2012 FCPA Year in Review

Lucinda A. Low, Brittany Prelogar, and Sarah Lamoree

Introduction

2012 was another active year in anti-corruption enforcement, with US authorities still leading the pack. While the number of US enforcement actions and aggregate penalties both declined compared to prior years, several noteworthy developments occurred.

In April 2012, US enforcement authorities publicly announced for the first time that they would not pursue charges against an employer on the basis of an oft-suggested “rogue” employee’s conduct. While Morgan Stanley Managing Director Garth Peterson’s self-dealing and intentional circumvention of the firm’s internal controls doubtless factored heavily into the decision, the announcement also provides strong support for investing in a robust corporate anticorruption compliance program.

In November 2012, the Department of Justice and Securities and Exchange Commission unveiled their long-awaited Foreign Corrupt Practices Act (FCPA) Resource Guide. While the Guide largely encapsulates past enforcement policy, it also shows the authorities raising the bar on FCPA compliance expectations in some respects. Detailed and thoughtful in its approach, the Guide is a useful first stop for in-house and outside FCPA practitioners alike.

The FCPA also took center stage with a wider audience in 2012 following front-page New York Times exposés of alleged pervasive bribery and an executive cover-up at Wal-Mart, as well as prime-time news coverage of inquiries into alleged phone hacking and bribery within Rupert Murdoch’s media empire. While investigations into both matters are ongoing, the scandals caused FCPA issues to reverberate in Board and corporate C-suites around the world and also captured the attention of the public at large.

On the enforcement front, 2012 saw a number of high-dollar corporate settlements, including several resulting from an industry sweep in the pharmaceutical and medical device sectors. Enforcement authorities faced a further series of prosecutorial setbacks in cases against individual defendants, and are currently beating back challenges to their sweeping jurisdictional theories and other statutory interpretations in pending cases. These and other judicial developments, including in the context of private litigation against corporate officers and directors arising out of FCPA violations, will be worth watching in 2013.

At the same time, anticorruption initiatives are gaining momentum outside the United States as well. World Bank enforcement remains strong, and a number of other national authorities have pushed ahead with both new legislation and additional enforcement activity. International enforcement efforts likely will continue to develop and become increasingly interconnected in 2013.

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# Table of Contents

| I.       | Statistics ................................................................................ | 5  |
| II.      | DOJ/SEC FCPA Resource Guide .................................................. | 8  |
| III.     | Trends .................................................................................... | 8  |
| A.       | Industries Affected .................................................................. | 8  |
| B.       | Credit for Disclosure, Cooperation, and Compliance Programs .... | 9  |
| 1.       | Declinations ........................................................................... | 9  |
| 2.       | Cooperation Credit .................................................................. | 11 |
| 3.       | Inadequate Response to Misconduct ....................................... | 12 |
| C.       | Investigation Along with Other International Regulatory Compliance Risks | 13 |
| IV.      | Jurisdiction ........................................................................... | 14 |
| V.       | Individual Prosecutions ......................................................... | 15 |
| A.       | Prosecution Setbacks ................................................................| 15 |
| B.       | New Actions: United States v. Rahman ..................................... | 16 |
| C.       | Sentencing Decisions ................................................................| 17 |
| 1.       | KBR Individual Defendants ...................................................... | 17 |
| 2.       | Richard Bistrom ....................................................................... | 17 |
| 3.       | Garth Peterson ........................................................................ | 18 |
| VI.      | 2012 Settlements ...................................................................... | 18 |
| A.       | Introduction ............................................................................ | 18 |
| B.       | Instrumentality/Foreign Official Definition ........................... | 18 |
| 1.       | Pharmaceutical and Medical Device Cases ..................................| 19 |
| a.       | Smith & Nephew ....................................................................... | 19 |
| b.       | Biomet .................................................................................... | 20 |
| c.       | Orthofix .................................................................................. | 20 |
| d.       | Pfizer/Wyeth .......................................................................... | 21 |
| e.       | Eli Lilly ................................................................................... | 21 |
| 2.       | Allianz .................................................................................... | 22 |
| 3.       | NORDAM and BizJet .................................................................. | 23 |
| 4.       | Marubeni .................................................................................. | 24 |
| 5.       | OPR 12-01 and Royal Family Members ...................................... | 24 |
| C.       | Obtaining and Retaining Business ............................................ | 25 |
| 1.       | Tyco International and Tyco Valves & Controls Middle East ....... | 25 |
| 2.       | Pfizer ..................................................................................... | 26 |
| D.       | Travel and Entertainment and Gifts .......................................... | 26 |
| 1.       | Pharmaceutical and Medical Device Cases ..................................| 26 |
| 2.       | OPR 12-02 ............................................................................... | 27 |
| E.       | Charitable Contributions ..........................................................| 28 |
I.  Other Non-US Enforcement .................................................................................................................. 43
   A.  Australia ........................................................................................................................................... 43
   B.  Asia ...................................................................................................................................................... 43
       1.  China ............................................................................................................................................ 43
       2.  South Korea ................................................................................................................................... 44
   C.  India .................................................................................................................................................... 44
   D.  Americas ............................................................................................................................................ 45
       1.  Canada .......................................................................................................................................... 45
       2.  Mexico .......................................................................................................................................... 45
       3.  Brazil ............................................................................................................................................ 47
II. UK Developments ................................................................................................................................. 39
    A.  2012 Enforcement ............................................................................................................................... 40
        1.  Enforcement Against Companies ................................................................................................. 40
        2.  Enforcement Against Individuals ................................................................................................. 41
    B.  British Crown Dependencies and Overseas Territories ................................................................. 41
    C.  Regulatory and Legal Developments ............................................................................................... 42
        1.  Financial Services Authority ......................................................................................................... 42
        2.  Deferred Prosecution Agreements ................................................................................................. 42
III. Collateral Litigation .............................................................................................................................. 37
    A.  Shareholder Suits ................................................................................................................................. 37
    B.  Ruehlen Document Request ............................................................................................................. 38
    C.  Offensive Litigation ............................................................................................................................. 38
        1.  Wynn v. Okada ................................................................................................................................. 38
        2.  Alba v. Alcoa .................................................................................................................................... 39
IV. Whistleblower Activity .......................................................................................................................... 35
    A.  2012 Annual Report ............................................................................................................................ 35
    B.  Recent Whistleblower Awards ........................................................................................................... 35
    C.  Scope of Anti-Retaliation Protections Overseas .................................................................................. 36
    D.  Other Notable Whistleblower Enforcement Actions ........................................................................... 37
V. Recent Whistleblower Awards ............................................................................................................... 33
    A.  Tyco ..................................................................................................................................................... 32
    B.  Allianz ................................................................................................................................................ 33
    C.  Oracle .................................................................................................................................................. 33
VI. Successful Liability .................................................................................................................................. 34
    A.  Pfizer .................................................................................................................................................. 34
    B.  Orthofix ............................................................................................................................................... 34
VII. Enforcement against Companies ......................................................................................................... 29
    A.  Pharmaceutical and Medical Device Companies .................................................................................. 29
    B.  Oracle ................................................................................................................................................ 30
    C.  Data Systems & Solutions ................................................................................................................... 30
VIII. Distributors, Subcontractors, and Other Third Parties ...................................................................... 29
    A.  Pharmaceutical and Medical Device Cases ......................................................................................... 29
    B.  Oracle ................................................................................................................................................ 30
    C.  Data Systems & Solutions ................................................................................................................... 30
IX. Books and Records / Internal Controls ............................................................................................... 31
    A.  Pharmaceutical and Medical Device Companies ................................................................................. 31
    B.  Tyco ................................................................................................................................................... 32
    C.  Allianz ................................................................................................................................................. 33
    D.  Oracle ................................................................................................................................................ 33
X. Enforcement Against Individuals .......................................................................................................... 28
    A.  Wynn Litigation ................................................................................................................................... 28
    B.  Guide .................................................................................................................................................. 29

www.steptoe.com/fcpa 3
E. Continental Europe ................................................................. 48
   1. Germany............................................................................. 48
   2. France.............................................................................. 48
   3. Sweden............................................................................ 49
F. Russia/CIS............................................................................ 49
   1. Russia............................................................................. 49
   2. Ukraine.......................................................................... 50
   3. Azerbaijan...................................................................... 50
G. Africa.................................................................................. 51
   1. South Africa.................................................................... 51
   2. Other.............................................................................. 51
XI. World Bank and other Multilateral Development Bank Anti-Corruption Enforcement ..... 52
XII. Conclusion ....................................................................... 53
APPENDIX: Table of 2012 Cases, by Element............................................. 54
I. Statistics

In 2012, US enforcement authorities brought a total of 23 enforcement actions against companies and individuals: 11 were brought by the Department of Justice (DOJ) and 12 by the Securities and Exchange Commission (SEC). This total is a precipitous drop from the combined 49 enforcement actions brought by the government in 2011.

Through the combined 23 enforcement actions, a total of 12 companies faced new charges from the DOJ, SEC, or both. Additionally, five individuals were charged in six enforcement actions.
Of the 12 companies involved in enforcement actions, eight are US-based while four are foreign entities.

In total, 12 companies paid a total of $259 million in penalties, disgorgement and pre-judgment interest, significantly less than in any year between 2008 and 2011. Rather than signaling any deemphasis by US enforcement authorities on the FCPA, however, the drop in fines likely reflects the significant resources that were diverted over the past several years from corporate settlements to individual trial preparation and execution, and the drafting of the Resource Guide. With many cases, some of them quite significant, still in the pipeline, 2013 may well be an active year.
The largest DOJ FCPA fine imposed in 2012 was $54.6 million against Marubeni Corporation, a Japanese agent used to funnel payments to officials in Nigeria in the long-running TSKJ case which has yielded the highest aggregate penalties to date. The smallest DOJ fine was $2 million against NORDAM Group. The largest SEC settlement (inclusive of disgorgement, prejudgment interest, and penalty) was $45.1 million against Pfizer/Wyeth and the lowest was $2 million against Oracle. The total mean DOJ and SEC penalties were $15.85 million and $14.73 million respectively.
In 2012, alleged violations occurred in 22 countries and in all regions of the world. Conduct in Europe resulted in more enforcement actions than any other region, with alleged corrupt activity in Europe cited 11 separate times in enforcement actions. China was cited the most frequently of any individual country (five times). Asia and the Americas were the center of significant activity as well. Africa, the focus of significant enforcement activity in recent years, was featured only once in this year’s crop of cases.

II. *DOJ/SEC FCPA Resource Guide*

The most anticipated development of 2012 was the issuance of the joint DOJ and SEC Resource Guide to the US FCPA (Resource Guide or Guide). With over 100 pages of material, the Guide is the most comprehensive document to date offering insights into the DOJ and SEC’s FCPA interpretation and enforcement strategy. Rather than signaling any major shift in the DOJ or SEC’s FCPA enforcement policies, the Guide primarily serves to consolidate in one document their interpretation of the FCPA and the factors influencing their exercise of prosecutorial discretion. New features include hypotheticals on common and recurring issues, questions and answers, checklists of factors to consider when analyzing FCPA issues, the enforcement authorities’ interpretation of a number of FCPA cases and settled enforcement actions, a detailed explanation of their approach to successor liability in M&A cases, and anonymized examples of matters in which they have declined to take enforcement action. While the Guide is non-binding and offers little of substance that is new for close followers of FCPA enforcement, it is detailed and thoughtful in its approach and provides greater transparency into the analytical framework applied by enforcement authorities in FCPA matters. For these reasons, it has quickly become a well-worn reference guide on the shelves of in-house and outside FCPA practitioners alike, although – given the pace of developments in this area – it may require periodic updates to remain current.


III. *Trends*

A. **Industries Affected**

As in prior years, 2012 saw enforcement activity in a wide swath of industries, including against companies in oil, gas, and energy-related sectors (Marubeni, Data Systems & Solutions), insurance (Allianz), aerospace and aircraft maintenance (NORDAM, BizJet), security products (Tyco Int’l), and software (Oracle).

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2 Some countries appear in more than one enforcement action. For the purposes of this statistic, each appearance is counted separately as an enforcement action in the specific region.

The trend of “industry sweeps,” which often result when one FCPA investigation uncovers potential industry-wide conduct with compliance implications, also continued. For instance, enforcement actions against pharmaceutical and medical device companies, including Pfizer/Wyeth, Smith & Nephew, Orthofix, Eli Lilly, and Biomet, represented almost one-third of all FCPA corporate settlements in 2012. This trend shows no sign of slowing. The SEC has manifested an interest in the dealings of sovereign wealth funds by issuing letters of inquiry to at least ten banks and private equity firms.\(^4\) At least one financial firm, Barclays, recently announced an FCPA investigation into its relationship with a Qatari sovereign wealth fund, and more may follow.\(^5\) The Hollywood film industry also became a focus of attention this year, with at least five movie studios receiving letters from the SEC regarding payments to government officials in China to gain rights to film and show movies in the country.\(^6\)

**B. Credit for Disclosure, Cooperation, and Compliance Programs**

One of the most significant trends of 2012 was the apparent credit US enforcement authorities have accorded companies in several cases for making timely voluntary disclosures, providing genuine cooperation in investigations, and developing and implementing effective compliance programs. The authorities’ growing transparency in this area in part is clearly intended to respond to oft-cited skepticism about whether companies receive tangible benefits from self-reporting and from investing in compliance programs, as well as to pressure by industry groups for Congress to amend the FCPA to include a defense for effective compliance programs.

1. **Declinations**

The *Morgan Stanley/Garth Peterson* matter provides the most striking example of the potential value of effective corporate compliance programs in deflecting enforcement activity against companies. In April 2012, the DOJ and SEC announced settled enforcement actions against Garth Peterson, a former Morgan Stanley managing director for real estate investment, for allowing a Chinese official to invest in Morgan Stanley transactions in exchange for Chinese government approvals.\(^7\) The authorities declined to pursue Morgan Stanley for Mr. Peterson’s actions, however, instead finding that Mr. Peterson’s actions were “rogue,” self-dealing conduct that intentionally circumvented the robust internal control mechanisms Morgan Stanley had in

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In making their first public declination of an enforcement action, the DOJ and SEC noted Morgan Stanley’s extensive compliance efforts as a key factor in their decision.\(^8\)

Given Morgan Stanley’s status as a highly-regulated financial services firm, it had a compliance program that by any measure was extensive. US authorities’ declination therefore raises questions about whether any program that falls short of this standard will be deemed effective, as well as the extent to which Mr. Peterson’s self-dealing accounted for the outcome. Certain current enforcement officials have expressed their personal view that compliance programs need only be appropriately tailored to a particular company’s risks (taking into account its industry, size, and other factors) and that Mr. Peterson’s self-dealing was a significant but not dispositive factor in their decision not to take enforcement action against Morgan Stanley. Indeed, while not heralded in government press releases like Morgan Stanley/Garth Peterson, at least 12 other companies also received declinations in FCPA matters in 2012 according to company filings (and there are more that are non-public),\(^9\) including companies involved in the Panalpina-related investigations\(^11\) and in the pharmaceutical and medical device industry sweep.\(^12\)

Consistent with these actions, the recently released Resource Guide emphasizes the importance enforcement authorities place on company self-reporting, cooperation, and remedial compliance efforts.\(^13\) For the first time, the Guide also notes that such efforts may result in a DOJ decision to “decline to pursue charges against a company based on the company’s effective compliance program.”\(^14\) It is unclear, however, whether any of the several dozen declinations referred to in the Guide involved allegations deemed not credible enough to pursue, matters not pursued due to resource issues, or true declinations. Further, many of the specific declination examples cited by the Guide involved relatively small bribes, and some involved potential bribes that were detected and prevented before being paid. Moreover, it appears that in connection with obtaining a declination, each company expended significant resources to investigate and remediate these matters. A reasonable question may be raised as to whether, given the circumstances involved in these cases, the DOJ and SEC would decline these cases in the event a company undertook a prompt investigation and implemented all the aforementioned remedial measures but chose not to self-report.

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\(^9\) Id.


\(^12\) GRIFOLS, S.A., REPORT OF FOREIGN ISSUER (FORM 6-K) (Nov. 30, 2012).

\(^13\) FCPA Guide, supra note 3 at 54, 56.

\(^14\) Id. at 56.
2. Cooperation Credit

Apart from declinations, DOJ settlements in 2012 display a willingness to grant other forms of credit for corporate cooperation and compliance efforts in reaching negotiated resolutions. For instance, both Tyco International and Lufthansa Technik received Non-Prosecution Agreements (NPAs), which, according to the DOJ, were based in part on their efforts to assist the ongoing FCPA actions and engage in remedial programs. Lufthansa, and its subsidiary BizJet (which received a Deferred Prosecution Agreement (DPA)), received such credit, and a downgrading of the fines imposed, because they “engaged in extensive remediation, including terminating the officers and employees responsible for the corrupt payments, enhancing their due-diligence protocol for third-party agents and consultants, and heightening review of proposals and other transactional documents.” In a similar vein, Tyco International received an NPA for “timely, voluntary, and complete disclosure” and extensive remediation. NORDAM Group, Inc. also received an NPA for its cooperation with the DOJ in ongoing FCPA-related matters and a reduced fine based on concerns about the company’s financial viability. In one notable instance, Pride International received an early ending to its DPA, previously entered into on November 4, 2010 and scheduled to run until November 2013, in order to reward the company for “good behavior” in the form of enhanced compliance efforts.

In addition to NPAs and DPAs, companies also have received credit for their efforts in the form of reductions in the minimum base penalties incurred. While fines for FCPA violations typically fall within the standard range prescribed by the US Sentencing Guidelines, 2012 has seen several significant deviations from these guidelines. For instance, in June 2012, Data Systems and Solutions LLC (DS&S) agreed to pay $8.82 million to resolve FCPA violations, almost 30% less than the low end of the Sentencing Guidelines range for the conduct at issue ($12.6–$25.2 million). In support of this resolution, the DPA specifically cited “the nature and extent of DS&S’s extraordinary cooperation and extensive remediation in this matter.” BizJet likewise received an almost 30% reduction in its fine due to its voluntary disclosure and cooperation. Similar reductions can also be seen in the Biomet enforcement actions (20% reduction off the bottom of the fine range), Smith & Nephew, Inc. enforcement action (20% 

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20 Id. at 6–7.
reduction), and Pfizer enforcement action (34% reduction). All were premised, in part, on the extraordinary cooperation of the companies involved.

Although these examples and the Guide provide some additional transparency into the credit the DOJ will provide to companies that cooperate with their investigations and ensure strong compliance efforts, certain aspects of how the DOJ applies such credit remain opaque. For example, while the Guide summarizes the available dispositions in FCPA matters, such as Plea Agreements (DOJ), Civil Injunctive and Administrative Remedies (SEC), DPAs (DOJ and SEC), and NPAs (DOJ and SEC), as well as the differences between these resolutions, it is silent on the factors that lead to the use of one of these dispositions over another. It is also silent on the factors influencing enforcement choices when multiple potential targets are presented (for example, individuals versus companies).

3. Inadequate Response to Misconduct

Although several companies saw tangible benefits of prompt and thorough investigative and remedial efforts in 2012, others paid the price for failing to quickly and effectively respond to FCPA issues identified internally. For instance, in December 2012, Eli Lilly settled an FCPA enforcement action with the SEC for $29 million based on improper payments made by employees at Lilly’s subsidiaries in China, Brazil, Poland, and Russia. The SEC specifically noted the failures of Eli Lilly’s efforts with its Russian subsidiary, finding that, even after two business reviews identified risks regarding the use of third parties, the company’s “check-the-box” due diligence consisted of “ordering a Dun and Bradstreet report and conducting a search using an internet service to scan publicly available information.” Unlike Morgan Stanley and others praised for their strong compliance efforts, the SEC cited these compliance failures in concluding that Eli Lilly lacked adequate internal accounting controls.

Allianz and Orthofix faced similar repercussions for failing to respond appropriately to potential FCPA violations. Allianz paid $12.4 million dollars in fines to settle alleged violations of the FCPA’s books and records and internal controls provisions based on improper payments made to government officials in Indonesia. Allianz allegedly learned of improper payments and related control weaknesses through a whistleblower-initiated internal audit, yet allowed the conduct to continue. Similarly, in July 2012, Orthofix International N.V. agreed to pay $7.4 million in fines to the SEC and DOJ for bribes paid by its Mexican subsidiary to Mexican

24 Id. at 13.
25 Id. at 16.
27 Id at 4.
The SEC noted that Orthofix had done little to investigate suspicious behavior and excessive spending, and had no effective FCPA compliance policy or FCPA-related training in place prior to the violations.  

Although still in the investigation stage, the alleged inadequacies in Wal-Mart’s FCPA compliance programs and response to alleged improprieties raised internally may also stand as a stark example of the negative consequences that can flow from a failure to implement appropriate compliance, audit, and investigative procedures. In one of the most significant FCPA developments of 2012, Wal-Mart is currently under investigation by DOJ, SEC, and various non-US authorities for potential corrupt payments made by subsidiaries in Mexico, Brazil, China and India. Two significant exposés by The New York Times on Wal-Mart’s alleged corrupt activities not only reverberated in Board and C-suites throughout corporate America, but – given Wal-Mart’s prominent position as one of the world’s largest companies – also raised the profile of the FCPA amongst the wider public and signaled a renewed focus in the United States on the actions of domestic corporations. Should the accusations of high-level executive knowledge of bribery prove true, Wal-Mart’s purported failure to address allegations and engage in meaningful investigation is likely to result in very significant enforcement action and related sanctions.

C. Investigation Along with Other International Regulatory Compliance Risks

A steadily increasing trend over the past few years has been US (and other) authorities’ investigation of other international regulatory compliance issues in conjunction with FCPA investigations. Innospec Inc. reached a settlement in 2010 with the DOJ, SEC, OFAC and the UK SFO in connection with bribery in Iraq and Indonesia, and violations of OFAC’s prohibitions on trade with Cuba and of the UK embargo of Iraq. Weatherford International Ltd., the subject of a long-running FCPA and US economic sanctions-related investigation, reserved $100 million to cover the sanctions-related portion of a potential settlement with US authorities in June 2012. We are aware of a number of other matters, not publicly reported, examining both FCPA and other international regulatory compliance issues ongoing in 2012, continuing a trend that has been evident for some time.

29 Id. at 5.
IV. Jurisdiction

The DOJ and SEC continue to rely on expansive jurisdictional theories in their pursuit of foreign companies and individuals. For example, in the Marubeni matter, the DOJ predicated jurisdiction on Marubeni’s alleged meetings and communications via telefax in the US with co-conspirators.\(^{34}\) And, the SEC’s enforcement action against Allianz SE, whose bonds formerly traded on the NYSE, is a reminder that “issuers” include more than just companies with equity shares and ADRs traded on US exchanges. A newly announced DOJ and SEC investigation of Net 1 UEPS Technologies Inc., a South African company, will look into whether the company or any of its affiliates engaged in corrupt payments to government officials in order to obtain a contract with the South African Social Security Agency.\(^{35}\) Although Net 1 is listed on a US exchange, it is a South African company, and the alleged activity involves South African government officials, so it is not clear, at this time, what nexus the case has to US interstate commerce that would support enforcement of the FCPA’s anti-bribery provisions.\(^{36}\)

While companies often choose to settle matters with US authorities even when any connection to the United States is tenuous at best, several individuals have asserted jurisdictional defenses in FCPA cases before judicial authorities. For example, Magyar Telekom 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, that the conduct alleged occurred wholly outside the US, and thus that there was no nexus to the US.\(^{37}\) On February 8, 2013, a New York federal judge denied the defendants’ motion in its entirety.\(^{38}\) The court concluded that it could exercise personal jurisdiction over the defendants, because defendants “allegedly engaged in a cover-up through their statements to Magyar’s auditors knowing that the company traded ADRs on an American exchange, and that prospective purchasers would likely be influenced by any false financial statements and filings.”\(^{39}\) The former chief executive of Siemens Argentina has also moved to dismiss an SEC suit alleging his participation of bribery of officials in Argentina, arguing that, as a German citizen residing in Germany, he is not subject to US jurisdiction because he was never employed in the United States and that he never travelled to the United States on business for Siemens during the period alleged in the complaint. The SEC, in contrast, alleged that the defendant is subject to US jurisdiction.

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\(^{37}\) Memorandum of Law in Support of Defendants’ Joint Motion to Dismiss Complaint at 6–7, SEC v. Straub, No. 11-cv-009645 (S.D.N.Y. Nov. 5, 2012).

\(^{38}\) Memorandum and Order on Defendants’ Joint Motion to Dismiss at 1, Straub, No. 11-cv-009645. (S.D.N.Y. Feb. 8, 2013).

jurisdiction because his conduct caused the falsification of Siemens’ annual and quarterly filings with the SEC. The motion is currently pending before the court.  

Individuals have continued to aggressively litigate government prosecutions on challenges that extend beyond a lack of personal jurisdiction as well. A Texas federal judge, on December 7, 2012, ruled that he would not dismiss the SEC’s civil complaint against two executives from Noble Corporation, alleging that these individuals bribed officials in Nigeria in exchange for illegal import permits for drilling rigs. Both defendants are litigating the FCPA’s facilitating payments exception, arguing that the SEC’s complaint failed to allege facts to support the inference that their payments fell outside of the FCPA’s facilitating payments exception, which allows for payments for routine government actions. The judge gave the SEC the opportunity to amend its complaint against James Ruehlen, the current head of Noble’s subsidiary in Nigeria, and Mark Jackson, Noble’s former CEO, who had been charged with violating the anti-bribery and internal controls and false records provisions of the FCPA. The SEC charged Jackson as a “control person” under the federal securities laws, because he allegedly misled auditors by signing false certifications of Noble’s financial statements.

V. Individual Prosecutions

A. Prosecution Setbacks

The DOJ met several individual prosecution setbacks in early 2012. After several mistrials, hung juries, and acquittals, the DOJ ultimately dismissed all charges arising out of its first FCPA sting operation and against the largest group of individual prosecutions to date, the “SHOT Show” defendants. The DOJ also dismissed conspiracy, money laundering, and obstruction of justice charges against John O’Shea, a general manager for ABB, Inc., after the court ordered a directed verdict of acquittal on the substantive bribery counts based on the government’s failure to present sufficient evidence to “connect the dots” between the defendant and the alleged bribery. Additional discussion of these cases is available in our previous alert, available at http://www.steptoe.com/publications-newsletter-463.html.

Trials set for spring 2012 were cancelled when four individual defendants connected with the Control Components Inc. (CCI) matter pleaded guilty to greatly reduced charges of

40 Memorandum of Law in Support of Motion to Dismiss at 4, SEC v. Sharef, No. 11-CV-009073 (S.D.N.Y. Oct. 12, 2012); Memorandum in Opposition to Motion to Dismiss at 20, Sharef, No. 11-CV-009073 (S.D.N.Y. Nov. 13, 2012); see also Reply Memorandum of Law in Support of Motion to Dismiss, Sharef, No. 11-CV-009073 (S.D.N.Y. Dec. 6, 2012).


42 A third executive, Thomas F. O’Rourke, a former controller and head of internal audit at Noble, agreed to settle SEC charges by paying a $35,000 civil penalty earlier this year. Noble Corporation entered into an NPA and paid $8.1 million to settle an FCPA investigation in 2010.


44 CCI, a California-based valve company, entered its guilty plea in July 2009 and paid an $18.2 million criminal fine for making approximately 236 corrupt payments in more than 30 countries from 2003 through 2007, with a
violating the FCPA.\textsuperscript{45} While the original indictment charged 16 criminal counts, each of the four defendants pleaded guilty to one count of making a corrupt payment to a foreign official. Four other CCI executives were also charged in the original indictment; three of those executives pleaded guilty prior to 2012, and charges remain outstanding against the final defendant. In addition to pleading to substantially reduced charges, the five defendants sentenced to date have received relatively light sentences. Stuart Carson, CCI’s former CEO, received four months in prison, eight months of home detention, and a $20,000 fine.\textsuperscript{46} Hong Rose Carson, a former sales director, received three years of probation, including six months home detention, a fine of $20,000, and 200 hours of community service.\textsuperscript{47} Paul Cosgrove, former head of worldwide sales, received three years of probation, including 13 months of home confinement, and 200 hours of community service.\textsuperscript{48} Finally, David Edmonds, former vice president, received four months in prison, four months of supervised release and a $20,000 fine.\textsuperscript{49}

\textbf{B. New Actions: United States v. Rahman}

In addition to the actions against Garth Peterson and the Noble executives discussed above, Mizanur Rahman was indicted on October 4, 2012 on charges of filing false tax returns with the Internal Revenue Service (IRS) in 2005 and 2006.\textsuperscript{50} While Mr. Rahman’s alleged violation is of the tax code, and the “International Corporation” for which Mr. Rahman worked as a consultant is not specified, the DoJ website lists as “related” the 2008 \textit{United States v. Siemens Bangladesh Limited} FCPA case.\textsuperscript{51} Siemens Aktiengesellschaft (Siemens AG) pleaded guilty in 2008 to FCPA internal controls and books and records violations,\textsuperscript{52} and settled with the SEC over allegations of bribery, lack of adequate internal controls, and books and records violations.\textsuperscript{53} Siemens AG and its subsidiaries paid a combined total criminal fine of over $1.6 billion to US and German authorities.\textsuperscript{54}
C. Sentencing Decisions

1. KBR Individual Defendants

Albert “Jack” Stanley, a former chairman and chief executive officer of Kellogg, Brown & Root Inc. (KBR) was sentenced on February 23, 2012 to 30 months in prison, three years of supervised release, and $10.8 million in restitution to his company. Mr. Stanley pleaded guilty in September 2008 to conspiring to violate the FCPA by participating with a consortium of companies in a decade-long bribery scheme of Nigerian government officials in order to gain engineering, procurement and construction contracts to build liquefied natural gas facilities, and for conspiring to commit mail and wire fraud as part of a separate kickback scheme.\(^{55}\)

Also on February 23, 2012, a co-conspirator in the same scheme, consultant Jeffrey Tesler, received 21 months in prison, two years of supervised release, and a $25,000 fine in addition to his previously-ordered forfeiture of $148,964,568.\(^{56}\) On February 22, 2012, Wojciech J. Chodan, another co-conspirator and former salesman at KBR’s UK subsidiary, was sentenced to one year of probation and ordered to pay a $20,000 fine, plus a previously-ordered forfeiture of $726,885.\(^{57}\) Both had pled guilty to the FCPA charges against them. The DOJ noted that the three defendants’ full cooperation and substantial assistance with the investigation and prosecution of other defendants was reflected in their sentences.\(^{58}\)

2. Richard Bistrong

On July 31, 2012, Richard Bistrong, the informant in the DOJ’s failed SHOT Show prosecution, received a sentence of 18 months in federal prison and three years of supervised release. Notably, Mr. Bistrong is the only person to be sentenced to any jail time or penalty based on the SHOT Show case. Judge Leon of the US District Court for the District of Columbia refused the prosecutors’ request for mere probation, home confinement, and/or community service based on Mr. Bistrong’s “substantial assistance to law enforcement,”\(^{59}\) noting that the charges had already been reduced, and a more lenient sentence would not reflect the seriousness of the charges or serve to deter corruption.\(^{60}\)


\(^{57}\) United States v. Chodan, No. 09-cr-00098 (S.D. Tex. 2009).


3. **Garth Peterson**

A former managing director of Morgan Stanley’s real estate investment business, Garth Peterson, received nine months in prison and three years of supervised release on August 16, 2012, after pleading guilty to conspiracy to evade Morgan Stanley’s internal controls. Eastern District of the District of New York Judge Weinstein noted the significant financial and professional penalties that Mr. Peterson already had accepted in the related SEC case, and determined that Mr. Peterson’s collective punishments satisfied general and specific deterrence. As for the SEC’s case, in which Mr. Peterson was charged with violating the anti-bribery and accounting provisions of the FCPA, and with aiding and abetting violations of the anti-fraud provisions of the Investment Advisers Act of 1940, on April 25, 2012 Mr. Peterson agreed to pay over $250,000 in disgorgement and turn over approximately $3.4 million in real estate acquired unlawfully, and was permanently debarred from the securities industry.

VI. **2012 Settlements**

A. **Introduction**

In 2012, as in most prior years, all FCPA cases against companies were settled rather than litigated. The 2012 DOJ dispositions included plea agreements, deferred prosecution agreements (DPAs), and non-prosecution agreements (NPAs). The SEC, in contrast, used its traditional tools of consent decrees and injunctions; absent this year were any DPAs or NPAs, tools the SEC adopted in 2011.

Below we address a number of the settlements in relation to relevant elements, affirmative defenses, and other issues related to the FCPA. These include:

- The instrumentality/foreign official element;
- The obtain or retain business element;
- The provision of meals, gifts and entertainment;
- Charitable contributions;
- Distributors and other third-parties;
- The books and records and internal controls provisions; and
- Successor liability.

The 2012 settled cases suggest that the DOJ and SEC continue to take aggressive, but nuanced, positions regarding the statute’s reach, particularly on the issue of state-owned entities (SOEs).

B. **Instrumentality/Foreign Official Definition**

The DOJ’s and SEC’s 2012 enforcement actions continued to demonstrate the breadth of officials with whom improper interactions can create FCPA liability. 2012 saw a series of

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actions involving government-employed aviation officials and mechanics, employees of SOEs, and even employees of a majority-privately-owned company. The 2011 *Control Components, Inc.* and *Lindsey Manufacturing* district court decisions confirmed that state-owned entities can be foreign government instrumentalities, and their employees foreign officials; the DOJ/SEC Resource Guide and a DOJ Opinion Procedure Release essentially ratified those factors, while emphasizing that no single criterion is dispositive.

1. Pharmaceutical and Medical Device Cases

In 2012, the US Government focused its enforcement efforts on medical device and pharmaceutical companies, continuing an industry sweep that began in 2011 with the *Johnson & Johnson* case. In all five 2012 settlements, some or all of the foreign officials involved in the allegations were doctors or other officials at state-owned or -run hospitals. These pharmaceutical and medical device cases, like others before them, are notable for their treatment of government-employed doctors as “foreign officials,” since one might not normally think of a doctor as an “official.” All of the countries involved in these cases have nationalized healthcare systems, in which most hospitals are owned and operated, or at least controlled, by the government. Indeed, the settlements appear to treat the hospitals automatically as instrumentalities simply because they existed within a nationalized system. As a result, it is difficult to evaluate the specific facts that lead to particular hospitals being deemed instrumentalities, or those that might exempt a hospital operating in a nationalized healthcare system from “instrumentality” status and its doctors from being treated as “foreign officials.”

a. Smith & Nephew

On February 6, 2012, Smith & Nephew plc, an English medical device manufacturer, and its wholly-owned US subsidiary, Smith & Nephew, Inc., settled criminal and civil allegations that the companies used shell entities owned by a distributor to make illicit payments to Greek doctors employed by government-owned hospitals.

The allegations state that, from 1997 until 2008, Smith & Nephew’s US and German subsidiaries transferred funds to shell entities in the UK controlled by their Greek distributor in order for the distributor to funnel illicit payments on their behalf to doctors employed by government hospitals in Greece. The subsidiaries agreed to sell the goods at full price to the distributor, then pay to the UK shells the amount of the discount that they owed to the distributor, which amounted to between 25% and 40% of the sales revenue. The distributor used those funds, which remained off the books, to pay cash incentives to the doctors in order to

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induce them to use Smith & Nephew products. The subsidiaries accounted for the transfers to the shell entities as “marketing services,” although those entities performed no actual services. Top-level Smith & Nephew officials allegedly knew about these arrangements and their illegality, but failed to take meaningful action to halt them.

The companies settled charges with the DOJ for total penalties of $16.8 million; Smith and Nephew’s US subsidiary must also retain a compliance monitor. The English parent, an issuer, paid $5.4 million in disgorgement and prejudgment interest to the SEC.

b. Biomet

On March 26, 2012, the SEC and DoJ announced the settlement of charges against Indiana-based Biomet, Inc. for payments made by its employees, subsidiaries, and distributors, to publicly-employed doctors in China, Argentina, and Brazil to win business. In addition to cash kickbacks, Biomet provided government doctors with a variety of perks, including travel for personal and entertainment purposes. Biomet falsely recorded the illegal payments as “commissions,” “royalties,” “consulting fees,” and “scientific incentives,” and in some cases obtained falsified invoices from doctors for consulting services that they never performed. Internal auditors warned Biomet employees about these practices, and managers at all levels of the company allegedly were aware of them but allowed them to continue for years.

Biomet paid $5.6 million in disgorgement and prejudgment interest to the SEC and a $17.28 million criminal fine.

c. Orthofix

On July 10, 2012, Texas-based Orthofix International N.V. settled charges with the SEC and DOJ relating to payments made by its Mexican subsidiary to hospital administrators. Between 2003 and 2010, Orthofix’s Mexican subsidiary Promeca gave cash, laptops and other benefits to officials in charge of administration and purchasing at a Mexican government health care provider, in some cases indirectly through front companies that the officials owned and often through a consultant retained by Promeca. Unlike the previous cases, Orthofix did not target doctors themselves, but rather bribed the officials in charge of the facilities in order to induce them to purchase large quantities of its products for use by doctors. Promeca falsified invoices and recorded the payments, at first as cash advances, and, once they grew larger, as promotional and training expenses.

Orthofix agreed to pay $5.2 million in disgorgement and prejudgment interest to settle SEC charges and a $2.22 million criminal fine to settle DOJ charges.

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67 While Orthofix is based in Texas, it organized under the laws of Curacao with stock trading on the NASDAQ exchange.
d. Pfizer/Wyeth

On August 7, 2012, the DOJ and SEC announced the conclusion of a long-running investigation involving Pfizer H.C.P. Corp. and Wyeth LLC. The SEC filed settled complaints against New York-based Pfizer and New Jersey-based Wyeth, which had been acquired by Pfizer in late 2009. The DOJ filed a criminal information against and agreed to a two-year DPA with a wholly-owned US subsidiary of Pfizer.

The settlement documents allege that, from 1997 until 2007, Pfizer provided improper payments and benefits to state-employed doctors and hospital administrators and other government officials in Bulgaria, China, Croatia, the Czech Republic, Italy, Kazakhstan, Russia, and Serbia in order to induce them to prescribe Pfizer products or approve them for regulatory or reimbursement purposes. Pfizer created sham consulting contracts and exclusive distributorships for the benefit of government officials, in addition to providing travel and cash. Its subsidiaries used fraudulent invoices from outside vendors, paid shell companies controlled by hospital administrators, and used third parties to make payments to officials. The entities involved improperly recorded the payments as promotional activities, marketing, training, travel, entertainment, and clinical trials, among other things.

Pfizer Russia also allegedly paid monthly payments totaling $13,000 to employees of a private, but government-licensed, company that provided false certifications that products met packaging and product registration requirements for customs clearance purposes. Notably, the SEC alleged that this was improper under the FCPA because, while the company was privately owned, it was performing a government function.

The SEC alleged that Wyeth subsidiaries engaged in similar conduct in Indonesia, Pakistan, China, and Saudi Arabia and that this activity occurred between 2005 and 2010, both before and after Wyeth’s acquisition by Pfizer. The acquisition took place while Pfizer’s FCPA investigation was pending.

Pfizer and Wyeth paid over $44.9 million in disgorgement and prejudgment interest to the SEC. Pfizer’s subsidiary paid $15 million criminal penalty to the DOJ, making the total paid to the government by all Pfizer entities $59.9 million.

e. Eli Lilly

The SEC demonstrated a continued focus on the pharmaceutical sector when it announced on December 20, 2012 a settlement with Indianapolis-based pharmaceutical maker Eli Lilly. The SEC alleged that Lilly subsidiaries and distributors in Russia, Brazil, China, and Poland provided illicit benefits to government officials in order to win business, including by paying distributors and other third parties linked to officials for fictitious “marketing” services, contributing to a charity run by a regional health official, and falsifying expense reports in order

to provide jewelry and other gifts to government doctors. The aims were largely the same as in the Pfizer case: to induce doctors to prescribe Lilly products and administrators to approve them for regulatory or reimbursement purposes.

Lilly paid over $29 million in penalties, disgorgement, and prejudgment interest and agreed to retain an independent consultant to review and make recommendations about its anticorruption compliance program.

2. Allianz

On December 17, 2012, German insurance company and former US issuer Allianz SE (Allianz) agreed to settle SEC allegations that it violated the FCPA’s books and records and internal controls provisions. The SEC alleged that from 2001 to 2008, PT Asuransi Allianz Utama Indonesia (Utama), a majority-owned joint venture of an Allianz subsidiary, and Asuransi Jasa Indonesia (Jasindo), an Indonesian SOE, paid over $650,000 in bribes to officials of unnamed Indonesian state-owned enterprises to obtain 295 insurance contracts for large government projects.

From 2001 through 2005, Utama management allegedly authorized bribes in the form of “overriding commissions,” which generally represented 5% to 25% of the insurance premiums, which were transferred to an Utama agent’s special purpose account for withdrawal and delivery to foreign officials. After a December 2005 whistleblower complaint and resultant audit, Allianz directed Utama management to close the special purpose account. Nevertheless, an Utama marketing manager continued to use the account to make improper payments until 2008. From 2005 through 2008, in addition to recording improper payments to the special purpose account, Utama disguised bribes as commissions booked to an unassociated agent’s account, and later withdrew the funds for cash payment to the official. It also paid bribes in the form of “reimbursements” to officials from intentionally inflated insurance premiums.

Allianz agreed to pay $12.4 million in disgorgement, prejudgment interest, and a civil penalty. The SEC noted Allianz’ cooperation with its investigation, and remedial measures including employment action against culpable individuals, new or enhanced FCPA compliance and accounting policies and procedures, and enhanced FCPA and global anti-corruption training and program. Though relatively unremarkable on its facts, the Allianz case highlights the risks companies face when operating in countries with substantial economic activity by state-owned enterprises, including when acting through joint ventures with other government enterprises.

3. NORDAM and BizJet

On March 14, 2012, Oklahoma-based aircraft maintenance, repair, and overhaul service (MRO) provider BizJet International Sales and Support, Inc. (BizJet) entered into a deferred prosecution agreement with the DoJ to settle one count of conspiracy to violate the FCPA’s anti-bribery provisions. \(^{72}\) BizJet’s parent, Lufthansa Technik, also entered into an NPA with the DOJ. According to the DPA, BizJet made improper payments to aviation officials of the Mexican Federal Police, the Mexican President’s Fleet, the air fleet of the Governor of the Mexican State of Sinaloa, and the Panama Aviation Authority to obtain more than $7 million in MRO service contracts. BizJet executives and managers paid bribes, which they called “commissions,” “incentives,” or “referral fees” to police officers, mechanics, and other aviation officials with decision-making authority to influence the award of such contracts.

After informing BizJet’s Board of Directors in a November 2005 meeting that such officials demanded $30,000 to $40,000 commissions in determining which companies would perform aircraft maintenance, BizJet began to pay referral fees to gain contracts. From 2006 to 2009, BizJet paid at least $550,000 to Mexican and Panamanian officials for assistance in securing government contracts. Some payments were made through a shell company owned by a BizJet sales manager. BizJet also allegedly gave expensive gifts, including a cellular telephone.

To settle the allegations, BizJet agreed to pay an $11.8 million criminal penalty. The DOJ noted that the thirty percent penalty reduction off the bottom of the fine range resulted largely from BizJet’s voluntary disclosure, extraordinary cooperation, and extensive remediation.

Not yet finished with Oklahoma MRO service providers, on July 6, 2012, the DOJ entered into a non-prosecution agreement with The NORDAM Group, Inc. (NORDAM) related to allegations that its Singaporean subsidiary NORDAM Singapore Pte Ltd. (NSPL) and marketing affiliate World Aviation Associates Pte Ltd. (WAAPL) paid as much as $1.5 million in bribes to state-owned or -controlled customers in order to obtain MRO contracts. \(^{73}\) Several US-based employees approved the bribes, known as “facilitator fees,” which were paid to officials NORDAM called “our friends inside.”

The payments initially took the form of direct transfers to officials’ bank accounts or deposits to WAAPL employees’ accounts, which were then withdrawn to pay officials in cash. Later, several WAAPL employees created sham entities and related representation agreements, and used commission payments from NORDAM to pay officials for assistance in securing contracts. In addition, NORDAM inflated certain customer invoices to offset the cost of bribes paid to those customers. All told, the bribery scheme netted NORDAM, NSPL, and WAAPL approximately $2.5 million in profits. In its settlement with the DOJ, NORDAM agreed to a $2 million penalty, reduced after a DOJ-retained consultant confirmed that a higher penalty would “substantially jeopardize” the company’s financial viability.

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4. Marubeni

On January 17, 2012, Japanese trading company Marubeni Corp. (Marubeni) entered into a settlement with the DOJ relating to allegations that Marubeni conspired to violate the FCPA’s anti-bribery provisions and aided and abetted a violation of the FCPA’s anti-bribery provisions by US company Kellogg, Brown & Root, Inc. (KBR) in connection with the Bonny Island bribery scheme, in which a consortium of four international oil and gas companies allegedly paid bribes to Nigerian government officials in exchange for $6 billion in engineering contracts. According to the DOJ, the consortium, comprised of Technip S.A., Snamprogetti Netherlands B.V., KBR, and JGC Corp., allegedly used agents, including Marubeni, to bribe officials of the executive branch of the Government of Nigeria, the Nigerian National Petroleum Corporation (NNPC), and Nigeria LNG Ltd. (NLNG).

The Nigerian government, through NNPC, owned 49% of NLNG, the government-created entity established to develop the Bonny Island Project and award required contracts. Despite NLNG’s majority-private ownership, the DOJ determined that the Nigerian government controlled NLNG through board members appointed by NNPC and the ability to block contract awards, making NLNG a government entity and instrumentality, and its employees government officials, under the FCPA. The 2012 Resource Guide reinforces the concept of majority privately-owned state instrumentalities, noting that although “an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares,” circumstances, such as in Marubeni, exist, in which will be deemed to control an entity despite minority ownership.

Marubeni agreed to pay a $54.6 million fine to settle the allegations, bringing the total fines in the case to date to $1.7 billion.

5. OPR 12-01 and Royal Family Members

On September 18, 2012, the DOJ issued Opinion Procedure Release (OPR) 12-01, which highlights that a royal family is not per se a “foreign official,” but instead is a fact-specific, case-by-case inquiry. In this OPR, the DOJ concluded that the royal family member in question was not a “foreign official” for purposes of the FCPA on the facts presented. While OPRs issued by the DOJ may be relied on only by the requestor and are not binding on any other agency, they provide useful insight into the DOJ’s reasoning and the factors it considers relevant.

The requestor sought to engage a consulting firm partly owned by the royal family member in connection with lobbying activities in the US relating to the embassy of the foreign country would result in enforcement action by the DOJ. In addition to the lobbying services, the consulting company would provide the requestor business and logistical support in the foreign country, including sponsoring the requestor and helping the requestor open a local office.

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and find additional business opportunities. The requestor represented that the royal family member held no current governmental position or duties, that he is a member of the royal family by tradition, not blood relation, and that his status bestows no privileges. He had no contact or association with the embassy or ambassador, though he was an acquaintance of the country’s Foreign Minister. There was no suggestion that paying the consultant would improperly influence officials. The proposed agreement contained representations by the consulting company that none of its members or principals was a foreign official, that it would abide by the FCPA and relevant anti-bribery laws, and that the rates paid would be based on a fair market rate.

In determining whether the royal family member is a government official as defined by the FCPA, the DOJ examined: (1) the “structure and distribution of power” of the foreign country’s government; (2) the royal family’s “current and historical legal status” and authorities; (3) the royal family member’s current and past government positions; (4) the mechanisms by which the royal family member could come to hold a government position of authority; (5) the likelihood of the royal family member gaining such a position; (6) the royal family member’s ability to affect government decision-making; and (7) “numerous other factors.” The DOJ also considered the steps taken by the requestor to comply with the FCPA and reduce the likelihood of a violation. Based on these factors, the DOJ concluded that the royal family member was not a government official, and stated it did not intend to take enforcement action based on the facts described by the requestor.

C. Obtaining and Retaining Business

While the Resource Guide did not offer new major insights on the interpretation of the business purpose element of the statute, 2012 settlements continued the recent trend of interpreting the business-purpose test broadly to include almost any bribe that can be shown to improve a company’s profitability, including winning government contracts, removing companies and their subsidiaries from government holds barring them from contract approval, and obtaining regulatory approvals. While instances of paying bribes to obtain government contracts, as in the Tyco case, clearly fit the business purpose test, other instances, such as Pfizer inducing government officials to grant necessary regulatory approvals so that a company’s product may be marketed, reflect the broad sweep of the statute’s “obtain or retain business” element.

1. Tyco International and Tyco Valves & Controls Middle East

In September 2012, the DOJ and SEC settled a significant FCPA enforcement action with Tyco International Ltd. (Tyco), a Switzerland-based maker of fire security products. Tyco’s subsidiary in the Middle East, Tyco Valves & Controls Middle East Inc. (TVC ME), also pleaded guilty to conspiracy to violate the FCPA. This enforcement action comes in the wake of Tyco’s $50 million settlement with the SEC for securities law violations in 2006, which related primarily to improper accounting practices and inaccurate financial reports. The DOJ alleged that TVC ME paid bribes to officials of government oil and gas companies, and their
subsidiaries, in Saudi Arabia, the UAE, and Iran in order to obtain and retain business. These bribes were paid in order to remove Tyco manufacturing plants from “blacklists” or “holds” created by Saudi Aramco (Aramco), a Saudi Arabian oil and gas company, to win specific bids, and/or to obtain specific product approval. According to the DOJ, TVC ME earned approximately $1.2 million in gross margin as a result of these payments.

Tyco agreed to pay $13.6 million in criminal penalties to the DOJ and $13 million in civil penalties, disgorgement and prejudgment interest to the SEC. The DOJ entered into a NPA with Tyco, citing the company’s timely, voluntary and complete disclosure; its cooperation, including a global internal investigation concerning bribery and related misconduct; and its extensive remediation.

2. Pfizer

As detailed above in Part VII.B.I, the DOJ and SEC reached a settlement with Pfizer for providing improper benefits to state-employed doctors, hospital administrators and other officials in multiple countries. In addition to schemes to increase doctors prescribing Pfizer drugs, Pfizer also used “consulting agreements” to conceal payments to a doctor who was a member of the Croatian government’s Registration Committee, in charge of registering and approving pharmaceutical products for sale in the country and for reimbursement by the national health insurance system. Pfizer personnel expressed confidence that, with this mechanism in place, their products would not meet regulatory obstacles, and, indeed, the products were successfully registered during the relevant period. As noted previously, Pfizer also made payments to receive required customs clearance certifications in Russia. In none of these instances did Pfizer provide anything of value in order to win business directly. Instead, the company paid to lay groundwork that would enable them to sell their products in the future or to improperly facilitate the consummation of existing sales.

D. Travel and Entertainment and Gifts

Enforcement actions in 2012 involving gifts, travel, and entertainment represent a continuation of the government’s focus on investigating and charging companies for excessive hospitality shown to foreign officials, consistent with advice in the Guide that lavish hospitality, or a pattern and practice of hospitality that otherwise evidences corrupt intent, will be the focus of enforcement efforts.

1. Pharmaceutical and Medical Device Cases

The pharmaceutical and medical device companies generally provided these benefits in the context of “marketing” and “training” arrangements aimed at doctors, and often through third parties. These cases illustrate the fine line between legitimate promotional and marketing

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expenses that fall within the FCPA’s affirmative defense and expenses that cross the line, whether due to amounts, frequency, or other circumstances reflecting an improper intent.

For instance, Biomet provided government doctors with a variety of perks, including personal travel and banquets. In one instance, Biomet’s distributor paid for a two-week visit to the UK, with the second week consisting of a “holiday.” In another, the company provided a trip to Spain, purportedly for training, but with a “substantial portion” spent on sightseeing and other entertainment.

Similarly, Eli Lilly employees in China submitted false expense reports and used the reimbursements to provide meals, jewelry, wine, visits to bath houses, card games, cosmetics, cigarettes, and other gifts and entertainment to government doctors. This conduct, while involving relatively modest amounts of money, was widespread throughout Eli Lilly’s subsidiary. The case highlights that, while enforcement authorities may be most focused on big-ticket gifts and entertainment, provision of smaller amounts through a pattern and practice suggesting corrupt intent can also be the basis of an enforcement action.

Pfizer had an innovative program of providing “bonuses” based on a percentage of the sales generated by a particular official. The bonuses took the form of international travel, purchases of equipment, free pharmaceutical products, and cash payments. Pfizer also offered points to doctors based on the number of Pfizer products they prescribed, which could be redeemed for gifts. Again, because the bonus and point systems reflected an improper intent to influence the doctors’ use of Pfizer products, they were deemed improper.

2. OPR 12-02

In OPR 12-02, the DOJ restated that it would not bring an enforcement action against an agency for hosting foreign government officials, where the contemplated trips and their associated expenses legitimately relate to “the promotion, demonstration, or explanation of [the requestors’] products or services,” as contemplated by the FCPA’s affirmative defense.\(^77\) Here, the requestors were 19 non-profit adoption agencies seeking to host 18 government officials from a foreign country during visits to the United States. The requestors’ stated purpose of the trip was to allow government officials to learn more about the requestors’ work, and the trip would consist of staff member interviews, inspection of files, and meetings with adoptive families.

The DOJ concluded that the requestors’ proposed expenses fell within the affirmative defense, provided for by the FCPA, covering “reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official … directly related to … the promotion, demonstration, or explanation of products or services …”\(^78\) In its analysis, the DOJ noted that the proposed provision of business class airfare for the higher ranking officials


\(^78\) 15 USC. § 78dd-2(c)(2)(A).
was permitted by the foreign country, and that the description of activities and proposed itineraries were consistent with the purpose of the trip. The DOJ also noted that the proposed travel sponsorship involved no side trips, per diems, or issues relating to accompanying family members. This OPR largely mirrors guidance provided in three previous OPRs, but also provided welcome confirmation, later echoed in the Guide, that providing business-class travel for officials may be appropriate under certain circumstances.

E. Charitable Contributions

The cases involving charitable contributions in 2012 did not set any new precedent, and appear to rehash issues from 2004 settlements; however, the Guide lays out useful advice to help companies avoid FCPA liability when considering a charitable donation.

1. Eli Lilly

Eli Lilly contributed $39,000 to the Chudow Castle foundation established and operated by the director of a regional government health authority in Poland with influence over government purchases of pharmaceutical products. Lilly made the payments to the foundation while it was negotiating with the authority over its purchase of a Lilly drug. Interestingly, this was the same charity that received a donation from Schering-Plough Corporation, resulting in an enforcement action against that company in 2004. By holding Lilly liable, the government demonstrated that it will continue to pursue even small contributions to bona fide charities, if circumstances suggest the donation will diverted to the personal benefit of a foreign official or is otherwise made for the purpose of obtaining an improper business advantage.

2. Wynn Litigation

Another development in 2012 implicating the FCPA risk of charitable donations is the SEC investigation into Wynn Resorts Ltd. (Wynn), stemming from a set of lawsuits between Wynn and its estranged director and former shareholder Kazuo Okada. Okada has alleged that a May 2011 Wynn donation of $135 million to the University of Macau Development Foundation (UMDF) was made with corrupt intent, as the final payment of the donation, scheduled to be made in 2022, coincides with the expiration of Wynn’s Macau gaming concession. In January 2012, Mr. Okada sued Wynn, seeking to compel the company to produce information related to the donation. Soon thereafter, Wynn disclosed that it had received a request from the SEC in connection with a formal inquiry for the company to preserve information related to the donation. However, in a positive development for Wynn, the Nevada Gaming Control Board determined in February 2013 that the allegations regarding the University of Macau donation

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81 Id. (citing Wynn Resorts Ltd. 8-k filing).
were unfounded, and concluded its investigation.\textsuperscript{82} As discussed below, litigation remains ongoing, and there have been no further public disclosures regarding the status of any SEC investigation.

3. \textbf{Guide}

The Guide also provides useful points regarding charitable donations, including a checklist of questions for companies to consider when making charitable donations.\textsuperscript{83} Pointing to the \textit{Schering-Plough} case, involving the same charity as in \textit{Eli Lilly}, the Guide highlights internal documents at the company referring to the payments as “dues” that were required in order to obtain assistance from the official connected to the charity. The Guide also highlights the fact that the donations were in violation of the company’s own internal policy that only allowed contributions to healthcare institutions. The Guide underlines the importance of due diligence regarding the government connections of the recipient’s personnel, ongoing monitoring of the charity’s use of the funds, earmarking them for specific purposes, and insisting on anticorruption certifications by the recipient that the funds will not be misused.

\section*{F. Distributors, Subcontractors, and Other Third Parties}

\subsection*{1. Pharmaceutical and Medical Device Cases}

Many of the pharmaceutical and medical device cases involved distributors, highlighting that the use of distributors, like any third party, can have attendant anticorruption risks.

\begin{itemize}
  \item Pfizer, for example, granted a distributorship to a Kazakh company believed to be affiliated with senior Kazakh government officials in order to gain influence over the officials. In Russia, Pfizer commonly structured four-party transactions to funnel money to government officials, involving the company, the official, and their respective intermediaries. It also used a Russian distributor to identify companies with neutral names to which it could make payments that were ultimately for the benefit of government doctors. In Croatia, Pfizer concealed payments to a government doctor, who was in charge of registering and approving pharmaceutical products for sale in the country and for reimbursement by the national health insurance system, by purporting to hire him as a consultant.

  \item Eli Lilly also made extensive use of third-party arrangements to carry out illicit activities, including granting unusually large discounts of approximately 18\% to a Brazilian distributor, rather than the average 10\%, to enable the distributor to use the difference to pay government officials. In Russia, Lilly paid millions of dollars to off-shore entities in order to funnel money
\end{itemize}


\textsuperscript{83} FCPA Resource Guide at 16. These include: (1) “What is the purpose of the payment?” (2) “Is the payment consistent with the company’s internal guidelines on charitable giving?” (3) “Is the payment at the request of the foreign official?” (4) “Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?”
to government officials. Purportedly, the payments were for “services,” but the entities rarely provided the contracted-for services, including “immediate customs clearance.” In fact, the services identified in the contract were often already being performed by a distributor, an international shipping handler or Lilly itself. The offshore entities were often selected by the government official involved or by the distributor appointed by the government, and Lilly had little information about them other than their addresses and bank accounts, which were outside of Russia.

Smith & Nephew also made use of intermediaries. The company paid two offshore shell companies controlled by a Greek distributor a percentage of the sales made by the distributor. This arrangement with the shell entities was purportedly for “marketing,” but they performed no services in exchange for the payments.

2. **Oracle**

In August 2012, Oracle Corporation (Oracle), the California-based seller of enterprise solutions software, settled SEC charges that it violated the FCPA’s books and records and internal control provisions. Between 2005 and 2007, the company’s Indian subsidiary, Oracle India Private Ltd. (Oracle India), sold products and services to end users in the Indian government at inflated costs, and “parked” excess funds outside Oracle’s books and records. While Oracle India negotiated sales contracts directly with various customers within the Indian government, the customers placed their purchase orders through local distributors. Oracle India inflated the margin between Oracle’s sale price to the distributor and the price at which the product sold to the customer, and funneled these margins into a side fund. Oracle India’s local distributors then paid third parties out of these side funds, allegedly for marketing and development expenses. However, many of these third parties were not on Oracle’s approved vendor list; some, in fact, did not exist at all.

According to the SEC’s complaint, this use of secret side funds, “created a risk that they potentially could be used for illicit means, such as bribery or embezzlement.” However, the DOJ did not announce any charges against Oracle, presumably because the government did not find sufficient evidence to support criminal anti-bribery or accounting charges against the parent company. Oracle agreed to pay a $2 million civil penalty to the SEC.

3. **Data Systems & Solutions**

In June 2012, Data Systems & Solutions LLC (DS&S) settled criminal FCPA charges with the DOJ for payments made to government employees of a Lithuanian state-owned nuclear power plant. DS&S, which is now known as Optimized Systems and Solutions LLC and is a

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subsidiary of UK-based Rolls-Royce plc., provided design, installation, maintenance and other services at nuclear and fossil fuel power plants.\textsuperscript{85}

From 1999 to 2004, the Ignalina Nuclear Power Plant (INPP) awarded DS&S multiple instrumentation and controls contracts for installations and maintenance at its plant. Beginning in 1999, DS&S paid Lithuanian government officials bribes in order to obtain these contracts, funneling these payments through subcontractors who provided technology and services in the power generation sector. These subcontractors, who were located both in the United States and abroad, sometimes provided DS&S with legitimate services and other times acted solely to disguise payments that DS&S funneled to government officials at INPP. DS&S typically would enter into fictitious contract modifications with these subcontractors, and use these “scopes of work” or “statements of work” to justify additional payments under the contract that the subcontractors then funneled to the foreign government officials. In addition to funding payments to government officials through overpayments in contracts, DS&S also spent thousands of dollars on gifts, entertainment and vacations for INPP officials.

DS&S agreed to pay a criminal penalty of $8.82 million and entered into a two-year deferred prosecution agreement to resolve the FCPA offenses. According to the DOJ, DS&S provided “extraordinary cooperation,” including an “extensive, thorough and swift internal investigation.” The company terminated all the officers and employees responsible for and involved in the corrupt payments, and implemented a comprehensive compliance program for its agents and subcontractors.

G. Books and Records / Internal Controls

As in previous years, the DOJ and SEC brought several enforcement actions in which they alleged violations of the FCPA’s books and records and internal controls provisions. Allegations of using unofficial accounts to make improper payments, and mischaracterizing payments in corporate records, remain common. In addition, the DOJ and SEC allegations of insufficient internal controls underscore the need for effective compliance programs.

1. Pharmaceutical and Medical Device Companies

The healthcare cases involved fairly typical violations of the books and records and internal controls provisions of the FCPA, such as intentionally vague accounting for illicit payments, insufficient auditing and oversight of payments to third parties, and failure to report or remediate misconduct once discovered.

The settlement against Eli Lilly detailed significant accounting and internal controls problems. In Brazil, for example, the company marked payments in its records as “discounts” for distributors when they were in fact used to bribe government officials. The SEC accused Lilly of taking a “check the box” approach to third-party due diligence in Russia, relying on “paper-thin”

assurances of reliability from employees, distributors, or customers and accepting paperwork at face value. Even after two business reviews identified “low” business ethics and risks regarding the use of third parties in Russia, it allowed the practices to continue for several years. For example, it failed to terminate marketing agreements that it knew were creating “sales potential” with government customers, even though it did not appear that any services were being performed under those agreements. The company also recorded its payments to that entity as compensation for “services” even though it performed none. Lilly’s audit department had no procedures specifically designed to assess FCPA risks, so transactions with offshore and government-affiliated entities did not receive specialized review.

In the Orthofix case, the DOJ highlighted serious failures of compliance and internal controls. As discussed in more detail in Part B.1, above, most of the illicit conduct involved Orthofix’s Mexican subsidiary, Promeca. Prior to purchasing Promeca, despite the fact that it was operating in a high-risk market, Orthofix failed to engage in serious anti-corruption due diligence. After the acquisition, Orthofix failed to translate its anti-corruption policy into Spanish and never implemented it at Promeca. Orthofix also failed to train many of its own personnel on corruption issues and for years failed to train Promeca personnel. Promeca recorded illicit payments in its books and records as “promotional expenses.” Orthofix noted that Promeca was significantly over-budget in high-risk areas like promotion and training, but took no investigative or further action because it viewed the budgets merely as a tool of financial control, not of legal compliance. Similarly, its audits of Promeca consisted only of the standard audit required by Mexican law and did not contain any anti-corruption review.

Even after Orthofix executives learned about illicit conduct, they often failed to report it to compliance personnel. For example, one executive failed to file a report after hearing a consultant say that the payment of “chocolates,” meaning kickbacks, to customers was a common feature of the Mexican medical device market, and that chocolates are often disguised in books and records as promotional expenses. Ultimately, Orthofix did report the misconduct to the SEC and take corrective action, including firing the Promeca executives who orchestrated the scheme and implementing an enhanced compliance program.

Pfizer also suffered from failures in accounting and internal controls, until it too corrected course and began an extensive internal investigation, reported the results to the government and implemented robust compliance procedures and remedial actions. For example, the company did not require any accounting of whether government hospitals for whose benefit it made donations actually used the funds, or whether they were instead diverted for personal use by government officials. The company also inaccurately booked improper payments to doctors as “conference support.”

2. Tyco

In addition to the conduct of TVC ME detailed above in VII.C, the 2012 enforcement actions against Tyco International Ltd. allege that several of Tyco’s other subsidiaries violated the books and records, internal controls, and anti-bribery provisions of the FCPA. Tyco subsidiaries in China, Germany, France, and Malaysia reported fake commissions to mask
inflated contract amounts so that the subsidiaries could use these profits to pay government officials employed by the contracting government agencies or state owned enterprises. Several of Tyco’s other international subsidiaries also kept inaccurate books and records including: (1) a UK subsidiary, which failed to accurately reflect funds used for the entertainment of government officials; (2) a Saudi subsidiary, which used a “control account” to make payments to the Saudi government; (3) a Thai subsidiary, which mischaracterized the work, if any, that was performed by consultants on its accounting records; (4) a Polish subsidiary, which used falsified or provided incomplete or inaccurate “service contracts” to pay additional expenses to public healthcare professionals; (5) a Chinese subsidiary, which submitted false itineraries and documentation for travel expenses in connection with medical conferences attended by publicly employed Chinese doctors. Tyco’s subsidiaries booked the majority of its illegal payments as “commission” payments to third parties and intermediaries; other miscellaneous payments were booked as “renovation work,” “promotional expenses,” and “sales development” expenses.

3. Allianz

As described in Part VII.B.2 above, in December 2012 Allianz SE settled books and records and internal controls charges with the SEC in connection with payments made to employees of Indonesian state-owned entities in exchange for insurance contracts from 2001 to 2008. Although Allianz consolidated its Indonesian joint venture Utama in its books, Utama’s accounting records were maintained in Indonesia and Allianz was unable to access the records. As a result, Allianz did not identify movement of funds to a special purpose account maintained in the name of the Indonesian agent that ultimately were paid as “overriding commissions” to SOE employees. Moreover, inadequate controls over the commission payment request process allowed funds to be moved into the special purpose account despite the absence of supporting documentation. Indeed, the special purpose account continued to be used after a 2005 whistleblower complaint and subsequent management instruction to close the account. And, although an audit identified two internal accounts related to the agent, one used for “various” purposes, Allianz did not investigate the nature of the accounts, or the identities of persons paid from them. After 2005, bribes also took the form of commissions booked to an unassociated agent and later withdrawn for payment to the official; and “reimbursements” to officials from intentionally inflated insurance premiums, which were paid from an unallocated account over which Allianz had no control.

4. Oracle

As detailed above in Part F of this section, the SEC charged Oracle with books and records and internal controls violations for structuring transactions with India’s government so that the Company’s Indian distributors could hold approximately $2.2 million of proceeds from sales in unauthorized side funds. Oracle India employees used these unrecorded side funds, which the SEC alleged should have been recorded as assets in the company’s books, to pay unauthorized third parties, including “vendors” not providing any services. These side funds were not recorded on the parent company’s books, and were improperly “parked” on the records of Oracle India’s distributors.
H. Successor Liability

In the Guide, the DOJ and SEC for the first time explicitly defined their approach to successor liability under the FCPA. Not surprisingly, they confirmed that traditional principles of parent-subsidiary liability apply equally in the FCPA context. A parent may be directly liable for the acts of its subsidiary if it had the requisite level of knowledge and involvement. But a parent may also be indirectly liable, under the theories of agency and respondeat superior, if it exercised sufficient control over the subsidiary. The Guide also affirms that the government will hold acquiring companies responsible for the past misconduct of their acquisition targets and reminds the compliance community of the importance of pre-acquisition due diligence, post-closing remediation and training, voluntary disclosure and cooperation with government investigations, if there is to be any chance of avoiding liability.

1. Pfizer

The case against Pfizer, discussed in more detail in Part B.1, demonstrates that, with robust due diligence and compliance efforts, it is possible for companies to avoid successor liability for the past acts of an acquisition target. Pfizer acquired Wyeth in late 2009 and the SEC alleged that Wyeth’s misconduct began in 2005. The acquisition took place while Pfizer was under investigation by the government for FCPA violations; as such, Pfizer conducted due diligence into Wyeth’s activities across the world, disclosed the results of its review to the SEC within 180 days of closing, cooperated fully with the SEC investigation into Wyeth’s conduct and promptly integrated Wyeth into its compliance program. The DOJ acknowledged Pfizer’s exemplary efforts and declined to charge it for Wyeth’s pre-acquisition conduct.

By contrast, in a clear case of successor liability, Pfizer was held responsible for illicit payments beginning in 1997 by Pharmacia & Upjohn, which Pfizer acquired in 2003. Pfizer’s DOJ and SEC settlements make no reference to any due diligence, investigation, compliance, or remediation efforts in connection with the Pharmacia acquisition, and the government appears to have held Pfizer fully responsible for Pharmacia’s pre-acquisition misconduct. These paired instances of pre-acquisition misconduct by the target company, one leading to liability for the acquiring company and the other not, were the perfect opportunity for the government to demonstrate its policy on FCPA liability in mergers and acquisitions.

2. Orthofix

The case against Orthofix, discussed generally in more detail in Part B.1, is an example of a company being held fully responsible for the acts of an acquired subsidiary, because of inadequate due diligence and compliance efforts surrounding the acquisition and continued failures in oversight and compliance after the acquisition, as discussed in more detail in Part G.1. Prior to the acquisition, Orthofix did not conduct serious anti-corruption due diligence into Promeca, the target, and, after the transaction, it failed to translate its anti-corruption policy into Spanish or to implement it at Promeca. For years, Promeca employees engaged in illicit conduct with the knowledge of an Orthofix executive, and Orthofix’s corporate procedures for uncovering violations at its subsidiaries were clearly insufficient. In light of these failings on the
part of Orthofix, the company was held liable for all of Promeca’s conduct, both pre- and post-acquisition.

VII. Whistleblower Activity

A. 2012 Annual Report

2012 represented the first full year since the SEC issued its Final Rule implementing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), and also saw the first award under the whistleblower program. The long-term impact of the whistleblower provisions on FCPA enforcement actions remains unclear.

The SEC published its first full annual report, indicating it received 3,001 whistleblower tips, complaints, and referrals, or approximately eight reports per day. One hundred fifteen (or 3.8%) of these tips were identified by the reporter as FCPA-related, a similar percentage as the previous year. One hundred forty-three of the tips resulted in enforcement actions that potentially qualify as eligible for a whistleblower award. Of those, seven (or 4.9%) pertained to allegations that were identified as FCPA-related. The SEC received whistleblower reports from 49 countries, totaling 324 non-US-originated reports, with the greatest number of reports originating from the United Kingdom, Canada, India, China, and Australia.

Kara Brockmeyer, Chief of the SEC’s FCPA unit, stated at a conference in November 2012 that the SEC is receiving a steady stream of complaints, often from employees who first tried to report their concerns internally. She noted that cases take time to investigate, however, perhaps portending more whistleblower awards in the future.

B. Recent Whistleblower Awards

The SEC made its first award under the whistleblower program in 2012. The first whistleblower award arose from a “multi-million dollar fraud,” it did not involve an FCPA violation. On August 21, 2012, a whistleblower received an award of nearly $50,000, or 30% of the amount collected in the enforcement action (the maximum collectible percentage by statute). The SEC recommended awarding the maximum compensation in part because the whistleblower provided quality information, including specific documents and names. A second whistleblower was not awarded a share of the recovery, because his information “did not lead to or significantly contribute to” the enforcement action. The SEC has not yet announced any

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89 Id. Although the SEC’s recovery was only $150,000, the case was bounty-eligible because the court ordered the Defendants to pay more than a million dollars in penalties.
90 Id.
FCPA whistleblower awards, but a demonstrated willingness to award the maximum reward may incentivize future FCPA tipsters, particularly given the large potential penalties in FCPA cases.

Apart from Dodd-Frank whistleblower bounties, in September 2012, the Internal Revenue Service announced an award of $104 million to be paid to Bradley Birkenfeld for reporting information regarding tax evasion by UBS. While this award was not related to Dodd-Frank’s provisions, the magnitude of the award may draw attention to the potential recovery available through similar whistleblower award programs.

C. Scope of Anti-Retaliation Protections Overseas

In addition to the bounty provision, Dodd-Frank’s provisions include anti-retaliation provisions for whistleblowers, which expanded on existing protections under the Sarbanes-Oxley Act (SOX) in important ways. Unlike the SOX protections, the new protections allow for a private right of action and also allow for enforcement by the SEC. Dodd-Frank’s provisions suggest that it covers personnel of foreign subsidiaries – who are often on the front line of FCPA issues. In the last year, however, the application of the anti-retaliation provisions of Dodd-Frank to foreign employees has been called into question.

There were several notable cases in 2012 analyzing the anti-retaliation provisions of Dodd-Frank in the FCPA context. One case did not reach the question of extraterritoriality, holding that the anti-retaliation provisions did not apply because the company in question did not qualify as an “issuer” subject to SEC regulation.91 Another federal court analyzed the extraterritorial application of the anti-retaliation provisions in the case of Asadi v. G.E. Energy (USA), LLC,92 holding that the Dodd-Frank anti-retaliation provisions did not protect the plaintiff’s whistleblowing activity because the alleged whistleblowing activity occurred entirely abroad. The court found persuasive a Department of Labor Administrative Review Board en banc decision holding that the anti-retaliation provisions of Sarbanes Oxley do not extend extraterritorially.93 Both cases have been appealed to the Fifth Circuit. If other courts follow the reasoning of Asadi, the result could be that foreign nationals may be eligible to receive bounties for making reports of violations to the SEC, but the anti-retaliation provisions of Dodd-Frank’s whistleblowing protections would not apply to retaliation abroad.

In January 2013 Meng-Lin Liu, a former compliance officer for Siemens AG in China, filed a Dodd-Frank whistleblower retaliation complaint in federal court, alleging that Siemens fired him after he tried to expose a kickback scheme involving inflated medical equipment sales

91 Nollner v. Southern Baptist Convention, Inc., 2012 WL 1108923 (M.D. Tenn. Apr. 3, 2012) (A terminated employee alleged that the Southern Baptist Convention, Inc. and two affiliates fired him after he reported to his superiors misconduct by these entities and their agents in connection with a construction project in India.).
92 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).
to third parties, which then resold the equipment to SOEs in China.\textsuperscript{94} Mr. Liu’s complaint alleges that executives ignored due diligence policies and that there was a “high probability” that the inflated payment amounts were used as bribes to officials. This case will be interesting to watch in 2013, given the confluence of the whistleblower statute with the company involved in the largest-ever FCPA enforcement action.

\textbf{D. Other Notable Whistleblower Enforcement Actions}

As noted previously, the Allianz settlement including allegations that Allianz learned of the improper payments from two internal whistleblower complaints made in 2005 and 2009. In 2010, the SEC opened an investigation after receiving “an anonymous complaint of possible FCPA violations.” The complaint was made before Dodd-Frank’s passage on July 22, 2010; however, the Order’s detailed information about the anonymous tip received by the SEC may be intended to encourage future whistleblowers to report FCPA violations.\textsuperscript{95}

In October 2012, Atlanta-based NCR Corp., which makes ATM machines and other kiosks, revealed that it has received a subpoena from the SEC following whistleblower allegations disclosed in August regarding potential FCPA violations in China, the Middle East, and Africa.\textsuperscript{96}

\textbf{VIII. Collateral Litigation}

\textbf{A. Shareholder Suits}

Apart from the significant costs associated with FCPA investigations and enforcement actions against a company, one of the many collateral consequences of corporate corruption is shareholder suits against the company or its officers and directors. While individuals have no standing to sue under the FCPA directly, shareholders can claim that a board of directors breached its fiduciary duty by not taking adequate steps to prevent FCPA violations. In several FCPA-related shareholder suits, however, plaintiffs have hit roadblocks when they failed to follow required or available pre-trial procedures. In particular, courts dismissed several shareholder suits because plaintiffs failed to make pre-suit demands on the board or to adequately plead demand futility.\textsuperscript{97} Wal-Mart also faced collateral litigation in 2012, and plaintiffs also made pre-litigation missteps. In a Delaware derivative litigation, plaintiffs accused certain Wal-Mart directors and officers of breach of duty in connection with the

company’s alleged improper payments in Mexico in connection with its expansion in that country. On July 16, 2012, the Delaware Court of Chancery criticized two of the plaintiffs for relying on public media reports to support their claims, instead of first making a books and records request as allowed under the Delaware statutes. The derivative shareholder suit against Wynn Resorts, Ltd., which followed corruption allegations from estranged Wynn Resorts director, Kazuo Okada, was dismissed on February 1, 2013, because the complaint did not sufficiently allege that Wynn Resorts knew that the alleged corrupt act (a donation to the University of Macau) was improper.  

B. Ruehlen Document Request  

As noted previously, James J. Ruehlen, a director of Noble Corp.’s Nigerian subsidiary, faces SEC allegations that he violated the FCPA by bribing Nigerian customs officials to make it falsely appear, through fraudulent paperwork, that oil rigs in Nigeria had been exported and re-imported, as required to renew temporary import permits. In October 2012, Mr. Ruehlen’s attorneys requested the SEC produce documents related to several other Panalpina-related investigations against companies other than Noble Corp. Mr. Ruehlen argued that the documents from the 10 other investigations were relevant to the application of the facilitation payments exception in his case. The request would have resulted in the production about 10.5 million pages of documents, however, and several of the companies holding the documents challenged Mr. Ruehlen’s motion to compel on the basis that the documents were not relevant to Mr. Ruehlen’s defenses, would require production of commercially sensitive and confidential documents to a competitor, and would be excessively burdensome to produce. Mr. Ruehlen’s lawyers withdrew their document request in November 2012.  

C. Offensive Litigation  

1. Wynn v. Okada  

The allegations regarding Wynn’s charitable donations, discussed previously in section VII.E.2, are only some of the accusations flying between Steve Wynn and Wynn’s estranged director Kazuo Okada. Following Okada’s claims regarding the donation, in February 2012, Wynn accused Okada in a Nevada state court of violating the FCPA by bribing Philippine gaming regulators with $110,000 in cash and gifts. Wynn Resorts then forcibly redeemed Okada’s 20% stake in the company, following Okada’s unsuccessful motion to dismiss Wynn’s claims against him and his companies. Okada and his entities counterclaimed in March 2012, stating that Steve Wynn and his general counsel were guilty of racketeering and that Wynn

99 See Sections VII.E.2 supra and C.1 infra.
fraudulently obtained Okada’s signature on several occasions in order to transfer his shares in the company. Wynn now seeks, through a February 22, 2013 shareholder vote, to remove Okada from its board on the basis that he is unfit to serve due to, among other things, alleged FCPA violations. In response, Okada requested injunctive relief in Nevada federal court to prevent the proposed removal, again claiming that Wynn’s Macau donation was “highly suspicious and apparently improper.” While the Nevada Gaming Control Board concluded that allegations around the donation were unfounded, the parties’ allegations have attracted the attention of the SEC as well as Philippine authorities, so what may have begun as an internal dispute now has the potential to create much larger problems for one or both parties.

2. Alba v. Alcoa

Like Okada, other private plaintiffs have found the Racketeer Influenced and Corrupt Organizations (RICO) Act to be a useful vehicle for bringing litigation premised on FCPA violations. For instance, in 2008, Aluminium Bahrain B.S.C. (Alba), an Alcoa Inc. (Alcoa) customer, sued Alcoa, an Alcoa subsidiary, and Canadian businessman Victor Dahdaleh under RICO, alleging that the defendants engaged in corrupt activities in Bahrain to secure long-term contracts and pricing advantages for Alcoa’s raw materials sales. In October 2012, without admitting any liability, Alcoa agreed to make an $85 million cash payment to Alba. According to Alcoa’s most recent quarterly report, the DOJ and SEC continue their investigation into the Alcoa conduct cited in the civil lawsuit.

IX. UK Developments

2012 saw significant developments on a number of fronts in the UK’s approach to combating foreign bribery. Serious Fraud Office (SFO) Director Richard Alderman, the principal architect of the SFO’s efforts to construct an enforcement regime incorporating elements of the US system – such as leniency for self-reporting companies and negotiated settlements – left the agency at the end of April. His replacement, David Green QC, appears to have adopted a different approach to enforcement, relying less on settlements and more on traditional prosecutions. As discussed in more detail in our October 15, 2012 International Law

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Advisory, in October 2012 the SFO removed from its website the Alderman-era guidance document intended to create an incentive system for companies to self-report foreign bribery issues by offering the prospect of leniency in a case’s ultimate resolution. In its place, the SFO announced that its new approach to foreign bribery enforcement would not provide special consideration for self-reporting companies above and beyond that specified in existing guidance for prosecutors and as mandated in statute by the UK Bribery Act 2010 (Bribery Act).

The new policy position also revoked Director Alderman’s prior statements regarding the SFO’s treatment of facilitating payments by reiterating that they are unlawful under UK law, and noted that the SFO did not intend to bring enforcement actions against companies providing bona fide hospitality and entertainment to clients and customers. Overall, the new guidance signals an SFO focused on deploying its resources to prosecute major cases of grand corruption, and away from smaller cases with less public impact.

A. 2012 Enforcement

1. Enforcement Against Companies

The new policy direction notwithstanding, the UK saw in 2012 another year of active enforcement. Although there was no foreign bribery-related prosecution under the Bribery Act, which came into effect on July 1, 2011, both authorities responsible for enforcing the UK’s foreign bribery laws were active under pre-Bribery Act legislation.

The SFO (which enforces the Bribery Act in England and Wales, and Northern Ireland) announced in July 2012 that it had agreed a settlement with Oxford Publishing Ltd., a subsidiary of the Oxford University Press (OUP), which had self-reported to the SFO. The settlement resulted in a civil recovery order of approximately £1.9 million in profits the OUP had allegedly improperly derived from textbook sales by its subsidiaries in Tanzania and Kenya; the OUP also agreed to a compliance monitor.

The SFO also announced a civil recovery order in January 2012 with Mabey Engineering (Holdings) Ltd., the parent company of Mabey and Johnson Ltd., the first company the SFO successfully prosecuted for foreign bribery-related conduct. The SFO announced that it had recovered £130,000 in dividends paid out to Mabey & Johnson directors that had been derived from unlawfully obtained contracts relating to Iraq, marking the first time the SFO has recovered dividends representing the proceeds of corruptly-derived corporate profits.

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112 Oxford also reached a separate settlement with the World Bank.
In Scotland, the Crown Office (which is responsible for enforcement of the UK’s foreign bribery laws in that jurisdiction) announced on November 23, 2012 that it had entered into a £5.6 million settlement with Abbott Group Ltd., an Aberdeen-based oil and gas driller. The civil recovery resulted from “corrupt payments made in connection with a contract entered into by one of its overseas subsidiaries,” apparently relating to an inquiry by a foreign tax authority that had prompted an internal investigation at Abbott. This settlement marks the first enforcement of UK foreign bribery laws by the Scottish Crown Office, and underscores that authority’s independence from the SFO: the Crown Office instituted its own self-reporting-based leniency program when the UK Bribery Act came into force, and unlike the SFO, has extended that program through June 2013.

2. Enforcement Against Individuals

The UK authorities were more active in 2012 prosecuting individuals, although still under pre-Bribery Act legislation. The SFO secured convictions of four individuals who were found guilty of taking corrupt payments in return for passing sensitive and proprietary commercial information regarding engineering projects in Russia, Iran, Qatar, Singapore, and Abu Dhabi.

The SFO also secured convictions of former Innospec Ltd. executives Paul Jennings and David Turner (who have also settled with the SEC and DOJ in connection with Innospec’s FCPA-related resolutions). A further four additional individuals await trials under pre-Bribery Act legislation in connection with their involvement in an alleged scheme to bribe Nigerian tax officials to evade Nigerian employment taxes, while former Innospec executives Dennis Kerrison and Miltiades Papchristos have pleaded not guilty to charges of corruption in connection with allegations in Indonesia.

In another case spinning off from an FCPA-related matter, former Alba CEO Bruce Hall and Alcoa sales agent Victor Dahdaleh also await trial in connection with their involvement in an alleged scheme to channel bribes from Alcoa, a US-based aluminum manufacturer, through Dahdaleh to Alba (the state aluminum company of Bahrain) officials.

Additionally, following a widely reported bribery and phone hacking scandal involving the Rupert Murdoch media empire, in November 2012, the Crown Prosecution Services charged three News Corp executives with 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. The charges have spurred speculation as to whether charges by the DOJ, SEC, and SFO against News Corp. will follow in 2013.

B. British Crown Dependencies and Overseas Territories

The UK has been subject to criticism for some time for its failure to extend the Bribery Act to its Crown Dependencies and Overseas Territories, many of which are important offshore
Developments in 2012 may have begun to address those concerns. The Isle of Man’s own Bribery Bill, modeled closely on the Bribery Act, received its first reading in the Manx parliament in December 2012. In the Channel Islands, Guernsey published a new chapter of bribery and corruption in its Handbook for Financial Services Business. That chapter is similar to that which firms that are regulated in the UK by the Financial Services Authority (FSA) must implement in 2013 to reduce the risks of bribery and corruption under applicable FSA rules.

One British Overseas Territory, however – the Turks & Caicos Islands (TCI) – has recently acted to enforce its own local anti-bribery laws in a case of transnational corruption. In a case that appears to be the first of its kind, the TCI government entered into a $12 million settlement with Jamaica-based Sandals Resorts in connection with bribes paid to former TCI government officials for preferential treatment in land-development transactions. This and contemporaneous settlements are the latest developments in the long-running probe into public corruption in the TCI government which resulted in direct suspension of the Islands’ legislature and the imposition of direct colonial rule from London in 2009. Of particular note is the reported assistance the TCI authorities received from the UK, US, and other governments in gathering evidence – another example of the increased cooperation across jurisdictions in investigating and prosecuting foreign bribery cases.

C. Regulatory and Legal Developments

1. Financial Services Authority

For its part, the FSA released in March 2012 the results of its review of 15 investment banks’ anti-corruption controls. The FSA found that many of the firms reviewed did not have adequate controls systems in place, and that its review was likely to result in enforcement actions against at least some of the firms subject to the review. The FSA also began a similar review in December in the asset management industry, for which a final report is due later this year. These reviews are expected to result in revisions to the FSA’s regulatory guidance on financial crime.

2. Deferred Prosecution Agreements

The UK Ministry of Justice published its consultation paper on the institution of Deferred Prosecution Agreements in October 2012, and has introduced a bill in Parliament to make them available in England and Wales for certain types of offenses, including violations of Sections 1, 2, 6 and 7 of the Bribery Act. Although the DOJ, and more recently the SEC, have made use of DPAs in FCPA settlements, the DPAs called for in the new legislation would differ substantially in the amount of judicial oversight that the process would receive, the much earlier point in an enforcement action that the courts would become involved, and increased scrutiny by the courts of when, if at all, a breach of the DPA had occurred. Passage of this legislation, which may

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114 The Crown Dependencies, self-governing possessions of the British Crown, are the Isle of Man, Jersey and Guernsey. There are 14 overseas territories, including the Cayman Islands, Bermuda, British Virgin Islands, Gibraltar and the Turks and Caicos Islands.
occur in 2013, would be a significant development in UK enforcement, aligning it more closely with the US approach and facilitating resolution of multi-jurisdictional cases.

X. **Other Non-US Enforcement**

In addition to the US and UK, countries around the world have increased anti-corruption efforts, including increased enforcement, legislative, and regulatory activity.

A. **Australia**

In October 2012, the OECD raised serious concerns with Australia’s “extremely low” enforcement of its foreign bribery laws. Australia prosecuted only one case out of 28 reported investigations since 1999, when Australia joined the OECD Anti-Bribery Convention. OECD opined that cases in Australia may have been “closed prematurely,” and recommended that Australia “vigorously pursue foreign bribery allegations.” Perhaps in response to this criticism, in January 2013, the Australian Federal Police reopened an investigation into OZ Minerals for allegedly bribing foreign officials in connection with OZ Minerals’ gold-mining operations in Cambodia.\(^{115}\) Separately, the Australian Federal Police is also investigating Cochlear, an Australian biomedical company, including whether its Swiss subsidiary and a local distributor in Portugal bribed Portuguese officials to influence a public tender for hospital medical supplies in 2004.\(^{116}\)

B. **Asia**

1. **China**

On December 26, 2012 the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) issued the Interpretation on Several Issues Concerning Specific Application of Laws in Handling Criminal Cases of Bribery (the Interpretation), which became effective on January 1, 2013.\(^{117}\) The Interpretation clarifies the standards for the offense of “offering bribes to individual state functionaries” under Article 389 of the PRC Criminal Code, and states that bribers, including both individuals and entities, are eligible for mitigation or waiver of punishment if they voluntarily confess prior to prosecution. The Interpretation enumerates circumstances, such as the amount of the offered payment, number of persons paid, or type of official targeted, that would indicate an offense is “serious” or “especially serious,” and may warrant enhanced penalties, up to life imprisonment. The Interpretation does not change the substantive requirements for bribery under the PRC Criminal Code, but it can lead to heavier penalties.

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\(^{116}\) *Id.*

\(^{117}\) Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning Specific Application of Laws in Handling Criminal Cases of Bribery, issued on December 26, 2012 and effective as of January 1, 2013. The SPC is the highest court of China, and the SPP is the top prosecutorial agency. Judicial interpretations from the SPC or the SPP have *de facto* legal effect under Chinese law.
punishment in cases where the bribe is calculated cumulatively. It also aims to incentivize individuals or entities to confess by providing reduced penalties. The Interpretation did not provide guidance on the offense of “offering a bribe to a foreign public official or official of an international public organization,” recently added to the PRC Criminal Code to satisfy its obligations under the UN Convention Against Corruption. Even with the stricter foreign bribery offense, enforcement continues to be focused on domestic bribery.

2. **South Korea**

Since Korea enacted the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (the FBPA) in 1999, most prosecuted cases related to bribery of procurement authorities in the United States army base in Korea. In 2011, representatives of a Korean logistics company and a travel agency were prosecuted for offering bribes to the president of a Korean subsidiary of a Chinese airline company, under the theory that the Chinese airline company was controlled by the Chinese government. In February 2012, the court ruled that the prosecution failed to prove that the president of the Chinese airline company is qualified as a foreign public official under the FBPA, but found the individual defendants guilty of bribery under the Korean Criminal Code. Notably, the companies in this case were not charged. Although Korean authorities have indicated that companies in some cases were not prosecuted under the FBPA because they were small, specific factors in determining whether to charge a company remain to be clarified.

C. **India**

Anti-corruption activists continued to pressure the Indian government in 2012 to pass the Lok Pal and Lokayuktas (Ombudsmen) bill, which would create an independent anti-corruption body that would inquire into complaints of corruption against public officials in India. Separately, the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations bill is also pending. The proposed bill, through which India is attempting to comply with its obligations under the UN Convention against Corruption, prohibits the receipt of bribery by officials as well as the corrupt offers and payments to foreign public officials and officials of public international organizations.

118 Amendment VIII to the Criminal Law of the People’s Republic of China, Order of the President of the People’s Republic of China No.41, 2011 China Law LEXIS 714 (Feb. 25, 2011, effective May 1, 2011).
120 See A Focus on Korea, FCPA PROFESSOR BLOG (May 24, 2012), available at [http://www.fcpaprofessor.com/a-focus-on-korea](http://www.fcpaprofessor.com/a-focus-on-korea).
121 See Phase 3 Report, supra note 119 at 38.
D. Americas

1. Canada

Canada continues to step up its enforcement efforts following a 2011 OECD report criticizing them. Two former executives of SNC-Lavalin, a Canadian engineering firm, were charged in June 2012 under the Corruption of Foreign Public Officials Act (CFPOA) for bribing Bangladeshi officials in connection with a bid to build the Padma Bridge in Bangladesh. The trial of the SNC-Lavalin executives is expected to begin in 2013. Another important trial began in 2012 of a Canadian citizen, Nazir Karigar, who is accused of paying $250,000 in bribes to Indian officials in connection with Mr. Karigar’s efforts on behalf of a Canadian high-tech security company pursuing a $100 million contract with Air India for a facial recognition security system. Mr. Karigar filed a motion to dismiss the CFPOA charge against him based on lack of jurisdiction on grounds that the case does not have a “real and substantial connection” with Canada, which is a requirement to establish territorial jurisdiction under Canadian law. The court dismissed the motion on May 2012 without prejudice. Oral argument in the case is scheduled for March 2013.

2. Mexico

In April 2012, Mexico adopted its first Federal Law Against Corruption in Public Procurement (Ley Federal Anticorrupción en Contrataciones Públicas), which went into effect in June. The law imposes fines on foreign or Mexican corporations and individuals that engage in corruption or bribes linked to public work contracts and forces public servants to report illegal acts or omissions.

Concurrent with the adoption of the Federal Law Against Corruption in Public Procurement, and as a result of The New York Times’ exposé in April 2012 of alleged bribery by Wal-Mart’s Mexican affiliate, Walmex, in the procurement of construction permits, the Public Function Bureau (Secretaría de la Función Pública, the country’s federal anti-corruption body), the Federal Office of the Attorney General (Procuraduría General de la República), and the Superior Audit Office of Mexico (Auditoría Superior de la Federación) all opened probes into the matter. In late 2012, the Public Function Bureau announced that it found no irregularities

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124 Conversation with the Clerk at the Criminal Division of the Ontario Superior Court of Justice, Jan. 25, 2013.
in Walmex’s federal permits, though two audits are still underway. The Superior Audit Office also announced that permits were granted in compliance with the applicable laws and regulations. The Attorney General’s Office, for its part, has not published the results of its investigation, although according to some sources, prosecutors have not uncovered sufficient evidence to file charges.\textsuperscript{127}

In part to deal with cases of alleged bribery such as the one involving Wal-Mart, Mexico’s new president, Enrique Peña Nieto, continues to advocate the elimination of the Public Function Bureau, and the creation of a centralized National Anticorruption Commission (Comisión Nacional Anticorrupción).\textsuperscript{128} The corresponding bill is currently pending before the Senate.\textsuperscript{129} Though originally envisioned as a national body with constitutional autonomy – charged with preventing, investigating and punishing acts of corruption at the federal, state and municipal levels – the project has been widely criticized by many sectors, and it is not yet known what kind of powers the new Commission would have.\textsuperscript{130} As one of President Peña Nieto’s first proposals upon his election in the summer of 2012, however, the initiative signals the new administration’s intention to engage in structural reform and crackdown on corruption. Developments may be expected during 2013.

There have been some developments in the anti-money laundering front as well. In October 2012, Mexico enacted a new federal statute placing restrictions on cash purchases of


real estate, jewelry, armored cars and other assets that criminals use to launder illicit funds. And both Mexico and Argentina fined the local subsidiaries of London-based bank HSBC.

3. Brazil

Brazil continued to step up its efforts to combat corruption at all levels of government in 2012. The draft anti-bribery statute that President Dilma Rousseff had sent to Congress in 2012 is still pending, and little progress has been achieved in finding a compromise on some of its more contentious elements, such as the size of fines, whistleblower provisions, and strict liability standards.

Setbacks on the legislative front did not forestall the Federal Administration’s anti-corruption efforts. 2012 marked the conclusion of the “mensalão” trial before the Brazilian Supreme Court, a watershed moment in the history of Brazilian anti-corruption enforcement. In 2006, the Brazilian government had prosecuted 38 individuals in connection with a congressional vote-buying scheme. The Brazilian Supreme Court reached its verdict in 2012, and convicted a total of 25 individuals for bribery, embezzlement, money laundering, tax evasion, and conspiracy. Many of the convicted individuals were high-ranking officials of President Dilma’s Workers’ Party and members of President Lula’s inner circle, such as former Chief of Staff José Dirceu, the former President of the House of Representatives João Paulo Cunha, and the former President of the Workers’ Party Jose Genoino. Virtually all of the defendants were sentenced to more than 10 years in prison, and had to pay fines in a total of R$22.7 million ($11.3 million).

The Brazilian Federal Police also continued to conduct large operations to combat corruption by public officials in 2012. The most noteworthy was a broad-based investigation into alleged influence-peddling in government regulatory agencies by President Rousseff’s São Paulo office manager (and former President Lula confidant) Rosemary Noronha. The Federal Police alleges that she and other high level officials, including directors of the National Water Resources Authority (ANA), the Civil Aviation Authority (Anac) and the National Waterways Authority (Antaq), accepted bribes to write opinions and issue decisions that favored businesses and lobby groups.

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E. Continental Europe

Continental Europe continues to present an uneven picture when it comes to the enforcement of its laws against foreign bribery. The OECD’s Anti-Bribery Working Group reviewed eight countries in continental Europe in 2012 and found their enforcement to be uniformly lacking, as measured by the number of investigations opened and concluded, and in some cases by the insufficiencies in the local laws as measured against the standards set by the OECD Anti-Bribery Convention.

1. Germany

Germany remains relatively proactive in its pursuit of both individuals and corporations. For example, German investigators conducted a raid on construction company Bilfinger, relating to allegations over overseas bribery in Hungary and Slovakia. Bilfinger is also being investigated by German and US authorities relating to its business in Nigeria. Germany also indicted three Hewlett-Packard (H-P) employees allegedly involved in a kickback scheme to win contracts from Russia’s Prosecutor General Office. H-P, while unable to be indicted itself because Germany does not have corporate criminality, was attached to the case and may face penalties from the proceedings; it is also being investigated in the US for the same conduct. Additionally, a MAN Group executive received a suspended jail sentence in September, following the truck maker’s sanction in 2009 for bribery in Slovenia. Following raids on several European Aeronautic Defense & Space (EADS) offices in November 2012, German prosecutors confirmed their investigation into an alleged kickback scheme related to the company’s Eurofighter jet sales to Austria.

2. France

Despite being cited by the OECD for insufficient enforcement and lack of prosecutorial independence, France sanctioned and investigated foreign bribery perpetrators in 2012. In what French commentators described as an “exceedingly rare event for a company listed on the CAC

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133 See e.g., Press Releases, OECD, Netherlands Must Significantly Step Up Its Foreign Bribery Enforcement, Says OECD (Jan. 8 2013); OECD Seriously Concerned by Absence of Foreign Bribery Convictions in Spain (Jan. 8 2013); Austria’s Enforcement of Foreign Bribery Laws Far Too Weak, But Could Pick Up Soon Says OECD (Jan. 8, 2013); Corruption: Greece’s Failure to Investigate Major Foreign Bribery Cases Raises Significant Concerns, Says OECD (June 20, 2012); Hungary Has Improved Legal Framework for Fighting Foreign Bribery, But Must Do More to Detect and Prosecute (Mar. 30, 2012); Slovak Republic Must Urgently Introduce Effective Legislation Holding Companies Liable for Foreign Bribery, Says OECD (June 20, 2012); all available at www.oecd.org.


40,” a French court fined the French defense and electronics group Safran €500,000 for corruption of Nigerian officials in the early 2000s by one of its predecessor companies Sagem, in a bid to obtain a contract to make Nigerian identity cards.\(^{138}\) Hearings of TOTAL executives will likely begin in early 2013 relating to the company’s actions under the Oil-for-Food program in Iraq; magistrates continue to investigate some of the company’s past dealings in Iran as well. French magistrates also continue to investigate two highly political corruption scandals involving the French majority state-owned naval construction company DCNS’ sales to the Malaysian and Pakistani governments, though only the former is being investigated under France’s 2000 law prohibiting bribery overseas, as the facts in the latter predate the law. The outcome of these investigations could be a telling indicator of any change in France’s approach to corporate transnational bribery.

3. **Sweden**

The OECD also cited Sweden for its meager enforcement of foreign bribery laws, which saw some enforcement in 2012. In Sweden, two Volvo executives were fined and received suspended jail sentences for corruption in Iraq in the context of the Oil-for-Food program.\(^{139}\) Sweden is also investigating IKEA for possible acts of bribery in Russia, and the telecommunications company TeliaSonera for its actions in Uzbekistan.

**F. Russia/CIS**

1. **Russia**

Following amendments to Russia’s anti-corruption laws in 2011, prohibiting bribery of foreign public officials and applicable to both individuals and legal entities, Russia was invited to the OECD Anti-Bribery Convention, and joined in February 2012. Continuing an anti-corruption platform, in December 2012 President Putin signed into law a new requirement that state officials and members of parliament disclose any expenses or purchases of land, homes, vehicles, or securities, as well as those made by their spouses and underage children, if their value exceeds the family’s declared income during the prior three years.\(^{140}\) Officials who cannot prove the source of funding for major purchases and investments will be forced to pay a fine or face criminal liability.


Another recent development has been the Russian government’s increased willingness to bring criminal bribery charges against its high-profile government officials.\(^{141}\) Although some commentators suggest that such high-profile cleansing is more indicative of political infighting than an aggressive policy of enforcing anti-corruption laws, news reports that over 2,000 corruption-based criminal cases have been filed in Moscow in 2012 may suggest a greater sense of urgency within the Russian government for applying its new anti-corruption law.\(^{142}\) In July 2012, a high-profile anti-bribery enforcement case brought by the Russian Interior Ministry in December 2011 concluded when a Moscow court sentenced a former senior IKEA executive to five years imprisonment for his participation in a scheme to extort a bribe of 6.5 million rubles from a Russian businessman.\(^{143}\)

2. **Ukraine**

Between 2011 and 2012, the Ukrainian government also adopted new anti-bribery legislation, the Law of Ukraine on Principles of Prevention and Combating Corruption, which was subject to further clarifying amendments in July 10, 2012 (Anti-Corruption Act).\(^{144}\) The Anti-Corruption Act explicitly applies to corrupt practices involving public officials, including foreign officials, and provides for administrative, civil, and disciplinary liability, though criminal liability is reserved for individuals. Whether enforcement will increase with amendments remains to be seen, and the US State Department has reported that the Anti-Corruption Act is rarely enforced, and that when it is enforced, it is normally aimed at lower-level state employees or used as a vehicle of political infighting.\(^{145}\)

3. **Azerbaijan**

In October 2012, the Group of States Against Corruption (GRECO) released a Compliance Report assessing the legislative measures taken by the government of Azerbaijan to bring its criminal code sections addressing corruption and bribery in line with the EU Criminal Law Convention on Corruption. The GRECO report approvingly noted the amendment of the Penal Code of Azerbaijan by the Law of June 24, 2011 (Penal Code), which entered into force on August 2, 2011, and has broadened the scope of the Penal Code’s bribery provisions to apply to


domestic public officials, foreign state officials, employees of international organizations, and individuals in the private sector. The provisions governing bribery and trading of influence have been amended to explicitly criminalize the offer and promise of an advantage, as well as the acceptance of an offer or promise. Additionally, the Penal Code now criminalizes passive and active bribery of domestic and foreign jurors and arbitrators of foreign and national arbitration tribunals.

G. Africa

1. South Africa

South Africa, a member of the OECD Anti-Bribery Convention, has joined the worldwide effort to criminalize bribery by its nationals and companies of non-national public officials. In 2012, South Africa initiated its first investigation into overseas bribery allegations against one of its companies, the telecommunications firm MTN. This went unacknowledged by a September 2012 OECD progress report, which questioned South Africa’s “proactivity” in using what the organization went on to praise as improved structural tools and increased dedicated resources to combat corruption. The country has a new Anti-Corruption Task Team to improve cooperation among domestic agencies, and the Ministry of Justice also has a new unit dedicated to managing South Africa’s mutual legal assistance obligations. However, one of the country’s main enforcement tool, the “Hawks” police unit, was left very weak by a 2011 constitutional court ruling that it is “constitutionally invalid” because it is “vulnerable to political interference.”

Further, while the OECD noted the country’s efforts to raise awareness to the Prevention and Combating of Corrupt Activities Act and the reporting obligations it places on a variety of government bodies; it also cited persistent gaps in the law with regards to the protection of whistleblowers and the establishment of mandatory internal controls within companies. As discussed previously in part V, 2012 also saw the first publicly-known investigation of a South African company, Net 1 UEPS, by the US authorities.

2. Other

Foreign companies operating in Africa have been investigated for corruption allegations domestically, generally by political rather than judicial bodies. For example, A Ugandan parliamentary committee investigated Tullow Oil’s alleged corrupt payments to Ugandan

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government officials; the investigation does not appear to have been publicly pursued after Tullow’s vehement denials last spring, but it has not been publicly dismissed either.\textsuperscript{150} In addition, a Guinean government committee is investigating allegations that BSG Resources Ltd. acquired mining rights in the Simandou region of Guinea by paying bribes in the form of jewels, cars, and cash to the former president and members of his entourage.\textsuperscript{151} The “review” is scheduled to be completed in the first quarter of 2013.\textsuperscript{152}

XI. World Bank and other Multilateral Development Bank Anti-Corruption Enforcement

Led by the World Bank Group, Multilateral Development Banks (MDBs) saw a continued high rate of anti-corruption enforcement in 2012. The World Bank debarred 63 entities in 2012 for violations of World Bank guidelines. In addition, pursuant to its cross-debarment agreements with four other MDBs,\textsuperscript{153} the World Bank cross-debarred 64 additional entities.\textsuperscript{154} Many of the World Bank’s own debarments were similarly recognized by other MDBs.

The continuing high rate of World Bank enforcement actions is partly due to the new settlement authority granted to the World Bank’s Integrity Vice-Presidency (INT) in 2010. We foresee INT’s continued use of this authority in 2013, highlighting the need for affected companies to keep informed of the relevant risks and procedures in this area. In addition, as we have reported in previous years, the World Bank, through INT, continues to make referrals to national authorities where its investigations find evidence of violations of national laws. Such referrals contribute to the multi-jurisdictional complexities in this area.


\textsuperscript{151} Tom Burgis et al., Guinea Reignites $2.5bn Mining Tussle, THE FINANCIAL TIMES, Nov. 2, 2012, available at http://www.ft.com/cms/s/0/06d895f4-24f7-11e2-8924-00144feabdc0.html#axzz2JxfdUjZQ.


\textsuperscript{153} In 2010, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group and the World Bank Group signed an agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB-financed development projects. Under this 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.

\textsuperscript{154} All but three of the cross-debarments were the result of sanctions levied by the Inter-American Development Bank. The three remaining cross-debarments were the result of debarments from the Asian Development Bank. The World Bank Group and the Inter-American Bank have been, and are likely to continue to be, the most active of the MDB’s 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 MDB cross-debarment agreement.
XII. Conclusion

FCPA enforcement activity remained robust in 2012, led again by US authorities. While US enforcement actions were down in number, several noteworthy developments occurred, including issuance of the long-awaited DOJ/SEC FCPA Resource Guide; the authorities’ first public declination to pursue charges against the employer of a “rogue” employee, along with some increased transparency concerning credit available for corporate self-reporting, genuine cooperation, and implementation of strong compliance programs; a number of high-dollar corporate enforcement actions (including as a result of industry sweeps in the pharmaceutical and medical device sectors); further prosecutorial setbacks in several cases against individual defendants; and high-profile investigative news reports concerning possible widespread corruption by retail giant Wal-Mart. Several individuals are currently challenging the authorities’ expansive jurisdictional theories, and it will be worth watching the judicial developments in these and other cases in 2013. In the meantime, US enforcement authorities continue to raise the bar on FCPA compliance expectations, as reflected in both the newly-issued Guide and in various settlement documents from 2012. At the same time, enforcement by the multilateral development banks continues to be strong, while legislative and enforcement developments in many other countries, while still uneven, also appear to be picking up steam.

Consistent with this, we anticipate continued aggressive anti-corruption enforcement and cooperation between the US government and other national and multilateral enforcement bodies in 2013. As in the past, the authorities are likely to continue targeting companies in a range of industries and using a variety of law enforcement tools. Likewise, as cases reported to US authorities by whistleblowers since the enactment of Dodd-Frank continue to come to the fore, this may add further fuel to the tipsters’ fire, particularly if 2013 sees the award of high-dollar bounties. We will continue to monitor and keep you apprised of major developments in this area.

Lucinda Low, Brittany Prelogar and Sarah Lamoree prepared this report. The authors practice at Steptoe in Washington. They would like to thank the other members of Steptoe’s Anti-Corruption Practice Group who contributed to this piece: Tom Best, Pablo Bentes, Carolyn Aiello, Jeanne Cook, Bill Gordon, Lauren Groth, Peter Jeydel, Irma M. Leon-Gonzalez, Charles Morris, Elisabeth Page, Bibek Pandy, Berengere Parmly, Henry Smith, Bo Yue, and Yuliya Zeynalova. For further information please feel free to contact them or any member of Steptoe’s FCPA and Anti-Corruption Practice Group, in Washington, New York, London, Brussels, or Beijing.
APPENDIX: Table of 2012 Cases, by Element

<table>
<thead>
<tr>
<th>Anti-Bribery Provisions: Substantive Elements</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Officials Involved</td>
<td></td>
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<tr>
<td>• Officials of Indonesian state-owned entities (<em>Allianz</em>)</td>
<td></td>
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<tr>
<td>• Police and aviation officials in Mexico and Panama. (<em>BizJet</em>)</td>
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<tr>
<td>• Employees of Chinese state-owned or –controlled customers (<em>NORDAM Group</em>)</td>
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<tr>
<td>• Officials of the executive branch of the Government of Nigeria, officials of the Nigerian National Petroleum Corporation, and officials of Nigeria LNG Limited (<em>Marubeni</em>)</td>
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<tr>
<td>• Government customers in Turkey (<em>Tyco</em>)</td>
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<tr>
<td>• Employees of SOEs in China, Egypt, and Vietnam (<em>Tyco</em>)</td>
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<tr>
<td>• Security officers at a government-owned mine in Mauritania (<em>Tyco</em>)</td>
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<tr>
<td>• Public-sector doctors and health officials in Saudi Arabia, China, and Poland (<em>Tyco</em>)</td>
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<tr>
<td>• Government employees of a Lithuanian state-owned nuclear power plant (<em>DS&amp;S</em>)</td>
<td></td>
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<tr>
<td>• Public-sector doctors in Argentina, Brazil, China (<em>Biomet</em>)</td>
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<tr>
<td>• Public-sector health officials and doctors, China, Brazil, Poland, Russia, MP in Russia (<em>Eli Lilly</em>)</td>
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<tr>
<td>• Public healthcare and social services officials in Mexico (<em>Orthofix</em>)</td>
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<tr>
<td>• Officials from healthcare regulatory agencies and public-sector doctors in Russia, Croatia, Bulgaria, Kazakhstan (<em>Pfizer/Wyeth</em>)</td>
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<tr>
<td>• Healthcare providers in Greece (<em>Smith &amp; Nephew</em>)</td>
<td></td>
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<tr>
<td>• Third Parties Involved, if any</td>
<td></td>
</tr>
<tr>
<td>• Sales agents (<em>Allianz, Marubeni, Tyco</em>)</td>
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<tr>
<td>• Joint venture partners (<em>Allianz</em>)</td>
<td></td>
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<tr>
<td>• Local distributors (<em>Oracle</em>)</td>
<td></td>
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<tr>
<td>• Vendors (<em>Oracle</em>)</td>
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<tr>
<td>• Subcontractors who provided technology and services in the power generation sector, both in the United States and abroad (<em>DS&amp;S</em>)</td>
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<tr>
<td>• Distributors (<em>Biomet, Eli Lilly, Pfizer/Wyeth, Smith &amp; Nephew</em>)</td>
<td></td>
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<tr>
<td>• Offshore distributors and service providers (<em>Eli Lilly</em>)</td>
<td></td>
</tr>
<tr>
<td>• Front companies controlled by the officials (<em>Orthofix</em>)</td>
<td></td>
</tr>
</tbody>
</table>
| Value Provided | • $183 million *(Marubeni)*  
  • Over $11 million *(Eli Lilly)*  
  • $9.4 million *(Smith & Nephew)*  
  • Over $4.7 million *(Tyco)*  
  • Over $2 million *(Pfizer/Wyeth)*  
  • $1.5 million *(Biomet)*  
  • $1.5 million *(NORDAM Group)*  
  • $650,256 *(Allianz)*  
  • $550,000 *(BizJet)*  
  • $397,050 *(Orthofix)* |
| --- | --- |
| Action, Inaction, Influence or Advantage Sought: | • Payments to secure insurance contracts for Indonesian government projects *(Allianz)*  
  • Payments to secure aircraft maintenance, repair, and overhaul contracts *(BizJet, NORDAM Group)*  
  • Payments to secure four EPC contracts for a Nigerian LNG project *(Marubeni)*  
  • Payments to secure contracts for sales of fire security projects on oil and gas contracts *(Tyco)*  
  • Payments to influence the award of instrumentation and controls contracts for installations and maintenance at a Lithuanian nuclear power plant *(DS&S)*  
  • Payments, travel to influence the purchase of company products *(Biomet)*  
  • Payments, gifts, entertainment, support of official’s foundation to influence the purchase of company products, prescription of company products, and the inclusion of company products on a government reimbursement list *(Eli Lilly)*  
  • Payments, vacation packages, home appliances, a car lease to influence the purchase of company products *(Orthofix)*  
  • Payments, trips, gifts to influence the purchase, registration of company products *(Pfizer/Wyeth)*  
  • Payments to influence the purchase of company products *(Smith & Nephew)* |
| Books and Records Violations | • *Allianz*  
  • *Biomet*  
  • *Eli Lilly*  
  • *Oracle*  
  • *Orthofix*  
  • *Pfizer/Wyeth*  
  • *Smith & Nephew*  
  • *Tyco* |
### Internal Control Issues
- Allianz
- Biomet
- Eli Lilly
- Oracle
- Orthofix
- Pfizer/Wyeth
- Smith & Nephew
- Tyco

### Combined Total Fines and Penalties
- $60.1 million (Pfizer/Wyeth)
- $54.6 million (Marubeni)
- $29.4 million (Eli Lilly)
- $26.6 million (Tyco)
- $22.7 million (Biomet)
- $22.2 million (Smith & Nephew)
- $12.39 million (Allianz)
- $11.8 million (BizJet)
- $8.82 million (DS&S)
- $7.4 million (Orthofix)
- $2 million (NORDAM Group)
- $2 million (Oracle)

<table>
<thead>
<tr>
<th>Anti-Bribery Provisions: Jurisdictional Elements</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dd-1 or dd-2 jurisdiction</strong></td>
<td>BizJet / Lufthansa Technik</td>
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<td></td>
<td>Biomet</td>
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<td></td>
<td>DS&amp;S</td>
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<td></td>
<td>Eli Lilly</td>
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<td></td>
<td>Marubeni</td>
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<td>NORDAM</td>
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<td>Pfizer</td>
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<td></td>
<td>Smith &amp; Nephew</td>
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<tr>
<td></td>
<td>Tyco Valves &amp; Controls Middle East Inc.</td>
</tr>
<tr>
<td><strong>Dd-3 territoriality</strong></td>
<td>Lufthansa Technik</td>
</tr>
</tbody>
</table>
### Accounting Provisions: Books and Records Elements

<table>
<thead>
<tr>
<th>Nature of Alleged Inaccuracy</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Inaccurately characterized bribes as commissions and reimbursements (<em>Allianz</em>)</td>
<td>• Reported fake commissions to mask inflated contract amounts, mischaracterized consultant work and third party services, and submitted false itineraries and documentation for travel expenses (<em>Tyco</em>)</td>
</tr>
<tr>
<td>• “Parked” proceeds from sales in unauthorized side funds (<em>Oracle</em>)</td>
<td>• “Parked” proceeds from sales in unauthorized side funds (<em>Oracle</em>)</td>
</tr>
<tr>
<td>• Inaccurately characterized bribes as commissions and reimbursements (<em>Allianz</em>)</td>
<td>• Falsely recorded the payments as “commissions,” “royalties,” “consulting fees,” “other sales and marketing,” “scientific incentives.” (<em>Biomet</em>)</td>
</tr>
<tr>
<td>• Inaccurately characterized bribes as commissions and reimbursements (<em>Allianz</em>)</td>
<td>• Falsely described the payments as payments for services, reimbursement of expenses or charitable donations. (<em>Eli Lilly</em>)</td>
</tr>
<tr>
<td>• Inaccurately characterized bribes as commissions and reimbursements (<em>Allianz</em>)</td>
<td>• Falsely recorded the payments as cash advances, promotional or training expenses; services covered by false invoices. (<em>Orthofix</em>)</td>
</tr>
<tr>
<td>• Falsely described the payments as payments for services, reimbursement of expenses or charitable donations. (<em>Eli Lilly</em>)</td>
<td>• Falsely recorded the payments as promotional activities, marketing, training, travel, conferences, advertising. (<em>Wyeth</em>)</td>
</tr>
<tr>
<td>• Falsely described the payments as promotions and marketing services. (*Smith &amp; Nephew)</td>
<td>• Falsely described the payments as cash advances, promotional or training expenses; services covered by false invoices. (<em>Orthofix</em>)</td>
</tr>
</tbody>
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### Nature of Resolution: DoJ

<table>
<thead>
<tr>
<th>Nature of Resolution: DoJ</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Plea (Parent or Subsidiary)</td>
<td><em>Tyco Valves &amp; Controls Middle East Inc.</em> (subsidiary)</td>
</tr>
<tr>
<td>• Deferred Prosecution Agreement</td>
<td><em>BizJet</em></td>
</tr>
<tr>
<td></td>
<td><em>Biomet</em></td>
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<tr>
<td></td>
<td><em>DS&amp;S</em></td>
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<td>• Non-Prosecution Agreement</td>
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| • Consent Decree         | • Biomet  
|                          | • Eli Lilly  
|                          | • Oracle  
|                          | • Orthofix  
|                          | • Pfizer / Wyeth  
|                          | • Smith & Nephew  
|                          | • Tyco Int’l  |
| • Injunction             | • Biomet  
|                          | • Eli Lilly  
|                          | • Oracle  
|                          | • Orthofix  
|                          | • Pfizer / Wyeth  
|                          | • Smith & Nephew  
|                          | • Tyco Int’l  |
| • Deferred Prosecution Agreement | • None  |
| • Cease and Desist Order | • Allianz  |
| • Independent Consultant | • Biomet (Independent Consultant)  
|                          | • Eli Lilly (Independent Consultant)  |