SHEARMAN & STERLING LLP

FCPA Digest

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

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SHEARMAN & STERLING LLP

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Last year, we noted that 2012 had been "a fairly slow time" in terms of corporate enforcement actions, with twelve enforcement actions against corporations. 2013 was slower still, with only nine corporate enforcement actions. There was a steep increase in corporate fines, however, and enforcement against individuals saw a marked increase, from five in 2012 to sixteen in 2013—eight of whom pleaded guilty.

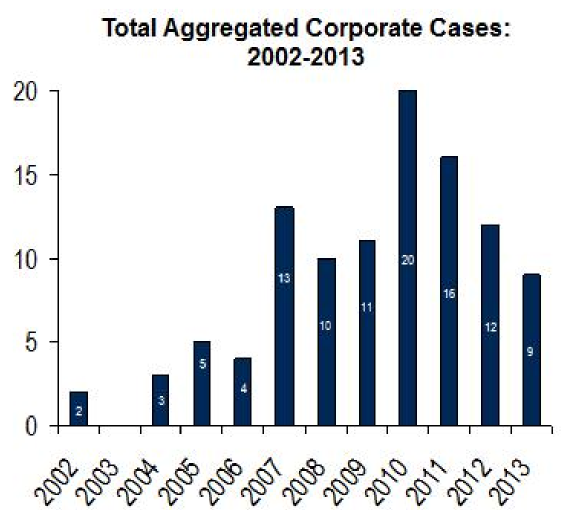
Among the highlights:

- Over $720 million in penalties in 2013, and the average penalties ($80 million) and the adjusted average ($28 million) were both considerably up from previous years;
- Significant number of new cases against individuals;
- Surge in "hybrid" monitors, with an independent monitor's term of 18 months followed by 18 months of self monitoring;
- Continued aggressive theories of jurisdiction and parent subsidiary liability; and
- Adoption of deferred prosecution agreements in the U.K., albeit with substantially more judicial involvement than in the U.S.

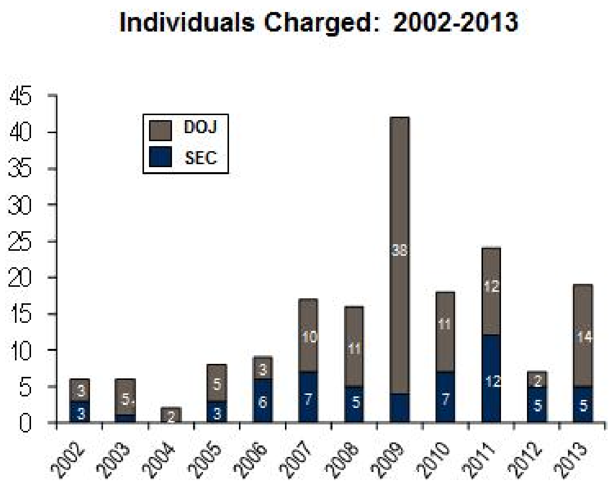
Enforcement Actions and Strategies

Statistics

In 2013, the government brought nine enforcement actions against corporations: Philips, Parker Drilling, Ralph Lauren, Total, Diebold, Stryker, Weatherford, Bilfinger, and Archer Daniels Midland (ADM).



This is the lowest number in the past seven years, which had seen annual totals averaging thirteen cases per year since 2007. Most of these cases were coordinated actions brought by both the SEC and the DOJ, with only two independent actions brought by the SEC (*Philips* and *Stryker*) and one from the DOJ (*Bilfinger*). It is difficult to say whether the lower rate of corporate enforcement is a trend, in spite of the relatively low twelve corporate enforcement actions in the prior year: although a substantial number of companies have announced new investigations or reserves for enforcement fines in recent years, there have only been a handful of publicly announced declinations. The regulators, for their part, have swept aside any suggestions of waning enforcement, stating that both the DOJ and the SEC have a substantial pipeline of FCPA cases awaiting announcement.

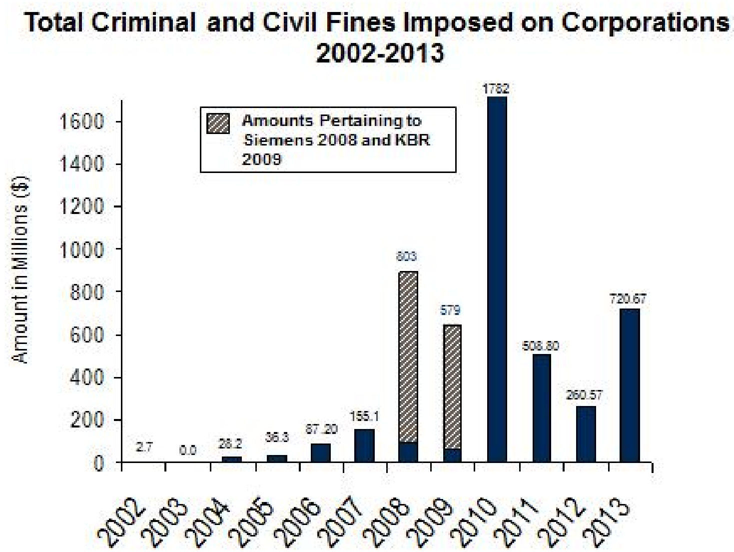


In contrast with the lower number of corporate matters, the year saw a surge in individual actions, with twelve charged in 2013. In addition, four individual actions brought in 2012 were unsealed in 2013 (thus we have included them in our statistics for 2013). Only five of these individual actions were connected with previous enforcement actions: *Jald Jensen*, *Bernd Kowalewski*, *Neal Uhl*, and *Peter Dubois* (incidentally, the group of individuals whose filings were belated unsealed in 2013) were all affiliated with *Bizjet*, which settled with the DOJ in 2012; and *Alain Riedo* was a Swiss national executive at *Maxwell Technologies*, which settled with the DOJ and SEC in 2012. The remaining eleven fell into two group actions, and one rather unique freestanding action: *Lawrence Hoskins*, *Frederic Pierucci*, *William Pomponi*, and *David Rothschild* were employed by and participated in a scheme at French company Alstom SA (which has not been subject to an enforcement action—yet), while *Iuri Rodolfo Bethancourt*, *Tomas Alberto Bethancourt Clarke*, *Jose Alejandro Hurtado*, *Haydee Leticia Pabon*, *Maria de los Angeles de Hernandez Gonzalez*, and *Ernesto Lujan* allegedly participated in a scheme involving a New York broker dealer called Direct Access Partners, LLC. Among the broker dealer defendants, *Gonzalez* was a Venezuelan government official charged not with FCPA bribery but with money laundering and Travel Act violations for accepting bribes. The final individual action was an obstruction of justice case against *Frederic Cilins*, a French national who allegedly interfered in a government investigation into a mining company's potential violations of the FCPA in Guinea. Press reports indicate that the mining company is Beny Steinmetz Group Resources (BSGR), which has denied any wrongdoing but is under investigation in several countries, including Switzerland.

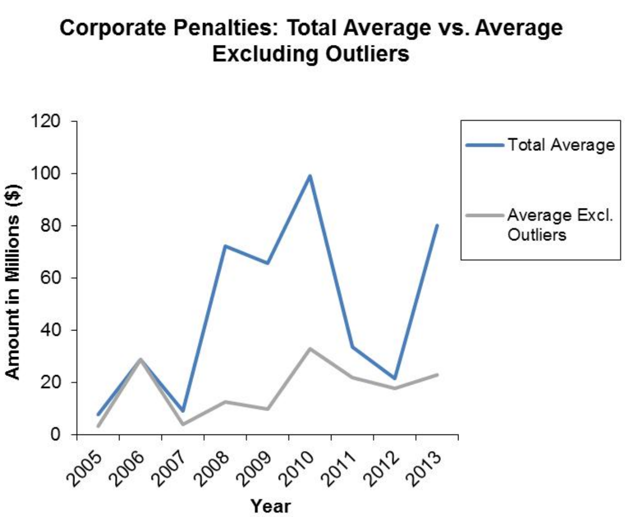
On the penalties side, the corporate penalties assessed in 2013 were markedly higher than in 2012 and rebounded to levels last seen in 2010. Altogether, the government collected $720,668,902 in financial penalties (fines, DPA/NPA penalties, disgorgement, and prejudgment interest) from corporations in 2013. This equates to an average of $80 million per corporation, with an exceptionally large range of $1.6 million (*Ralph Lauren*) to $152.79 million (*Weatherford*) and $398.2 million (*Total*). *Weatherford* and *Total's* penalties are, each respectively, over three times that of any of the other companies.

Recent Trends and Patterns in FCPA Enforcement

Weatherford's high fines appear to stem from the company's widespread bribery schemes and particularly "anemic" compliance systems and controls, as well as its initial failure to cooperate with the authorities. Total engaged in a bribery scheme that spanned a decade and resulted in over $150 million in profits, resulting in the second highest disgorgement in FCPA enforcement history.



Meanwhile, *Ralph Lauren's* low fines were purportedly the result of the "exceptional" self reporting, cooperation, and remediation that led to an unprecedented double NPA, although the isolated nature of the bribes (and resulting low disgorgement) likely factored in as well. When we remove those three outliers, the average is $28 million. This is in line with the averages calculated in recent years using the same criteria ($17.7 million in 2012, $22.1 million in 2011).



On the individuals side, *Riedo* is a fugitive and two others, *Cilins* and Alstom executive *Pomponi*, are each pending trial. Two of the Alstom defendants, *Rothschild* and *Pierucci*, have pleaded guilty, while the status of the fourth Alstom defendant *Hoskins* is yet unclear. Similarly among the *Bizjet* defendants, the status is unclear for two defendants (*Jensen and Kowalewski*) while two pleaded guilty (*Uhl and DuBois*). *Uhl and Dubois* were each sentenced to 60 months' probation and 8 months' home detention, with a $10,100 fine imposed on *Uhl* and a $159,950 fine imposed on *DuBois*. Finally, all four of the broker dealer defendants in the DOJ proceedings (*Clarke Bethancourt*, *Hurtado*, *Gonzalez*, and *Lujan*) have pleaded guilty, with sentencings scheduled for 2014. The parallel civil proceedings (with additional defendants *Bethancourt* and *Pabon*) were stayed pending resolution of the criminal case, and the stay had not been lifted as of December 2013.

In addition to the relative profusion of new individual enforcement, there were sentencings and other case developments in numerous pending actions. After a slew of guilty pleas last year, three CCI defendants were sentenced: *Flavio Ricotti* to time served and *Mario Covino* and *Richard Morlok* to three years' probation and three years' home confinement. The *CCI* cases are thus fully resolved, save for Korean national *Han Yong Kim*, whose request to make a "special appearance" was denied in June.

Meanwhile, in the case against the *Siemens* executives, the DOJ's cases appear to be stalled, with none of the defendants choosing to come to the U.S. to answer charges and apparently no success thus far in obtaining extradition of them. On the other hand, the SEC civil enforcement action seems close to being resolved, albeit in some strange and uneven ways. *Herbert Steffen's* motion to dismiss was granted for lack of jurisdiction and the SEC voluntarily dismissed all claims against *Carlos Sergi*, while *Uriel Sharef* settled with the SEC for a $275,000 civil penalty—the second highest penalty assessed against an individual in an FCPA case. The SEC indicated that it has reached an agreement in principle to settle claims against *Andres Truppel*, and has requested that the court enter default judgments against *Stephan Signer* and *Ulrich Bock*.

In contrast, the three *Magyar Telekom* executives charged by the SEC, *Elek Straub*, *Andras Balogh*, and *Tamas Morvai*, are apparently proceeding to trial and the case has now entered the pretrial discovery phase, after the defendants' motions to dismiss were denied in February 2013. Similarly, the *Noble* executives *James Ruehlen* and *Mark Jackson* are also on their way to trial; after considerable pretrial litigation (discussed below) regarding the statute of limitation and other issues resulting in the SEC filing an amended complaint in March 2013, Ruehlen and Jackson filed answers on April 2013, denying most of the SEC's allegations.

In yet another case with multiple individual defendants, *Haiti Telecom*, the legal battles continue: briefs were filed in the appeal of *Jean Rene Duperval*, while oral arguments were held in the appeal of *Joel Esquenazi* and *Carlos Rodriguez*. Three of the remaining defendants (*Washington Vasconez Cruz*, *Amadeus Richers*, and *Cecilia Zurita*) have been classified as fugitives, and *Marguerite Grandison's* case was closed when she entered into an eighteen month diversion program.

Finally, the year also saw resolutions from the rather distant past, with *Thomas Farrell*, *Clayton Lewis*, and *Hans Bodmer* (all charged in 2003) each sentenced to time served, and *Paul Novak* (charged in 2008) sentenced to fifteen months in prison and a $1 million fine. In addition, *Frederic Bourke's* (charged in 2005) long legal journey finally came to an end—after two unsuccessful appeals of his original 2009 conviction, the United States Supreme Court refused to hear his case. He began his prison sentence of one year and one day in May 2013.

Types of Settlements

As in the past, nearly all of the criminal corporate resolutions were in the form of deferred or non-prosecution agreements, with only two corporations pleading guilty (respectively, *ADM* subsidiary *Alfred C. Toepfer International (Ukraine) Ltd.* and *Weatherford* subsidiary *Weatherford Services Ltd.*). The civil corporate resolutions took the form of administrative cease and desist orders and civil settlements, with one notable exception—the SEC's first-ever FCPA-related non-prosecution agreement with a company (*Ralph Lauren*). As we noted last year, however, the government has not been clear as to the factors that influence the type of settlement, and unfortunately, the *Ralph Lauren* double NPA does not supply any meaningful clarity. Both the SEC and DOJ credited *Ralph Lauren's* prompt self reporting, remedial measures, and "extensive, thorough, real time cooperation," including measures such as revising and enhancing compliance policies and conducting a world wide risk assessment. The SEC also noted that *Ralph Lauren* ceased retail operations in Argentina, the site of the alleged bribes. Yet, it is difficult to distinguish these factors from those set out by the SEC (albeit in a less effusive manner) in *Philips*, a case that predated *Ralph Lauren*: self reporting, cooperation, and "significant remedial measures" but *Philips* was subject to an administrative cease and desist order. Moreover, as we have noted before, although we, too, would like to get NPAs rather than DPAs for our clients, the practical consequences are still the same—allegations of wrongdoing (with admissions in DOJ cases), penalties, monitoring or reporting, tolling of the statute of limitations, limits on public statements, and bad publicity.

Interestingly, subsequent to the *Ralph Lauren* NPAs, nearly every enforcement action contained allegations of at least one notable deficiency in the self reporting/cooperation/remediation process: *Diebold* only undertook "some" remedial measures that were "not sufficient to address and reduce the risk of occurrence" (which led to the decision to impose a monitor); *Stryker*, *Weatherford*, and *Bilfinger* did not self report; *Weatherford* engaged in misconduct during the SEC's investigation; and *Bilfinger's* cooperation came "at a late date." The *ADM* settlement documents did not contain overt references to any shortcomings in the self reporting company's cooperation or remediation, but while the parent company was granted an NPA, it still had to settle civil charges by the SEC and its subsidiary pleaded guilty to criminal charges.

Elements of Settlements

Monitors. Independent compliance monitors made a comeback in 2013, albeit in the hybrid form we have seen in recent years, in which the monitor's term is only eighteen months followed by eighteen months of self reporting. Out of seven DOJ actions, monitors were imposed on four companies: hybrid monitors for *Diebold*, *Weatherford*, and *Bilfinger*, and a full three-year monitor for *Total*. Consistent with the DOJ's approach in other recent cases against foreign companies, the DPA specifies that the monitor is to be a French national. *Parker Drilling*, *Ralph Lauren*, and *ADM* agreed to self report for the duration of their respective settlement agreements.

We have previously noted the lack of clarity in what factors lead to an independent compliance monitor. The year's enforcement actions, however, showed a measure of transparency in the government's reasoning, which seemed to place weight on the company's ability to remediate its past wrongdoing. For example, in the DPA with *Diebold*, the DOJ stated that *Diebold's* remediation was "not sufficient to address and reduce the risk of recurrence of the Company's misconduct and warrants the retention of an independent corporate monitor." In contrast, the DPA with *Parker Drilling* (which was allowed to self monitor) gave a long list of examples of the company's "extensive" remediation. As to the other actions, it seems reasonable that *Ralph Lauren* would not have a monitor, given the double NPA and the smaller scope of the alleged scheme. It seems equally reasonable for *Total* to have a monitor, given the severity of its offense and the total lack of any references to remediation in its DPA. In contrast, *Weatherford's* DPA gives a long list of the "extensive" remediation the company undertook, but it also mentions the "extent and pervasiveness of the Company's criminal conduct," which may have tipped the balance toward a monitorship. The *Bilfinger* DPA gives only a general and brief description of cooperation and remediation, but it does note that Bilfinger's cooperation came "at a late date."

Discount. In prior years, companies have typically received discounts from the Sentencing Guidelines as a reward for their cooperation and settlement. Where no discounts were granted, the fines would generally be at the very bottom of the range set by the Sentencing Guidelines. In 2013, however, both *Total* and *Bilfinger* received fines that were higher than the bottom of the Sentencing Guidelines range, Weatherford's fine was squarely at the bottom of the range, and only three companies received discounts: *Diebold* (30%), *ADM Ukraine* (30%), and *Parker Drilling* (20%). *ADM Ukraine* received an additional deduction of $1,338,387 to account for a fine imposed by German authorities on ADM Ukraine's direct parent company, Alfred C. Toepfer International GmbH. Such unusual circumstances aside, the factors that affected the imposition of monitors—remediation, cooperation, and severity of the offense—seem to also affected the discount. Foreign corporations appear to be getting the short end of the stick (*Diebold*, *Parker Drilling*, *ADM*, and *Ralph Lauren* are all U.S. companies), but this is likely because non-U.S. companies may not be as willing to cooperate with U.S. government authorities nor, perhaps, have the requisite savvy to navigate the process of cooperating with an overseas regulator.

Approval of Settlements. SEC civil settlements against companies for FCPA violations tend to be approved within thirty days, but, as we noted last year, U.S. District Judge Richard Leon refused to "rubber stamp" two pending settlements: *Tyco* (settlement agreement signed in 2012) and *IBM* (settlement agreement signed in 2011). In doing so, he stated that he was "increasingly concerned" by the SEC's settlement policies, and he refused to approve the deal with IBM unless the company agreed to file reports to the court about its compliance program and any potential FCPA violations. IBM, backed by the SEC, had argued that such reporting would be too burdensome, but the company ultimately agreed to modified reporting and Judge Leon approved the settlement in July 2013. Under the new terms of the settlement, IBM is required to: 1) file annual reports to the court and SEC describing its anticorruption compliance programs; 2) immediately report any reasonable likelihood of FCPA violations; and 3) report within 60 days of learning that it is subject to any criminal or civil probe or enforcement proceeding. *Tyco's* settlement, which had already included reporting requirements, received approval in June 2013.

Judge Leon's intervention, though unusual, was not particularly controversial given that court approval is part and parcel of a civil settlement. DPAs, on the other hand, have been viewed as being exempt from judicial scrutiny—until July 2013, when Judge John Gleeson of the Eastern District of New York published a lengthy written opinion in *U.S. v. HSBC Bank USA* holding that a court has authority to approve and oversee the implementation of a DPA pursuant to its "supervisory power."

Judge Gleeson, acknowledging that his was a "novel" theory, noted the importance of the supervisory power in "preserv[ing] the judicial process from contamination," and reasoned that, since the parties "have chosen to implicate the Court in their resolution of this matter," the court would not be a "potted plant." Nonetheless, Judge Gleeson recognized the "significant deference" the court owed to the government and approved the DPA "without hesitation." However, in a similar vein to Judge Leon's reporting requirements, he ordered the government and HSBC to file quarterly reports keeping the court apprised of all significant developments in the implementation of the DPA. Judge Gleeson also clearly distinguished DPAs from NPAs, noting that the latter is "not the business of the courts" as it falls within the government's "absolute discretion to decide not to prosecute."

While not an FCPA case, the *HSBC USA* case does raise the question of whether courts will exercise such authority in overseeing and approving DPAs in future FCPA enforcement actions. Given Judge Gleeson's own discussion of DPAs vs. NPAs—and the functional equivalent of the two in terms of admissions, penalties, and supervision—the risk that a court may examine the merits (and factual predicates) of a proposed DPA may well cause the DOJ to be more willing to proceed on the NPA path in the future.

Perennial Statutory Issues

Jurisdiction

The enforcement actions in 2013 were well within established limits, with the possible exception of the *Bilfinger* matter. In December, the DOJ charged the German company with conspiring to violate and violating the FCPA under sections 78dd-1 (applying to "issuers") and 78dd-2 (applying to "domestic concerns") by conspiring with *Willbros* Group, Inc. (a U.S. issuer) and its foreign subsidiaries (U.S. domestic concerns) to pay bribes to Nigerian government officials for contracts in Nigeria. Sections 78dd-1 and 78dd-2 apply to officers, directors, employees, and agents, but there were no allegations that Bilfinger, a company wholly separate from Willbros, was an agent of Willbros or its subsidiaries. The information simply alleges that Bilfinger, "together with Willbros Group Inc., an issuer under the FCPA, Willbros International Inc., a domestic concern under the FCPA, and their employees and agents, who were domestic concerns under the FCPA," violated the substantive anti bribery provisions of the FCPA. It is therefore unclear whether jurisdiction was based on *aiding and abetting* the Willbros entities or Bilfinger's conspiracy relationship with the Willbros entities. The latter would likely refer to liability under *Pinkerton v. U.S.*, 328 U.S. 640 (1946); namely, "being liable for the reasonably foreseeable substantive FCPA crimes committed by a co conspirator in furtherance of a conspiracy." The government has made clear, through the 2012 *FCPA Guide* and otherwise, that it can and will assert jurisdiction over foreign defendants on aiding and abetting liability and *Pinkerton* conspiracy liability. However, one might question why such theories were used in the *Bilfinger* matter, given the circumstances of the case. Based on the allegations, it appears that Bilfinger could have been charged under 78dd-3, which applies to "other persons" that commit an act in furtherance of a bribe "while in the territory of the U.S.," because the DOJ did introduce a territorial nexus by alleging that an unnamed Bilfinger employee flew from Houston to Boston to discuss the scheme and that an unidentified individual/entity wired funds related to the scheme from Houston to Germany.[1]

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[1] Given Bilfinger's non U.S. status, the territorial nexus (*i.e.*, "making use of mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe) is a required element even under 78dd-1 and 2. In contrast, U.S. nationals are subject to so called "nationality jurisdiction."

Meanwhile, 2013 saw two judicial decisions discussing the scope of the FCPA's jurisdiction, with similar analyses but opposite outcomes.

SEC v. Straub, et al.

In late 2011, the SEC sued three former employees at *Magyar Telekom Plc* (Elek Straub, Andras Balogh, and Tamas Morvai, all Hungarian citizens) for violations of the FCPA. The defendants filed a motion to dismiss partly based on jurisdiction grounds. While much of the subsequent briefing focused on whether the defendants had the requisite minimum contacts with the United States to establish personal jurisdiction, the defendants also argued that the SEC's claim was insufficient for failure to meet the FCPA's territorial jurisdiction requirement for the anti bribery counts.

The sole territorial nexus alleged by the SEC against the Magyar executives was that one defendant, located in Hungary, sent and received email messages to and from "representatives of the Greek intermediary" in furtherance of the bribery scheme "from locations outside the United States but [] routed through and/or stored on network servers located within the United States." The Magyar defendants argued that the SEC had failed to allege that they "*personally knew* that their emails would be 'routed through and/or stored' on servers within the United States," and therefore had failed to state a claim under the anti bribery provision. In February, Judge Richard Sullivan of the Southern District of New York denied the defendants' motion, describing the issue of "whether § 78dd-1(a) requires that a defendant intend to use the mails or any means or instrumentality of interstate commerce" as a "matter of first impression in the FCPA context." Judge Sullivan concluded, however, based on analysis of the statute itself, legislative history, and case law on similarly worded statutes, that "defendants need not have formed the particularized *mens rea* with respect to the instrumentalities of commerce," and thus that the SEC had sufficiently pled that the defendants had "used the means or instrumentalities of interstate commerce, pursuant to the FCPA." In his opinion, Judge Sullivan first analyzed the placement of the word "corruptly" in section 78dd-a(a) as meant to modify the "offer, payment, promise to pay, or authorization of the payment of any money . . . or . . . anything of value" that follows in the text of the statute. He described the section as "not a model of precision in legislative drafting," however, so he also looked to legislative history, "[b]ecause the plain language of the provision is ambiguous, even when read in context and after applying traditional canons of statutory construction . . . ." Judge Sullivan then concluded that, "although Congress intended to make an 'intent' or *mens rea* requirement for the underlying bribery, it expressed no corresponding intent to make such a requirement for the 'make use of . . . any means or instrumentality of interstate commerce' element."[2] In further support of his interpretation, Judge Sullivan observed that the language of section 78dd-1(a) is similar to other statutes,

[2] Judge Sullivan noted, however, that this was "not to say that a defendant need know that he is violating the FCPA by bribing an official—only that he intends to wrongfully influence that official."

such as mail and wire fraud and money laundering statutes, for which courts have held that the use of interstate commerce in furtherance of a violation is a jurisdictional element of those offenses.[3]

With respect to the question of personal jurisdiction, Judge Sullivan observed that the "minimum contacts" standard was met where, during and prior to the alleged violations, Magyar's securities were publicly traded and registered with the SEC, such that defendants "knew or had reason to know that any false or misleading financial reports would be given to prospective American purchasers of those securities." He pointed in particular to the allegations that the defendants signed false representation letters related to Magyar's reporting to the SEC. As such, Judge Sullivan concluded, "it is not only that Magyar traded securities through ADRs listed on the NYSE that satisfies the minimum contacts standard but also that Defendants allegedly engaged in a cover up through their statements to Magyar's auditors knowing that the company traded ADRs on an American exchange, and that prospective purchasers would likely be influenced by any false financial statements and filings." On that basis, he had "little trouble" inferring that the defendants intended to cause an injury in the United States, even if doing so was not their primary intention.[4] Judge Sullivan also noted that exercise of personal jurisdiction was not unreasonable as the defendants had not "made a particular showing that the burden on them [to defend the action in the United States] would be 'severe' or 'gravely difficult.'" He concluded by pointing out that the federal courts had a strong interest in litigating the case and that the defendants could "potentially evade liability altogether" if the SEC were not able to enforce the FCPA against the defendants in the United States.

SEC v. Sharef, et al.

Also in 2011, the SEC charged seven former executives of Siemens Aktiengesellschaft and its regional company in Argentina, Siemens S.A., *Uriel Sharef*, *Ulrich Bock*, *Carlos Sergi*, *Stephan Signer*, *Herbert Steffen*, *Andres Truppel*, and *Bernd Regendantz*, of violating the FCPA by engaging in a bribery scheme to retain a government contract to produce national identity cards for Argentine citizens, in which some payments were processed through U.S. bank accounts. Three years earlier, in 2008, Siemens had settled with the SEC in connection with the same scheme. (Similarly, Siemens settled with the DOJ, and several years later the DOJ charged many of the same executives as the SEC but none have appeared in the U.S. to answer the criminal charges.)

Defendant *Steffen*, a German citizen, filed a motion to dismiss the action on personal jurisdiction grounds, which Judge Shira Scheindlin of the Southern District of New York granted in February 2013,

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3 Although defendants argued that the scope of these statutes is broader than the FCPA, Judge Sullivan found no "meaningful distinction" in the language of the statutes, stating that the "difference between 'causes to' and 'uses' [as in the FCPA] is not so great as to enable the Court to divine a congressional intent to impart a different meaning to one statutory provision and not to another."

4 The defendants subsequently moved for leave to file an interlocutory appeal, which the Court denied, finding that the case did not present the sort of "exceptional circumstances" that would justify it.

within weeks of Judge Sullivan's decision in the Magyar executives case.[5] In granting Steffen's motion, Judge Scheindlin concluded that the SEC had failed to establish the requisite minimum contacts between him and the United States, finding that his actions were "far too attenuated from the resulting harm." In distinguishing the decision from that in *Straub*, Judge Scheindlin opined that the "exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle. . . . If this court were to hold that Steffen's support for the bribery scheme satisfied the minimum contacts analysis, even though he neither authorized the bribe, nor directed the cover up, much less played any role in the falsified filings, minimum contacts would be boundless." Judge Scheindlin further concluded that exercise of jurisdiction over Steffen would not be reasonable, given his "lack of geographic ties to the United States, his age [74], his poor proficiency in English, and the forum's diminished interest in adjudicating the matter," where the SEC and DOJ had obtained "comprehensive remedies against Siemens" and an individual action against Steffen had been resolved in Germany.

Despite the different outcomes, the decisions in the two cases are consistent in their interpretation of the requirement of minimum contacts to establish personal jurisdiction in civil enforcement actions. Both Judge Sullivan and Judge Scheindlin were careful to note that their decisions regarding personal jurisdiction turned on the facts of each case, specifically, the extent to which each defendant directed the alleged activity to the United States. In addition to Judge Scheindlin's limitations noted above, for his part, Judge Sullivan cautioned that his ruling did not "create a per se rule regarding employees of an issuer," but rather was the result of a "fact based inquiry—namely, an analysis of the SEC's specific allegations regarding the Defendants' bribery scheme, Defendants' falsification of Magyar's books and records, and Defendants' personal involvement in making representations and sub representations with respect to and in anticipation of Magyar's SEC filings."

Parent/Subsidiary Liability

We have previously highlighted the SEC's disconcerting practice of charging parent companies with anti bribery violations based on the corrupt payments of their subsidiaries, even when the facts alleged in the pleadings do not establish any parental involvement in bribery. In the *Ralph Lauren* case, both the SEC and DOJ took an even larger leap, by seemingly imposing apparently strict criminal and civil liability on a parent company for the corrupt acts of its subsidiary. Ralph Lauren's Argentine subsidiary paid bribes to customs officials authorized by Ralph Lauren Argentina's general manager to clear goods through customs over a four year period. Both agencies characterized the general manager as Ralph Lauren's ''agent,'' based solely on his position as general manager of the subsidiary and the fact that Ralph Lauren had appointed him to that position. The pleadings cursorily state that the manager had been hired by Ralph Lauren to manage the business of the Argentine subsidiary and "thus was an employee and agent of an issuer, as that term is used in the FCPA." Given that the manager was also an employee and officer of the subsidiary in question, we view this as an extremely tenuous basis for parent liability. Neither agency,

5 Defendants Bernd Regendantz and Uriel Sharef settled with the SEC for $40,000 and $275,000, respectively. The action was dismissed as to defendant Carlos Sergi and final judgments as to the remaining defendants are pending.

moreover, included any allegation of any authorization, direction, or control by RLC of its subsidiary's corrupt conduct, or even its knowledge of such conduct.

The theoretical underpinnings of this unprecedented and aggressive expansion of corporate liability were foreshadowed in the 2012 *FCPA Guide*. Although the government confirmed that a parent's ''authorization, direction, and control'' of the subsidiary's specific corrupt conduct remains one basis for liability, it also enunciated a much broader and potentially unlimited pure *agency* theory, the fundamental characteristic of which is general control. Accordingly, DOJ and SEC warned that they will evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, *both generally and in the context of the specific transaction*. Thus, the government apparently intends to treat a subsidiary as the parent's agent by focusing not on the formal relationship, present in all cases, between a parent and a subsidiary, informed by the practical realities of how the parent and subsidiary interact, and then apply "traditional principles of *respondeat superior*" to hold the parent liable for bribery by the subsidiary, whether or not specifically authorized, directed, or controlled by the parent.

Under this theory, a subsidiary is virtually *always* an agent of its parent, and thus the parent is strictly liable for any acts ''within the scope of [the agent's] duties'' and intended to benefit the parent—even if the parent had policies prohibiting bribery. This flagrantly disrespects the corporate form and the black letter rule that to ''pierce the corporate veil'' the parent must have operated the subsidiary as an alter ego and itself paid no attention to the corporate form.

Although we have noted elements of this approach in prior SEC actions, the DOJ's espousal of such a theory is particularly worrisome, as it impacts non issuer domestic concerns and foreign companies —a much broader universe of companies. We have previously criticized the SEC for reaching for an anti bribery charge against a parent company when a books and records or internal controls charge was more jurisdictionally sound and supported by the evidence. We can only speculate that the DOJ did the same in the *Ralph Lauren* case because it had no jurisdiction over the foreign subsidiary itself, given that it also did not allege any act by the subsidiary in U.S. territory. However, given the DOJ's parallel authority to charge issuers with criminal violations of the books and records and internal controls provisions, there is similarly no justification for stretching the anti bribery provisions merely to allege or charge them. The fact that the *Ralph Lauren* case was resolved through an NPA rather than a DPA (or a guilty plea) does not excuse this approach—when the DOJ announces it will not prosecute but requires the company to *admit* to facts establishing a criminal violation of the law, it is stating, as a fact, that the company committed a crime. In such case, it is obligated to demonstrate, through the pleadings, in whatever form they are presented, that it could, in fact, prove each and every element of the offense.

Ralph Lauren also provides a puzzling contrast with two other enforcement actions in 2013, which were in the more conventional mold of charging a parent with anti bribery violations only if specific indications of parental involvement were or could be alleged: *Weatherford* and *Total*.

In *Weatherford*, the SEC charged the parent company with anti bribery violations in addition to books and records and internal controls violations. Weatherford allegedly authorized $11.8 million in payments to officials in the Middle East through a distributor between 2005 and 2011. Weatherford also retained a

Swiss agent to funnel bribes to an Angolan official, and bribed other officials via a joint venture. The SEC complaint went on to note that operationally Weatherford's subsidiaries acted as *agents* of Weatherford in connection with such bribery and certain Weatherford employees and employees of its subsidiaries were directly involved in or consciously disregarded the high probability that the distributor might misuse the payments for bribes. The DOJ, however, charged the parent only with failure to establish effective internal controls.

Further, in its criminal information against *Total*, the DOJ expressly outlined the different ways in which the parent had engaged in a conspiracy to violate the anti bribery provisions. For instance, Total allegedly negotiated a consulting arrangement with Iranian officials pursuant to which it would make unlawful payments to a designated intermediary, in connection with a government corporation signing an agreement with Total to develop oil and gas fields in Iran.

Obtain or Retain Business

In prior years, we saw allegations that veered beyond the traditional boundaries of the "obtaining or retaining business" element, and indeed, the 2012 *FCPA Guide* confirmed that the business purpose test is "broadly interpreted." However, the business purpose in each of the 2013 enforcement actions remained within uncontroversial territory, being closely related to securing contracts or sales. Indeed, many pleadings included a practically verbatim recitation of the statute: "obtain and retain lucrative contracts" (*Total*); "obtain and retain contracts" (*Diebold*, *Bilfinger*); and "obtain or retain business" (*Stryker*). The types of benefits alleged in the other actions still remained closely tied to obtaining or retaining business and followed established precedent: a reduced fine for customs violations in *Parker Drilling*, customs clearance in *Ralph Lauren*, and obtaining inside information on competitors' pricing in *Weatherford*.

A somewhat ambiguous benefit was alleged in *ADM*, which paid bribes to obtain VAT refunds. While we have seen bribes allegedly paid for tax benefits in past enforcement actions (*e.g.*, assistance in a tax dispute and a tax rebate in *Diageo*, reduction of tax liabilities in *Alcatel Lucent* and the *Panalpina* cases), the difference here is that the Ukrainian government owed ADM the VAT refunds even prior to receiving the illicit payments. That is, one view could be that the bribes were not paid to create a previously non existent benefit, but to expedite the benefit that was already due to ADM. Seemingly recognizing this, the SEC was careful to allege that "[g]etting these VAT refunds earlier—before the Ukraine endured a brief period of hyperinflation—gave ACTI Ukraine a business advantage resulting in a benefit to ADM of roughly $33 million." Any time a company has more money in its coffers is a business *advantage*, the linkage to obtain or retain specific or even general business, however, seems here, however, to be so tenuous as to be non existent.

Instrumentalities

As in recent years, most of the cases brought in 2013 involved government officials that were employed by "instrumentalities" such as state owned hospitals and healthcare facilities (*Philips*, *Stryker*), state owned oil companies (*Total*, *Weatherford*, *Bilfinger*), state owned banks (*Diebold*). In many instances, the government described facts that supported instrumentality status: for example, in *Diebold*, the DOJ alleged that the recipient banks were approximately 70% owned by the Chinese government and that the government retained controlling rights, including the right to appoint and nominate a majority of the board of directors and top manager. Other enforcement actions were not as detailed—in *Weatherford*, the pleadings indicated that at least some of the foreign officials at issue were employees of a "state owned oil company in the Middle East" without providing further details or even identifying the specific country. The enforcement actions of 2013 thus seem to take for granted the notion that state owned entities are instrumentalities of a foreign government. Indeed, to date the government's view has prevailed and all challenges to the notion have uniformly failed. In October 2013, however, the U.S. Court of Appeals for the Eleventh Circuit heard oral argument in the *Esquenazi*/*Rodriguez* appeal, which centers on defendants' assertion that Haiti's state owned telecom company was not an instrumentality of the Haitian government. The discussion will likely heat up again in the coming year—a decision in the appeal is expected in early 2014.

Finally, there was one instance in which the government official was neither an official of the government nor an instrumentality thereof: in *Bilfinger*, bribes were paid to an unnamed political party ("the dominant political party of Nigeria") in addition to government officials and employees of state owned companies. This is consistent with the language of the FCPA itself, which prohibits bribes to "any foreign political party or official thereof, or to any candidate for foreign political office."

Statute of Limitations

Though the FCPA does not specify a statute of limitations, the five year period set by 28 U.S.C. § 2462 governs civil enforcement of the Act and significantly limits the SEC's ability to bring cases based on claims occurring outside the limitations period. Recent cases, however, reveal that the SEC continues to try to stretch the boundaries of the statutory period of repose by asserting various theories, such as the equitable doctrine of fraudulent concealment. The extent of the government's ability to stretch these limits has been of particular significance in the cases against the *Noble* and *Magyar* executives.

In the *Ruehlen* and *Jackson* cases, the SEC argued that it could use the "fraudulent concealment rule" to extend the statute of limitations on its claim against the Noble executives and seek civil penalties for conduct occurring more than five years prior to bringing its case. As we previously reported, defendants moved in 2012 to dismiss the SEC's first complaint, arguing that the events giving rise to the claims had occurred outside of the limitations period and that the SEC had failed to plead any basis for tolling the limitations period. The court's decision, partially granting and partially denying the motion to dismiss, agreed that the SEC's claims accruing before February 2007 should be barred but noted that the tolling agreements signed by defendants with the SEC, though not pleaded in the complaint, could serve to suspend the running of the statute of limitations and allow the SEC to bring claims based on conduct occurring one year earlier (after May 2006 or five years prior to the execution of the tolling agreements). The court then granted the SEC leave to amend the complaint and allege additional facts establishing the existence of the tolling agreements and also to plead facts that would warrant additional tolling based on the doctrine of fraudulent concealment, *i.e.*, facts that not only established that defendants concealed the conduct complained of but that the SEC had reasonably relied on those denials, as well as facts establishing that the SEC had acted diligently in gathering the facts that form the basis of its claim.

The SEC duly filed an amended complaint on January 2013 that specifically alleged the tolling agreements (which the defendants did not dispute). However, the SEC still failed to plead facts establishing its diligence in investigating the facts behind the allegations of the complaint (a clear violation of the court's express instructions), nor did it plead that it relied on defendant's denials of wrongdoing. Defendants accordingly moved to dismiss this amended complaint, arguing that, because the SEC failed to rectify its pleading deficiencies, it was still not entitled to extend the statute of limitations. Further sounding the death knell to the SEC's amended complaint was the Supreme Court's decision in *SEC v. Gabelli*, which defendants submitted as a supplemental authority in support of their motion to dismiss argument. In *Gabelli*, the Supreme Court rejected the SEC's argument that under § 2462 the statute does not begin to run until the plaintiff has discovered its claim or when the claim could have been discovered with reasonable diligence by the plaintiff. Reasoning that "the discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury" and that "in the context of enforcement actions for civil penalties" the SEC is not like an individual victim who relies on apparent injury to learn of a wrong, the Supreme Court held that no "discovery" rule could be read into § 2462 and affirmed that the five year statute of limitations begins to run when the defendants allegedly fraudulent conduct occurs.

In light of *Gabelli*, both parties filed a joint motion seeking leave for the SEC to file a second amended complaint. This time, the SEC neatly cured the limitations period trap that its previous complaints had fallen into by seeking civil penalties only for wrongful conduct that fell within the statute of limitations, i.e. violations that accrued on or after May 10, 2006, as allowed under the tolling agreements. The second amended complaint does not explicitly seek disgorgement but does still seek injunctive relief to permanently restrain the defendants from committing the violations with which they have been charged (most of which occurred almost seven years before the amended complaint was filed). The defendants' motion to dismiss decision had raised limitations issues about injunctive relief, but the court did not resolve them, stating that "determining the likelihood of future violations is almost always a fact specific inquiry."

The same issue may well arise in the *Magyar* executives case. In that case, the court denied the defendants' motion to dismiss in 2012, finding that the limitations period was tolled while the defendants, none of whom are nationals or even residents of the United States, were located outside of the territory of the United States. Earlier this year, the defendants petitioned to bring an interlocutory appeal arguing that reversal of the court's order would bring a swift end to the case because it would eliminate any prospect of the recovery of civil penalties (without civil penalties, the SEC would have no case). Judge Sullivan, however, denied the request, noting that "even if reversal would eliminate the SEC's claim for civil penalties, the claims for disgorgement and injunctive relief would still survive" and equitable remedies are exempt from § 2462's limitations period.

Thus, the ancient distinction between law and equity appears in these cases potentially to have blurred the otherwise clear repose promised by § 2462. The SEC, however, has previously been criticized by various district courts for seeking "obey the law" injunctions, in part on the ground that such injunctions add nothing to every person's responsibility to obey the law. In these cases, particularly in the *Noble* case, where even the legal tolling theory does not bring most of the alleged violations within the limitations period, the courts may well have to address the appropriateness of the SEC seeking injunctive relief as a substitute for time barred civil relief, particularly if the SEC also seeks associated equitable relief such as disgorgement when it is barred by statute from obtaining civil penalties.

Anything of Value

While cash payments have remained the most common form of payment among recent FCPA cases, several cases featured non cash benefits as well. For example, in *Stryker* and *Diebold* the agencies focused on inaccurately recorded "sponsorships" or "training". Similarly, the DOJ and SEC have noted the use of expensive and extravagant gifts (perfume, handbags, and apparel) as forms of bribery in *Ralph Lauren*). Recent enforcement activity has also highlighted the breadth behind the "anything of value" element. For example, in *Stryker*, the SEC charged the company with violations of the payment of a $197,055 "charitable donation" to a public university in Greece to curry favor with an influential professor.

However, perhaps the most distinctive "item of value" in 2013 was found not in an enforcement action but a pending investigation into several financial institutions' hiring practices in China. According to press reports, several financial institutions focused recruiting efforts on the children of influential Chinese state officials. Documents allegedly demonstrate that job applicants with prominent Chinese families, although not unqualified, faced less rigorous hiring standards than other average counterparts. These investigations raise the issue of whether hiring qualified relatives of foreign officials is necessarily corrupt or illegal. Indeed, because many of the candidates were highly educated and well qualified in their own right, it is questionable whether their relationship with Chinese state officials should be sufficient to trigger FCPA liability.

Modes of Payment

Companies continued to find creative ways of raising funds to pay bribes, and in most cases used third parties, such as a local agent with questionable industry qualifications (*Parker Drilling*), a "customs clearance agency" (*Ralph Lauren*), an employee at a Swiss bank and a British Virgin Islands limited liability company that both acted at the direction of an Iranian government official (*Total*), freight forwarding agents and distributors (*Weatherford*), and a stevedoring (shipping) company and insurance company (*ADM*). The allegations relating to *ADM's* use of the insurance company contained some particularly explicit correspondence: as the company entered into sham insurance contracts with the provider, the executives made clear that the contracts should "include no insurance protection but serve the purpose only of generating a commission for the VAT repayment . . . Regardless of the wording of the contract, the content is completely different. That means that in the case of a conflict, claims could not be made successfully." In the case of *Diebold*, the company engaged in private bribery by entering into fictitious contracts with local distributors. Companies even used outside counsel to pay bribes, using schemes in which the law firm would invoice the company for purported legal services rendered (a U.S. law firm in *Parker Drilling* and a Mexican law firm in *Stryker*). The arrangement closest to a direct payment was found in *Weatherford*, where the company entered into a joint venture with entities controlled by certain foreign officials, without receiving any capital, expertise, or labor contributions from those entities. The corrupt payments were made in the form of joint venture dividends, which went to the government officials.

The payments were also disguised in various ways, such as "loading and delivery expenses" and "stamp tax/label tax" (*Ralph Lauren*), "legal fees and expenses" (*Parker Drilling*), "business development expenses" (*Total*), "honorarios medicos" and "donations and grants" (*Stryker*), and prepayments for commodities and insurance premiums (*ADM*). In *ADM*, the culpable subsidiaries misrepresented the payments not only in its books and records, but also to ADM, the parent company. They first referred to payments as "charitable donations" to the government that were necessary to recover their VAT refunds. Later, they explained that the VAT collection "came at a price, the price being the government required a 'depreciation' of 18%," which ADM understood to be the cost of negotiating a legal settlement with the Ukrainian government. In *Weatherford*, a "volume discount" was granted to a distributor, who used the discounted amounts to create a slush fund to pay bribes. Leisure trips were disguised as legitimate travel and sponsorship of conferences (*Stryker*), as well as the old standard, "training" (*Diebold*).

Unusual Developments

This year has seen a number of unique enforcement actions, not easily categorized under a single theme. Generally speaking, these cases demonstrate a potential shift, or at least expansion, of enforcement actions as compared to those in the previous decade.

Broker Dealers and the Financial Sector

In May of 2013, the DOJ and SEC announced charges against two Miami based brokers—*Tomas Alberto Clarke Bethancourt* and *Jose Alejandro Hurtado*—at the New York based financial services firm of Direct Access Partners LLC (DAP). The case is one of a few enforcement actions involving the financial services industry and is the first where enforcement agencies have specifically pursued individuals for bribes related to the provision of financial services.

Interestingly, the matter appears to have stemmed from the SEC's examination of DAP, suggesting that SEC regulated firms' compliance programs are being tested as part of the Commission's normal review. The potential impact of the enforcement action on the financial sector was not lost on the DOJ which called the charges a "wake up call to anyone in the financial services industry who thinks bribery is the way to get ahead." No similar known enforcement actions have been initiated since and it remains to be seen whether the financial sector will play an increasingly significant role in FCPA enforcement in the future.

Undercover Cooperating Defendant

In the *BizJet* case, four executives of the aircraft maintenance, repair, and overhaul company, BizJet, organized a bribery scheme to pay government officials in Latin America in exchange for valuable aircraft service contracts. Subsequently, previously sealed documents revealed that one of the defendants and former vice president of the company, Peter DuBois, agreed to work as an undercover informant for the

DOJ as part of his plea agreement. DuBois is described as having recorded conversations with the former BizJet executives and "other subjects of the government's ongoing investigation." Later revelations made clear that DuBois's cooperation led to the investigation and eventual prosecution of another aircraft maintenance company—NORDAM Group.

Obstruction of Justice, Cilins, & BSGR

Possibly among the most intriguing story lines is the ongoing development of the alleged bribery scandal involving Beny Steimetz Group Resources (BSGR) and a lucrative mining concession in the African nation of Guinea. In April 2013, *Frederic Cilins*, a French national described as acting as an agent for a then-unnamed mining company, was arrested and charged with obstruction of justice and money laundering. Cilins allegedly attempted to pay a cooperating witness (the former wife of Lansana Conté, the former dictator of Guinea) $1 million in exchange for the destruction of documents which allegedly implicated Cilins's employer in a significant bribery scandal involving a mining concession in Guinea and a signed affidavit containing numerous allegedly false statements regarding the manner in which the mining concession was acquired. Subsequent developments revealed that the unnamed mining company was BSGR, owned by Beny Steinmetz, Israel's wealthiest citizen.

Compliance Guidance

While there was only one DOJ FCPA Opinion Release in 2013 (discussed below), the enforcement actions in 2013 provided a fair amount of guidance on various compliance topics, as did remarks made by DOJ and SEC officials in public forums, particularly Charles Duross, deputy chief of the DOJ's Fraud Section, and Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA unit, who spoke at a number of conferences throughout the year.

Travel and Entertainment

For many years, we have argued that companies over analyze travel and entertainment, sometimes at the expense of more serious compliance risks. While providing such benefits to government officials may well violate local law and regulations, and are often included in FCPA settlements to paint a picture of a lax compliance environment, they are rarely charged as pure "obtain or retain business" bribes. It is thus the extreme, and often fairly easily identified, travel and entertainment that present the most risk. This view was implicitly endorsed by Ms. Brockmeyer, who referred to "problematic entertainment" while specifically excluding "the little things" such as taking foreign officials out to a nice dinner after spending a day touring a factory. She then referred to the *Diebold* action, which included taking officials to a veritable laundry list of vacation locales (including Paris, Las Vegas, the Grand Canyon, Hawaii, Napa Valley, Bali, and New Zealand). Ms. Brockmeyer acknowledged that business travel could be "perfectly legitimate" but cautioned that "if your factory's in Michigan, then you should not be taking your government official to Las Vegas on the way."

Besides *Diebold*, two other 2013 settlements also included notable examples of improper travel and entertainment, all of which clearly crossed the boundaries of legitimate business travel. In *Stryker*, the company provided six nights in New York City, two Broadway shows, and five days in Aruba for a Polish official and her husband. In *Weatherford*, the company provided a trip to the World Cup soccer tournament, a honeymoon for the daughter of an Algerian government official, and a religious trip for an Algerian government official.

Gifts

The DOJ Opinion Procedure Release of 2013 addressed a request from a partner at a U.S. law firm that represented a foreign country in various international arbitrations. The partner had become a personal friend of an official at that foreign country, and wished to pay the medical expenses of the foreign official's daughter. Various safeguards were put into place, including full transparency with the respective employers of the partner and the official, a representation from the partner that the intent was purely humanitarian, and a certified letter from the Attorney General of the foreign country representing that 1) the payment of medical treatment would not affect the government's decisions for hiring legal counsel and 2) the payment would not violate the laws of the foreign country.

After considering the facts and circumstances, the DOJ stated that it did not intend to take any enforcement action with respect to the proposed payments. It did make clear its stance that "[a] person may violate the FCPA by making a payment or gift to a foreign official's family member as an indirect way of corruptly influencing that foreign official," citing *U.S. v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991). This may not be an entirely appropriate statement for the issue at hand, since the benefit to the daughter in this case would go *directly* to the official, who "lack[ed] the financial means to pay for [the] treatment for his daughter." With that being said, a literal interpretation of the DOJ's reference to "an indirect way of corruptly influencing [a] foreign official" could very well overstep the boundaries of the statute, which requires that "money or anything of value" be given to the government official. Of course, the benefit does not have to be handed directly to the official, but the benefit must still inure to the official in some way. The DOJ's statement could be cause for concern as it seems to insinuate that a payment to a family member that could *not* be traced to a benefit to the official himself, even if it were intended to influence the official, might also violate the FCPA. As far as we are aware, no enforcement actions have reached this far, and it remains to be seen whether the government will be willing to cross this line in the future.

Charitable Donations

The line between legitimate charitable contributions and corrupt payments is another area of substantial debate, particularly if no direct benefit flows to the government official. Not surprisingly, in the cases brought by the government in 2013, it went to great lengths to demonstrate unambiguous corrupt intent and direct benefit to the corrupt official. For example, in *Stryker*, the company paid a "sizeable and atypical donation" to a Greek public university, which was used to fund a laboratory run by a corrupt government official. In other cases, companies attempted to disguise payments as charitable donations: *Weatherford's* religious trip for an Algerian government official was improperly booked as a charitable donation, and the *ADM* subsidiary responsible for paying bribes told the company headquarters that "charitable donations" to the government were necessary to obtain tax refunds.

Recent Trends and Patterns in FCPA Enforcement

Meanwhile, charitable organizations have been implicated in at least one company currently under FCPA investigation. Hyperdynamics Corp., a Texas based oil company, said in a statement that it understands that the DOJ is investigating whether the company's activities in obtaining and retaining concession rights to mine in Guinea, as well as its "relationships with charitable organizations," violate the FCPA and anti money laundering statutes. According to press reports, in 2006 Hyperdynamics won virtually all rights to explore for oil off the coast of the Republic of Guinea, despite having had no prior oil exploration experience. The former CEO of Hyperdynamics is reportedly the founder of a charity called "American Friends of Guinea," to which he donated over two million shares of Hyperdynamics stock upon his resignation from the company in 2009.

Third Party Due Diligence

Nearly all of the cash payments alleged in the 2013 enforcement actions were made through third party intermediaries—a "politically connected" agent in *Parker Drilling*, a customs broker in *Ralph Lauren*, an employee of a Swiss bank who acted at the direction of a government official in *Total*, Mexican outside counsel in *Stryker*, joint venture partners, freight forwarding agents, and distributors in *Weatherford*, and a shipping company and an insurance company in *ADM*. In fact, Ms. Brockmeyer commented at one conference that more than 60 percent of the SEC's cases in the last two years involved third party intermediaries. Noting that such intermediaries pose a substantial corruption risk, Ms. Brockmeyer identified some key red flags when evaluating third parties, such as 1) lacking business purpose for the third party; 2) paying an inflated rate to the third party; and 3) dealing with a third party that does not have the infrastructure or support to provide the contracted services.

Self Reporting

The benefits of self reporting are not always clear. A voluntary disclosure virtually guarantees a costly government investigation, and even companies that do not self report can and will receive credit for cooperation and remediation (*see, e.g.*, *Parker Drilling*). The cases in 2013, however, do appear to support the notion that voluntary disclosure reaps benefits. Of the nine companies that were subject to enforcement actions in 2013, four received credit for self reporting their activity to the SEC and DOJ (*Philips*, *Ralph Lauren*, *Diebold*, *ADM*). Although it is difficult to distinguish the benefits from cooperation/remediation from the benefits that are solely attributed to self reporting, the four companies appeared to reap specific benefits: no bribery charges and no civil penalties for *Philips*, double NPA for *Ralph Lauren*, thirty percent criminal penalty discounts (the largest of the year) each for *Diebold* and *ADM Ukraine*, and no civil penalties and an NPA for *ADM*. In two of those actions, the regulators specified the prompt self disclosure following discovery of problematic activity, with *Philips* reporting after a few months (reported in "early 2010" after discovering the unlawful payments in December 2009) and *Ralph Lauren* reporting within two weeks. This is consistent with government guidance, and Mr. Duross noted a practical angle: companies that wait to report until the internal investigation is "done" run the risk of "going to meet with the government to make their report and enforcement officials having questions that were not asked during the investigation or that may lead to the company having to go back and retread ground that has already been covered, through witness interviews, document collection or otherwise."

Recent Trends and Patterns in FCPA Enforcement

In contrast, the companies that did not self report were subject to SEC civil penalties (*Weatherford*, *Stryker*) or did not receive a criminal penalty discount (*Weatherford*, *Bilfinger*, *Total*). *Parker Drilling* was the lone outlier, as it evaded civil penalties and received a 20 percent discount in spite of its failure to self report.

Meanwhile, an increasing number of whistleblower tips may also affect the calculus to self report. Under the Dodd Frank Act, the SEC will pay rewards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over $1 million. In November 2013, the SEC's Office of the Whistleblower reported that it logged 3,238 whistleblower tips and complaints in 2013, approximately 150 of which involved FCPA issues. Ms. Brockmeyer noted that there have been "some very, very good whistleblower complaints" in the FCPA space, and companies may lean more strongly toward self reporting if there is a high risk of a whistleblower tip to the SEC.

Cooperation and Remediation

Cooperation and remediation featured in all of the enforcement actions in 2013, although some received more attention than others. The one most prominently touted by the government was certainly the *Ralph Lauren* double NPA; indeed, Ms. Brockmeyer noted that the case stood out because it was "an opportunity for us to talk publicly about the types of cooperation we think really are above and beyond the types of cooperation . . . to get meaningful credit." The *Ralph Lauren* criminal NPA gave several examples of cooperation and remediation, much of them standard fare, but also noting some unusual actions, such as ceasing retail operations in Argentina (the site of the bribes) and winding down all operations in the country, translating an amended anticorruption policy into eight languages, and conducting a world wide risk assessment.

Most of the stated examples, however, mirror those provided in the 2012 *FCPA Guide*, and indeed, many of them feature in the other 2013 settlements, although many refer only to the general concept of "cooperation" or "remediation" without going into the details of specific activities the company undertook. Nearly all conducted internal investigations (except for *Bilfinger*), most adopted enhanced anticorruption policies and protocols (except for *Total*), and many terminated culpable employees and/or agents (*Philips*, *Parker Drilling*, *Weatherford*, *Bilfinger*, *ADM*). Interestingly, in the 2013 settlements there were also instances in which the government specifically called out deficient cooperation and/or remediation. In *Bilfinger*, the DOJ noted that the company's cooperation came "at a late date," and in *Weatherford* the SEC noted that the company engaged in misconduct during the SEC's investigation, including failing to provide the SEC with accurate and complete information. In *Diebold*, the DOJ specified that the company undertook "some" remedial measures that were "not sufficient to address and reduce the risk of recurrence" and thus justified its decision to impose an independent monitor.

Representatives from the DOJ and SEC provided some further insight into cooperation and remediation. At one conference, Matthew Queler, Assistant Chief of the DOJ's FCPA Unit and Tracy Price, Assistant Director of the SEC's FCPA Unit, conveyed their view that a robust internal investigation can enhance a company's credibility with the authorities. Ms. Price emphasized the value of cooperating early, by noting that early conversations with the government on potential roadblocks to an investigation, such as foreign blocking statutes and data privacy laws, provide authorities an opportunity to help the company overcome potential issues. Ms. Price further noted that early government participation may help the company focus its investigation on issues of most interest to the authorities. From the DOJ side, Mr. Queler stressed the importance of comprehensive document preservation, stating that if a company preserves only a lower level employee's materials and not the materials of the employee's supervisors and management the authorities may be skeptical about the thoroughness of the company's investigation.

Commercial Bribery

The SEC has emphasized the broad reach of the FCPA's accounting provisions. For example, Diebold was charged with accounting violations for commercial bribery. In *Diebold*, the company entered into false contracts with distributors to pay bribes to its private sector customers in Russia. While Ms. Brockmeyer commented that the SEC is not necessarily looking for commercial bribery cases, she stated that the SEC would charge those economic violations as well if they are found in the course of a foreign bribery investigation.

As we have noted previously, the expansiveness of the books and records provisions, as well as coverage of commercial bribery under other federal and state statutes, the definition of "foreign government official" or "instrumentality of a foreign government" is not particularly important from a compliance perspective. A company subject to the accounting provisions of the FCPA is obligated to properly record all payments (including commercial bribes) in its books and records, and it would be rare indeed to see a company willing to be fully transparent in that context. And of course, private bribery is illegal in most jurisdictions, so companies are best served to include a blanket prohibition on all bribery (both public and private) in their compliance policies.

Private Litigation

The year saw a number of the derivative and securities class action lawsuits that typically follow disclosures of FCPA investigations. One of the more notable private litigation cases, however, involves a former Siemens employee who brought an action alleging that Siemens had violated the whistleblower protections provided by Dodd Frank.

Meng Lin Liu, a former employee at a Siemens subsidiary in China, Siemens China Ltd. (SLC), filed a complaint on January 15, 2013, against Siemens, alleging that it violated the Anti Retaliation Provision of the Dodd Frank Act. The complaint alleged that Siemens retaliated against Liu when he complained of compliance violations at SLC; in particular, that SLC circumvented internal FCPA controls, failed to conduct adequate due diligence on third parties, and inflated bids in order to pass funds through intermediaries to government officials. Liu claims that Siemens retaliated against him after he raised these allegations to senior business and compliance officials at SLC. He alleged that he received a negative performance review, that he was removed from several of his compliance related job duties, and that he was ultimately told that he should not return to work for the remainder of his employment contract, which was then terminated.

Recent Trends and Patterns in FCPA Enforcement

The Southern District of New York dismissed the case against Siemens on October 21, 2013, finding that Dodd Frank's anti retaliation provision does not apply extraterritorially and, therefore, did not cover Liu, a Chinese citizen, for conduct that occurred outside of the United States. A person outside of the United States can still be a whistleblower, and thus eligible for whistleblower awards, but they will not be protected from retaliation under Dodd Frank. The outcome of the case is an important lesson for non U.S. employees about the reach of Dodd Frank protections and should serve as a warning for would be whistleblowers that they may not be protected from retaliatory action.

In another private litigation involving a whistleblower, a shareholder derivative action was brought against the members of NCR's board of directors, alleging that they were aware of, and failed to properly respond to, the company's bribery issues in China and the Middle East. The FCPA violations discussed in the complaint came to light after an anonymous whistleblower provided documents to the *Wall Street Journal*. Additionally, shareholder lawsuits have been brought against other companies that are actively conducting investigations into potential FCPA violations, including Wal Mart (for its ever expanding bribery investigation for alleged conduct in Mexico and elsewhere) and Juniper (which in August 2013 disclosed an ongoing FCPA investigation).

Finally, in early 2013 Kazuo Okada, a member of the Wynn Resorts board of directors, filed a complaint against Wynn Resorts for alleged violations of the securities laws. Wynn Resorts had issued a proxy statement to seek shareholders' approval to remove Okada from the board, and Okada alleged that the proxy statement made numerous false and misleading statements, which in turn usurped the shareholders' right to make an informed decision. The suit was largely in response to the lawsuit filed by Wynn Resorts against Okada in 2012, in which Wynn Resorts claimed that Okada breached his fiduciary duties by violating the FCPA in the course of his independent development of a casino in the Philippines.

Okada voluntarily dismissed his suit toward the end of the year, but the U.S. government continues to investigate Okada and his company, Universal Entertainment Corp., for the bribery allegations. In April 2013, the U.S. government filed a motion in the *Wynn Resorts* case to intervene and for a temporary and partial stay of discovery, based on its ongoing investigation. The stay was granted and it appears that the investigation continues to intensify—in October 2013, the government requested an extension of the stay, presenting new evidence to the court under seal which they argued warranted further investigation.

Enforcement in the United Kingdom

While there has been little reported enforcement activity in the U.K. during 2013, the Serious Fraud Office ("SFO") has suffered a year of negative publicity in relation to a number of issues including the loss of data obtained in the course of its closed investigation into BAE Systems, the collapse of its prosecution of Victor Dahdaleh, and the ongoing action for damages brought by the Tchenguiz brothers.

One development this year was the new National Crime Agency ("NCA") becoming fully operational in October. It replaced the Serious Organised Crime Agency and is responsible for investigating and prosecuting serious and organized crime (including economic crime) in the U.K. While the SFO remains the lead agency for investigation of large and complex bribery and corruption cases, it is likely that it will work closely with the NCA in this area going forward (not least because of the NCA's larger budget). While there has been speculation that the SFO might be merged into the NCA, at present the two criminal enforcement agencies remain separate.

Enforcement Actions

This year saw the third conviction of an individual for an offense under the Bribery Act, when a student at Bath University (the son of a Chinese public official) was found guilty of attempting to bribe his tutors. This follows earlier convictions of a court clerk (who received bribes in return for fixing driving convictions) and a taxi driver (who was convicted of attempting to bribe a mini cab licensing officer).

In August 2013 the SFO announced that it had brought its first charges under the Bribery Act (the previous prosecutions had been brought by other prosecuting bodies). The case relates to alleged commercial bribes in connection with an alleged £23 million fraud concerning the promotion and sale of biofuel investment products to U.K. investors at Sustainable AgroEnergy plc between April 2011 and February 2012. Three of the four defendants in the case were charged with offenses of making and accepting a financial advantage contrary to sections 1(1) and 2(1) of the Bribery Act. No charge has been brought against the company itself, which is in administration. The first hearing took place on October 7, 2013, and the case is listed for trial starting on September 22, 2014.

The SFO has also charged a number of individuals associated with a U.K.-based printing company (Smith & Ouzman Limited) in connection with various transactions in Africa. The alleged offenses pre date the effective date of the Bribery Act, and the charges of corruptly agreeing to make payments totalling over £400,000 to influence the award of business contracts to a company have therefore been brought under the Prevention of Corruption Act 1906. The trial is due to take place in November 2014.

Thus, the year 2013 was another year without any corporate prosecutions under the Bribery Act. However, it is likely that the absence of any such prosecutions to date primarily reflects the time necessary to investigate and bring a serious prosecution for such offenses committed since the Bribery Act came into force. In this regard, it is worth noting that David Green, the current head of the SFO, has recently stated that his office has a number of matters currently under investigation. Furthermore, on December 23, 2013, the SFO confirmed that it "has opened a criminal investigation into allegations of bribery and corruption at Rolls Royce" (although the company had disclosed the investigation long ago).

Draft Sentencing Guidelines for Fraud, Bribery and Money Laundering Offenses

On June 27, 2013, the Sentencing Council published a consultation on new sentencing guidelines for fraud, bribery, and money laundering offenses. Along with guidelines for the sentencing of individuals, the draft guidelines include specific sentencing guidelines for corporate offenders. There are currently no sentencing guidelines for organizations convicted of financial crimes, despite the Bribery Act having been in force for over two years.

For corporate offenders of financial crimes, the draft guidelines propose a step-by-step basis for determining the appropriate sentence. First, the court will consider whether it is appropriate for compensation to be paid to the victims of the crime. Second, the court will look at the culpability and harm factors involved in the offense. Harm is represented by a financial figure assessed as the actual gross amount obtained or intended to be obtained (or loss avoided or intended to be avoided) by the offender as a result of the offense. The court will apply a multiplier to that figure and then depart from that starting point after considering aggravating and mitigating features of the case and any other factors that should be considered in determining the final amount of the penalty (such as assistance given to the prosecution and any guilty plea).

Deferred Prosecution Agreements

The Crime and Courts Act 2013 (the "CCA") received Royal Assent on April 25, 2013 and is expected to come into force in early 2014. Once in force, schedule 17 of the CCA will permit the use of Deferred Prosecution Agreements in England and Wales for the first time for the investigation and prosecution of corporate economic crimes including offenses under the Bribery Act 2010. On June 27, 2013, the Director of the SFO and the Director of Public Prosecutions in the U.K. released a draft Code of Practice on DPAs giving guidance to prosecutors on the use of DPAs. The final version of the draft Code must be published before schedule 17 of the CCA comes into force.

In contrast to the U.S. approach, DPAs under the CCA can only be struck with companies, not individuals. Similar to the U.S., the DPA will involve an agreement by a prosecutor to defer prosecution in exchange for the company agreeing to comply with certain terms and conditions (which may also include financial penalties). We expect that these terms and conditions are likely to follow the U.S. model and require acceptance of responsibility, disgorgement of profits, financial penalties, enhanced anti bribery compliance efforts, and, possibly, monitorships.

As noted above, for the most part courts in the United States have a limited role in approving or even reviewing DPAs (although, as noted above, the court in *HSBC USA* strongly rejected that view). The English model differs significantly and involves the court at a number of stages prior to the final execution of the DPA. Under the CCA, the court must approve the DPA before it is finalized. The draft Code makes clear that a DPA will only be appropriate (and therefore will only receive judicial approval) where both an "evidential" test and a "public interest" test are satisfied. To satisfy this hurdle, there will be three separate court hearings and the prosecution will be required to demonstrate to the court's satisfaction that (i) there is a realistic prospect of conviction and (ii) the public interest is served by a DPA rather than a prosecution. At the first hearing, the court will determine whether the DPA is in the interests of justice and is fair, reasonable, and proportionate; at the second, the prosecutor and company will present the terms of the DPA, and the judge may formally approve the agreement. Only after these two preliminary hearings (which will be held in private) will there be a public hearing, where the court will state its reasons for approving the DPA and the DPA will then become formally binding upon the parties.

DPAs should provide a new and flexible means to deal with corporate economic and financial crime as an alternative to criminal prosecution and civil enforcement (such as civil recovery orders under the Proceeds of Crime Act 2002), benefitting both prosecutors and companies. However, the involvement of the courts, and the requirement for an evidentiary hearing and findings, may discourage companies from making voluntary disclosures and seeking a DPA. Therefore only time will tell whether the English style of DPA will prove to be an efficient and productive method of eliciting corporate disclosure and cooperation and resolving Bribery Act enforcement actions.

Anti Bribery Controls

In October 2013 the U.K. Financial Conduct Authority ("FCA", the successor to the Financial Services Authority) published the findings of its thematic review into the anti money laundering and anti bribery and corruption systems and controls of twenty two wealth and asset management firms. This follows similar reports published in respect of other industries.

The FCA found both good examples of risk management and a number of weaknesses in the firms' anti bribery and corruption systems and controls. This led the FCA to conclude that there is still work for most firms to do to ensure bribery and corruption risks are appropriately mitigated, especially where the firms were part of major financial groups which should have been aware of the FCA's expectations. The FCA emphasized that given its previous communications in this area it had expected firms to have taken more actions to reduce the risk of money laundering and bribery and corruption.

In Chapter 3 of its thematic review, the FCA gave a number of examples of good and poor practice. For example, in relation to anti bribery and corruption controls, examples of good practice include having gift and entertainment policies and procedures that clearly define the approval process including clear instructions for escalation, definitions, and guidelines for staff to follow. Conversely, examples of poor practice include gift and entertainment activity which is not consistently monitored by senior management, or where the firm's policies and procedures do not address other areas of bribery and corruption but focus on only one area such as gifts and entertainment.

The FCA expects all firms it regulates to consider its findings and to improve their anti money laundering and anti bribery and corruption systems and controls where necessary. The FCA noted that significant weaknesses remained even at the firms it had visited which formed part of groups that had been subject to previous regulatory attention.

Conclusion

As a result of the OECD Convention (which encouraged international cooperation) and, perhaps even more significantly, the Sarbanes Oxley Act (which spurred voluntary disclosures and auditor attention to compliance controls), the number of FCPA enforcement actions surged over the past decade. At its peak, the number of U.S. enforcement actions in a single year was twenty, while the annual average over the past ten years has been about ten. These numbers obviously represent a substantial increase over the first decades of FCPA enforcement, where international cooperation was erratic and the incentives for corporation cooperation were less persuasive, and the last two years' dip in numbers might be viewed as an ebbing of that tide. However, it is highly unlikely that, despite the drop in cases, there is a trend or pattern of less enforcement in the future, particularly given that a number of companies have disclosed investigations over the past year and the authorities have stated that they have a pipeline of cases they intend to resolve in the coming year. Indeed, it would take only a few more cases in 2014 to demonstrate precisely the opposite.

On the other hand, this year's increase in average penalties, even after adjusting for outliers, is also probably not yet a trend or pattern. FCPA average penalties reached their peak in 2010 at almost $100 million, and the average penalty over the past decade has been about $50 million on a gross basis. As we have noted, however, these numbers are largely driven by the *TSKJ* cases[6] (which alone account for over $1.5 billion over the four years) and a few other outliers such as *Siemens*. When the high and low outliers of each year are eliminated, the average penalty drops to about $26 million, which is similar to the past year's adjusted average of $28 million.

Finally, several years ago we noted a convergence of compliance standards, noting the similarities between compliance programs required by FCPA settlements (and later incorporated into the *FCPA Guide*), similar requirements in a Canadian settlement, the OECD Practice Guidance, and, of course, the Bribery Act Guidance. With some exceptions, this has not yet been matched by a similar convergence of enforcement amongst the OECD signatories, but the steps being taken in the U.K. to adopt deferred prosecution agreements may well create incentives for voluntary disclosures and corporate settlements and result in a similar surge of cases in the U.K. However, in the U.K. and elsewhere, such a surge will require implementation of appropriate legal tools, dedication of sufficient investigative and prosecutorial resources, incentives for corporate cooperation and disclosure, and, above all, political will.

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6 Comprising the enforcement actions against *Technip S.A.*, *Snamprogetti Netherlands B.V.*, *Kellogg, Brown & Root, Inc.*, *JGC Corp.*, and *Marubeni Corp*.

Recent Trends and Patterns in FCPA Enforcement

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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