SEC corporate cases against *Syncor* and its subsidiary, *Syncor Taiwan*, were settled in 2002, the SEC filed settled charges against *Monty Fu*, Syncor’s former chairman, only in 2007. Likewise, the SEC did not bring charges against the four individuals in *Samson et al.* until 2006, two years after *ABB* had settled related charges with the DOJ and SEC in the first *Vetco Gray* cases. Similarly *Wooh* was not charged until a year after his employer *Schitzer* settled. In each of these cases, the agreements with the corporations required them to provide assistance to the government in any subsequent investigation and prosecution of individuals and other entities.



More recently, there is a strong trend of actions against individuals being brought separately or even in advance of charges against their employers and then, in all likelihood, following classic prosecutorial strategy of working up the chain of command, using the individuals to build the government’s case against their superiors and eventually the company. In *Willbros*, the DOJ charged four employees over a two-year period, with two pleading in previous years (*Steph* and *Brown*) and an indictment being returned against two others (*Tillery* and *Novak*) in February 2008. Finally, in May 2008, Willbros Group and Willbros International agreed to a deferred prosecution agreement. Similarly, the DOJ entered into a plea agreement with the former CEO of KBR, *Stanley*, in 2008, well in advance of settling the matter with *Halliburton/KBR* in early 2009.

Perhaps following the same strategy, in *Sapsizian*, the government has thus far charged only two employees of Alcatel but not the company itself. According to the government’s press release, however, Alcatel “continues to be investigated.” Similarly, the DOJ entered plea agreements with *Covino* and *Morlock* in 2008 but has yet to initiate proceedings against their employer or employer’s parent company, IMI, which has disclosed that it is under investigation. Likewise, the Department has charged a

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Bridgestone employee, *Hioki*, but has not yet charged Bridgestone, which is currently the subject of a related antitrust investigation.

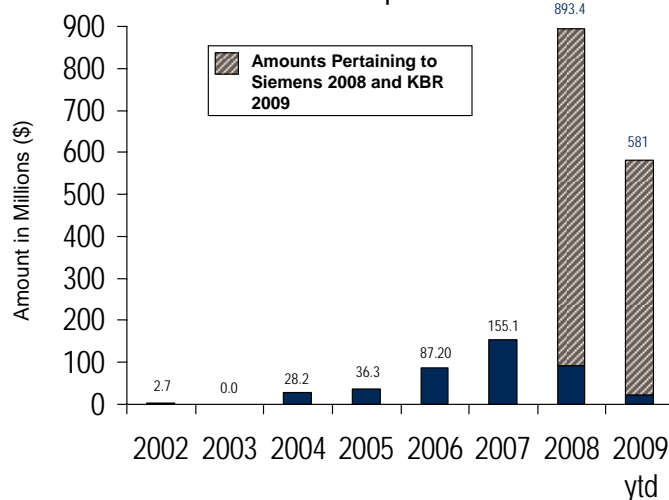
As Department officials have noted, consistently with the Federal Principles, sending people to jail has a significant deterrence effect on other corporate employees tempted to engage in bribery, both those employed by the same corporation and elsewhere. In some cases, the Department has chosen to proceed solely against the individual and not the corporation. Most of such cases, however, involved small, privately held companies where the individuals were effectively alter-egos of the companies. For example, in 2008 in the *Green* case, the Department obtained an indictment against husband and wife owners of a Los Angeles-based film business for allegedly bribing Thai officials in exchange for contracts related to a Thai film festival. Similarly, in September 2008, the government brought FCPA and export controls charges against *Shu Quan-Sheng*, the President, Secretary, and Treasurer of his own company, AMAC International, but did not charge the company itself.

There are, of course, other cases in which individuals but not their employers were charged, although they tend to be dependent upon unique circumstances. In *Self*, for example, Pacific Consolidated Industries (PCI) voluntarily disclosed the conduct of its former executive, was under new management, and provided assistance in an investigation that resulted in convictions in both the U.S. (of *Self*) and in the U.K. (of the foreign official) as well as a pending charge against another PCI employee. As a result, it appears that the government does not intend to proceed against PCI directly.

Penalties

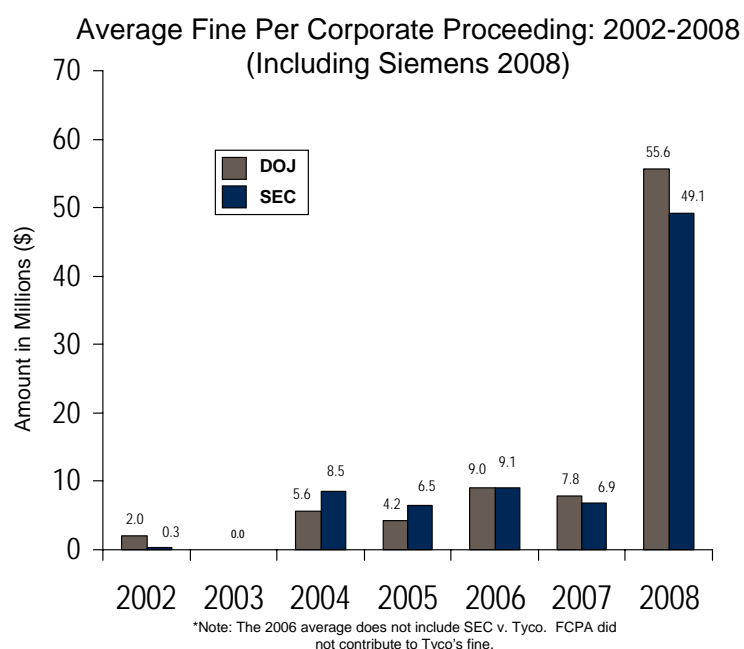
Without a doubt the penalties assessed against corporations have increased over the past several years, both in the aggregate (including all fines, penalties, restitution, and disgorgement) and in individual cases. The latest large scale penalties (*Siemens*, *Halliburton/KBR*) dwarf the previous records reported in earlier *Trends and Patterns*. *Siemens*, however, involved pervasive corruption throughout one of the world's largest companies over a lengthy period, while *Halliburton/KBR* involved a series of extremely large contracts over a ten year period. The aggregate DOJ and SEC penalties in these matters (\$800 million in *Siemens* and \$579 million in *Halliburton/KBR*) distort the

Total Criminal and Civil Fines Imposed on Corporations:
2002-present



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calculations of average corporate fines because of the large amount of business obtained through corruption in those cases. Interestingly, if the *Siemens* fines are removed from the calculation of average fines, the overall average level of penalties is actually down in 2008 from the previous two years. See *Average Fine Not Including Siemens* p. 6. It is highly unlikely, however, that this should be viewed as a trend.



To some degree, when compared to penalties in the earlier corporate cases, the overall increase in penalties over the past decade can be attributed to the promulgation of the Organizational Sentencing Guidelines in 1991. These Guidelines were intended to impose some rationality on corporate fines and, in doing so, increase them. Even though the Guidelines are now advisory rather than mandatory, the 2008 revision of the Principles of Federal Prosecutions of Business Organizations requires that “negotiated departures or recommended variances from the advisory Sentencing Guidelines,” given as concessions for cooperation and voluntary disclosure, be “justifiable under the Guidelines” and “disclosed to the sentencing court.” Of course, as a

practical matter, one cannot forget that the Guidelines are driven by loss calculations and thereby provide some room for maneuvering as both sides argue over which transactions should or should not be included and what loss or benefit should be assigned to them.

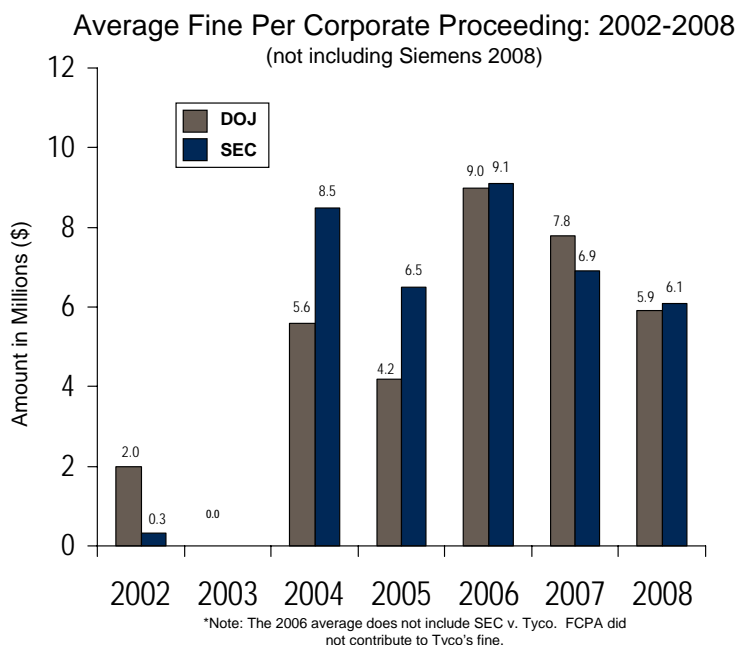
For corporations that are issuers subject to civil enforcement actions under either or both the anti-bribery and books & records provisions, the SEC has the authority to collect both fines and disgorgement, together with pre-judgment interest. The SEC penalties may thus prove to be as large or even larger than those assessed in DOJ actions, depending, in some cases, on whether the business obtained through the improper payments proved profitable. In notable instances, the SEC was content to forgo a fine by giving the issuer credit for having paid the DOJ fine and collect only disgorgement as occurred in *Halliburton/KBR* in 2009, *Siemens* and *Willbros* in 2008, *El Paso Corp.* in 2007, and *Statoil* in 2006. The SEC’s general practice, however, has been to extract both fines and disgorgement, even when the issuer was also paying a criminal fine or penalty. For example, in cases connected to the now defunct U.N. Oil-for-Food (OFF) program (e.g., *Ingersoll-Rand*, *Westinghouse Air Break Technologies (Wabtec)*,

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Flowserve, and *Fiat*), the SEC granted no credit for the DOJ penalties and required the defendants to pay both a civil fine and disgorgement.

In certain cases, the Department has begun to give credit for fines and other penalties paid overseas to foreign law enforcement authorities. In some cases, such as *Siemens* and *Statoil*, the fines were previously or simultaneously assessed and paid, and the DOJ may have sought to avoid a perception of unfairness even while asserting the United States' policy interests in bringing enforcement actions and imposing penalties. In other matters, such as OFF cases, the DOJ appears to specifically have sought to encourage foreign enforcement authorities to take action. Thus, for example, in *Akzo Nobel*, an OFF matter in which the company was charged with books & records violations, the DOJ gave a credit conditioned on the company settling with the Dutch authorities and paying a fine "no less than € 381,602."

A final trend and pattern worth noting is the SEC's continued demand for disgorgement of ill-gotten profits in cases in which only books & records violations are charged, such as in the OFF cases. Whether or not a false entry in a company's books and records (or a failure to implement adequate internal controls) truly results in increased profits is open to question. To date, however, no FCPA defendant has publicly challenged the SEC on whether disgorgement is appropriate when the sole charge is false books and records.



Prior to the *ABB* case in 2004, the SEC had never collected disgorgement in FCPA cases; since then it has sought it in virtually every case with only a few exceptions, such as *Dow Chemical*, *Delta & Pine Land*, *Lucent*, and *Conway*. In *Tyco*, the SEC collected \$1 in ill-gotten gains (along with \$50 million in penalties related to other violations). While this is an isolated example of the SEC seeking such nominal disgorgement, the case does underscore the overall policy of levying disgorgement sanctions in nearly all cases against issuers.

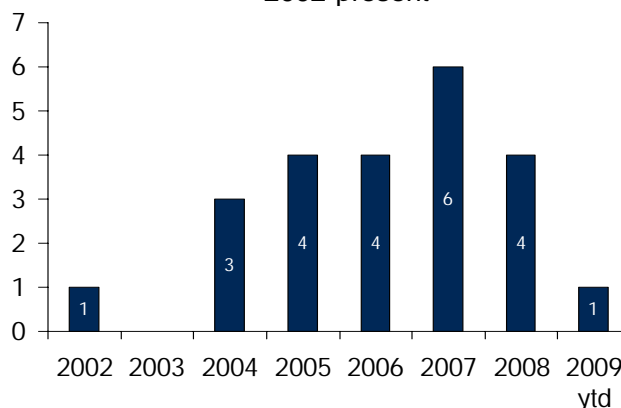
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Monitors

Some of the cases brought by the U.S. authorities in the past year suggest that the pattern we have noted in past *Trends and Patterns* of increasingly requiring a monitor in all cases may be plateauing or, at least, the enforcement agencies may be adopting a more nuanced approach. In response to growing criticism of cronyism in the selection of monitors in

certain non-FCPA cases and of so-called “runaway” monitors who had allegedly exceeded the scope of their mandates, the Department in 2008 announced a new policy governing the selection and supervision of monitors.

Total DOJ/SEC Settlements Requiring Monitorship:
2002-present



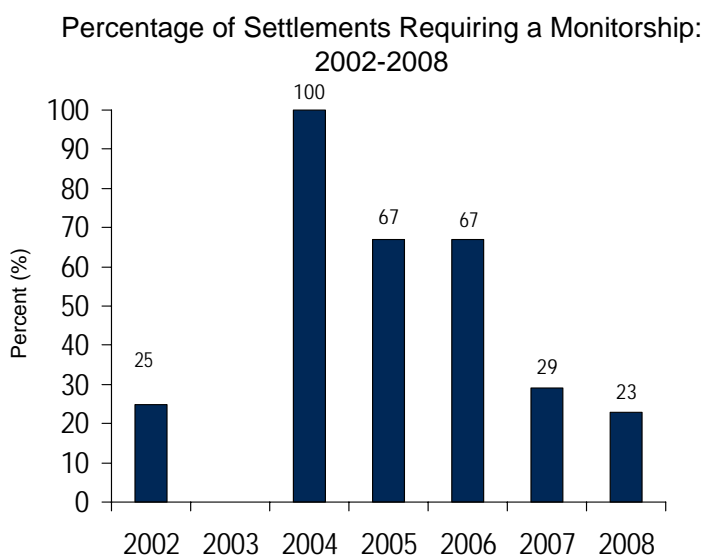
True to form, the DOJ and the SEC required *Siemens* to retain a monitor and, reflecting the scope and pervasiveness of the conduct, required that the monitor be in place for four years rather than the usual three. In an interesting departure, however, the agencies appointed a non-U.S. monitor – a former German minister – albeit one assisted by a U.S. law firm. This approach is an evolution from the approach taken in *Statoil*, one of the few previous cases in which the U.S. authorities imposed a monitor on a foreign company. In *Statoil*, although the authorities imposed a U.S. lawyer as a monitor, the deferred prosecution agreement included unique provisions that the monitor’s activities “not be contrary to Norwegian law” and that the monitor maintain confidentiality of company trade secrets and other confidential business information “in conformity with Norwegian law.”

The OFF cases (*e.g.*, *Inveco/Fiat*, *AB Volvo*, *Flowserve*, *El Paso*, *Akzo Nobel*, *Chevron*, *Textron*) represent one notable categorical exception to the general trend of routinely imposing a monitor. The absence of monitors in the vast majority of OFF cases may be due to the unique and no longer present circumstances surrounding the now terminated OFF program. In those few OFF cases in which the authorities did require a monitor or required the company to engage a consultant, the company’s conduct included not just the OFF kickbacks to the Iraqi government but also providing travel and entertainment to Iraqi officials directly (*Ingersoll-Rand*) or paying bribes to public officials in other countries (*York*).

In addition, in a limited number of non-OFF cases, the government appears to have concluded similarly that the conduct at issue was sufficiently isolated in nature or quantity to not require the imposition of a

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monitor. For example, in *Wabtech*, the incidents involved one customer in India. In *Lucent*, the conduct was limited to providing trips to Chinese officials. The *Lucent* matter, however, presents unique circumstances in that the conduct preceded its merger with Alcatel. It could be, therefore, that the government held off on a monitor in view of the substantial revamping of a compliance program that usually accompanies a merger. On the other hand, the authorities had never done so before, *see, e.g., InVision*, so the explanation may be related to the separate ongoing investigation of Alcatel. A monitor may be imposed on the new company, Alcatel-Lucent, if the government chooses to bring additional charges in its ongoing investigation of Alcatel's alleged payments to Costa Rican officials (to which an Alcatel employee, *Sapizian*, has already pleaded guilty).



Finally, in at least two cases, *Ingersoll-Rand* and *Paradigm*, the government essentially agreed to allow a “monitor-lite.” In *Ingersoll-Rand*, an OFF case with a limited additional conduct involving travel and entertainment of Iraqi officials, the DOJ and the SEC essentially ratified the company’s selection of external counsel to act as a “consultant” for a period of six months, during which time he was to evaluate the company’s compliance programs and make recommendations to the company (with copies to the government). Notably, although the consultant is charged with certifying that the company’s program was “adequately designed and

implemented,” the agreement does not include the standard detailed requirements and description of the monitor’s workplan (*e.g.*, “onsite observations,” interviews, and testing), nor is the company required, as was done in some other agreements (*see, e.g., Baker Hughes*), to accept the consultant’s recommendations in all respects.

Paradigm provides an even more instructive example. In that case, the company, in preparation for an *Initial Public Offering*, scrubbed its internal controls and discovered improper payments spread across several countries. Nevertheless, instead of imposing a monitor, the government merely noted that the company had agreed to retain its existing external counsel (who conducted the internal investigation) for 18 months as “external compliance counsel” to review the “implementation and effectiveness” of the

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company's programs and make recommendations concerning enhancements as well as whether additional internal investigations and voluntary disclosures to the government were appropriate. Significantly, although the external counsel was required to report periodically to the Department "as directed," the agreement does not contain the provision found in all other monitor agreements that his work in this respect would not be protected by the attorney-client privilege as to the Department.

Over time, the procedure for selecting FCPA monitors and determining the scope of their mandate has evolved. The earliest monitors, in 2005, were generally picked unilaterally by the company subject to the Department's veto (*e.g., Micrus, Monsanto, DPC Tianjin*). Later in 2006, the Department required that the company select a monitor from a shortlist created by the Department (*e.g., Statoil, Schnitzer*). Then, in 2007, settlements required that the Department and company mutually decide or, if unable to agree, the Department would select a monitor unilaterally (*e.g., Baker Hughes, York, Vetco Gray*). In a number of plea agreements and deferred prosecution agreements last year, companies were allowed to name a monitor, and if the Department found the selection unacceptable, the company could continue to nominate monitors until one was agreed upon (*e.g., Willbros, Faro, AGA Medical*).

Many of the early agreements provided only minimal guidance as to the scope of the monitors' mandates and few controls on their conduct. As a result, some companies complained publicly concerning "monitors run amok." The more recent agreements have addressed some of these issues by requiring the monitor to submit a workplan in advance that is reviewed and approved by both the company and the authorities and creating a mechanism by which the company can seek review of the monitor's recommendations (*e.g., Baker Hughes, Halliburton/KBR*).

Despite these improvements, the past year has seen Congressional hearings concerning the appointment of monitors, and concerns over cronyism and lack of supervision, particularly in non-FCPA cases. In an attempt to get ahead of any legislation, the Department's Acting Deputy Attorney General Craig S. Morford issued a memorandum in March 2008 on the selection and use of monitors in deferred prosecution agreements and non-prosecution agreements with corporations. The Morford Memo presents nine principles for the Department to consider in drafting monitor provisions in deferred and non-prosecution agreements concerning selection, independence, scope of duties, and review of recommendations of monitors. Although most of these requirements have already been incorporated into FCPA settlements, the requirement that each U.S. Attorney's Office and Department create a standing committee to consider monitor selections is new. It is too soon to determine whether requiring approval by more senior officials, some of whom are political appointees, will change the mix and quality of FCPA monitors in the future.

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II. Legal Interpretations and Scope

Over the past years, through litigation and settlements several questions involving the interpretation and application of the FCPA have been clarified, although in some cases the government's views remain controversial and subject to further testing in court.

The Business Nexus Test

Over the years, some practitioners have argued that the FCPA was essentially a procurement fraud statute, *i.e.*, that it applied only when bribes were paid to obtain business from a foreign government. This matter was squarely presented in the *Kay* case, which involved two executives of American Rice Inc. who were indicted for authorizing bribes to Haitian customs officials to reduce duties and taxes on rice exported from Texas to Haiti. *Kay* and *Murphy* were originally indicted in 2002. The Southern District of Texas initially dismissed the indictment, but the 5th Circuit reversed, holding that corrupt payments designed to obtain a tax benefit may satisfy the business nexus element of the FCPA, provided the government established a link between the reduced taxes and obtaining or retaining business from *someone*, not necessarily the government. On remand, the government sought a superseding indictment to allege that the company believed the tax reduction would allow it to price its goods at a price that would be competitive with other rice products in the Haitian market. The jury convicted both defendants of FCPA violations, and the district court subsequently sentenced *Kay* to 37 months and *Murphy* to 63 months in prison. Additionally, the court fined *Kay* \$1,300 and *Murphy* \$1,400 in penalties. In 2008, the 5th Circuit upheld the defendants' convictions, and the Supreme Court denied *certiorari*.

Although technically binding only in the 5th Circuit, the *Kay* decision is likely to be persuasive precedent throughout the United States, particularly because so few FCPA matters result in appellate rulings. Contrary to some practitioners' predictions of woe, however, it does not make any bribe paid to an official for any purpose subject to the FCPA, and we would expect to see defendants continue to argue that certain payments to officials fail to satisfy the business nexus test. An early example took place in the *Baker Hughes* series of cases. Although *Baker Hughes* and KPMG's Indonesian affiliate settled with the DOJ and the SEC over charges that they had paid Indonesian tax officials to withdraw what they viewed as an extortionate tax assessment, two U.S. executives of *Baker Hughes*, *Mattson* and *Harris*, contested the SEC's charges and persuaded the district court, in advance of the *Kay* decision, to dismiss the complaint on the grounds that the reduction in assessed tax was not related to "obtaining or retaining business." The SEC's appeal was pending when the *Kay* decision was announced. Significantly, however, although the *Kay* decision undercut some of the key points of the district court's opinion, the SEC ultimately withdrew its appeal and did not pursue its action against the former *Baker Hughes* executives, apparently concluding that it could not meet the *Kay* standard.

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Corrupt Intent

The Supreme Court's denial of *certiorari* in *Kay* also put an end, for now at least, to questions concerning whether the government was required to prove that a defendant knowingly and specifically sought to violate the FCPA, as opposed to simply intending to do something wrong. At the *Kay* trial, the district court rejected the defendants' request for an instruction that the jury must find specific intent to violate the FCPA to find that the defendants had acted "corruptly." Instead the court defined "corruptly" for the jury as acting intentionally to create an unlawful result or by unlawful means. In October 2007, the 5th Circuit denied the defendants' appeal, agreeing with the Second Circuit in *Stichting*, that the FCPA is not in the "narrow category" of "complex statutes" requiring a showing of specific intent to avoid "implicat[ing] innocent individuals." Both of these decisions are consistent with the 8th Circuit's 1991 decision in *Liebo*. Thus, in the absence of a split amongst the circuits, the Supreme Court is unlikely to disturb this view.

Jurisdiction over Foreign Persons

The FCPA prohibitions extend to foreign companies and foreign individuals who make use of the "mails or other instrumentalities of interstate commerce" or do "any acts within the territory of the United States" in furtherance of an offer, promise, or payment of an unlawful payment to a non-U.S. official. The key issue for foreign persons has always been what would qualify as an act within the United States. In the *Siemens* and *Halliburton/KBR* cases, the government has at last alleged in pleadings what it had long argued – that U.S. dollar denominated transactions that typically clear through correspondent accounts in U.S. intermediary banks establish U.S. jurisdiction over the foreign parties to the transaction.

Prior to the *Siemens* matter, neither the Department nor the SEC had ever brought a case under such a jurisdictional theory, although they had occasionally charged a completely overseas transaction as a books & records and internal controls violation. For example, in *Schering-Plough*, the corrupt payments in question were paid by the company's subsidiary in Poland directly to a Polish official without the use of U.S. banks. Nevertheless, as an issuer, Schering-Plough was held responsible for its subsidiary's inadequate internal controls as well as for its own inaccurate books and records, which included the consolidated books and records of its foreign subsidiaries.

Significantly, in *Siemens* and *Halliburton/KBR*, neither the SEC nor the DOJ went so far as to base its jurisdiction solely on the correspondent accounts and each carefully pleaded the use of more uncontroversial territorial acts such as transfers from bank accounts of actors in the scheme held in the United States at U.S. banks. Both cases, of course, settled and did not challenge any of the bases of jurisdiction asserted by the agencies. However, in the *KBR* pleading, the DOJ identified certain foreign joint venture partners as unindicted co-conspirators, and it may have alleged jurisdiction based on the use

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of correspondent accounts to send a strong signal to foreign companies as to the reach of the U.S. law as well as to spur foreign law enforcement in the alleged co-conspirators' countries into action.

The Department, in a spin-off from the *Siemens* matter, has also filed an *in rem* civil forfeiture complaint against the bank accounts of certain former Siemens consultants and foreign government officials in which it claims *in rem* jurisdiction over funds transferred by Siemens from accounts in Cyprus and Austria to accounts in Singapore banks because “each of the transfers . . . would have moved through banks located within the United States on their way to the beneficiary bank in Singapore.” The assertion of jurisdiction over these funds appears to be based solely on their passage through correspondent accounts. The issue could, therefore, be squarely presented to a court if the owners of these foreign bank accounts challenge the forfeiture.

Extortion

Most demands from officials for bribes can be characterized as extortion. Whether and to what extent extortion is a defense in FCPA matters has been addressed in two recent proceedings, *Kay* and *Kozeny*, with somewhat differing conclusions. See Philip Urofsky, *Extortionate Demands Under the Foreign Corrupt Practices Act*, BNA White Collar Crime Report (Dec. 19, 2008).

The FCPA legislative history shows that Congress intended that true extortionate demands – made under threat of harm to person or property – should not be construed as an FCPA violation. It remains unclear whether a company that would have only suffered a loss of business as a result of refusing a bribe would be able to successfully avail itself of a common law extortion defense. In 2004 in *Kay*, the trial court instructed the jury that threat of “serious economic loss” could be considered in assessing whether a defendant had the requisite corrupt intent. In contrast, in a 2008 opinion, the district court in *Kozeny* stated that it will instruct the jury at trial only as to “true extortion,” citing legislative history as authority for this view. Intriguingly, however, the forfeiture complaint in *Siemens* cites “extortion” under Bangladesh law as a predicate, in addition to FCPA and federal money laundering law violations, and explicitly notes that Bangladesh law defines extortion to include demands made under threat of non-physical injury, including fiscal injury and damage to reputation.

Facilitation Payments

Under the 1988 amendments, Congress explicitly excepted “facilitation payments” from the category of bribery prosecuted under the FCPA. With this exception, the statute distinguishes between corrupt payments made to speed up normally performed government actions requiring no discretion (like a routine permit or license issue) and corrupt payments to obtain or retain business. The proceedings

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against Wabtec, settled in February 2008, shed some light on how, in practice, the government is drawing (or not drawing) the line between mere facilitation payments and prosecutable offenses.

As recited in the deferred prosecution agreement, Wabtec's subsidiary in India, Pioneer Friction Limited ("Pioneer") made payments to government officials associated with the Indian Railway Board and the Ministry of Rails for several different purposes: (1) to secure approval of Pioneer's tender bids and allow Pioneer to sell other parts outside of the tender process; (2) to schedule inspections to perform required pre-delivery inspections; (3) to secure issue of delivery receipts certifying products conformed to tender; and (4) to put a stop to excessive excise tax audits. The latter three of these payment types may have arguably been payments to obtain routine governmental action, outside the scope of enforcement envisioned by the FCPA. Nevertheless, *Wabtec* bore scrutiny for these payments because it disguised the payments, giving rise to books & records and internal control violations. It remains a question whether the prosecutors would have brought an action based solely on such facilitation payments had they not been disguised nor part of a broader course of conduct involving corrupt payments more clearly prohibited by the FCPA.

III. Aggressive Investigatory Steps and Prosecution Theories

Foreign Evidence

Absent cooperation by the subjects of an investigation, *e.g.*, a cooperating corporation, the government's ability to obtain evidence located overseas depends on the cooperation of foreign governments, and over the years many investigations appear to have stalled for lack of such cooperation. In the recent past, however, prosecutors have repeatedly cited an improved climate of cooperation and pointed to various cases in which they successfully obtained evidence, such as Swiss bank records, not previously available. In 2008, we saw a substantial advance in cooperation amongst U.S. and foreign law enforcement authorities. In the *Siemens* matter, in which the investigation was initiated by the Munich prosecutor, the cooperation between the German and U.S. authorities was apparent. More surprisingly, however, the government's forfeiture complaint reveals that FBI agents traveled to Bangladesh and participated in interviews with the local corruption investigators. In several other cases, the Department and the SEC have publicly acknowledged the assistance of foreign investigatory authorities – *e.g.*, *Baker Hughes* (Isle of Man, U.K., Switzerland), *Hioki* ("multiple foreign jurisdictions"), *Halliburton/KBR/Stanley* (France, Italy, Switzerland, U.K.), *Sapsizian* (Costa Rica and France), *Smith* (U.K.), and *Willbros* (Nigeria). As for pending investigations, Magyar Telekom in Hungary reported that beginning in May 2008 Hungarian and Macedonian authorities began investigating Magyar for suspected corruption, joining the U.S. investigation that began in 2007.

Further, the Department and the SEC have increasingly availed themselves of more formal cooperation tools by making formal government-to-government requests for evidence under existing bi-lateral Mutual

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Legal Assistance Treaties (MLATs) and memoranda of understanding. These requests have apparently become more fruitful following the adoption of international conventions such as the OECD Treaty that require their signatories to cooperate in such investigations. Indeed, the pace of these requests appears to have increased, with a DOJ official stating at a recent conference that the Department issued no less than 45 such requests in 2008.

Detention and Arrest of Individuals

The government has increasingly applied traditional coercive law enforcement tools to FCPA investigations. For example, in a number of cases the government has apparently put individuals on border watches and detained them when they entered or transited through the United States. For example, in one well-publicized instance in May 2008, in connection with its investigation into BAE Systems' arms deals with Saudi Arabia, the government separately detained BAE CEO Mike Turner and BAE Director Sir Nigel Rudd as they traveled through the Houston and Newark airports, served them with subpoenas, and searched their electronic equipment. The same month, the Department issued several subpoenas on several BAE employees. As demonstrated in the UBS tax evasion investigation, the U.S. authorities' willingness to detain foreign executives for questioning can seriously disrupt a business' operations. In that case, the bank warned members of its former private banking team serving wealthy U.S. customers to avoid traveling to the U.S. after one of its executives, Martin Liechti, was similarly detained and held in the U.S. as a material witness and another former employee, Bradley Birkenfeld, was indicted.

Of even more consequence to the individual involved, in 2008, the government terminated the U.S. passport of Paul Novak, a U.S. citizen who was a former consultant to Willbros, while he was living in South Africa (and presumably not cooperating with the Department), causing him to be deported to the United States where he was immediately arrested upon arrival at the Houston Airport. The indictment against Novak also charges another former Willbros executive, James Tillery, who remains at large.

Finally, it is often (and deliberately) difficult to determine what stage the government has reached in an investigation and thus to judge the risk of traveling into or through the United States. The BAE executives were merely briefly detained for questioning, while Tillery had already been charged in a indictment that was kept under seal until he was arrested at the airport. In 2006, it was well known that the U.S. had opened an investigation into alleged bribery by Alcatel of Costa Rican officials. Unfortunately for Christian Sapsizian, a Paris-based Alcatel executive, the government apparently was further along than expected, and he was arrested upon a complaint (and subsequently indicted) while transiting through the Miami airport in late 2006.

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Forfeiture of Proceeds of Bribery

In settled cases, the government often effectively forces the defendant to forfeit the ill-gotten gains from the bribery through a combination of criminal and civil fines and disgorgement. Over the past several years, the government has increasingly sought in contested cases to deprive the defendant, often individuals, of the use of the proceeds of alleged bribery, sometimes even before trial. The earliest instance of this approach was its request to the Swiss authorities in 2000 to seize funds in Swiss accounts purportedly held for the benefit of James Giffen and several officials of Kazakhstan. When Giffen was subsequently indicted in 2003, the government included forfeiture allegations claiming \$84.33 million in frozen funds, the contents of several identified accounts in Swiss and New York bank accounts, and \$51.7 million deposited in a Swiss account held in the name of the treasury of the Republic of Kazakhstan.

Similarly, in October 2008, the government filed a superseding indictment against Gerald and Patricia Green including criminal forfeiture allegations laying claim on the defendants home, car, and pension fund if convicted on charges of bribing Thai tourism officials. The following month, the government successfully moved to freeze the defendants' pension plan with an estimated value of approximately \$458,748. In its motion papers, the government announced that a restraining order preserving the availability of the car or residence was unnecessary because the government had already seized the car pursuant to a seizure warrant and intended to record a *lis pendens* notice against the real property sufficient to prevent its lease or transfer.

In another attempt to preserve the availability of an individual defendant's assets to satisfy eventual FCPA penalties, the Department obtained a court order freezing the proceeds of Victor Kozeny's sale of his Aspen home, estimated at \$23 million. The order describes the funds as proceeds of money laundering; the 2005 *Kozeny* indictment alleges FCPA and Travel Act violations as well as money laundering and forfeiture allegations.

Similarly, in January 2009, following on the settlement of the *Siemens* matter, the government filed a civil forfeiture complaint and sought a freeze order from the Singaporean government against funds in the foreign accounts of a number of unindicted individuals, including the alleged corrupt intermediaries and at least one of the recipients of the allegedly unlawful payments.

Thus, although the FCPA itself provides only for prosecution of the bribe-payers, including agents and intermediaries, the DOJ has used the civil and criminal forfeiture statutes to reach both the bribes and the proceeds of the bribery on all sides of a bribe transaction, including the alleged bribe-payers (*Giffen*, *Green*, *Kozeny*), intermediaries (*Siemens*), and the foreign officials themselves (*Giffen*). In some circumstances, this has put the government in a difficult position requiring creative solutions. For example, in *Giffen*, some portion of the alleged bribes were transferred, just ahead of the Swiss government's freeze order, from an account held in the name of a foreign official into an account held in the name of the Treasury of the Kazakh government. Although the Swiss government subsequently froze

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the latter account and it was included in the criminal forfeiture count in *Giffen*, the U.S. government subsequently entered into a complicated settlement with the Kazakh government in which it filed and settled a civil forfeiture action in which the parties agreed to the release of the forfeited funds to a World Bank trust fund, where they will be used for projects in Kazakhstan to assist poor children, improve public financial management, and increase transparency in the extractive industries.

Aggressive Use of Traditional Investigatory Tools

As we have noted in previous *Trends & Patterns*, the Department has recently increased the resources dedicated to FCPA investigations, including assigning a number of agents to work exclusively on FCPA investigations. The existence of an “FCPA squad” may account for the increased use of traditional law enforcement tools. We do not, of course, know what else the government is doing in cases it has not yet filed. However, in earlier cases, the Department has used informants and undercover agents to surreptitiously record conversations amongst potential FCPA conspirators, *e.g.*, *Tannenbaum* and *King*. Such evidence – the defendants’ own words – is, of course, very powerful in front of a jury, and it is reasonable to expect that the government continues to seek opportunities to utilize these tools as well.

Prosecution Theories

Traditionally, the government paired FCPA charges with other applicable statutes, including the Travel Act, 18 U.S.C. § 1952 (incorporating state bribery laws) or “honest services” mail or wire fraud charges, 18 U.S.C. §§ 1341, 1343, 1346. Often, the purpose of these charges was to provide an alternative basis for foreign legal assistance in the days when there was no dual criminality between the U.S. and the rest of the world in FCPA cases. Today, however, the government has increasingly charged other crimes to capture the full scope of the alleged criminal conduct, particularly including money laundering and tax violations.

In the past, many mechanisms for international assistance such as letters rogatory and early MLATs required dual criminality. Most modern MLATs, however, do not require dual criminality and many multilateral anti-corruption treaties, including the OECD Convention, explicitly place an obligation on parties to render such assistance. In light of this development, the government appears to have moved away from routinely adding fraud or Travel Act charges to an FCPA charge unless justified by specific facts in a particular matter. For example, in *Schnitzer*, a corporate settlement, the Department charged the company with both FCPA *and* federal wire fraud violations in connection with the bribes and kickbacks it paid to customers in China and South Korea. This choice to charge conspiracy to commit wire fraud may have been in recognition of the difficulty of determining who exactly is (or is not) a government official in China and thus whether the bribes in question constituted FCPA violations or commercial bribery. Perhaps for similar reasons, in *Diagnostic Products*, the SEC declined to apportion

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the profits the company earned in China between those earned through kickbacks to government officials and those earned through kickbacks to individuals and simply ordered the company to disgorge *all* profits earned during the period in which it was paying such bribes.

In recent cases, however, the Department has expanded its palette of charges to more fully capture the full range of conduct uncovered by its investigations. This has come up in two contexts: (i) when more than one criminal scheme is detected during an investigation or (ii) when the FCPA scheme traverses multiple criminal statutes.

In the first context, a number of cases have arisen over the past years where the FCPA offenses were discovered during an investigation targeting entirely different conduct. For example, the *Saybolt* case from 1998 began during an investigation of environmental crimes, and *Cantor* from 2003 arose during a securities fraud investigation. More recently, in 2008, the *Shu Quan-Sheng* case arose in connection with an illegal arms export investigation and, in *Hioki*, the FCPA allegations were raised in the course of an antitrust cartel investigation.

In the second instance, the government has steadily increased the range of charges it brings against FCPA defendants. In *Giffen*, of course, it charged the defendant, in addition to FCPA offenses, with traditional fraud, honest services fraud (later dismissed), money laundering, and tax violations. Similarly, this year, the government expanded its charges against the *Greens* to include money laundering charges and tax counts, although the tax charges are only against Patricia Green. Further, in the *Willbros* matter, the SEC charged the company with securities fraud and reporting violations under the Exchange Act and the Securities Act alleging that the company had engaged in a fraudulent scheme using fraudulent invoices to claim inflated off-sets to value-added tax liabilities in Bolivia. One of the Willbros executives, Carlos Galvez, was charged with aiding and abetting the company in these securities violations for his role in falsifying books and records and aiding and abetting the company in making material misstatements in its financial statements and Commission filings.

IV. Mergers & Acquisitions Guidance

As noted in previous *Trends & Patterns*, the issue of successor liability has bedeviled a number of recent merger or acquisition transactions and, indeed, in the *Titan/Lockheed* transaction caused Lockheed to terminate the transaction rather than subject itself to potential liability. In 2008, however, we saw the culmination of a series of cases and FCPA Opinions in which the Department has clearly established a pattern (albeit not a binding position) in *acquisition* transactions that the acquiring company will not be held liable for pre-acquisition conduct *provided* it promptly implements a compliance program to prevent post-acquisition conduct, discloses any pre-acquisition conduct it discovers, and cooperates in the government's investigation. It even appears that there may be a "grace period" during which it will not be prosecuted for post-acquisition conduct provided it is in the process of cleaning house. On the other

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hand, a new owner that turns a blind eye or fails to expend the necessary time, energy, and money to implement adequate controls will be held liable for such ongoing activity, even activity that takes place very shortly after the transaction closes.

Acquisitions

Over the past years, the Department has issued a number of FCPA Opinions that provide guidance as to its current approach to successor liability in the mergers and acquisitions context. As early as 2001, the Department began issuing instructive opinions on this subject, essentially stating that an acquirer (or joint venture partner) that did reasonable due diligence, investigated any problematic transactions, disclosed its concerns to the DOJ and what remedial steps it had or would take, and promised to implement a rigorous compliance program would not be charged for accurately and completely disclosed pre-acquisition conduct. In 2004, in an opinion issued to the new owners of the Vetco Gray companies, the Department provided assurance that it would not prosecute the Vetco Gray companies for disclosed pre-acquisition conduct in light of an extensive pre-acquisition global compliance review, the guilty pleas of two of the Vetco Gray subsidiaries, and the new owners' undertaking to report additional pre-acquisition conduct, if discovered, and to institute a rigorous compliance program, whose scope and elements were described in detail in the Opinion. Unfortunately, however, the Vetco Gray companies failed to honor their commitments, and, in early 2007, the companies were prosecuted for post-acquisition conduct and fined \$26 million, at the time, the largest FCPA criminal fine ever imposed. In announcing the Vetco Gray plea agreement, the Department made special note of the company's failure to "institute and implement a compliance system, internal controls, training, and other procedures sufficient to have deterred and detected violations of the FCPA" as was required under the Opinion. The company's failure to abide by its commitment under the Opinion was further taken into account in the sentencing calculations.

In FCPA Opinion 08-02, Halliburton sought an opinion providing it with protection against liability for pre-acquisition conduct and a "grace period" for post-acquisition conduct in the context of an auction sale where it had no opportunity to conduct any pre-acquisition due diligence beyond the limited data the seller, widely reported to be Expro International Group PLC, was willing to post in a data room. The government agreed to grant such protection, but at a high price. In exchange for the safe harbor provided by the FCPA Opinion, Halliburton agreed, assuming it won the auction (which it did not), to disclose upon closing all pre-acquisition corruption or internal controls issues learned of in due diligence, provide the Department with a detailed post-acquisition due diligence work plan within 10 days of the closing, retain external counsel and forensic accountants to undertake a comprehensive compliance review of high, medium, and low-risk areas of the new business, report on its findings at set periods, and institute a rigorous compliance program. In exchange, the Department agreed not to bring an enforcement action

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against the company for disclosed post-acquisition conduct that took place within the first six months after the closing.

Halliburton, on the eve of settling the KBR FCPA action, was clearly eager to ensure it was protected from having to endure yet another investigation. It is questionable whether the standard set by Opinion 08-02 reflects what is necessary in all cases to invoke a grace period or what was necessary to obtain the DOJ's agreement in advance. In most cases, it seems likely that a company that is able to and does conduct reasonable risk-based due diligence in advance of the acquisition (something Halliburton was not able to do), ensures that reasonably rigorous compliance procedures and controls are in place soon after the acquisition, and takes appropriate remedial action immediately upon learning of any issue is likely to be afforded lenient treatment regardless of whether it adopts all of the measures set out in 08-02.

One cautionary note is appropriate, however. All of these transactions involved an acquisition either in whole or in part of another company in which, as a result of the transaction, the company that had engaged in the improper conduct was now owned by new "clean" owners. In such a circumstance, the government may well be persuaded that it is not fair to the new owners to hold them responsible for acts over which they have no control *even when they will reap the benefit in the form of ongoing contracts with continuing profits*. (This latter point, however, is why the government will sometimes use its leverage in the pre-closing period to force the parties to reach some form of settlement with it that will often require effective disgorgement of such ill-gotten profits.) In a *merger*, on the other hand, the old company may be viewed as part-owner of the new company, and the argument of "clean hands" may not prevail.

Spin-offs and Sales

The flip side of an acquisition is, of course, a sale or spin-off. In circumstances in which buyers have sufficient leverage, they may well insist that the seller provide protection against successor liability. For example, in a number of cases, the buyer forced the selling company to settle the potential criminal charges prior to closing, as occurred as a closing condition of Vetco International Limited's sale of its Vetco Gray division to GE in 2007. A seller that is unwilling to do so faces the risk, as in the *Titan/Lockheed* transaction, of seeing the deal implode and the buyer walk away.

In 2006, when Halliburton spun-off its Kellogg, Brown & Root subsidiary, the DOJ's FCPA investigation of the Bonny Island transactions was well known. To make KBR palatable to the investing public, Halliburton eventually offered to indemnify the new KBR for any FCPA penalties to "enhance KBR's financial stability." The bill finally came due in 2009, when Halliburton settled the FCPA investigation on KBR's behalf and paid \$402 million in criminal fines under the plea agreement with the DOJ and \$177 million in disgorgement to the SEC. After this, however, as with any buyer, the owners of the new KBR

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are now on their own and responsible for any post-spin-off conduct, as Halliburton exacted a release from its indemnity as part of the settlement.

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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