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2013 FCPA Year in Review

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INTRODUCTION

2013 was an active year in enforcement of the US Foreign Corrupt Practices Act (FCPA), and for the development and enforcement of anti-corruption laws worldwide. Although the total number of enforcement actions brought by the US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) did not reach the elevated levels of 2011, the agencies did bring marginally more enforcement actions than in 2012. A closer look at the trends affecting FCPA enforcement suggests that the statute remains a key priority for US authorities, and that the marginally lower 2012-2013 enforcement numbers are the result of the agencies' deployment of their relatively limited resources to major initiatives not directly resulting in corporate settlements. Those initiatives included the development of the *Resource Guide* (released in November 2012), resource-intensive prosecution of individuals in criminal and civil proceedings, the resolution of several major, longstanding, investigations, and the pursuit of new investigations requiring the collaboration with other US government agencies and, in many cases, law enforcement authorities abroad.

The enforcement actions the DoJ and SEC brought in 2013 were nevertheless significant in number, and contained a number of important legal and policy developments as well as a continuation of previous enforcement themes. The agencies resolved some of the longest-running and largest investigations in the history of their enforcement programs. The SEC deployed resolution vehicles such as Non-Prosecution Agreements (NPA) for the first time, and the SEC again appeared to expand the scope of its international enforcement reach by using the FCPA's accounting provisions to charge not only foreign bribery-related conduct, but also related conduct involving underlying violations of US export controls and economic sanctions laws and commercial bribery. Important legal issues were heard in the Federal Courts of Appeal for the first time.

The collateral effects of robust FCPA enforcement also continued to affect companies and individuals significantly in 2013. Shareholder derivative litigation continued; other collateral litigation compounds the risk picture for companies when conducting internal investigations or cooperating with US enforcement authorities.

Perhaps the most important trends in FCPA/anti-corruption law enforcement in 2013, however, were the growing importance of other countries' and jurisdictions' anti-corruption enforcement efforts, and increased whistleblower activity in the wake of the implementation of the Dodd-Frank whistleblower bounty provisions. These developments had profound – and not necessarily positive - implications for multinational companies' compliance programs: financial incentives for whistleblowers to report straight to the SEC undermine companies' compliance investments, and increased investigation and enforcement activity in other countries and by international authorities such as the World Bank, coupled with increasing cooperation with the US SEC and DoJ, have made it more likely that even a company with a strong, global

compliance program will be subject to investigation by US or other countries' authorities (or both) regarding issues that it would not have previously known of or had the opportunity to investigate and remediate on its own.

As a result, 2013 may come to be seen as the year in which anti-corruption enforcement became truly global, and the year in which companies began to grapple with the significant implications these changes have for their compliance programs worldwide.

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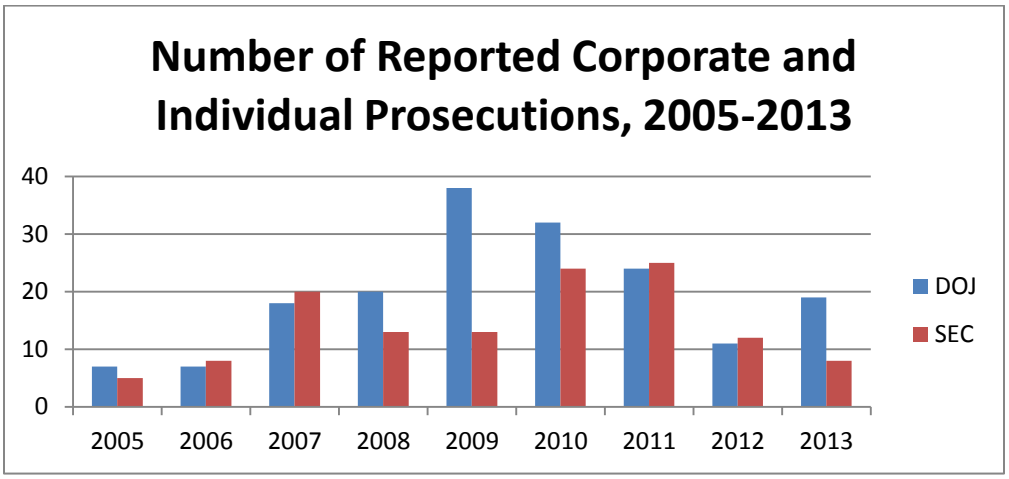
I. FCPA ENFORCEMENT STATISTICS FOR 2013

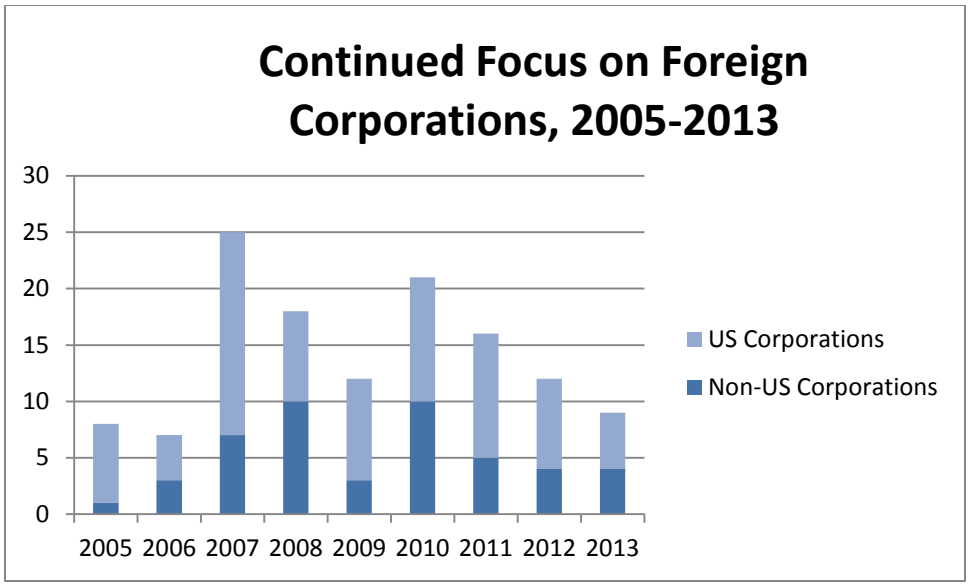
A. Number of Enforcement Actions

The DoJ and SEC brought a total of 27 enforcement actions against companies and individuals in 2013: 19 by the DoJ, and 8 by the SEC. This represents an increase from the combined 23 enforcement actions brought by the US authorities in 2012, though it does not match the 49 actions brought by the SEC and DoJ on a combined basis in 2011.



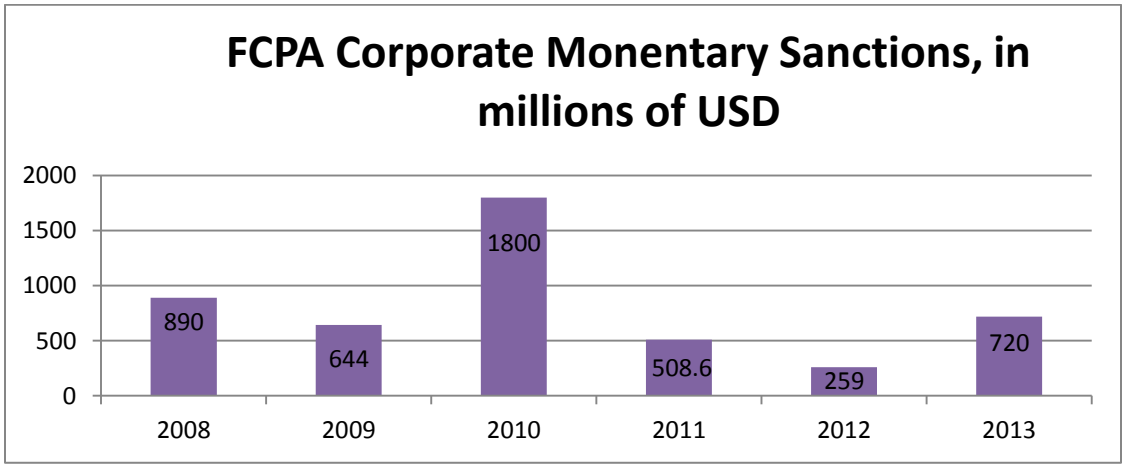
Nine separate companies faced charges from one or both of the US enforcement agencies out of the 27 total enforcement actions brought. This represented the lowest number of unique companies to be subject to enforcement actions since 2006. Five of those companies were US-based, and four were based outside the US Twelve individuals were charged in criminal prosecutions by the DoJ; while the SEC did not bring new enforcement actions against any individuals in 2013, litigation between the SEC and a number of executives of companies that entered into FCPA settlements in years past remained ongoing, including the SEC's litigation against former Noble Corp. executives Mark Jackson and James Ruehlen,[2] following on from Noble's FCPA settlements reached with the DoJ and SEC in November 2010.[3]

[2] *SEC v. Jackson*, 4:12-cv-563 (S.D. Tex. Feb. 24, 2012).
[3] Non-Prosecution Agreement, *In re Noble Corp.*, (Nov. 4, 2010), *available at* http://www.justice.gov/opa/documents/noble-npa.pdf; Press Release, US Securities and Exchange Commission, SEC Charges Noble with FCPA Violations (Nov. 4, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21728.htm.



B. Monetary Sanctions

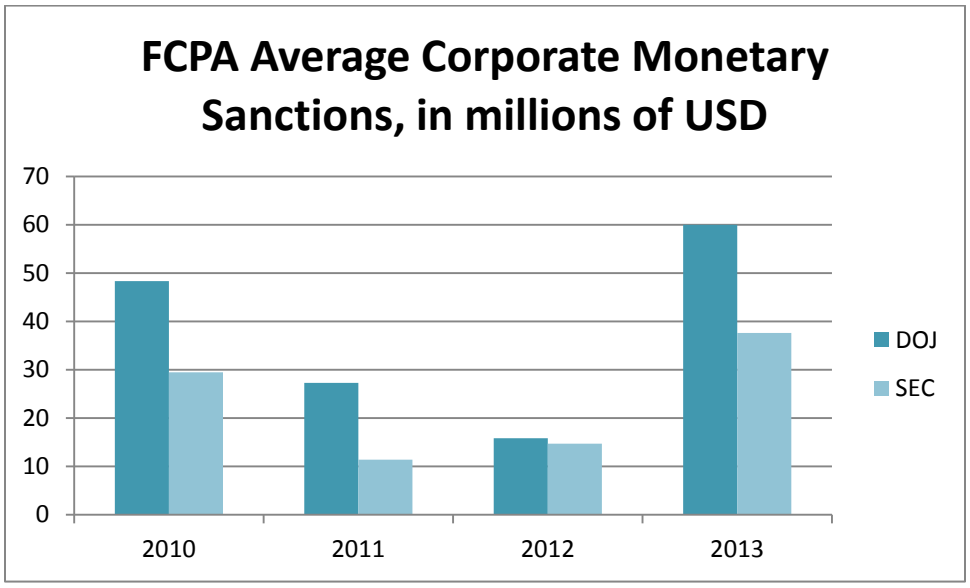
The nine companies paid a total of $720 million in criminal and civil penalties, disgorgement, and pre-judgment interest, almost tripling the monetary sanctions levied by the US government in 2012.



These elevated monetary sanctions numbers were driven by financial sanctions levied by the US authorities in a small number of particularly notable cases of grand corruption, some going back for many years. The largest FCPA-related DoJ-imposed monetary sanction in 2013 (and 4th-largest ever) was a $245.2 million criminal penalty against French oil company Total S.A., which used offshore companies to funnel payments to Iranian government officials in exchange for lucrative oil and gas concessions. The smallest DoJ-related monetary sanction was $882,000 levied against Ralph Lauren Corporation under its NPA relating to improper payments to customs officials in Argentina.

The largest and smallest SEC sanctions paralleled those of the DoJ. The largest SEC-levied sanction in 2013 (and 4th largest ever) was $153 million in disgorgement against Total S.A. in the Iran-related investigation referenced above. The smallest SEC sanction was $734,846 in disgorgement and prejudgment interest against Ralph Lauren Corporation, levied in connection with the SEC's first corporate NPA the SEC in an FCPA-related case, bookending the DoJ NPA referenced above.

The mean DoJ and SEC sanctions were $60.0 million and $37.6 million, respectively, representing a significant increase over 2012's means of $15.85 million (DoJ) and $14.73 million (SEC). As FCPA investigations typically take many years to resolve – and year-on-year data can be significantly affected by one or two large settlements (as was the case with *Total* and *Weatherford* in 2013) – one should not read too much into the year-to-year averages.



C. Geography and Industries Affected

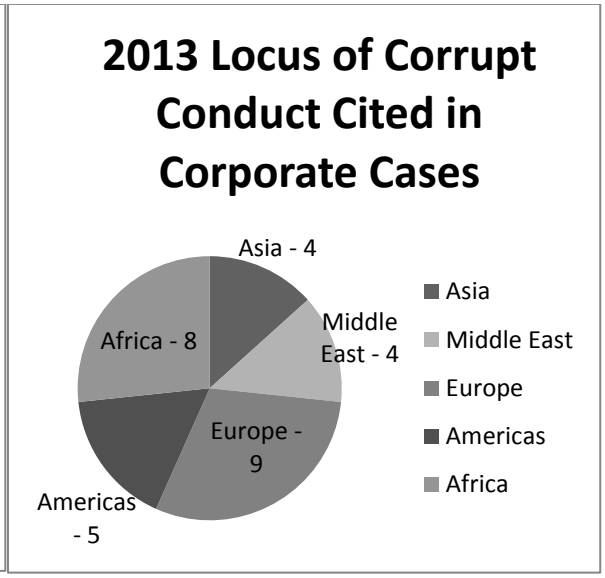
As in 2012, 2013 saw FCPA-related settlements involving conduct with a wide geographic spread, including 17 countries and in all regions, with several cases involving multi-country and multi-regional conduct. Conduct in Europe (including Russia and the FSU) accounted for more enforcement actions than any other region, with conduct on that continent cited nine times in five of the nine corporate cases.[4] Africa-located conduct also accounted for significant enforcement activity, with Angola and Nigeria being cited multiple times, and conduct in other African countries the subject of eight enforcement actions in total. In contrast to 2012, Asia-related enforcement actions featured less prominently in 2013, although major anti-corruption investigations by Chinese authorities, in particular in the health care sector, reportedly have caused new FCPA and UK Bribery Act-related investigations at the companies

[4] Some countries appear in more than one enforcement action. For the purposes of these figures, each appearance is counted separately as an enforcement action in the specific region.

implicated. Americas-related activity remained at the roughly the same level as compared to 2012, with 6 and 5 settlements, respectively.

2013 saw enforcement activity in industries that have been the subject of significant enforcement actions in years past, such as in the extractives and medical device sectors, and in industries that have not been the targets of enforcement actions to date.

This year, Stryker Corp. and Koninklijke Philips Electronics N.V. were added to the long list of enforcement actions of investigations against pharmaceutical and medical device companies. Oil services and other extractive firms, a long-standing focus of US enforcement agencies, continued to come under scrutiny in the *Total*, *Weatherford* and *Parker Drilling* settlements. Enforcement agencies did, however, branch out to previously relatively untouched industries through their investigations of Ralph Lauren Co., the clothing manufacturer, and Diebold, Inc., the ATM manufacturer. 2013 suggests that enforcement agencies are looking to a wider variety of industries, previously not associated with significant corruption risks, while maintaining a high level of scrutiny on the traditional "high risk" industries.



D. Monitorships

Corporate monitorships were required in one third of the corporate resolutions, with two of those resolutions involving a "hybrid" monitorship, in which the monitor serves for 18 months, and upon successful completion of that initial period, converts to an 18-month self-reporting obligation.

II. KEY DEVELOPMENTS AND TRENDS IN FCPA ENFORCEMENT

A. Voluntary Disclosure, Cooperation and Remediation

The enforcement actions brought in 2013 highlighted that companies' responses – and ultimately how they approach allegations of wrongdoing internally – can be a significant driver

of the form and severity of the final resolution. On the one hand, the agencies' resolutions with Ralph Lauren demonstrate that voluntary disclosure, cooperation and remediation can lead to significantly reduced sanctions in FCPA cases – but not necessarily a declination. Ralph Lauren discovered in the course of updating its FCPA/anti-corruption compliance program potentially improper payments in Argentina, and within two weeks of that discovery made a voluntary disclosure to the SEC and DoJ, and voluntarily conducted a worldwide FCPA risk assessments of its interactions with customs officials. As a result, both the SEC and DoJ entered into NPAs with the company and levied over a million US dollars in monetary sanctions against the company. The NPA with the SEC represented the first time that the SEC had entered into an NPA with a company. The SEC press release on the settlement indicates that the agency agreed to the NPA "due to the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-time cooperation with the SEC's investigation."[5] The SEC also noted Ralph Lauren's extensive cooperation with the investigation, including immediately reporting the company's preliminary findings of its internal investigation to the SEC and making documents and witnesses available to assist enforcement authorities with their investigation. Where Ralph Lauren appeared to have fallen short was in its compliance efforts vis-à-vis its Argentine subsidiary prior to the discovery of the conduct; presumably that is the reason its efforts did not warrant a declination.

At the other end of the spectrum are the November 2013 *Weatherford* settlements. Weatherford paid $152.6 million in FCPA-related monetary sanctions, agreed with DoJ for one of its subsidiaries to plead guilty to violations of the FCPA's anti-bribery provisions, and the parent company entered into a DPA charging criminal violations of the FCPA's internal controls provisions. $65.2 million of the $152.6 million in FCPA-related sanctions was paid pursuant to Weatherford's settlement with the SEC, which charged violations of both the anti-bribery and internal controls provisions.[6] Unlike Ralph Lauren, Weatherford was also forced to agree to a "hybrid" monitorship both in connection with its FCPA conduct, but also, for the first time in an FCPA case, in connection with its violation of US export controls laws. In addition to the conduct in question, which was of a significantly different character than that charged in *Ralph Lauren*, the severity of the sanctions imposed in the *Weatherford* settlements can be attributed to the company's failure to voluntarily disclose the matter, less-than-full cooperation with the DoJ and SEC particularly during the early part of the government's investigation, and the apparent surfacing of additional compliance issues while the investigation was pending notwithstanding the Company's strong efforts to remediate the conduct in question and develop a robust compliance program once it decided to cooperate fully.

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[5] Press Release, US Securities and Exchange Commission, SEC Announces Non-Prosecution Agreement With Ralph Lauren Corp. Involving FCPA Misconduct (Apr. 22, 2013), *available at* http://www.sec.gov/news/press/2013/2013-65.htm.

[6] The *Weatherford* FCPA-related settlements were released concurrently with civil and criminal settlements with the US Attorney's office for the Southern District of Texas, US Department of Commerce's Bureau of Industry and Security and US Treasury's Office of Foreign Assets Control (OFAC) relating to violations of US export controls and economic sanctions. *See infra* Part IV.A.2.a. Weatherford and three of its subsidiaries paid an additional $100 million in connection with those settlements. Press Release, Department of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), *available at* http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html.

Other settlements released in 2013 fell in between these two poles. The resolution for Total, S.A., shared many commonalities to the Weatherford disposition, including that Total received no "discount" off the low end of the fine range suggested by the Federal Sentencing Guidelines (U.S.S.G.) and was required to have an independent monitor for three years. Many other companies, however, did receive discounts off the low end of the penalty range suggested by the U.S.S.G., including a subsidiary of ADM (30% discount plus additional sums subtracted based on penalties paid to German authorities); Diebold (30% discount); and Parker Drilling (20% discount). Charging documents and press releases cited extensive internal investigative efforts (Parker Drilling, Diebold) and widespread and/or early remediation (Parker Drilling, ADM). In contrast, Bilfinger did not receive a penalty discount from the low end of the applicable U.S.S.G. range, and charging documents merely mentioned the company's cooperation and remediation efforts without further comment.

B. Focus on Third Parties

As discussed below, the DoJ and SEC enforcement in 2013 continued to focus on the conduct of third parties. Total S.A.s' $398 million settlement of its almost ten-year investigation, a likely follow-on from the *Statoil* case, focused on its payments to intermediary companies in Switzerland and other offshore havens.[7] Weatherford, Total, Bilfinger, ADM, Diebold, Stryker, Parker Drilling, Ralph Lauren, and Phillips (all discussed below in Section IV), also involved third party conduct. The trend has continued in early 2014, with Alcoa reaching a combined $384 million FCPA-related set of settlements with DoJ and the SEC in connection with millions of dollars in payments made through intermediaries to members of Bahrain's royal family and Alba officials.

C. Cooperation Between US and Other Countries' Law Enforcement Authorities

Cooperation between the US enforcement authorities in FCPA investigations was significant in 2013 and is likely to continue to increase. Major investigations involving multiple countries' enforcement authorities continued, including cooperation between the DoJ, the SEC, and French, Swiss, and UK authorities in their investigation of Alstom SA, a France-based engineering company;[8] between the DoJ and UK Serious Fraud Office (SFO) in connection with their investigation of Eurasian Natural Resources Company (ENRC);[9] between the DoJ, SFO and Guinean authorities in connection with the investigation of Frederic Cilins and BSG Resources Ltd. regarding their activities in the mining sector in Guinea;[10] and in connection with other ongoing investigations.[11]

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[7] *See* Deferred Prosecution Agreement, *United States v. Total, S.A.*, No. 18-cr-239 (E.D. Va. May 29, 2013) (hereinafter Total DPA).
[8] *See infra* Part V.D.
[9] *See infra* Part VI.B.
[10] *See infra* Part VI.A.
[11] *E.g.*, James Moore, *Two Men Arrested During SFO Raids Linked to Rolls Royce*, THE INDEPENDENT (Feb. 12, 2014), *available at* http://www.independent.co.uk/news/business/news/two-men-arrested-during-sfo-raids-linked-to-rollsroyce-9124366.html (noting DoJ's awareness of SFO's investigation into possible bribery by Rolls-Royce in China and Indonesia).

2013 settlements also reflected this trend. Total S.A.'s FCPA settlement represented the first cooperation between US and French prosecutors, resulting in FCPA settlements in the United States and related enforcement efforts in France.[12] The DoJ also thanked the UK's Crown Prosecution Service and Metropolitan Police Service for their assistance in investigating Parker Drilling; the Indonesian Komisi Pemberantasan Korupsi (Corruption Eradication Commission) for its assistance in investigating Alstom executives; and Mexico and Panama for their assistance in investigation BizJet executives. Finally, as mentioned above, the DoJ credited a $1.7 million fine paid by ADM's German subsidiary when calculating penalties due by another ADM subsidiary.

D. Continued Issuance of Declinations

The DoJ and SEC continued to issue declinations in what appears to be an increasing number of cases. Companies reporting resolution of their FCPA matters included medical device makers Medtronic Inc. and Zimmer Holdings, Inc., after over six years of investigation as a result of one of the agencies' first industry "sweeps";[13] Wynn Resorts, in connection with its $135 million donation to the University of Macau in May, 2011;[14] manufacturers Owen-Illinois Group, Dyncorp International Inc., Raytheon Company, Deere & Company, Allied Defense Group, 3M Company, and IDT Corporation;[15] and oil services contractor Nabors Corp., whose investigation resulted from the Panalpina-related industry "sweep" beginning in 2007.[16]

Although the incidence of (or at least the transparency regarding) declinations may be increasing in absolute terms, there remains little information regarding the factors the enforcement authorities considered in a particular case. While the DoJ's and SEC's 2012 *Resource Guide* provides general insight—emphasizing the importance of self-reporting, cooperation, and remedial compliance efforts—it nevertheless remains unclear how these factors, and others such as insufficient evidence, lack of agency resources or other factors play into the declination decision in a particular case.[17]

III. 2013 CORPORATE SETTLEMENTS

In addition to the wider enforcement trends discussed above, 2013's FCPA enforcement actions bore many similarities to prior years. As in almost all years past, all resolutions between companies and the SEC and DoJ were negotiated settlements, not litigated. Dispositions

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[12] Geraldine Amiel and Joe Palazzolo, *Prosecutor Recommends Corruption Trial for Total, CEO*, WALL STREET J., (May 29, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324682204578513230302339730.

[13] Medtronic Inc. (SEC Form 10-K), 114 (June 24, 2013); Zimmer Holdings, Inc. (SEC Form 10-K), 65 (Feb. 27, 2013).

[14] Wynn Resorts, Ltd. (SEC Form 8-K) (July 8, 2013).

[15] Owens-Illinois Group, Inc. (SEC Form 10-Q), 20 (July 25, 2013); Delta Tucker Holdings, Inc. (SEC Form 10-K), 94 (Mar. 27, 2013); Raytheon Co. (SEC Form 10-K), 22 (Feb. 13, 2013); News Release, Deere & Company, Deere Notified of Conclusion to Foreign Business Practices Investigation (Jan. 10, 2013), *available at* http://www.deere.com/wps/dcom/en_US/corporate/our_company/news_and_media/press_releases/2013/corporate/2013jan10_corporaterelease.page; Allied Defense Group (SEC Form 10-Q), 8 (Aug. 14, 2013); 3M Co. (SEC Form 10-K), 107-08 (Feb. 14, 2013); IDT Corp. (SEC Form 10-Q), 15 (June 10, 2013).

[16] Nabors Industries, Ltd. (SEC Form 8-K) (Feb. 15, 2013).

[17] DoJ Criminal Div. and SEC Enforcement Div., *A Resource Guide to the US Foreign Corrupt Practices Act*, at 54, 56 (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (*Resource Guide).*

included criminal plea agreements, DPAs and NPAs, including (as already mentioned) the first NPA entered into by the SEC in an FCPA matter.

Below we address a number of the settlements released in 2013 in relation to the relevant statutory elements, affirmative defenses and other issues presented under the FCPA. Those include:

- Third parties
- The instrumentality/foreign official element;
- Gifts, meals and entertainment
- Charitable contributions;
- The obtain or retain business element; and
- Use FCPA's books and records and internal controls provisions.

With respect to most of these issues, the 2013 cases broke no significant new legal ground; rather, they represented a continuation of past interpretations of the statute by the enforcement agencies. Indeed, it is striking how many of the cases in 2013 are outgrowths of prior cases. In some cases, they reflect practices that companies with robust compliance programs have long since abandoned. The one area where 2013 saw a more expansive approach is on the accounting side of the statute.

A. Third Parties

Enforcement actions in 2013 continued to demonstrate the authorities' focus on third parties, with eight of the nine corporate enforcement actions involving misconduct by or through agents, distributors, or consultants in cases involving both large-scale procurement transactions and smaller, "retail" corruption. These included the year's significant *Total* and *Weatherford* settlements.

1. Sham Consultancies — Total S.A.

Total S.A.'s May 2013 settlements included a DPA with DoJ charging it with conspiracy to violate the FCPA's anti-bribery provisions and criminal violations of the books and records and internal controls provisions,[18] and a cease-and-desist order filed by the SEC alleging violations of the anti-bribery, books and records and internal controls provisions, resulting in $398 million in fines penalties and disgorgement.[19] The company was alleged to have paid over $60 million between 1995 and 2004 to Iranian government officials in order to obtain the rights to oil and gas development concessions in Iran,[20] through sham consulting agreements to intermediary companies in Switzerland and the British Virgin Islands.[21]

[18] *See* Total DPA. Our previous alert on the settlement is available at http://www.steptoe.com/publications-8854.html.
[19] Order Instituting Cease-and-Desist Proceedings, *In re Total, S.A.*, SEC Release No. 69654, File No. 3-15338 (May 29, 2013) (hereinafter Total Order).
[20] Total DPA at A-2, A-3.
[21] *Id.*

Total allegedly conducted no diligence on the consultants before engagement, lacked internal controls sufficient to ensure the consulting agreements were legitimate and complied with applicable law, and mischaracterized the true nature of the consultancy agreements and related payments.[22] In response to the centrality of the third-party relationships to the conduct, the DoJ, in its DPA Attachment C of the DPA, required Total to acknowledge its compliance "failures," such as its failure to conduct adequate audits of payments to consultants and its failure to provide appropriate incentives to perform in accordance with the company's compliance and ethics program, and include remediation of those failures as a condition of the agreement.[23]

2. Joint Venture Partners and Distributors

a. Weatherford International Ltd.

The other nine-figure resolution in 2013 – the *Weatherford* matter – also focused primarily on third-party relationships and conduct, in particular that of joint venture partners, freight forwarders and distributors. Company executives, including in-house counsel, approved a joint venture arrangement in Angola between a Weatherford subsidiary and two local companies despite their knowledge that the joint venture partners were closely linked to senior Angolan officials, and that the purpose of the joint venture was to make payments to those government officials in exchange for allowing the company to capture the local market for a certain Weatherford product.[24] In a separate stream of conduct, another Weatherford subsidiary provided special "discounts" to a distributor in the Middle East, selected by a government official, in order create a "slush fund" used to make payments to those officials in return for sales.[25]

b. Bilfinger S.E. (joint venture partners)

On December 9, 2013, Germany-based engineering and services company Bilfinger SE (Bilfinger) entered into a DPA with DoJ to settle charges related to more than $6 million in improper payments to Nigerian government officials to win contracts related to the Eastern Gas Gathering System project, which was the subject of previous FCPA enforcement actions against Willbros and individuals associated with Willbros. Bilfinger and Willbros were joint venture partners, making this case essentially the bookend to the prior prosecution (and another clear example of a follow-on case). According to the DPA, the bribes were paid to government and state-owned entity officials as well as officials of "the dominant political party in Nigeria," both by Bilfinger SE directly and through Willbros. Bilfinger was charged with violating and conspiring to violate the FCPA's anti-bribery provisions. The company agreed to pay a monetary penalty of $32 million to settle the charges and to retain an independent corporate compliance monitor for at least 18 months.

[22] Information, *United States v. Total, S.A.*, No. 13-cr-239 (E.D. Va. May 29, 2013)
[23] Total DPA at C-1- C-6.
[24] Deferred Prosecution Agreement, *United States v. Weatherford International Ltd.*, No. 4:13-cr-733 (S.D. Tex. Nov. 26, 2013) (hereinafter Weatherford DPA).
[25] *Id.* at 7, 9-10.

c. ADM (joint venture partners)

On December 20, 2013, Illinois-based agricultural processing company Archer-Daniels-Midland Company (ADM) resolved DoJ claims related to payments made in connection with improper payments made by 50%-owned ADM joint venture in Venezuela.[26] According to the DoJ NPA, due diligence conducted by ADM in 1998 prior to entering the joint venture agreement identified invoicing and offshore payment practices that could constitute FCPA violations.[27] Specifically, customers of the joint venture partner requested that commissions be added to grain sales prices, and then paid separately to US bank accounts controlled by the customer.[28] Upon creating the joint venture, ADM instituted a policy prohibiting offshore commission payments, but did not formalize it until approximately 2004. ADM's Latin American subsidiary – a domestic concern – was responsible for making payments to offshore, third-party bank accounts. After a 2004 audit of ADM Venezuela, ADM terminated the employee responsible for approving the refunds, conducted "limited" compliance training for its joint venture partners, and instituted a written policy prohibiting commission payments to accounts from which the funds did not originate.[29] In addition, from 2004 to 2009, ADM Venezuela and certain of its customers began to classify the improper payments as commissions in an attempt to circumvent Venezuelan currency exchange controls.

ADM agreed to pay $9.45 million to settle the DoJ allegations, and an ADM Ukrainian subsidiary agreed to pay $17.8 million in fines to settle criminal charges related to payments made in order to obtain VAT refunds from the Ukrainian government. ADM also agreed to pay $33.34 million in disgorgement to settle SEC charges related to the Ukrainian conduct.

d. Diebold, Inc. (distributors)

On October 22, 2013, Diebold Inc. (Diebold) entered into a DPA with the DoJ, and the SEC filed a settled complaint, in connection with approximately $1.8 million gifts and pleasure trips provided between 2005 and 2010 to Chinese, Indonesian, Russian and Ukrainian officials of state-owned banks, in order to encourage purchases of the company's automatic teller machines and security systems, directly and through third party distributors in Russia and Ukraine. The SEC and DoJ resolutions make clear that Diebold failed to implement remedial measures, even after its offices in China were raided in 2007 by a regional government agency and the conduct became known to the company, and that it continued to do business with its Ukrainian distributor for three years after it became aware that the distributor had made illicit payments to its bank customers.

Diebold paid $22.9 million in disgorgement and interest to the SEC along with $25.2 million in criminal fines to resolve the DoJ charges, for a total of $48.1 million, and agreed to appoint an independent compliance monitor for 18 months.

[26] Non-Prosecution Agreement A-8, *In re Archer Daniels Midland Co.* (Dec. 20, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/archer-daniels-midland/adm-npa.pdf.
[27] *Id.* at A-9.
[28] *Id.*
[29] *Id.* at A-10.

3. Customs Agents, Law Firms and Others

a. Stryker (local law firms)

On October 24, 2013, the SEC issued an administrative order charging Michigan-based Stryker Corporation (Stryker) with violations of the FCPA's books and records and internal controls provisions in connection with payments made by subsidiaries in Argentina, Greece, Mexico, Poland, and Romania to publicly-employed doctors, officials and other health care professionals to secure sales of its products., and requiring it to pay $13.2 million in disgorgement, prejudgment interest and civil penalties.[30] This case was particularly noteworthy for the use of a law firm as a corrupt intermediary in Mexico. Stryker's local subsidiary allegedly directed a local law firm to make the payments to government officials on its behalf.[31] The local law firm then falsely invoiced the subsidiary for legal services in the amount of the illicit payments, where no legitimate services had been rendered.[32] Stryker also provided other benefits to the government officials directly, such as "honoraria" to state physicians, and some through sham consulting arrangements.[33]

b. Parker Drilling (customs agents and US law firms)

On April 16, 2013, Parker Drilling Company (Parker) entered into a DPA with DoJ to settle alleged violations of the FCPA's anti-bribery provisions,[34] and agreed to settle with the SEC in connection with alleged violations of the anti-bribery, books and records and internal controls provisions relating to payments made to Nigerian Customs Service officials through its Nigerian freight forwarder Panalpina.[35] These settlements arose out of the long-running industry "sweep" of Swiss freight-forwarder Panalpina World Transport (Holding) Ltd. and its affiliates, and customers.

Parker paid $11.8 million in criminal fines and $4.1 million in disgorgement and interest to the SEC to resolve the investigation, which related to $1.25 million in payments approved by Parker executives to a Nigerian agent despite knowledge that the agent would use the funds to entertain Nigerian officials involved in Nigerian enforcement proceedings for alleged violations of Nigerian customs laws by Parker's customs broker Panalpina.[36] In an effort to reduce the fine, the company hired the Nigerian agent, through its outside counsel in the United States, to funnel payments to Nigerian officials.[37] The DoJ and SEC cited that the company had conducted no due diligence on the agent, even though he had no relevant experience and was known to be politically influential in Nigeria.[38] Moreover, the "consulting" agreement with the agent

[30] Order Instituting Cease-And-Desist Proceedings, *In re Stryker Corp.*, Release No. 70751 (Oct. 24, 2013) (hereinafter Stryker Order).
[31] *Id.* at 3.
[32] *Id.*
[33] *Id.* at 5
[34] Deferred Prosecution Agreement, *United States v. Parker Drilling Co.*, No. 13-cr-176 (E.D. Va. Apr. 16, 2013).
[35] Complaint, *SEC v. Parker Drilling Co.*, No. 13-cv-461 (E.D. Va. Apr. 16, 2013) (hereinafter Parker Drilling Complaint).
[36] *Id.* at 4-5.
[37] *Id.* at 5.
[38] *Id.*

provided no basis for determining the compensation under the agreement,[39] and the company succeeded in obtaining an unexplained $3 million (or 80%) reduction of the initial fine.[40]

c. Ralph Lauren (customs agents) and Weatherford (freight forwarder)

On April 22, 2013, Ralph Lauren entered into NPAs with both the DoJ and SEC to settle alleged violations of the FCPA's anti-bribery and internal controls provisions relating to payments made by its wholly owned subsidiary, PRL S.R.L. (RL Argentina) to Argentine customs officials. Between 2004 and 2009, RL Argentina allegedly made improper payments through its customs broker to government officials in order to clear shipments through customs without the necessary paperwork and to avoid customs inspections. In addition, RL Argentina allegedly provided or authorized gifts, including perfume, dresses, and handbags, to Argentine customs officials to secure the importation of goods into Argentina.[41] Ralph Lauren discovered these improper payments through an internal investigation, and disclosed its findings to the DoJ and SEC in 2010.

Under the NPA with the DoJ, Ralph Lauren agreed to pay a total of $882,000; under the NPA with the SEC, the company agreed to disgorge $593,000 and pay prejudgment interest in the amount of $141,845.79. The DoJ NPA also includes extensive reporting requirements, under which the company must self-report FCPA issues over a two-year period and update the DoJ on its recently implemented compliance program. According to the DoJ NPA, RL Argentina did not provide any anti-corruption training or guidance related to Ralph Lauren's anti-corruption procedures to RL Argentina. However, Ralph Lauren took various remedial measures, as a result of its internal investigation, including: conducting new compliance training, terminating its relationships with all individuals involved in the wrongdoing, strengthening its internal controls and procedures for third-party due diligence, conducting a risk assessment of its major operations worldwide to identify other compliance problems, and ceasing its operations in Argentina.[42]

Weatherford also admitted to using a Switzerland-based freight forwarder to funnel payments to an Angolan government official in exchange for re-approving an existing contract, despite numerous "red flags" including the freight forwarder's objection to anti-corruption contractual safeguards, lack of appropriate due diligence in the engagement process and use of false invoices against which to make payment to the freight forwarder.[43]

d. Phillips (other agents)

On April 5, 2013, Koninklijke Philips Electronics, N.V. (Philips) reached a settlement with the SEC to resolve claims that the company's Polish subsidiary made improper payments via a "third party agent" to Polish health care officials to win tenders on at least 30 occasions

[39] *Id.* at 5-6.
[40] *Id.* at 7.
[41] Non-Prosecution Agreement, Exhibit A, Ralph Lauren Corp. (Apr. 22, 2013), *available at* http://www.sec.gov/news/press/2013/2013-65-npa.pdf (hereinafter Ralph Lauren SEC NPA).
[42] *Id.* at ¶¶ 2-5.
[43] *Id.* at 4-6.

from 1999 to 2007.[44] The cease and desist order states that employees of Philips Polska sp. z o.o. (Philips Poland) entered into a series of agreements under which Polish officials would receive 3%-8% of the value of medical equipment contracts in exchange for incorporation of Philips product specifications into tenders, increasing the likelihood that Philips would be awarded bids.[45] Philips Poland employees sometimes kept a portion of the improper payments as a "commission" and often used the third-party agent (no details of which were provided) to assist with the arrangements and payments.[46]

In December 2009, Polish authorities indicted 23 persons, including three former Philips Poland employees, prompting an internal investigation by the company. The investigation revealed the improper payments, as well as Philips Poland's improper accounting and inadequate internal controls. The company agreed to pay disgorgement of $3.12 million and $1.4 million in prejudgment interest to settle the SEC's claims.

B. Foreign Official / Instrumentality

A feature of FCPA enforcement actions has been the agencies' broad interpretation of who is classified as a "foreign official" for the purposes of the FCPA.[47] As described in our 2012 Year-in-Review, 2012 saw important enforcement and litigation around the agencies interpretation of this statutory element. Such litigation included the *Lindsey Manufacturing* and *Control Components Inc.* cases, which confirmed, broadly speaking, that state-owned entities may be considered foreign government "instrumentalities" for the purposes of the statue, and their employees "foreign officials."[48] The *Resource Guide* and DoJ Opinion Procedure Release 12-01 essentially reaffirmed those positions.

2013 did not see significant new developments with respect to this element. Instead, DoJ and SEC enforcement actions appeared to conform to the agencies' established views. For example, in the extractive industry, the US enforcement agencies unsurprisingly asserted that the NNPC personnel in Nigeria who received payment in the *Bilfinger SE* DoJ settlement, the Angolan and Middle Eastern state-owned oil companies' personnel who received corrupt payments in the *Weatherford* settlements, and the Iranian officials in the *Total* settlements were "foreign officials" for the purposes of the FCPA.

Likewise, customs officials who received payments in connection with the *Ralph Lauren* and *Parker Drilling* matters in Argentina and Nigeria, respectively, and healthcare officials – including doctors in state-owned hospitals – who received improper payments in connection with the *Stryker* and *Phillips Electronics* matters – as in 2012 in connection with the *Smith & Nephew, Biomet, Orthofix, Pfizer/Wyeth*, and *Eli Lilly* settlements, were also asserted to be "foreign officials" for the purposes of the FCPA.

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[44] Order Instituting Cease-And-Desist Proceedings at 2, *In re Koninklijke Philips Electronics N.V.*, Release No. 69327 (Apr. 5, 2013) (hereinafter Philips Order).
[45] *Id.*
[46] *Id.* at 3.
[47] In addition, as seen in the *Bilfinger* case, improper interactions with "political party" also create liability under the FCPA. Deferred Prosecution Agreement, *United States v. Bilfinger SE*, No. 4:13-cr-745 (S.D. Tex. Dec. 8, 2013).
[48] *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

We expect that 2014 will see significant new developments in this area, however, as it is likely that the Federal Court of Appeals for the Eleventh Circuit comes to a decision in the appeal of Joel Esquenazi and Carlos Rodriguez, two executives convicted of FCPA violations in 2011 related to a scheme to bribe officials of Haiti Teleco, a state-owned telecommunications company in Haiti. Esquenazi and Rodriguez have argued that Haiti Teleco did not qualify as an "instrumentality" under the FCPA. The Court heard oral arguments in the case in October 2013 and a decision is still forthcoming.

C. Gifts, Meal, Entertainment and Travel

The SEC and DoJ continued to bring cases involving hospitality provided to foreign officials for improper purposes. While 2013 broke no new conceptual ground, authorities in 2013 placed particular emphasis on companies providing foreign officials with substantial leisure trips, viewing these trips as bribes when given in exchange for an improper business advantage. An increased focus on substantial, all-expenses paid international trips left fewer cases that punished the "pattern and practice" of giving smaller amounts and gifts that we have seen in previous years.

1. Medical Treatment for Foreign Officials - US Department of Justice Opinion Procedure Request No. 13-01

On December 19, 2013, the DoJ issued an Opinion Procedure Release (OPR) indicating that it did not intend to take FCPA enforcement action against a US law firm partner who had proposed to pay for the medical treatment of a daughter of a foreign official. OPRs are not binding on other agencies and may only be relied on by the requesting party, but do provide companies with valuable insight as to how the DoJ evaluates a specific FCPA issue. Although under certain circumstances payments or gifts to foreign officials' family members can violate the FCPA, this OPR suggests that the DoJ will not take action when a gift is made without evidence of corruption, and with adequate assurances that it will not otherwise improperly influence a business relationship.

Here, the requestor proposed to pay up to $20,000 personally for the daughter of an employee of the foreign country's Office of Attorney General (OAG) to receive a vital medical treatment unavailable in her country. OAG was the agency responsible for granting contracts to foreign law firms, including the partner's law firm, which stood to earn up to $4 million from the foreign government through 2014. While the partner was not the "primary relationship partner," the partner works on the representation and aids in firm business pitches to OAG. The official had played and would play no role in awarding contracts to foreign firms.

The partner represented to DoJ that he or she was motivated solely by humanitarian concerns in paying for the treatment; would use only personal funds; would make payments directly to the medical facility and would not pay for the daughter's travel to the facility. The foreign country's laws criminalize corruption and require the OAG to publicly explain its reasoning for awarding contracts. Finally, DoJ noted that both the partner and official had discussed the matter transparently with their employers, that the law firm did not object to the arrangement, and that the attorney general of the foreign country had written a certified letter

expressing that the payment would not influence any OAG decisions and would not violate the foreign country's laws.

DoJ noted that it did not consider all payments or gifts to foreign officials "per se" prohibited, and stated that it would look at whether a gift was made with an indicia of corrupt intent, whether the arrangement is transparent and in conformity with the law of that country and whether there are safeguards in place to protect against an official exerting improper influence. While DoJ did not rule out potential future actions based on paying for the medical expenses of foreign officials' family members, the OPR stated that DoJ was satisfied that that in this instance the partner's proposal did not indicate corrupt intent or threaten improper influence.

2. Gifts and Cash — Ralph Lauren

As described above, on April 22, 2013, the DoJ and SEC announced that Ralph Lauren agreed to NPAs with both agencies relating to allegations that employees of its Argentine subsidiary RL Argentina had bribed government official, primarily through its dealings with customs officials and using a third party customs broker.[49] In addition to cash payments to customs officials, RL Argentina and its agents also provided officials with gifts – including perfume, dresses and handbags – in exchange for preferential customs treatment.[50]

3. Weatherford

In addition to the allegations outlined above, the SEC alleged that Weatherford and its subsidiaries provided improper travel and entertainment benefits for foreign officials in several countries that were not justified by a legitimate business purpose, [51] including an Angolan oil industry official's week-long trip to Italy and Portugal in 2008, only one day of which included business-related training.[52] Weatherford also provided a trip for two Algerian oil officials to watch the 2006 FIFA World Cup, and a religious trip to Saudi Arabia for a state employee and his family. Weatherford also paid for the honeymoon of the daughter of an Algerian official,[53] notable in that the direct recipient of the gift was not an official, but rather, an official's family member.

4. Stryker

In addition to the conduct described in Section IV.A.3, Stryker's Polish division paid for a publicly-employed hospital official and her husband to travel to New York City and Aruba for twelve days, even though the ostensible purpose of the trip was limited to a single-day tour of a Stryker manufacturing facility in New Jersey.[54] The total cost of this trip was $7,000 for airfare, accommodation, and entertainment costs, including tickets for the couple to attend two

[49] Press Release, Department of Justice, *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty* (Apr. 22, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-456.html.
[50] Ralph Lauren SEC NPA, Exhibit A at 8.
[51] Complaint at 1, *SEC v. Weatherford Int'l, Ltd.*, No. 4:13-cv-3500 (S.D. Tex. Nov. 26, 2013), *available at* http://www.sec.gov/litigation/complaints/2013/comp-pr2013-252.pdf (hereinafter Weatherford SEC Complaint).
[52] *Id.* at 6.
[53] *Id.* at 14.
[54] *See* Stryker Order.

Broadway shows.[55] Stryker paid for the trip in return for the official's promise to advocate for the hospital's purchase of Stryker products,[56] and improperly recorded the expenses as "consulting and service contract payments," "business travel expenses," "charitable donations," or "commissions."[57]

5. Diebold

The DoJ and SEC settlement with Diebold discussed above also included providing foreign officials with improper leisure trips, entertainment, and gifts,[58] including travel to Paris, Amsterdam, Florence, Rome, the Grand Canyon, Napa Valley, Disneyland, Las Vegas and other destinations.[59] Diebold China provided dozens of officials with annual cash gifts ranging in value from less than $100 to $600.[60] During the same period, Diebold's Indonesian subsidiary provided over $147,000 in leisure trips and entertainment for bank officials in that country[61] in order to obtain and retain business with state-owned banks.[62]

D. Charitable Contributions

2013 showed continued enforcement against charitable gifts provided in *quid pro quo* arrangements. Conduct cited in the *Stryker* SEC settlement involved the company's Greek subsidiary, which contributed $200,000 to a public Greek university at the request of a prominent public hospital official in Greece. Stryker made this contribution in exchange for a promise from the official to purchase the company's products.[63] Although the university was a legitimate organization, Stryker's contribution was considered improper because of the *quid pro quo* arrangement with the official.

E. Obtaining and Retaining Business

US enforcement authorities continued to interpret the FCPA's business-purpose test broadly in 2013. The majority of settlements involved common payments-for-contracts and successful public bidding arrangements (*Weatherford*, *Total*, *Bilfinger*, *Stryker*, *Philips* and *Diebold*). Other settlements, however, involved less direct business advantages, such as reductions of previously assessed customs fines and avoiding necessary customs inspections and paperwork (*Ralph Lauren*), and, interestingly, obtaining the release of tax refunds lawfully owed by a foreign government (*ADM*).

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[55] *Id.* at 4.
[56] *Id.*
[57] *Id.* at 2, 6.
[58] Press Release, Department of Justice, *Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty* (Oct. 22, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html.
[59] Complaint, *SEC v. Diebold, Inc.*, 1:13-cv-6013-ABJ (D.D.C. Oct. 22, 2013) *available at* http://www.sec.gov/litigation/complaints/2013/comp-pr2013-225.pdf. (hereinafter Diebold Complaint).
[60] *Id.* at 6.
[61] *Id.* at 2.
[62] *Id.*; Deferred Prosecution Agreement, *United States v. Diebold, Inc.*, No. 5:13-cr-00464-SO (N.D. Ohio Oct. 22, 2013), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf.
[63] Press Release, SEC, *SEC Charges Stryker Corp. with FCPA Violations* (Oct. 24, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262#.UsxFb9JDt8F.

1. VAT Refunds — ADM

VAT can work differently in different countries. Payments to obtain VAT refunds could hypothetically fall within the FCPA's facilitating payments exception if a party is legally entitled to the refunds once a claim is filed.[64] Alternatively, some VAT refund processes involve discretionary decisions that would take them outside the realm of "routine government action"[65] as defined by the statute. The *ADM* settlement does not provide detail about the regime at issue, although the fact of prosecution suggests the latter rather than the former. It is also possible that the improper recordation of the payments as "insurance premiums or other business expenses"[66] and the company's payment of the funds through off-book funds, third-party vendors and inflated contracts provided indicia of an improper purpose.[67]

2. Customs Clearance — Ralph Lauren

As described above, Ralph Lauren's Argentine subsidiary made payments and provided gifts worth almost $600,000, to Argentine customs officials and other government officials during the period between 2005 and 2009.[68] The SEC alleged that the bribes were paid to "improperly secure the importation" of the company's goods, including induce the officials to assist in improperly obtaining paperwork necessary to clear customs, to permit clearance without necessary paperwork or clearance of prohibited goods, and to avoid customs inspection.[69] The company uncovered the improper payments and reported to SEC, and eventually was able to enter into a NPA with SEC. Treating such advantages as "business" is in keeping with the government's position in numerous cases in recent years, including *Vetco Gray*.

3. Reduction in Regulatory Fines — Parker Drilling

As discussed above, Parker Drilling employed a Swiss-based freight forwarding and customs agent to funnel payments to Nigerian officials to reduce a fine levied against the company for violation of Nigerian customs laws. Ultimately, the company succeeded in obtaining an unexplained $3 million (or 80%) reduction of the initial fine,[70] underscoring that enforcement authorities, following the *Kay* case,[71] will look to any reduction of customs-related costs as a business benefit.

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[64] The FCPA does not apply to facilitation payments, which are defined by the statute as "facilitating or expediting payments to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." 15 U.S.C. § 78dd–1 (b) (2012).

[65] *Id.* The SEC stated that "the Ukrainian government determined to delay paying the VAT refunds owed or did not make any refund payments at all" at time between 2002 and 2010, and it could be "a local tax authority issue." *See* Compliant at 4-5, 6, *SEC v. Archer Daniels Midland Co.*, No. 2:13-cv-2279 (C.D. Ill., Dec. 20, 2013). (Hereinafter ADM Complaint)

[66] ADM Complaint at 5.

[67] ADM Complaint at 8, 9.

[68] Ralph Lauren Agreement Ex. A at 17.

[69] *Id.*

[70] Parker Drilling Agreement at A-10.

[71] *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007) (holding that payments to Haitian customs officials to reduce tax liability were designed to "obtain or retain business").

F. Accounting and Internal Controls Provisions

As in previous years, the DoJ and SEC brought several enforcement actions alleging violations of the FCPA's books and records and internal controls provisions. These charges, by definition, reflected the nature of the underlying conduct cited in bringing the charges, in particular regarding the use of third parties. The *Weatherford* SEC settlement was particularly notable, however, for its use of the books and records provisions to charge commercial bribery and violations of US export controls and economic sanctions – the first time the SEC had done so in connection with an FCPA case (or ever). Moreover, the enforcement actions brought in 2013 were consistent with the agencies' position in the *Resource Guide* and elsewhere that that the maintenance of an adequate FCPA/anti-corruption compliance program is necessary, as a matter of law, to satisfy the issuer's obligation to maintain a "system of internal accounting controls."

1. Total

In connection with its SEC and DoJ settlements described above, Total was accused of significant failures in its accounting and internal controls practices. Specifically, Total allegedly mischaracterized the payments it made to the corrupt intermediary as "business development expenses," when they were in fact designed to induce Iranian officials to use their influence to grant hydrocarbon development rights to Total.[72] The contract with the intermediary was falsely described as a legitimate consulting agreement for the provision of "economic and marketing research and support services"[73] and contained no specific terms for payment.[74]

Perhaps not surprisingly, given the magnitude of the settlement and nature of the conduct, Total's DPA contained an unusual level of detail regarding the company's FCPA/anti-corruption compliance program's shortcomings:

(a) failure to implement adequate anti-bribery compliance policies and procedures;
(b) failure to maintain an adequate system for the selection and approval of consultants;
(c) failure to conduct adequate audits of payments to consultants;
(d) failure to establish a sufficiently empowered and competent corporate compliance officer;
(e) failure to take reasonable steps to ensure the company's compliance and ethics program was followed;
(f) failure to evaluate regularly the effectiveness of the company's compliance and ethics program;
(g) failure to provide appropriate incentives to perform in accordance with the compliance and ethics program;
(h) concealment of the consulting agreements' true nature and participants;
(i) failure to perform due diligence concerning the parties to the consulting agreements; and

[72] Total Order at 4.
[73] *Id*. at 3
[74] *Id*.

(j) lack of controls sufficient to provide reasonable assurances that the consulting agreements complied with applicable laws.[75]

2. Ralph Lauren

In its NPA with the company, the SEC asserted that Ralph Lauren failed to discharge its internal control responsibilities by virtue of its failure to maintain an FCPA/anti-corruption compliance program company-wide, including at its Argentine subsidiary responsible for the underlying conduct.[76] Ralph Lauren failed to identify customs broker invoice line items such as "Loading and Delivery Expenses" and "Stamp Tax/Label Tax" deliberately included as euphemisms for reimbursement requests for improper payments, and failed to secure adequate supporting documentation for those expenses. The SEC alleged that the failure of Ralph Lauren's review process for authorization of expenditures to the customs broker to identify any improper payments during the period of 2005 to 2009 was evidence of Ralph Lauren's failure to devise and maintain a system of internal controls consistent with the requirements of the FCPA.

3. Weatherford

In the Weatherford case, the SEC also alleged violations of the FCPA's books and records provisions in connection with commercial bribery.[77] The commercial bribery allegation involved payments to a private Italian company in "Congo."[78] The SEC also used the internal controls provisions to sanction Weatherford for alleged foreign trade controls violations. The foreign trade controls issue had to do with the falsification of accounting and inventory records in order to conceal the illicit details of transactions that implicated US economic sanctions and export controls laws and regulations.[79]

In the course of the alleged improprieties, Weatherford employees kept some of the diverted funds for their own personal benefit, while other amounts were used to make payments to foreign officials.[80] In contrast to the 2012 *Morgan Stanley/Garth Peterson* case, this personal benefit did not insulate the company from liability, because, unlike Morgan Stanley, Weatherford's compliance program was deemed to be inadequate.

The criminal violations of the internal controls provisions were based on the allegation that company executives and employees deliberately circumvented company policies and that management deliberately failed to address compliance issues or, in some cases, actively condoned bad practices.[81]

4. Philips

As part of the alleged violations by Philips of the books and records and internal controls provisions, described above, employees of Philips' Polish subsidiary reportedly kept a portion of

[75] Total Agreement at A-5.
[76] Ralph Lauren Agreement at ¶ 9.
[77] Weatherford Complaint at A-5- A-10.
[78] *Id.* at 9-10. The SEC did not specify either the Democratic Republic of the Congo or the Republic of the Congo.
[79] *Id.* at 2.
[80] *Id.* at 14-15.
[81] Weatherford DPA at 5-9.

the improper payments to the government healthcare officials as a "commission."[82] In addition, employees of the Polish subsidiary falsely characterized the improper payments in the company's books and records as legitimate expenses, supported by false documentation created by the employees or by third parties.[83] Even an internal audit, prompted by searches of Philips' offices by Polish officials and arrests of its employees, failed to discover the improper payments.[84] They were not discovered until a subsequent internal investigation brought about by Polish indictments of three former employees of the subsidiary.[85]

5. Diebold

In addition to the public bribery and accounting charges described above, it is noteworthy that the SEC also charged Diebold with violating the FCPA's books and records provisions based on allegations of commercial bribery. Specifically, Diebold is accused of concealing approximately $1.2 million in bribes by its Russian subsidiary, which was paid to employees at private banks in Russia in order to induce them to purchase Diebold ATM systems.[86] Diebold allegedly paid the bribes through a distributor with which it executed phony service contracts, and recorded the improper payments in its books and records as legitimate expenses. While the accounting provisions of the FCPA have never been limited to expenditures that implicate the anti-bribery provisions, this action, coupled with Weatherford, suggests a new willingness on the part of the SEC to use these provisions to reach a broad range of improper conduct.

6. ADM

As noted above, ADM settled the SEC charges related to alleged bribes paid to by two of its subsidiaries to Ukrainian tax officials to release VAT refunds. The subsidiaries allegedly disguised improper payments in their books and records as insurance and export-related payments. In addition, the subsidiaries misrepresented their reserves, and manipulated and structured insurance contracts to avoid detection of improper payments. ADM's internal controls were deemed insufficient to detect the misconduct.

In addition, ADM's DoJ NPA indicates the company's Venezuelan subsidiary used customer overpayments to fund improper payments to the offshore accounts of Venezuelan officials in connection with import licenses. ADM Venezuela improperly recorded these payments in its books and records as "commissions."

7. Parker Drilling

As previously noted, Parker Drilling was the subject of an SEC complaint alleging violations of the anti-bribery, books and records and internal controls provisions.[87] Parker Drilling's accounting failures included making payments to a third-party agent without receiving any invoices to substantiate the purpose of the payments and recording those payments in its

[82] Philips Order at 3.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Diebold Complaint at 9-10.
[87] Parker Drilling Complaint.

books and records with unspecified, "vague expenditure descriptions."[88] Still, even after a request from the company treasurer for the invoices, the invoices provided by the agent did not describe the agent's entertainment expenses nor did the agent provide any supporting documentation to go along with the invoices.[89]

8. IBM

On July 26, 2013, Judge Richard Leon of the US District Court for the District of Columbia approved an FCPA settlement between IBM and the SEC that was initially reached on March 18, 2011.[90] The original settled complaint alleged violations of the books and records and internal controls provisions based on the provision of cash payments, gifts and entertainment to government officials in South Korea and China between 1998 and 2003 by IBM subsidiaries and a majority-owned joint venture.[91] IBM agreed at the time to pay $5.3 million in disgorgement, $2.7 million in interest and a $2 million civil penalty. On December 20, 2012, Judge Leon rejected the agreed-upon settlement citing IBM's "history" of books and records violations.[92] In 2000, IBM paid $300,000 to settle civil FCPA charges arising out of conduct of an affiliate in Argentina.[93] Judge Leon therefore took the position that the company should be required to report all violations of accounting laws, not just those related to foreign corruption, and requested annual reports of the company's FCPA compliance including any other potential accounting violations.

After a delay of over two years, the final settlement amount of $10 million remained the same. IBM was required to file additional reports to the court and to the SEC regarding its FCPA compliance, including an obligation to inform them upon learning that it is "reasonably likely" the company violated the FCPA.[94] Also in 2013, IBM announced that DoJ had initiated its own investigation into possible FCPA violations in Poland, Argentina, Bangladesh and the Ukraine.[95]

IV. INDIVIDUAL PROSECUTIONS

Despite significant setbacks in criminal trials in 2012, the DoJ and SEC showed no signs in 2013 of rethinking their policy of targeting individuals. Consistent with prosecutors' public statements, the agencies continued to employ traditional law enforcement techniques in their enforcement efforts, and appear prepared to bring a number of ongoing matters to trial in calendar 2014.

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[88] *Id.* at 6.
[89] *Id.*
[90] Tom Schoenberg, *IBM Judge OKs Foreign Bribe Settlement Two Years Later,* Bloomberg (Jul. 26, 2013), *available at:* http://www.bloomberg.com/news/2013-07-25/ibm-judge-approves-10-million-foreign-bribe-settlement-with-sec.html.
[91] Complaint, *Securities and Exchange Commission v. International Business Machines Corp.,* No. 11-cv-563 (D.D.C. Mar. 18, 2011).
[92] Schoenberg, *supra* note 90.
[93] Order Instituting Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, *In the Matter of International Business Machines Corp.*, SEC Release No. 43761, File No. 3-10397 (Dec. 21, 2000).
[94] Schoenberg, *supra* note 90.
[95] *Id.*

A. New Prosecutions

1. Direct Access Partners

In August 2013, three executives of Direct Access Partners, an SEC-registered broker-dealer, pleaded guilty to conspiracy to violate the FCPA, to violate the Travel Act, and to commit money laundering, as well as substantive counts charging these offenses. The charges arose from the payment of $5 million in bribes to a vice president at Banco de Desarrollo Economico y Social de Venezuela (BANDES), who directed bond trading work to Direct Access in exchange for the bribes. Ernesto Lujan and Tomas Alberto Clarke Bethancourt, respectively a managing partner and senior vice president of Direct Access, pleaded guilty on August 29, 2013, and are awaiting sentencing. Jose Alejandro Hurtado, a vice president, pleaded guilty on August 30, 2013 and is scheduled for sentencing on March 21, 2014.[96] Direct Access has subsequently ceased operations.

In addition, on November 18, 2013, Maria de los Angeles Gonzalez de Hernandez of Venezuela, the BANDES vice president who accepted the bribes, pleaded guilty to conspiracy to violate the Travel Act and to commit money laundering, as well as substantive counts in relation to those offenses.[97]

The conduct was detected in the course of regular SEC inspection of the broker-dealer. While this was the first FCPA case to arise from such inspections; it reinforces lessons from past cases that virtually any government inspection or review involving foreign activities can surface information that can lead to an FCPA prosecution.

2. BizJet Executives

Indictments of four executives of BizJet International Sales and Support Inc. (BizJet), an Oklahoma-based maintenance, repair, and overhaul (MRO) service provider and US subsidiary of Lufthansa Technik AG, were unsealed on April 5, 2013.[98] The executives were charged with offenses relating to the bribery of officials in Mexico, Brazil, and Panama in exchange for aircraft maintenance, repair, and overhaul. Peter DuBois, a former vice president at BizJet, pleaded guilty to conspiracy to violate the FCPA and substantively violating the FCPA, while Neal Uhl, another vice president, pleaded guilty to conspiracy. The two, both US citizens, were sentenced to probation and eight months home detention. Bernd Kowalewski, the former president and CEO of BizJet, and Jald Jensen, a former sales manager, were also charged, but are believed to be living outside the United States. Mr. Jensen is a US citizen; Mr. Kowalewski's citizenship is not indicated. The indictments followed an $11.8 million corporate settlement, as

[96] Press Release, Department of Justice, Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/August/13-crm-980.html.
[97] Press Release, Department of Justice, High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme (Nov. 18, 2013), *available at* http://www.justice.gov/opa/pr/2013/November/13-crm-1229.html.
[98] Press Release, Department of Justice, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-388.html.

well as BizJet's and Lufthansa's entry into deferred prosecution agreements, in March 2012.[99] DoJ stated that it worked closely with Mexican and Panamanian law enforcement in investigating the offenses.

Notably, both Messrs. Dubois and Uhl received reduced sentences for their cooperation in this case, including recording telephone calls and meetings in an undercover capacity. They were both sentenced to five years' probation and eight months' home detention. Mr. Dubois was also ordered to pay $159,950 in criminal forfeiture, and Mr. Uhl was ordered to pay a $10,000 criminal penalty.

3. Frederic Cilins

Frederic Cilins, a French citizen, was arrested in Florida on April 14, 2013 and charged with witness tampering, obstruction of a federal investigation, and destruction of records in a federal investigation in connection with his alleged role in attempting to thwart the investigation of BSG Resources Ltd.'s activities in Guinea relating to the Simandou iron ore mining concession.[100] Specifically, the government alleged in an indictment dated April 25th, 2013 that Mr. Cilins offered payments to the wife of the late president of Guinea in an attempt to retrieve and destroy documents relating an investigation of whether a mining company, believed to be BSG Resources, bribed officials in Guinea to obtain business.

Mr. Cilins pleaded not guilty to the initial indictment. A superseding indictment was filed against Mr. Cilins on February 18, 2014. Mr. Cilins pleaded not guilty to the charges of the superseding indictment on February 25th, 2014. Jury selection for the trial is scheduled to begin March 31, 2014. [101]

4. Alstom Executives

Four Alstom executives have been charged with offenses relating to the alleged bribery of a member of the Indonesian Parliament, as well as officials of Indonesia's state-owned power company, in order to win a $118 million contract for Alstom. On April 16, 2013, prosecutors unsealed charges against Frederic Pierucci, a French citizen in charge of sales for Alstom, and David Rothschild, former vice president of sales for Alstom USA.[102] Mr. Pierucci later pleaded guilty to conspiracy to violate the FCPA and to substantive violations of the FCPA, and Mr. Rothschild pleaded guilty to conspiracy to violate the FCPA. Furthermore, on May 1, 2013, William Pomponi, former vice president of sales for Alstom USA, was charged with conspiring to violate the FCPA and to launder money, as well as substantive FCPA and money laundering

[99] Press Release, Department of Justice, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-crm-321.html.
[100] Press Release, Department of Justice, Obstruction Charges Filed in Ongoing FCPA Investigation into Alleged Guinean Mining Rights Bribe Scheme (Apr. 15, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-429.html.
[101] Superseding Indictment, *United States v. Cilins*, No. 13-cr-315 (S.D.N.Y. Feb. 18, 2014).
[102] Press Release, Department of Justice, Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company (Apr. 16, 2013), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-434.html.

offenses.[103] On July 30, 2013, Lawrence Hoskins, former Alstom vice president for the Asia region, was charged with the same offenses.

In press releases, DoJ indicated it cooperated with Indonesian law enforcement in investigating Messrs. Pierucci, Rothschild, Pomponi, and Hoskins. The charges follow Swiss authorities' imposition of about $40 million in fines on Alstom in 2011 for bribery-related offenses, as well as 2011 media reports that the UK Serious Fraud Office (SFO) was investigating Alstom for bribery and that agency's arrest of three Alstom executives on March 24, 2010. The US is also believed to be investigating the company.

5. PetroTiger Ltd. Executives

On November 8, 2013, DoJ filed sealed complaints against executives of PetroTiger Ltd., a British Virgin Islands oil services company with operations in Colombia and offices in New Jersey. The complaints were unsealed on January 6, 2014,[104] and contain charges arising from the alleged payment of approximately $267,000 in bribes to a Colombian official in exchange for the official's assistance in securing a $39 million contract from Colombia's state-owned oil company. Among those charged were general counsel Gregory Weisman, who pleaded guilty to one count of conspiracy to violate the FCPA, and co-CEOs Joseph Sigelman and Knut Hammarskjold, who were charged with conspiracy to violate the FCPA, conspiracy to launder money, and substantive violations of the FCPA.[105]

Mr. Weisman, the only defendant arrested outside the United States, was arrested in the Philippines. The defendants were also charged with conspiracy to commit wire fraud based on an alleged kickback scheme unrelated to the Colombia bribery scheme. In its press release announcing the charges, DoJ acknowledged the cooperation of its law enforcement counterparts in Colombia and the Philippines. Mr. Weisman pleaded guilty to one count of one count of conspiracy to violate the FCPA and to commit wire fraud on Nov. 8, 2013; Mr. Hammarskjold pleaded guilty to the same charges on February 18, 2014 and is scheduled for sentencing on May 16th, 2014, while Mr. Sigelman's case remains pending.[106]

6. Alain Riedo

On October 15, 2013, Alain Riedo, a Swiss national, was indicted on charges of conspiracy, aiding and abetting, and substantive violations of the FCPA's anti-bribery, books and records and internal controls provisions.[107] As Vice President and General Manager of a Swiss subsidiary of Maxwell Technologies, Inc., from 2002 to 2009, Riedo allegedly was responsible

[103] Press Release, Department of Justice, Former Executive of French Power Company Subsidiary Charged in Connection with Foreign Bribery Scheme (May 1, 2013), *available at* http://www.justice.gov/opa/pr/2013/May/13-crm-496.html.
[104] Press Release, Department of Justice, Foreign Bribery Charges Unsealed Against Former Chief Executive Officers of Oil Services Company (Jan. 6, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-crm-007.html.
[105] *Id.*
[106] *Id.*; David Voreacos, *PetroTiger Ex-CEO Hammarskjorld Pleads Guilty in Bribe Case*, BLOOMBERG NEWS (Feb. 18th, 2014), *available at* http://www.bloomberg.com/news/2014-02-19/petrotiger-ex-ceo-hammarskjold-pleads-guilty-in-bribe-case-1-.html.
[107] Indictment, *United States v. Riedo*, No. 13-cr-3789 (S.D. Cal. Oct. 15, 2013).

funneling bribes through a Chinese agent to help Maxwell sell products to Chinese state-owned manufacturers of electric utility infrastructure.[108] Maxwell's agent ensured that the quotes obtained from customers in China included a secret mark-up of approximately 20%, characterized as "extra amounts," "special arrangement" or "consulting" fees on agent invoices.[109] Mr. Riedo allegedly caused the company to falsely record those amounts in its books and records as commissions, sales expenses or consulting fees, and to have hampered efforts by the company to learn the truth about those transactions.[110] In addition, Mr. Riedo signed a Sarbanes-Oxley-related sub-certification on behalf of Maxwell and falsely certified the truthfulness of one of the company's 10-Q quarterly reports.[111] He also sent emails to the CFO in an effort to allow the payments to the agent to continue.[112]

For its part, Maxwell paid in 2011 over $14 million to the SEC and DoJ to settle related FCPA charges. The case against Mr. Riedo is pending in the US District Court for the Southern District of California. Mr. Riedo is presently at-large but an arrest warrant remains in place.

B. Key Litigation Regarding Jurisdiction

The DoJ and SEC have relied on expansive jurisdictional theories in their pursuit of foreign companies and individuals. While companies often choose to settle matters with US authorities even when connection to the United States is tenuous at best, several individuals have asserted jurisdictional defenses in FCPA cases before judicial authorities.

1. Magyar Telekom Executives

On February 8, 2013, a New York federal judge denied several Magyar Telekom executives' motion to dismiss an FCPA-related SEC complaint for lack of personal jurisdiction. The executives, charged originally by the SEC in late 2011 for their alleged roles in bribery schemes in Macedonia and Montenegro, filed motions to dismiss based on lack of personal jurisdiction. The executives, who are all Hungarian citizens, argued that the SEC's suit lacked precedent and that the alleged conduct occurred wholly outside the US, and therefore there was no nexus to the United States.[113]

The court concluded that it could exercise personal jurisdiction over the defendants, because the defendants "allegedly engaged in a cover-up through their statements to Magyar's auditors knowing that the company traded American depository receipts on a US stock exchange, and that prospective purchasers would likely be influenced by false financial statements and filings."[114] The court denied Defendants' motion for certification for an interlocutory appeal to

[108] *Id.* at 3, 7-8.
[109] *Id.*
[110] *Id.* at 8-10.
[111] *Id.* at 11.
[112] *Id.* at 11-12.
[113] Memorandum of Law in Support of Defendants' Joint Motion to Dismiss Complaint at 6-7, *SEC v. Straub*, No. 11-cv-9645 (S.D.N.Y. Nov. 5, 2012).
[114] *Id.* at 9; *see also* Richard Vanderford, *Ex-Magyar Execs Can Face FCPA Claims in NY, SEC Says*, LAW 360 (Jan. 17, 2013), *available at* http://www.law360.com/whitecollar/articles/408454/ex-magyar-execs-can-face-fcpa-claimsin-ny-sec-says.

the US Court of Appeals for the Second Circuit and to stay the proceedings pending adjudication of the appeal.[115] The case is ongoing.

2. Former Siemens Executives

The former chief executive of Siemens Argentina, Herbert Steffen, also moved to dismiss an SEC suit for lack of personal jurisdiction.[116] The SEC alleged Steffen bribed Argentine officials in order to secure lucrative public procurement contracts, but Steffen argued that, as a German citizen residing in Germany, he was not subject to US jurisdiction because he was never employed in the United States and he never travelled to the United States for Siemens during the period alleged in the complaint.[117] The SEC argued that Steffen was subject to US jurisdiction because his conduct caused the falsification of Siemens' annual and quarterly filings with the SEC.[118]

On February 19, 2013, the US District Court for the Southern District of New York granted Steffen's motion and dismissed the claims against him.[119] The court ruled that the SEC had not established Steffen's "minimum contacts" in the US for personal jurisdiction, and noted that, even if such "minimum contacts" existed, jurisdiction over Steffen was unreasonable in that case given his "lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum's diminished interest in adjudicating the matter" given that "the SEC and the Department of Justice have already obtained comprehensive remedies against Siemens and Germany has resolved an action against Steffen individually."[120]

C. Developments in Ongoing Matters

1. Kozeny/Azerbaijan Defendants

2013 saw some finality for several defendants who participated in a scheme organized by Viktor Kozeny to bribe Azeri officials in order to take control of the Azerbaijani state-owned oil company SOCAR. Frederic Bourke, the founder of Dooney & Bourke reported to prison on or about May 10, 2013 after the US Court of Appeals for the Second Circuit denied his petition for a rehearing *en banc* of his appeal of his 2009 conviction on bribery-related offenses.[121] Mr. Bourke was convicted of conspiracy to violate the FCPA, conspiracy to violate the Travel Act, and making false statements in connection with his investment of $8 million the Kozeny scheme.[122] Mr. Bourke is serving a one-year sentence.

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[115] Memorandum and Order on Defendants' Joint Motion to Certify an Interlocutory Appeal at 1, *Straub*, No. 11-cv-009645. (S.D.N.Y. Aug. 5, 2013).
[116] See previous discussion of the Siemens executives in Section V, *supra*.
[117] Memorandum of Law in Support of Motion to Dismiss at 4, *SEC v. Sharef*, No. 11-cv-9073 (S.D.N.Y. Oct. 12, 2012); *see also* Reply Memorandum of Law in Support of Motion to Dismiss, *Sharef*, No. 11-cv-9073 (S.D.N.Y. Dec. 6, 2012).
[118] Memorandum in Opposition to Motion to Dismiss at 20, *Sharef*, No. 11-cv-9073 (S.D.N.Y. Nov. 13, 2012).
[119] Opinion and Order at 21, *Sharef*, No. 11-cv-9073 (S.D.N.Y. Feb. 19, 2013).
[120] *Id*. At 15, 20-21.
[121] *United States v. Bourke*, No. 11-5390 (2d Cir. May 7, 2013).
[122] *United States v. Bourke*, No. 1:05-cr-00518-SAS (S.D.N.Y. 2005).

In related cases, Hans Bodmer,[123] Clayton Lewis,[124] and Thomas Farrell,[125] each who participated in the scheme, were sentenced to time served. Mr. Bodmer, a Swiss lawyer involved in much of the conduct charged, was arrested in South Korea and extradited to the United States in January 2004.[126] Mr. Lewis, a private investor, invested and lost $126 million on behalf of Omega Advisors Inc. in support of the scheme. Finally, Thomas Farrell served as an aide to Mr. Kozeny and supervised the purchase of privatization vouchers and options. Each person's sentencing was delayed as they provided substantial cooperation to the DoJ for approximately nine years.[127]

2. Willbros International Inc. Executives

Paul Novak, a former consultant to Willbros International Inc., was sentenced to 15 months in prison on May 3, 2013 for his role in a scheme to bribe officials in Nigeria for which Willbros was prosecuted in 2008. Mr. Novak conspired to pay $6 million in bribes in order to win a $387 million natural gas pipeline contract for Willbros. Mr. Novak's settlement followed the guilty pleas of Willbros executives Jim Bob Brown and Jason Steph in 2007, as well as a $22 million settlement with DoJ by Willbros in 2008. Kenneth Tillery, a Willbros executive also charged in relation to the Nigeria scheme, remains a fugitive.

3. Noble Executives – Ruhlen and Jackson

The SEC's civil action against James Ruehlen, the current head of Noble Corp.'s subsidiary in Nigeria, and Mark Jackson, Noble's former CEO, remains ongoing. The SEC filed an unsettled enforcement action against Jackson and Ruehlen on February 24, 2012 in connection with their involvement in payments to Nigerian customs officials to secure temporary importation permits for drilling rigs, and other clearances. Jackson and Ruehlen continue to contest the charges, with the defendants filing their answers to the SEC's second amended complaint denying the allegations on April 19, 2013.[128] The matter remains pending.

4. Siemens Executives

In addition to the litigation by Steffen, Uriel Sharef, a former officer and board member of Siemens AG also charged in the SEC complaint, settled with the SEC on April 16, 2013.[129] He agreed to pay a $275,000 civil penalty for his role in the Argentine identity card scheme.

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[123] *United States v. Bodmer*, No. 1:03-cr-00947-SAS (S.D.N.Y. 2003).
[124] *United States v. Lewis*, No. 1:03-cr-00930-NRB (S.D.N.Y. 2003).
[125] *United States v. Farrell*, No. 1:03-cr-00290-SAS (S.D.N.Y. 2003).
[126] *United States v. Bodmer*, No: 1:03-cr-00947-SAS (S.D.N.Y. 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bodmer/07-12-04bodmer-opinion.pdf.
[127] David Glovin, *Swiss Lawyer Sentenced to Time Served in Bribery Case*, BLOOMBERG (Mar. 7, 2013), *available at* http://www.bloomberg.com/news/2013-03-06/swiss-lawyer-sentenced-to-time-served-in-bribery-case.html.
[128] Answer to Amended Complaint/Counterclaim/Crossclaim, etc. with Jury Demand by Mark A. Jackson, *SEC v. Jackson*, No. 12-cv-563 (S.D. Tex. Apr. 18, 2013); Answer to Amended Complaint/Counterclaim/Crossclaim, etc. with Jury Demand by James J Ruehlen, *SEC v. Jackson*, No. 12-cv-563 (S.D. Tex. Apr. 18, 2013).
[129] Press Release No. 22676, SEC, Former Siemens Executive Uriel Sharef Settles Bribery Charges (Apr. 16, 2013), *available at* http://www.sec.gov/litigation/litreleases/2013/lr22676.htm.

Messrs. Steffen and Sharef are members of the so-called "Siemens Eight," eight Siemens executives and associates whom the DoJ and SEC charged with bribery offenses relating to the Argentine identify card scheme in December 2011.[130] All eight live outside of the United States, and none have appeared in court to answer the criminal charges. DoJ has indicated, without giving further explanation, that it does not expect any of them to be extradited "in the immediate future."

V. NOTEWORTHY INVESTIGATIONS

2013 saw a marked rise in cooperation between law enforcement authorities in joint and collaborative investigations. As anti-corruption enforcement efforts around the world become more sophisticated and active, this trend can be expected to continue. Moreover, as discussed in more detail below, even where investigations do not involve the US authorities, other countries' investigations of Western companies – in particular by China in the healthcare sector in 2013 – can and do result in investigations by the US authorities or the SFO.

A. BSG Resources

As referenced above in connection with *Cilins* case, 2013 saw authorities in the US, UK and Africa conduct collaborative investigations of Guernsey-based BSG Resources' alleged bribery of Guinean officials in connection with the company's 2008 acquisition of mining rights in Guinea's Simandou iron ore deposit, and Cilins' attempts to secure and destroy allegedly incriminating evidence from Guinean officials' family members. Guinean officials arrested two BSG employees in April 2013, and that same month, the US Attorney's Office for the Southern District of New York brought the obstruction of justice and witness tampering charges in conjunction with ongoing grand jury proceedings. In September 2013, Swiss police raided BSG owner Beny Steinmetz's Geneva home, as well as the Swiss offices of Onyx Financial Advisors, a company reported to provide management services to BSG. French police also raided the home of an Onyx director. The UK SFO and the Guernsey Financial Investigation Unit have begun investigations into the alleged conduct, and the SFO has reportedly received assistance requests from US and Guinean authorities.

B. ENRC

In April 2013, the SFO initiated a formal investigation of Eurasian Natural Resources Corporation (ENRC), which commenced upon whistleblower allegations involving the company's mining operations in Kazakhstan and Africa. Press reports indicate an outside firm hired by ENRC to conduct the initial internal investigation uncovered documents evidencing "cash payments to African presidents" in connection with ENRC's purchase of a Zambian copper smelter, as well as evidence of falsified documents related to the company's acquisition

[130] *United States v. Sharef*, No. 1:11-cr-1056-DLC (S.D.N.Y. 2011). The other six defendants are: Andres Truppel, dual citizen of Germany and Argentina, former Siemens consultant and Siemens Argentina CFO; Urlich Bock, German citizen, former Siemens consultant and commercial head of the Siemens Business Services Major Products subdivision; Eberhard Reichert, German citizen, technical head of the Siemens Business Services Major Products Subdivision; Stephan Signer, German citizen, commercial director at Siemens Business Services; Carlos Sergi, Argentine citizen, former member of the board of Siemens Argentina; and Miguel Czysch, German citizen, business associate of Mr. Sergi.

of a copper mine in the Democratic Republic of the Congo.[131] The UK Serious Fraud Office is reportedly working with the US DoJ in connection with the matter.

C. Hyperdynamics

Also related to Guinea and potentially arising out of common investigative efforts by the DoJ, Guinean authorities and the SFO, US-based energy company Hyperdynamics Corporation acknowledged receipt of a DoJ subpoena in connection with an investigation of the company's acquisition and retention of offshore oil and gas exploration rights and its "relationships with charitable organizations" with respect to possible FCPA and anti-money laundering violations. Hyperdynamics signed a production sharing agreement with the Government of Guinea in 2006. The company has stated that it is cooperating with the US government's investigation.[132]

D. China Pharmaceutical Investigations

As has been extensively reported by the press, Chinese authorities in July 2013 accused GlaxoSmithKline plc (GSK) of involvement in a six-year corruption scheme in which the company allegedly used travel agencies to provide government doctors up to $500 million in cash travel, entertainment, and other improper benefits. In August 2013, police in Shanghai arrested Peter Humphrey, a British investigator who reportedly performed risk management services for GSK. Police also apparently arrested an acquaintance of Mr. Humphrey and detained four Chinese GSK executives in connection with a bribery and tax fraud investigation. Chinese investigators indicated several of the executives confessed to fraud.[133]

Chinese investigators also began probes into three other multinational drug companies: Sanofi, which allegedly paid more than 500 doctors approximately $275,000 to prescribe the company's products;[134] Novartis, whose Alcon subsidiary allegedly bribed doctors in more than 200 Chinese hospitals to use its lens implants;[135] and Eli Lilly, which allegedly paid more than $5 million in kickbacks to ensure use of its products.[136] The inquiry also includes general inquiries to drug companies, such as UCB and Novo Nordisk—which have not been implicated—to gather general information about the Chinese pharmaceutical industry.[137]

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[131] Juliette Garside, *ENRC Investigated for Bribery in Africa and Kazakhstan*, The Guardian, Apr. 28, 2013, *available at* http://www.theguardian.com/business/2013/apr/28/enrc-bribery-africa-kazakhstan.
[132] Press Release, Hyperdynamics Corp., Hyperdynamics Notified of DoJ Investigation (Sep. 30, 2013), *available at* http://investors.hyperdynamics.com/releasedetail.cfm?ReleaseID=793971.
[133] David Barboza, *China Arrests British Adviser Hired by GlaxoSmithKline*, N.Y. Times, Aug. 21, 2013, *available at* http://www.nytimes.com/2013/08/22/business/global/police-in-china-arrest-british-executive.html.
[134] Associated Press, *Sanofi Being Investigated for Bribery by China*, N.Y. TIMES (Aug. 11, 2013), *available at* http://www.nytimes.com/2013/08/12/business/global/sanofi-being-investigated-for-bribery-by-china.html.
[135] Reuters, Novartis to Investigate Bribery Claims at Alcon Unit in China, Sep. 17, 2013, *available at* http://www.reuters.com/article/2013/09/17/us-novartis-alcon-china-idUSBRE98G0MC20130917.
[136] Laurie Burkitt, *Eli Lilly Investigates Bribery Accusations in China*, WALL ST. J. (Aug. 22, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887323665504579028370607960690. In December 2012, Eli Lilly settled SEC claims related to alleged misconduct in Russia, China, Brazil, and Poland. *See* Complaint, *SEC v. Eli Lilly and Co.*, No. 1:12-cv-2045 (D.D.C. Dec. 20, 2012), *available at* http://www.sec.gov/litigation/complaints/2012/comp-pr2012-273.pdf.
[137] *See* Burkitt, *supra* note 136.

As a result of these Chinese investigations, at least GSK plc is conducting an FCPA/Bribery Act investigation of its own, having approached US and UK authorities.[138] Novartis has also reportedly initiated an anti-corruption investigation into its China operations.[139]

E. Avon

On October 31, 2013, Avon Products, Inc. (Avon) stated in its SEC Form 10-Q that it had "substantially completed" its internal investigation into potential bribery in China and other countries. The company noted its cooperation with the DoJ and the SEC, but indicated the SEC proposed settlement terms significantly greater than Avon's initial offer of $12 million. On February 20, 2014, Avon reported that it was in advanced discussions with the DoJ and SEC regarding resolution and that it expected to pay at least $132 million in monetary sanctions.

F. Wal-Mart

Also unresolved is Wal-Mart's internal investigation into allegations of bribery made in connection with its Mexican operations. US authorities' investigations remain in progress and the Mexican investigation is discussed in more detail below. Wal-Mart's reported spend on investigations in its fiscal year ending in January 2014 was $282 million.

As for Mexican authorities' probe into allegations of bribery by Wal-mart's Mexican affiliate Walmex in the procurement of construction permits, there were few developments.[140] In early 2013, some sectors accused the Mexican government of stopping its various investigations in an effort to silence the case.[141]

VI. WHISTLEBLOWER ACTIVITY/DEVELOPMENT OF SEC PROGRAM

The SEC's whistleblower program saw substantial activity in 2013, including three whistleblower awards – although none to date in an FCPA case. Significant litigation over the scope of the Dodd Frank Act's anti-retaliation provisions, calling into question whether some of the incentives provided for in the regulations can be used in practice, has been brought. Irrespective of the outcome of that litigation, however, the trend of increased whistleblower

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[138] Christopher Matthews and Jessica Hodgson, *GlaxoSmithKline Probes Allegations in China*, WALL ST. J. (June 12, 2013).

[139] Marta Falconi, *Novartis's Alcon Unit Investigates China Bribery* Allegations, WALL ST. J. (Sept. 17, 2013), *available at* http://online.wsj.com/news/articles/SB10001424127887324665604579081154070064832.

[140] As reported in Steptoe's *2012 FCPA Year in Review*, the Public Function Bureau announced in late 2012 that it had found no irregularities in Walmex's federal permits, though two audits were still underway. The Superior Audit Office (*Auditoría Superior de la Federación*) had also announced that permits were granted in compliance with the applicable laws and regulations. And the Attorney General's Office (*Procuraduría General de la República*) had not published the results of its inquiry, although prosecutors had reportedly failed to uncover sufficient evidence to file charges. *See La expedición de permisos a Wal-Mart fue legal, dice el gobierno mexiquense*, CNN MEXICO (Dec. 19, 2012), *available at* http://mexico.cnn.com/nacional/2012/12/18/la-expedicion-de-permisos-a-walmart-fue-legal-dice-el-gobierno-mexiquense; *see also Cuesta a Wal-Mart 35mdd investigación de corrupción*, EXPOKNEWS (Dec. 19, 2012), *available at* http://www.expoknews.com/2012/12/19/cuesta-a-walmart-35-mdd-investigacion-de-corrupcion/; and *Update 1-Walmex Used Bribes to Open 19 Mexico Stores*,NY TIMES, REUTERS (Dec. 17, 2012), *available at* http://www.reuters.com/article/2012/12/18/walmart-bribes-idUSL1E8NI1CW20121218.

[141] *See* Milenio, *Se unen ONG contra impunidad en caso Walmart*, April 23, 2013, *available at* http://www.zocalo.com.mx/seccion/articulo/se-unen-ong-contra-impunidad-en-caso-walmart-1366761160.

reports relating to FCPA matters likely continued, with significant implications for companies' compliance programs.

A. SEC 2013 Annual Report

The SEC published its annual report in November 2013, indicating it received 3,278 whistleblower tips, a modest increase over 2012 reports (3001).[142] FCPA-related tips also increased, with 149 reports (or 4.5% of the total) classified by reporters as FCPA-related, versus 115 in 2012. The SEC received whistleblower reports from 55 countries, totaling 404 non-US-originated reports. Interestingly, the greatest number of reports originated from the United Kingdom (66), followed by Canada (62), and China (52). The report also detailed an SEC Office of Inspector General audit of the Whistleblower Office, which found that the whistleblower program was "effective and operated appropriately."

B. Recent Dodd Frank Whistleblower Awards

The SEC has made four awards to six whistleblowers since the inception of the whistleblower program under Dodd-Frank, with three of the awards occurring in 2013 of $14 million, approximately $25,000 and over $150,000, in connection with various schemes to defraud investors, including through sham hedge funds and through a scheme aimed at foreigners investing in the US as part of an investment program to gain US residency. The SEC's demonstrated willingness to award at the maximum rate (i.e. 30% of the sanction amount) may incentivize future FCPA tipsters, particularly given the large potential penalties in FCPA cases.

C. Litigation over Scope of Dodd Frank Anti-Retaliation Protections

In addition to the bounty provision, Dodd-Frank's provisions include anti-retaliation provisions for whistleblowers, which expanded existing protections available under the Sarbanes-Oxley Act (SOX). Unlike SOX, the new protections allow for a private right of action and for enforcement by the SEC. While Dodd-Frank's anti-retaliation provisions can be read to suggest that they cover employ of non-US subsidiaries – who are often on the front line of FCPA issues – the application of those provisions to foreign employees has been the subject of litigation in 2013 and likely will continue to be going forward.

The Fifth Circuit recently held, in *Asadi v. G.E. Energy (USA), LLC*,[143] that whistleblowers must report directly to the SEC to be protected by the Dodd-Frank anti-retaliation provisions. While the district court found that plaintiff Asadi's internal reports were also not afforded protection, it did so on the grounds that the Dodd-Frank anti-retaliation provisions did not protect the plaintiff's whistleblowing activity because it occurred entirely abroad. [144] While whistleblowers may still receive protections under SOX-based anti-retaliation statutes, the *Asadi* decision certainly limits the class of potential whistleblowers and creates significant incentives

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[142] US Securities and Exchange Commission, Annual Report on the Dodd-Frank Whistleblower Program for Fiscal Year 2013 (Nov. 2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[143] *Asadi v. G.E. Energy (USA), LLC*, No. 12-20522 (5th Cir. July 17, 2013), *available at* http://www.ca5.uscourts.gov/opinions/pub/12/12-20522-CV0.wpd.pdf.

[144] Memorandum and Order, *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-cv-00345 (S.D. Tex. June 28, 2012) (the company allegedly fired the country executive for Iraq in mid-2011 after he objected to the hiring of a close associate of a senior Iraqi official).

for employees to take their complaints directly to the SEC and not to their employees, significantly undermining companies' investments in their compliance programs.

Although the *Asadi* decision has not been widely adopted by district courts, the courts have generally not been favorable to extraterritorial whistleblowers. Whether other circuit courts adopt the reasoning of *Asadi* remains to be seen.

VII. COLLATERAL LITIGATION

A. Derivative Suits

As in previous years, 2013 saw a number of shareholder derivative suits arising from FCPA investigations and enforcement actions. None, however, were successful in 2013. Other species of collateral litigation were brought in 2013, however, including a Texas state law defamation action with potentially significant implications for companies cooperating with the DoJ and SEC in FCPA investigations.

1. *Copeland v. Hewlett-Packard Co.*

On May 6, 2013, the US District Court for the Northern District of California dismissed a shareholder suit against Hewlett-Packard Co. (HP) alleging HP's directors breached their fiduciary duties to the company by ignoring foreign bribe payments and blocking federal authorities from investigating allegations of bribery against the company.[145] In dismissing the shareholders' motion to supplement a two-year old derivative claim, the court found that HP's directors acted reasonably in refusing to pursue the allegations because they had previously engaged counsel to investigate the allegations, and subsequently determined that not litigating the matter was in the best interest of the corporation.[146]

2. *Freuler v. Parker Drilling Co.*

On March 11, 2013, The Fifth Circuit Court of Appeals declined to revive a shareholder's suit alleging that Parker Drilling Co. directors had ignored a foreign bribery scheme related to Kazakhstan and Nigeria that ultimately triggered DoJ and SEC investigations, and resulted in approximately $16 million in combined monetary sanctions. The Fifth Circuit upheld the lower court's decision[147] to dismiss the action, because the plaintiff failed to direct his complaint to the board before filing suit.[148]

B. Wynn v. Okada

On February 1, 2013, the US District Court for the District of Nevada dismissed a shareholder derivative suit against Wynn Resorts, Ltd. (Wynn). This lawsuit is one of many in the dispute between Wynn and one of its former directors, Kazuo Okada, who was terminated by

[145] *Copeland v. Hewlett-Packard Co.*, 5:11-cv-1058 (N.D. Cal. 2013).
[146] Matt Chiappardi, *Judge Tosses Derivative Claim Over Ex-HP CEO Hurd's Exit*, LAW 360 (May 06, 2013), *available at* http://www.law360.com/articles/438961/judge-tosses-derivative-claim-over-ex-hp-ceo-hurd-s-exit.
[147] *Freuler v. Parker*, No. 10-cv-3148 (S.D. Tex. 2012).
[148] Jeremy Heallen, *5th Circ. Nixes Parker Drilling Investor's FCPA Suit*, LAW 360 (March 12, 2013), *available at* http://www.law360.com/articles/422770/5th-circ-nixes-parker-drilling-investor-s-fcpa-suit.

Wynn after an investigation concluded that Okada paid more than $110,000 in bribes to gaming regulators in the Philippines.[149] Following its discovery of these payments, Wynn forcibly redeemed Okada's 20% stake in the company, prompting Okada to allege in March 2012 that Steve Wynn and Wynn's general counsel were guilty of racketeering and that Wynn fraudulently obtained Okada's signature on several occasions in order to transfer his shares in the company.[150]

In a February 22, 2013 shareholder vote, Wynn sought to remove Okada from its Board. However, after US District Judge James Mahan denied Okada's motion for a preliminary injunction preventing Wynn from holding a special meeting of its shareholders to vote on Okada's removal, Okada resigned. [151]

In October 2013, the litigation between Wynn and Okada was stayed by six months to allow US prosecutors time to complete their bribery investigation of Okada in the Philippines. Federal prosecutors had been concerned that the civil litigation may interfere with their criminal probe.[152]

C. Employee Defamation Action – Writt v. Shell Oil Co.

In November 2010, Shell Oil Company (Shell) was ordered to pay $48 million in civil and criminal fines after its contractor, Panalpina Inc., made improper payments to Nigerian customs officials. Shell subsequently placed the blame for the improper payments on Robert Writt, a Shell project manager, in a written report detailing the investigation, which Shell submitted to DoJ. Writt brought a defamation suit against Shell, claiming that Shell's written investigative report falsely stated that he recommended reimbursement to contractors for payments that he knew were bribes. Following a decision by the Texas First District Court of Appeals, which found that Shell's report was only covered by conditional privilege and that Shell was therefore not immune from suit if Writt could show that Shell's actions were motivated by malice, the defamation suit was sent back to the lower court for further proceedings.[153]

D. Offensive Litigation

In 2008, the Kingdom of Bahrain's state-owned Aluminum Bahrain Ltd. (Alba) brought a RICO lawsuit against Alcoa, Inc. (Alcoa) and a third-party intermediary for allegedly making payments to senior Alba officials to persuade them to pay inflated prices for Alcoa products.[154] In 2012, the US District Court for the Western District of Pennsylvania denied the defendants'

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[149] *Wynn Resorts, Ltd. v. Okada*, No. A-12-656710-B (Dist. Ct. Clark Cnty. Nev. 2012).
[150] Karlee Weinmann, *Okada can't skirt Wynn Resorts' Disloyalty Claim*, LAW 360 (Jan. 16, 2013), *available at* http://www.law360.com/securities/articles/407613?nl_pk=e6f5be21-78ce-483a-aaa3-3c152f97f114&utm_source=newsletter&utm_medium=email&utm_campaign=securities.
[151] Hannah Dreier, *Judge won't halt attempt to oust Wynn board member*, LAS VEGAS SUN (February 15, 2013), *available at* http://www.lasvegassun.com/news/2013/feb/15/judge-wont-halt-attempt-oust-wynn-board-member/.
[152] *Wynn-Okada lawsuit halted another 6 months for Okada criminal probe*, REUTERS (November 1, 2013), *available at* http://www.reuters.com/article/2013/11/01/wynn-okada-lawsuit-idUSL3N0IM0HY20131101.
[153] *Robert Writt v. Shell Oil Company and Shell International, E&P, Inc.*, No.01-11-00201-CV (F.D. Ct. App. Texas June 25, 2013); the Texas First District Court of Appeals overturned a lower court ruling that blocked the defamation suit.
[154] *Aluminium Bahrain BSC (ALBH) v. Alcoa Inc.*, No. 08-cv-00299 (W.D. Pa. 2008).

motion to dismiss the case, and Alcoa reached an $85 million settlement with Alba. However, the third-party intermediary, Victor Dahdaleh, chose to fight and filed an interlocutory appeal to the Third Circuit Court of Appeals challenging the lower court's exercise of personal jurisdiction over him. Mr. Dahdaleh's appeal was denied on January 25, 2013.

In related proceedings, as described in more detail below, the UK SFO's criminal trial against Mr. Dahdaleh collapsed after key prosecution witnesses refused to appear in court.[155] In additional related proceedings, Alcoa in early 2014 reached a combined $384 million FCPA-related set of settlements with DoJ and the SEC in connection with millions of dollars in payments to members of Bahrain's royal family and Alba officials, through Dahdaleh and affiliated companies, to win business.[156] The $161 million in disgorgement to be paid to the SEC is the fourth-largest disgorgement figure in an FCPA case.[157]

VIII. NON-US ANTI-CORRUPTION LEGAL AND ENFORCEMENT DEVELOPMENTS

2013 was a significant year for the development of anti-corruption legal regimes and enforcement outside the United States, with the implementation of new anti-corruption laws or amendments in major emerging markets and developed countries, increased enforcement of transnational bribery laws by developed nations, and politically significant investigations in China in a number of industries, with particular focus on the healthcare sector. Coupled with the significant rise in whistleblower activity as a result of the Dodd-Frank reforms, these developments underscore the growing importance of other nations' domestic and transnational laws and enforcement efforts, and the new anti-corruption compliance paradigm faced by major multinationals. Nonetheless, the overall enforcement picture remains uneven, with two-thirds of OECD Bribery Convention countries not evidencing any significant enforcement.[158]

A. United Kingdom

2013 saw important legal developments that are likely to have a direct impact on its Bribery Act (and other criminal law) enforcement efforts in the years to come. In the short term, however, the UK SFO has yet to bring a significant prosecution of a company for foreign corruption of public officials, and suffered a significant setback in 2013 as a result of the collapse of its trial of Victor Dahdaleh, a third party accused of making millions of dollars in illicit payments on behalf of Alcoa to Bahraini officials in exchange for lucrative contracts.

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[155] Tom Harper, *Victor Dahdaleh corruption case: Billionaire's fraud trial collapses after key SFO witnesses refuse to give evidence*, THE INDEPENDENT (December 10, 2013), *available at* http://www.independent.co.uk/news/business/news/victor-dahdaleh-corruption-case-billionaires-fraud-trial-collapses-after-key-sfo-witnesses-refuse-to-give-evidence-8995972.html.

[156] For additional background on the *Alcoa* settlement, see Steptoe's advisory, *Alcoa Settles Bahrain FCPA Bribery Case with SEC and DoJ for $384 Million Following Collapse of SFO Prosecution of Agent,*, Steptoe & Johnson LLP (Jan. 17, 2014), *available at:* http://www.steptoe.com/publications-9304.html.

[157] Alan Katz, *Alcoa Pays $384 Million to Resolve Bahrain-Bribery Probe*, BLOOMBERG (January 10, 2014), *available at* http://www.bloomberg.com/news/2014-01-09/alcoa-pays-384-million-to-resolve-foreign-bribery-probe.html.

[158] Transparency International, *Exporting corruption: Progress report 2013: enforcement of the OECD convention* (Oct. 7, 2013), *available at* http://issuu.com/transparencyinternational/docs/2013_exportingcorruption_oecdprogre.

1. UK Legal Developments

a. Crime and Courts Act 2013: Deferred Prosecution Agreements

The Crime and Courts Act (CCA) – enshrining DPAs in English and UK law for companies in certain circumstances - received Royal Assent on 25th April 2013.[159] Schedule 17 of the CCA empowers prosecuting agencies to enter into DPAs in cases involving economic crime, including offences arising under Sections 1, 2, 6 and 7 of the UK Bribery Act 2010. DPAs will, however, only be available for organisations and not individuals, and only for cases of economic crime prosecuted by the SFO or the Crown Prosecution Service. They will differ from the US position substantially in the amount of judicial oversight that they will receive (a judge can approve a DPA only where (a) it is in the interests of justice; and (b) the terms of the DPA are fair, reasonable, and proportionate). In addition, courts will be required to become involved in cases to be resolved via DPA much earlier in an enforcement action, and will be more involved in determining when, if at all, a breach of the DPA has occurred.

The legislation requires the Director of Public Prosecutions and the Director of the SFO to issue jointly a code providing guidance regarding DPAs. This was published in February 2014.[160]

The CCA entered into force on February 24, 2014. This is a significant development in UK enforcement, aligning it more closely with the US approach and facilitating resolution of multi-jurisdictional cases. It also may be that the prospect of receiving a DPA, as opposed to criminal conviction, will cause companies to be more likely to self-report, thus contributing to the UK's overall foreign corruption enforcement efforts.[161]

b. Sentencing Council Guidance

2014 will see the UK promulgate guidance on sentencing of organizations for financial crimes. A consultation took place in 2013 on proposed guidelines for fraud, bribery, and money laundering offenses. The guidelines will enter into force on October 1, 2014, and may be used now to inform calculation of financial penalty levels in DPAs. On their entry into force, they will be used more broadly to sentence convicted offending organizations.

The consultation proposes a range of sentencing categories based on the offender's culpability and the financial value or impact of the crime. The proposed multipliers in the most serious cases (i.e., those with the highest culpability and the highest harm) would be up to 400% of the amount obtained as a result of a bribe. These could significantly increase the values of fines for convicted offenders. Cooperation and self-reporting are also incentivised by proposed reductions of up to one third for a plea of guilty and more for cooperation.

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[159] A previous Steptoe alert on this legislation is available at http://www.steptoe.com/publications-newsletter-730.html.

[160] Press Release, SFO, Deferred Prosecution Agreements: new guidance for prosecutors (Feb. 14, 2014), *available at* https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/deferred-prosecution-agreements-new-guidance-for-prosecutors.aspx.

[161] For more detail, please see Steptoe's forthcoming advisory, expected to be issued the week of March 3, 2014.

2. Enforcement Efforts

As discussed in our 2012 Year-In-Review**,** SFO Director David Green QC has made significant changes to the SFO's foreign bribery enforcement program in recent years, focusing the agency's resources on the most serious cases. 2013 saw the launch of a number of significant fraud and corruption investigations, including against Rolls Royce plc, a leading manufacturer of jet engines, mining conglomerate ENRC and Barclays Bank, and a number of prosecutions against individuals and companies. Despite the SFO's renewed focus, the SFO has still not produced any foreign bribery-related civil settlements or criminal convictions under the UK Bribery Act.

Two recent developments beyond DPAs ultimately may affect the SFO's lack of settlements and convictions. The CCA, discussed above, comes in conjunction with an apparent softening of the SFO's previously aggressive enforcement posture, with indications that prosecutions might be deemed not to be in the public interest in cases where companies have provided "genuine self-report[s]" and cooperation.[162]

Second, the UK's National Crime Agency (NCA) was launched in October 2013, with an Economic Crime Command (ECC) dedicated to combatting economic crime and bribery. The new agency could become as important to anti-corruption enforcement efforts as is the SFO. The Serious and Organised Crime Strategy that accompanied the launch of the NCA indicates that the ECC will have a lead role in overseeing the UK's response to bribery and corruption, either by taking action itself or by coordinating with the SFO and the City of London Police, and potentially indicates a reduction in the role of the SFO and an increase in enforcement activity.

a. Enforcement Against Companies

Consistent with Director Green's enforcement strategy, the SFO reached no corporate civil settlements were in 2013. Corporate prosecutions, however, were brought in 2013 and are continuing. Fraud charges were brought against the Olympus Corporation and its UK subsidiary Gyrus Group Ltd. in September 2013, and in October 2013, pre-Bribery Act charges were brought against Smith & Ouzman Ltd., a UK-based printing company specializing in security documents such as ballot paper.

Both Olympus and Gyrus will be prosecuted for fraudulent representations concerning payments they made in 2009 and 2010. The SFO began its investigation when the CEO of Olympus, a Japan-based manufacturer of cameras and other high-technology optical equipment, was terminated by the Olympus board of directors for raising concerns over more than one billion dollars of fees paid to marketing and investment advisers, which were improperly disguised as acquisition-related expenses.

In the Smith & Ouzman Ltd. case, two of its directors, an employee, and an agent were charged under the UK's pre-Bribery Act legislation (Section 1 of the Prevention of Corruption

[162] David Green, QC, Director UK Serious Fraud Office, Remarks at Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference (Oct. 24, 2013), *available at* http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2013/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx.

Act 1906) with offenses of corruptly agreeing to make payments totaling nearly £500,000 to government officials to allegedly to influence the award of business contracts to the company. Trial has been listed for November 2014.

Although it did not involve charges of corrupt payments to foreign government officials, the SFO brought its first charges against a company under the Bribery Act in August 2013. The main focus of the case was an alleged conspiracy to commit a £23 million fraud by four individuals connected to Sustainable AgroEnergy Plc, relating to the promotion and selling of "bio fuel" investment products to UK investors. Three of the defendants were also separately charged with offences of making and accepting a financial advantage (i.e., giving and receiving bribes) contrary to section 1 (1) and 2 (1) of the Bribery Act 2010.

b. Enforcement Against Individuals

UK authorities pursued a number of individual bribery-related prosecutions in 2013, but had little success in securing convictions.

The trial of former Innospec Ltd. CEO Dennis Kerrison and former sales director Miltiades Papchristos were scheduled to commence in 2013. As of the date of publication, those trials have not yet commenced.

In perhaps the most widely-reported event relating to the SFO's foreign-bribery-related enforcement program in 2013, the SFO's prosecution of Victor Dahdaleh (widely understood to be the third-party intermediary whose identity was not revealed in the *Alcoa* DoJ and SEC FCPA settlements),[163] collapsed as the Crown was unable to offer sufficient evidence for the case to proceed. The trial, which began in April 2013, involved Mr. Dahdaleh's alleged in involvement in an alleged scheme to channel bribes from Alcoa and its subsidiaries to officials at Alba, the state aluminium company of Bahrain. The case disintegrated in December 2013 when two prosecution witnesses, both lawyers at US-based law firm Akin Gump Strauss Hauer & Feld LLP refused to testify, and another prosecution witness, convicted defendant Bruce Hall, presented courtroom testimony that contradicted prior statements to the SFO**.** For more information regarding the Alcoa settlements, see Steptoe's January 17, 2014 alert.

Finally, following a widely reported bribery and phone hacking scandal involving the Rupert Murdoch media empire, the Crown Prosecution Service commenced a trial of NewsCorp executives on charges of conspiracy to commit misconduct in public office, relating to allegations that they paid a Ministry of Defense employee over £100,000 from 2004 to 2012 for information ultimately used in news articles published in *The Sun*. Their trial commenced in October 2013 and is ongoing. A police detective who leaked information about cases to the journalists was found guilty of misconduct in public office in January 2014 and has been sentenced to 15 months in jail.

[163] Joe Mankak, *Alcoa Unit Pleads Guilty to Bahrain Bribery*, USA TODAY (Jan. 9, 2014), *available at* http://www.usatoday.com/story/money/business/2014/01/09/alcoa-subsidiary-pleads-guilty-to-bahrain-bribery/4394283/.

c. Financial Conduct Authority

Although not *per se* an anti-corruption enforcement agency, the Financial Conduct Authority (FCA) has been active in prosecuting failures of financial institutions falling within its jurisdiction in areas related to corruption. In April 2013, the FCA fined EFG Private Bank Ltd (EFG), based in Switzerland, £4.2 million for failing to take reasonable care to establish and maintain effective anti-money laundering (AML) controls for high risk customers. The investigation found that EFG had not fully implemented its AML policies with regard to 17 customer files, opened between December 2007 and January 2011 and containing customer due diligence that highlighted significant money laundering risks, but insufficient records of how the bank's senior management had mitigated those risks. The failings were serious, presented facts that indicated a higher risk of money laundering and/or bribery and corruption, and lasted for more than three years.

In December 2013, the FCA fined insurance broker and risk management service provider JLT Specialty Limited (JLT) more than £1.8 million for failing to have appropriate internal controls in place to guard against the risk of corruption or bribery when making payments to overseas third parties who introduced JLT to prospective business. JLT paid these agents over £11.7 million, received almost £20.7 million in gross commissions from business they generated, but failed to conduct proper due diligence before entering into agreements with them. In a related statement, FCA director, Tracey McDermott stated: "Bribery and corruption from overseas payments is an issue we expect all firms to do everything they can to tackle. Firms cannot be complacent about their controls – when we take enforcement action, we expect the industry to sit up and take notice."[164]

B. British Crown Colonies, Overseas Territories and Crown Dependencies

1. Turks & Caicos

In the first half of 2013, Sandals Resort International agreed to pay $12 million to the government of Turks & Caicos, with no admission of liability, as a result of its voluntary release of evidence to US authorities investigating bribery and money laundering by former island officials. The evidence was then shared with the Turks and Caicos Special Investigation Prosecution Team, which investigates local corruption.[165]

[164] Press Release, Financial Conduct Authority, *Firm fined £1.8million for "unacceptable" approach to bribery & corruption risks from overseas payments*, (Dec. 19, 2013), *available at* http://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments.

[165] *See Sandals to pay $12M to Turks & Caicos as part of corruption probe*, TRAVEL WEEKLY (Jan. 25, 2013), *available at* http://www.travelweekly.com/Travel-News/Hotel-News/Sandals-to-pay-12-million-dollars-to-Turks-and-Caicos-as-part-of-corruption-probe; Maria Dolores Hernandez, *Sandals Resort pays $12 million to settle bribery probe* (Jan. 30, 2013), *available at* http://www.fcpablog.com/blog/2013/1/30/sandals-resort-pays-12-million-to-settle-bribery-probe.html; and Morgan Commette, *Sandals Resort in the Caribbean Islands to Pay $12 Million* (Aug. 22. 2013), *available at* http://commettelaw.com/2013/08/22/sandals-resort-caribbean-islands/.

2. Isle of Man

a. Bribery Act 2013

The Isle of Man Bribery Act entered into force on 16 December 2013 (Bribery Act 2013). The Act replaces the Isle of Man's Corruption Act 2008, and introduces four core offences, replicating the UK Bribery Act and its extra-territoriality provisions:

(1) offering, promising or giving a bribe;
(2) requesting, agreeing to receive or accepting a bribe;
(3) bribing a foreign public official; and
(4) a new corporate offense of failing to prevent bribery (section 10).

In respect of the corporate offense of failing to prevent bribery, the only defense available to commercial organizations is proof that adequate procedures were in place to prevent bribery. Neither the Bribery Act 2013 nor the UK Bribery Act 2010 provide a definition of "adequate procedures." Under section 12 of the Bribery Act 2013, the Isle of Man's Department of Home Affairs must publish guidance for organizations with respect to preventing bribery.

C. China

Perhaps the most dramatic developments in anti-corruption enforcement by any non-US regulator in 2013 came out of the People's Republic of China, with highly-publicized investigations and arrests of individuals taking place in a number of companies, in particular under the healthcare and pharmaceuticals industries. Although actions taken against Western companies' Chinese subsidiaries and personnel garnered the most attention, the investigations were not confined to Western companies and targeted some Chinese-based companies as well.

On July 11, 2013, the Chinese government confirmed that it was investigating several executives of GlaxoSmithKline (China) Investment Co., Ltd. (GSK), the Chinese subsidiary of Anglo-American pharmaceutical manufacturer GlaxoSmithKline plc, for commercial and public sector bribery, and alleged that GSK had bribed government officials, doctors, pharmaceutical trade associations, and hospitals either directly, or through third parties such as travel agencies to promote its drugs.[166] The investigation into GSK is the most high-profile corruption investigation in connection with a foreign invested company undertaken by Chinese authorities to date. According to the investigating police authority, the company used inflated or falsified invoices to generate funds used to bribe officials.[167] In addition to paying bribes, executives of the company allegedly took bribes from travel agents in return for directing business to them.[168] Corruption concerns have spread to the whole industry and at least five other foreign pharmaceuticals companies were also reportedly under inquiry by Chinese authorities in relation

[166] Press Release, Ministry of Public Security, Executives of GlaxoSmithKline (China) Investment Co., Ltd. Investigated by Police for Suspicion of Serious Economic Crimes (July 11, 2013), *available at* http://www.mps.gov.cn/n16/n1237/n1342/n803715/3841211.html.
[167] *Id.*
[168] *Id.*

to their activities in China.[169] The investigation of GSK by the Chinese government has caused the DoJ to expand its ongoing anti-bribery investigation of the company to include China.[170]

In the public sector, 2013 saw an increased number of cases targeting senior as well as working-level Chinese officials. According to the Chinese Central Commission for Discipline Inspection (CCDI) and the Ministry of Supervision (MOS), the government disciplined 182,038 officials for corruption in 2013, an increase of 13% from 2012.[171] The new five-year anti-corruption plan issued by the CCDI on December 25, 2013 indicates that punishment for corrupt activities on the supply side will be enhanced and that the intensified anti-corruption campaign in China is likely to continue in the years to come.[172]

D. Brazil

Brazil saw perhaps the most far-reaching domestic and transnational anti-corruption legal reforms of any major economy in 2013. The most notable development of the year was the enactment of Law 12,846/2013 (the "Clean Company Act), Brazil's first anti-bribery statute providing for corporate liability of any kind. The statute provides for strict civil and administrative liability of companies for acts "against the public administration, national or foreign." Sanctioned conduct includes bribery, bid-rigging, fraud in the execution and performance of contracts with the government, and obstruction of audits, inspections, and investigations by public officials. Bribery, in particular, is defined as "the promise, offer or supply, directly or indirectly, of an undue advantage to a public official or a related third-party" by an entity domiciled in Brazil. Because company liability for an agent's conduct is "strict," liability is independent of an administrative or judicial showing of culpability.

Following the Act's entry into force on January 29, 2014, companies held liable for "acts against the public administration" will be subject to fines of up to 20% of their gross revenue in the year preceding initiation of an investigation, publication of the condemnatory decision, and disgorgement. In establishing the amount of the fine, Brazilian authorities will consider factors such as the amount of the undue advantage and the degree of injury caused to the public administration. Both the cooperation of the investigated entity and the existence of an effective compliance program are mitigating circumstances that may reduce the fine, but are not affirmative defenses. Taking a leaf out of its competition law enforcement book, the Clean

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[169] The other companies that have reportedly received government inquiries in China include UCB, AstraZeneca, Novartis, Abbott, and Pfizer. S*ee* Wang Weijia and Ma Xiaohua, "*Anti-Corruption Storm" Sweeps Multinational Pharmaceutical Companies Targeting High Drug Prices*, YICAI (July 25, 2013), *available at* http://www.yicai.com/news/2013/07/2887330.html. *See also*, Wang Zhuoming, Seven Employees of Ganlee Arrested and Doctors Involved in Case in Hubei Return Bribes, 21 CENTURY ECONOMIC REPORT (Jan. 10, 2014), *available at* http://biz.21cbh.com/2014/1-10/1NMDA0MThfMTAzOTU1Ng.html (Chinese authorities stated that anti-corruption investigations in the pharmaceutical industry would continue for at least two more years).

[170] *See* Emily Flitter and Ben Hirschler, Exclusive: US Prosecutors Add China Bribe Allegations to GSK Probe, REUTERS (Sep. 6, 2013), *available at* http://www.reuters.com/article/2013/09/06/us-gsk-bribery-doj-idUSBRE98511R20130906.

[171] Press Release, CCDI and MOS, Annual Briefing on Party and Government Probity Building and Anti-Corruption Work in 2013 (Jan. 10, 2014), *available at* http://www.ccdi.gov.cn/xwtt/201401/t20140110_16784.html.

[172] *See* CCDI, 2013-2017 Work Plan for Establishing and Perfecting Corruption Prevention and Punishment System (Dec. 25, 2013), *available at* http://www.ccdi.gov.cn/flfg/cyfg/201312/t20131226_15812.html.

Company Act also provides for a leniency program that gives authorities discretion to reduce fines by two thirds for the first entity that cooperates with investigations.

The Clean Company Act provides the General Comptrollers' Office with authority to investigate and prosecute acts against the federal government and foreign administrations. The statute also provides state and municipal governments with authority to investigate and sanction acts against the public administration, potentially raising the risk of different authorities having overlapping jurisdiction over the same conduct. The formal administrative procedures pursuant to which acts against the administration shall be investigated are yet to be published at the time of writing.

On the domestic enforcement front, the "mensalão" trial (a vote-buying scheme) came to a final resolution with the imprisonment of the first 12 defendants convicted by the Brazilian Supreme Court for corruption, conspiracy, money laundering and tax evasion. Among the individuals who started to serve prison sentences in 2013 are high-profile politicians such as Lula's former Chief of Staff José Dirceu (10 years and 10 months), the former President of the Worker's Party José Genoino (six years and 11 months), and the former Treasurer of the Worker's Party Delúbio Soares (6 years and eight months). Another high-profile enforcement action stemmed from the denunciation by Siemens of a bid-rigging scheme involving as many as 12 companies in purchases of metropolitan trains by the State of São Paulo. Siemens has decided to cooperate with the São Paulo State authorities in exchange for leniency in the application of sanctions against it. The administrative and judicial investigations are still pending at the time of this writing.

E. Canada

Also of significance are the amendments passed by Canada to its Corruption of Foreign Public Officials Act (CFPOA)[173] in 2013. The amendments are designed to meet Canada's obligations under the OECD Convention. They materially expand the jurisdictional scope of Canadian anti-bribery legislation by extending the CFPOA's prohibitions to acts by Canadian persons outside of Canada (nationality jurisdiction).[174] The CFPOA had followed territorial jurisdiction and only offenses that had a "real and substantial link" with Canada could be prosecuted. By adding nationality-based jurisdiction, the amendment brings the CFPOA closer to the FCPA in terms of its jurisdictional scope.

The amendments also create a new accounting offense under the CFPOA, for engaging in improper accounting practices in order to commit or conceal an offense under the CFPOA.[175] They also set out a mechanism through which the Canadian Government may eliminate the facilitation payments exception from the CFPOA that is still recognized under the FCPA.[176] The Canadian Government, however, may indefinitely delay the elimination of the facilitation

[173] The text of the amendment is available at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6246177.
[174] Fighting Foreign Corruption Act, S.C. 2013, c.26 § 4; Corruption of Foreign Public Officials Act, S.C. 1998, c.34 § 5.
[175] Fighting Foreign Corruption Act, S.C. 2013, c.26 § 4; Corruption of Foreign Public Officials Act, S.C. 1998, c.34 § 4(1).
[176] Fighting Foreign Corruption Act, S.C. 2013, c.26 § 3(2).

payment exception.[177] The amendments also eliminate the "for profit" requirement from the definition of the term "business" so that the CFPOA reaches conduct of all enterprises, including non-profits.[178] Finally, the amendments increase the maximum penalty under the CFPOA from an imprisonment of five years to up to fourteen years.[179]

2013 also saw increased enforcement activity, continuing a trend that began, albeit from a low base, in the last years of the last decade. In August 2013, an Ontario court found Nazir Karigar guilty of one count of agreeing to offer bribes to foreign public officials resulting in the first conviction of an individual under the CFPOA. Mr. Karigar was an agent for Cryptometrics Canada, an Ottawa-based technology company, and was accused of paying bribes to the Indian Minister of Civil Aviation and to officials of Air India, an Indian state-owned enterprise. The court held that it was not a requirement for conviction under the CFPOA to either prove the identity of the foreign public officials to be bribed, or to in fact gain business through the illicit payment. Even though the case was tried before the 2013 amendments came into effect, the court found that Mr. Karigar's offense had a "real and substantial connection" to Canada.[180]

Canada also registered a corporate CFPOA prosecution in 2013. Griffiths Energy International Inc., a junior oil and gas company, reached a settlement with the Crown regarding its payments to Chadian public officials, including the Chadian Ambassador to Canada and the United States while in Washington, D.C. in order to secure an exclusive right to explore and develop oil and gas reserves and resources in southern Chad. Griffiths Energy agreed to pay $10.3 million Canadian dollars in total fines and penalties as part of a sentencing agreement.[181]

A major investigation by the Canadian authorities of the engineering firm SNC Lavalin is pending.[182]

F. Australia

In May 2013, the Australian Federal Police, the United States Federal Bureau of Investigation, the Royal Canadian Mounted Police, and the City of London Police's Overseas Anti-Corruption Unit created an International Foreign Bribery Taskforce to enable the law enforcement agencies of these four agencies to collaborate and strengthen their investigations of foreign bribery offenses.[183]

Following the OECD's critique in 2012 of Australia's low enforcement of foreign bribery laws, Australia signaled its intent to step up its investigation and prosecution of foreign bribery

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[177] *Id.* § 5.
[178] *Id.* § 2(3).
[179] *Id.* § 4; Corruption of Foreign Public Officials Act, S.C. 1998, c.34 § 4(2).
[180] R v. Karigar, 2013 ONSC 5199, *Ontario Superior Court of Justice*, Aug. 15, 2013.
[181] Sentencing Agreement between Her Majesty the Queen and Griffiths Energy International Inc., *In the Court of Queen's Bench of Alberta Judicial District of Calgary*, Jan. 14, 2013.
[182] John Nicol and Dave Seglins, *SNC-Lavalin bridge contract linked to $1.5M in suspected kickbacks*, CBC News, (Feb. 13, 2014), available at http://www.cbc.ca/news/canada/snc-lavalin-bridge-contract-linked-to-1-5m-in-suspected-kickbacks-1.2534234.
[183] Australian Federal Police, Media Release: New international taskforce combats foreign bribery (June 12, 2013), *available at* http://www.afp.gov.au/media-centre/news/afp/2013/june/new-international-taskforce-combats-foreign-bribery.aspx.

cases in 2013. Some high profile cases include the continued criminal prosecution of executives of Securency and Note Printing Australia in connection to the bribes paid to public officials in Indonesia, Malaysia and Vietnam in order to secure banknote contracts;[184] the investigation into the Australian mining company BHP Billiton's allegedly improper payments to Cambodian officials in connection to the exploration and development efforts;[185] and the closed investigation of Cochlear, an Australian biomedical company, into whether its Swiss subsidiary and a local distributor in Portugal bribed Portuguese officials to influence a public tender for hospital medical supplies.[186]

G. France

In 2013, France responded to concerns expressed by the OECD for its anti-corruption enforcement efforts, which had expressed "serious concern" regarding France's implementation and enforcement of the OECD Convention, citing a low number of corruption prosecutions and convictions as evidence of its lagging anti-corruption enforcement efforts.[187] The Working Group also criticized the lack of autonomy existing in the foreign bribery offense under French law in light of Article 113-6 of the Criminal Code, requiring dual criminality in bribery of foreign public officials committed by French nationals abroad.[188]

In 2013, the French government did follow up on a previous OECD recommendation by enacting Article 2-23, granting private associations the right to file a civil foreign-bribery complaint, effectively curbing the prosecution's previous monopoly on initiating such cases.[189]

H. Germany

In legislative developments, the German Administrative Offences Act (OWiG) went into force in June 2013, raising the scope of corporate liability for employees' compliance violations with a tenfold increase in maximum fines, expanding liability to corporate successors, and

[184] Richard Baker and Nick McKenzie, *New Charges in Banknote Bribery Case*, SUNDAY MORNING HERALD, (Mar. 15, 2013), *available at* http://www.smh.com.au/national/new-charges-in-banknote-bribery-case-20130314-2g3m6.html.
[185] Simon Lewis, *BHP Billiton Faces Bribery Charges After Abandoned Project*, THE CAMBODIAN DAILY (Aug. 19, 2013), *available at* http://www.cambodiadaily.com/archives/bhp%E2%80%88billiton-faces-bribery-charges-after-abandoned-project-39998/; Joshua Wilwohl, *Australian Police Say Appropriate Steps Taken in BHP Bribery Case*, THE CAMBODIAN DAILY (June 18, 2013), *available at* http://www.cambodiadaily.com/business/australian-police-say-appropriate-steps-taken-in-bhp-bribery-case-31221).
[186] Cochlear Media Release, *Australian Federal Police Evaluation of Allegations Complete* (Oct. 17, 2013), *available at* http://www.cochlear.com/wps/wcm/connect/95fd4f7c-0423-49c9-8315-2c765c277ce3/AFP_evaluation_of_allegations_complete.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=95fd4f7c-0423-49c9-8315-2c765c277ce3.
[187] OECD Working Group on Bribery in International Transactions: Annual Report 2013 (hereinafter OECD Annual Report) at 49.
[188] OECD Annual Report at 49.
[189] *See* Law No. 2013-1117 of Dec. 6, 2013 [La loi n° 2013-1117 du 6 Décembre 2013], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028278976.

strengthening German law-enforcement agencies' authority to freeze corporate assets subject to administrative fine proceedings.[190]

German enforcement agencies continued their active prosecution of corruption in 2013 in their indictment of Bernie Ecclestone, Chief Executive of Formula One, on charges of bribery and breach of trust related to the alleged payment of $44 million to Gerhard Gribkowsky during the latter's tenure as Chief Risk Officer at Bayern Landesbank (BayernLB).[191] The criminal court of Hanover began proceedings in the highly-publicized corruption case against former Federal President, Christian Wulff, for benefits that he and his then-wife allegedly received prior to his resignation amid scandal in 2012.[192]

IX. WORLD BANK AND OTHER MULTILATERAL DEVELOPMENT BANK ANTI-CORRUPTION ENFORCEMENT

The impact of enforcement by the Multilateral Development Banks (MDBs) and other regional bodies continued to grow in 2013. Led by the World Bank Group, MDBs continued their high rate of anti-corruption and anti-fraud enforcement through the imposition of sanctions through their debarment regimes, the recognition of other MDBs' sanctions through cross-debarment agreements, and referral to national authorities. During the World Bank's 2013 fiscal year, it formally sanctioned 72 entities, including those entities debarred as a result of a default sanction and entities that reached Negotiated Resolution Agreements with the Bank.[193] In addition, there were 252 jointly recognized debarments during fiscal year 2013 as a result of the 2010 Cross-Debarment Agreement among the World Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the African Development Bank, and the Inter-American Development Bank.[194]

Notable cases settled recently include the debarment for 10 years of SNC- Lavalin Inc.,[195] and 33 months debarment for ARINC.[196] In addition, in July 2013 (during the Bank's 2014

[190] OECD, *Germany: Follow-Up to the Phase 3 Report & Recommendations* (Apr. 2013), *available at* http://www.oecd.org/daf/anti-bribery/GermanyPhase3WrittenFollowUpEN.pdf.
[191] Tom Cary, *Bernie Ecclestone to face more lawsuits after current case*, THE TELEGRAPH (Dec. 11, 2013), *available at* http://www.telegraph.co.uk/sport/motorsport/formulaone/10512242/Bernie-Ecclestone-to-face-more-lawsuits-after-current-case.html.
[192] Jan Schwartz, *Disgraced German ex-president on trial on corruption charges*, REUTERS (Nov. 14, 2013) *available at* http://www.reuters.com/article/2013/11/14/us-germany-president-trial-idUSBRE9AD0NP20131114.
[193] In comparison, the World Bank debarred 83 entities during fiscal year 2012.
[194] In 2010, these MDBs formally signed an agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB-financed development projects. Under the cross-debarment agreement, entities debarred for more than one year by one MDB may be automatically sanctioned for the same misconduct by the other participating development banks. The vast majority of the 2013 cross debarments were the result of sanctions levied by the World Bank, the Asian Development Bank and the Inter-American Development Bank. These three institutions have been, and are likely to continue to be, the most active of the MDBs in seeking public debarments for conduct in violation of their specific guidelines. However, due to the advent of cross debarment, any debarment over one year risks automatic recognition by other signatories to the cross-debarment agreement.
[195] As part of a Negotiated Resolution Agreement (NRA) with the World Bank's Integrity Vice-Presidency (INT) the Bank debarred SNC Lavalin Inc., in addition to over 100 of its affiliates, for a period of ten years with conditional release (debarment with conditional release). The sanction is a result of the company's alleged misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh and the Rural Electrification and Transmission Project in Cambodia. The debarment can be reduced to eight years if the debarred entities comply with

fiscal year), the Bank handed down a 2.5 year debarment with conditional release for Sinclair Knight Merz Pty (SKM).[197] The DoJ now routinely requires companies settling FCPA cases to agree to cooperate with the MDBs as part of their overall covenants, and multijurisdictional cases are on the rise.

Notable litigated decisions of the Sanctions Board include a case dismissed by the Board for insufficient evidence,[198] and a case in which a Bank contractor agreed on a no-contest basis to certain conduct which was referred to the Board for a determination of the appropriate sanction. The Board imposed a sanction under the cross-debarment threshold.[199] These decisions show that litigation, in appropriate cases, may be preferable to settlement.

The World Bank is currently conducting a systematic review of its sanctions system, including the identification of issues with implementation, efficiency, and effectiveness.[200] The review included external consultations and comments from stakeholders of the sanctions system, including members of the World Bank defense Bar, which continues to push the Bank to provide respondents with a process that is commensurate with the serious penalties often associated with the World Bank sanctions process, including debarment, cross debarment, and referrals to national authorities. 2014 will likely bring some changes to the system, but their current scope and direction remain to be seen.

In addition to MDBs, regional authorities' procurement and debarment standards continue to be strengthened, enhancing the collateral risks of an FCPA/corruption case. Of particular importance to many multinational firms are the European Community exclusion standards, affecting European Union procurement, individual EU state procurement, and European Union IFI's (such as the European Investment Bank). EU Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 (the 2004 Directive) contains the current debarment standard at the EU level. However, in 2013 the EU proposed a revision to the 2004 Directive (the 2013 Proposal) which, although not yet in final form, is expected to be finalized in 2014. Under both the 2004 Directive and 2013 Proposal, there is mandatory exclusion for a conviction by a national court for fraud, corruption, money laundering or participation in a

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all conditions of the NRA. The remainder of the SNC-Lavalin Group is conditionally non-debarred for the period of debarment served by SNC-Lavalin Inc.

[196] As part of an NRA with INT, the Bank debarred ARINC Incorporated, a US registered engineering and systems integration company, for a period of 33 months in relation to the company's alleged misconduct on the Airports Development Project in Egypt.

[197] The World Bank conditionally non-debarred SKM for a period of 2.5 years following SKM's self-reporting to INT of corrupt conduct relating to Bank-financed projects in the East Asia and Pacific regions. Interestingly, INT did not force SKM to report the misconduct through its formal Voluntary Disclosure Program, a program that comes with strict and somewhat draconian terms (and which in our experience, companies have been very reluctant to use). Instead, INT allowed SKM to report the misconduct through its standard NRA process. It is too early to tell whether this signals a change in practice by INT or is an exception related to the circumstance of the case.

[198] World Bank Sanctions Board Decision No. 59 (Jun. 24, 2013), *available at* http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.59.pdf.

[199] World Bank Sanctions Board Decision No. 56 (Jun. 10, 2013), available at http://siteresources.worldbank.org/INTOFFEVASUS/Resources/3601037-1346795612671/SanctionsBoardDecisionNo.56.pdf.

[200] *See* The World Bank, Consultation on Review of the World Bank Group Sanction System (2013), *available at* http://consultations.worldbank.org/consultation/sanctions-reviews.

criminal organization. The 2004 Directive also provides for permissive debarment in specific circumstances, including where "any… economic operator… has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate."[201] The 2013 Proposal retains this concept but focuses it even more specifically on integrity. It would permit debarment where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.[202] The 2013 Proposal would expand the permissive ground significantly, to include anti-competitive conduct, conflicts of interest, significant performance failures in prior contracts, misrepresentation, and other types of conduct.

X. CONCLUSION

The last year saw continued focus by the DoJ and SEC on FCPA conduct, including the conclusion of several years-long investigations and two nine-figure settlements. New innovations, such as the SEC's use of NPAs also came to fruition. Cooperation with international authorities was shown to be an important tool for US authorities and we expect that trend to continue in 2014. We also expect 2014 may be a banner year for FCPA settlements, given the auspicious start with the *Alcoa* settlement, and longstanding investigations of Wal-Mart and Avon potentially coming to a close.

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[201] *See* 2004 Directive, Article 45(2)(d).
[202] *See* 2013 Proposal, Article 55(3).

APPENDIX: TABLE OF 2013 CASES, BY ELEMENT

Anti-Bribery Provisions: Substantive Elements	Case
• **Officials Involved**	• State-owned oil company officials *(Weatherford, Total, Bilfinger)* • Albanian tax auditors *(Weatherford)* • Publicly-employed doctors and other health care professionals and professors in several countries *(Stryker, Philips)* • Nigerian customs officials *(Parker Drilling)* • State-owned bank officials in China and Indonesia *(Diebold)* • Nigerian oil and gas officials *(Bilfinger)* • Nigerian political party officials *(Bilfinger)* • Argentinian customs officials *(Ralph Lauren)* • Ukrainian government tax officials *(ADM)*
• **Third Parties Involved, if any**	• Joint venture partner *(Weatherford)* • Customs agent or Freight forwarder *(Weatherford, Parker Drilling, Ralph Lauren)* • Consultant/agent *(Total, Stryker, Philips)* • Law firm *(Stryker, Parker Drilling)* • Distributor *(Diebold)* • Vendors (*Archer-Daniels-Midland)*
• **Value Provided**	• $60 million *(Total)* • $21 million (*Archer-Daniels-Midland)* • $14 million (*Weatherford*) • $6 million *(Bilfinger)* • $3 million (*Diebold)* • $2.2 million (*Stryker)* • $1.25 million *(Parker Drilling)* • $568,000 *(Ralph Lauren)* • 3% to 8% of contract amounts *(Phillips)*
• **Action, Inaction, Influence or Advantage Sought:**	• Capture local market for oil/gas well screens (*Weatherford)* • Re-approval of existing government contract *(Weatherford)* • Promote sales to government or state-owned enterprise *(Weatherford, Diebold, Philips, Stryker)* • Contracts relating to EGGS project in Nigeria (*Bilfinger*) • Oil and gas development rights in Iran (*Total)* • Reduction in customs-related penalty *(Parker Drilling)* • Circumvent customs paperwork requirements and avoid inspections *(Ralph Lauren)* • Expedite release of VAT refunds and secure import licenses *(Archer-Daniels-Midland)*

• **Books and Records Conduct Cited**	• *Archer-Daniels-Midland* • *Diebold* • *Parker Drilling* • *Philips* • *Ralph Lauren* • *Stryker* • *Total* • *Weatherford*
• **Internal Control Conduct Cited**	• *Archer-Daniels-Midland* • *Diebold* • *Parker Drilling* • *Philips* • *Ralph Lauren* • *Stryker* • *Total* • *Weatherford*
• **Combined Total Fines and Penalties**	• $398 million *(Total)* • $252 million (*Weatherford* – of which $100 million relates to trade sanctions violations) • $53.8 million (*Archer-Daniels-Midland)* • $48 million *(Diebold)* • $32 million *(Bilfinger)* • $15.8 million *(Parker Drilling)* • $13.2 million *(Stryker)* • $4.5 million *(Philips)* • $1.6 million *(Ralph Lauren)*

Anti-Bribery Provisions: Jurisdictional Elements	**Case**
• **Dd-1 or dd-2 jurisdiction**	• *Bilfinger* • *Parker Drilling*
• **Dd-3 territoriality**	• *Alfred C. Toepfer International (ADM) (conspiracy)* • *Weatherford Services, Ltd.*

Accounting Provisions: Books and Records Elements	Case
• **Nature of Alleged Inaccuracy**	• Falsified invoices used to conceal illicit payments and discounted sales to distributors to create a "slush fund" to bribe officials *(Weatherford)* • Mischaracterized consultancy agreement as related to "economic and marketing research and support services" and falsely recorded related payments as "business development expenses" *(Total)* • Sham invoices from outside law firm *(Stryker)* • False phone service contracts with distributor *(Diebold)* • False documentation created by subsidiary and/or agent to conceal portion of contract value paid as bribes; falsely recorded as "commissions" *(Philips)* • Improperly recorded travel and other gifts and entertainment as "consulting and service contract payments," "business travel expenses," "charitable donations," or "commissions." *(Stryker)* • Inflated contracts; misrepresented reserves; structured insurance contracts to conceal improper payments; and falsely recorded bribes as "commissions", "insurance premiums" and "other business expenses" *(Archer-Daniels-Midland)* • Paid agent without receiving invoices and recorded payments with unspecified "vague descriptions" *(Parker Drilling)* • Invoices included falsified line items such as "loading and delivery expenses" and "stamp tax/label tax" and included no supporting documentation *(Ralph Lauren)* • Falsified accounting and inventory records to conceal illicit details of transactions that implicated economic sanctions and export controls laws *(Weatherford)* • Disguised improper payments as insurance and export related payments *(ADM)*

Nature of Resolution: DoJ	Case
• **Plea (Parent or Subsidiary)**	• *Alfred C. Toepfer International (ADM)* • *Weatherford Services, Ltd. (Weatherford)*
• **Deferred Prosecution Agreement**	• *Bilfinger* • *Diebold* • *Parker Drilling* • *Total* • *Weatherford*
• **Non-Prosecution Agreement**	• *Archer-Daniels-Midland* • *Ralph Lauren*
• **Monitor**	• *Bilfinger* • *Diebold* • *Total* • *Weatherford*

Nature of Resolution: SEC	Case
• **Consent Decree**	• *Archer-Daniels-Midland* • *Diebold* • *Parker Drilling* • *Weatherford*
• **Injunction**	• *Archer-Daniels-Midland* • *Diebold* • *Parker Drilling* • *Weatherford*
• **Non-Prosecution Agreement**	• *Ralph Lauren*
• **Cease and Desist Order**	• *Philips* • *Stryker* • *Total*
• **Independent Compliance Monitor**	• *Diebold* • *Weatherford*

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