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FCPA Enforcement in 2010

The SEC Announces Its Individual Cooperation Policy and the DOJ Arrests 22 in a Multi-City FCPA Sting: What Trends Lie Ahead?

FCPA enforcement in 2009 saw steady, and, in the case of actions against individuals, dramatic increases in the number of filed FCPA and FCPA-related cases by both the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC"),[1] and a continuation of 2008's unprecedented levels of fines, penalties and disgorgements totaling in the hundreds of millions of dollars.[2]

But beyond the raw statistics from 2009 are trends and possibly game-changing developments that could raise materially the risks of non-compliant behavior by individuals and corporations subject to the FCPA's primary anti-bribery provisions as well as the books, records, and internal controls provisions applicable to SEC registrants.[3]

While no one can forecast with certainty the trends that will actually dominate enforcement in 2010, our look-ahead for 2010 focuses on three areas: (1) the intensified focus on individuals, both as targets of investigations and cooperating witnesses, as illustrated by a new SEC policy addressing cooperation by individuals and a raft of new FCPA criminal cases against individuals brought within the last 30 days, including a multi-city sting that netted arrests of more than 20 individuals and involved more than 150 FBI agents; (2) DOJ's developing expectations regarding compliance programs in general and remediation of violations, as well as monitors and self-reporting; and (3) the increasing internationalization of enforcement. The following articles in this issue of FCPA Update address these trends and their implications for multinational companies.

— The Editors

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1 DOJ brought 28 FCPA enforcement actions in 2009; the SEC brought 15 FCPA enforcement actions in 2009. The DOJ enforcement actions filed in 2009 were: *U.S. v. Warwick*, No. 09-CR-449 (E.D. Va. Dec. 15, 2009); *U.S. v. Esquenazi, et al.* (Haiti Teleco), No. 09-CR-21010 (S.D. Fla. Dec. 4, 2009); *U.S. v. O'Shea*, No. 09-CR-629 (S.D. Tex. Nov. 16, 2009); *U.S. v. Jumet*, No. 09-CR-0397 (E.D. Va. Nov. 10, 2009); *U.S. v. AGCO Ltd.*, No. 09-CR-00249 (D.D.C. Sept. 30, 2009); *U.S. v. Control Components, Inc.*, No. 09-CR-00162 (C.D. Cal. July 22, 2009); *U.S. v. Basurto*, No. 09-CR-325 (S.D. Tex. June 10, 2009); *U.S. v. Novo Nordisk A/S*, No. 09-CR-00126 (D.D.C. May 11, 2009); *U.S. v. Perez*, No. 09-CR-20347 (S.D. Fla. April 22, 2009); *U.S. v. Diaz*, No. 09-CR-20346 (S.D. Fla. April 22, 2009); *U.S. v. Carson, et al.*, No. 09-CR-00077 (C.D. Cal. April 8, 2009); *U.S. v. Latin Node*, No. 09-CR-20239 (S.D. Fla. April 7, 2009); *U.S. v. Tesler and Chodan*, No. 09-CR-00098 (S.D. Tex. Feb. 17, 2009); *U.S. v. Kellogg, Brown & Root LLC*, No. 09-CR-00071 (S.D. Tex. Feb. 6, 2009); *U.S. v. Morlok*, No. 09-CR-00005 (C.D. Cal. Jan. 7, 2009); *U.S. v. All Assets Held in the Name of Zasz Trading and Consulting PTE Ltd., Account No. 1093101397, et al.*, No. 09-CV-00021 (D.D.C. Jan. 6, 2009). The SEC

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Trends for 2010 Part I.

A Focus on Individuals: Bribe Payers, Bribe Receivers, Witnesses and Whistleblowers

Perhaps the most salient trend in FCPA enforcement emerging from 2009 and continuing into 2010 is the U.S. regulatory focus on individuals – those who paid or facilitated the paying of bribes as well as bribe recipients – and the increasing pressure that the government seems willing to bring to bear on individuals to cooperate and turn over evidence of wrongdoing by their employers, their competitors, their counter-parties, or others.

This intensifying focus on utilizing the full array of law enforcement tools against individuals and other actors is quickly emerging as a singular trend that is highly likely to increase the chance that bribes, wherever paid, will be prosecuted so long as there is a basis for jurisdiction under the FCPA. Such a basis can exist whenever the bribe-payer or its corporate parent company is U.S.-registered, or is domiciled in the U.S., or because U.S. nationals and permanent residents are involved in the corrupt payments or bribery was facilitated by instrumentalities of U.S. commerce. A key tool that U.S. regulators have rolled out to start off 2010 – the SEC's new policy to encourage cooperation by individuals – and several new FCPA cases that highlight the increasing focus of U.S. prosecutors on bringing cases against individuals are discussed in the sections below.

The SEC's New Individual Cooperation Policy

On January 13, 2010, the SEC issued its "Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions" ("SEC Individual Cooperation Policy")[4] which will doubtless have an immediate effect on SEC civil enforcement of the FCPA against individuals who may be subject to "control person" and aiding and abetting liability, as well as companies.

The Policy Statement was announced as part of a general initiative to encourage cooperation by both individuals and companies, and, as described by SEC Director of Enforcement Robert Khuzami, is part of an array of tools that the SEC will be employing to enforce securities law requirements, including the FCPA, similar to those utilized by the DOJ, including deferred prosecution, non-prosecution, and cooperation agreements, as well as expedited procedures for processing witness immunity requests to the DOJ.[5]

The SEC Individual Cooperation Policy notes the "wide spectrum" of ways that the SEC can reward cooperation "ranging from taking no enforcement action to pursuing reduced charges and sanctions."[6] Among the factors that the SEC will consider in determining whether cooperation merits recognition under the program will be "[t]he value of the individual's cooperation to the Investigation," including such matters as:

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enforcement actions filed in 2009 were: *SEC v. UTStarcom, Inc.*, No. 09-CV-6094 (N.D. Cal. Dec. 31, 2009); *SEC v. Bobby Benton*, No. 09-CV-03963 (S.D. Tex. Dec. 11, 2009); *SEC v. AGCO Corp.*, 09-CV-01865 (D.D.C. Sept. 30, 2009); *SEC v. Oscar H. Meza*, 09-CV-01648 (D.D.C. Sept. 30, 2009); *SEC v. Nature's Sunshine, et al.*, 09-CV-00672 (D. Utah July 31, 2009); *Matter of Helmerich & Payne, Inc.*, No. 3-13565 (SEC July 30, 2009) (cease-and-desist order); *SEC v. Avery Dennison Corp.*, No. 09-CV-5493 (C.D. Cal. July 28, 2009); *SEC v. Thomas Wurzel*, No. 09-CV-01005 (D.D.C. May 29, 2009); *Matter of United Industrial Corp.*, No. 3-13495 (SEC May 29, 2009) (cease-and-desist order); *SEC v. Novo Nordisk A/S*, No. 09-CV-00862 (D.D.C. May 11, 2009); *SEC v. ITT Corp.*, No. 09-CV-00272 (D.D.C. Feb. 11, 2009); *SEC v. Haliburton Co. and KBR, Inc.*, No. 09-CV-399 (S.D. Tex. Feb. 11, 2009).

2 Fines and penalties, civil and criminal, in 2009 totaled more than $400 million while the total amount of disgorgement equaled roughly $200 million. The comparable figures in 2008 were roughly $500 million in fines and penalties, civil and criminal and roughly $400 million in disgorgement. The 2008 figures were largely driven by the civil and criminal settlements by Siemens AG and three of its subsidiaries. The largest settlement in 2009 took place in the Halliburton case, with more than $550 million in fines, penalties and disgorgement paid by the company. *See* SEC Press Rel. No. 2009-23, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), http://www.sec.gov/news/press/2009/2009-23.htm; SEC Lit. Rel. No. 20829, SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over $1.6 Billion (Dec. 15, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm.

3 For a basic summary of those provisions, see FCPA Update, Vol. 1, No. 1 (Aug. 2009), http://www.debevoise.com/files/Publication/3143fa0a-ebbb-4dff-a8e1-28b53eb18152/Presentation/PublicationAttachment/842874c6-e886-4a04-89b4-28e58f03e031/FCPA_Update_August09v12.pdf.

4 *See* Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, SEC Rel. No. 34-61340, 75 Fed. Reg. 3122-02 (effective Jan. 19, 2010) (to be codified at 17 C.F.R. § 202), http://sec.gov/spotlight/enfcoopinitiative.shtml.

5 *See* SEC Press Rel. No. 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), http://sec.gov/news/press/2010/2010-6.htm.

6 *See* Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, 75 Fed. Reg. 3122-02 (effective Jan. 19, 2010) (to be codified at 17 C.F.R. § 202), 17 C.F.R. § 202.12 (2010)).

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- Whether the individual's cooperation "resulted in substantial assistance to the investigation;"
- "[W]hether the individual was first to report the misconduct to the Commission or to offer his or her cooperation in the Investigation, and whether the cooperation was provided before he or she had any knowledge of a pending investigation or related action;"
- "Whether the Investigation was initiated based on information or other cooperation provided by the individual;"
- "[W]hether the cooperation was truthful, complete, and reliable;"
- "The time and resources conserved as a result of the individual's cooperation in the Investigation;"
- "Whether the individual's cooperation was voluntary or required by the terms of an agreement with another law enforcement or regulatory organization;"
- "Whether the individual provided non-privileged information, which information was not requested by the staff or otherwise might have been discovered;"
- "Whether the individual encouraged or authorized others to assist the staff who might not have otherwise participated in the Investigation;" and
- The "[i]mportance of the underlying matter," including "[t]he age and duration of the misconduct," "[t]he number of violations," "[t]he isolated or repetitive nature of the violations," and the "amount" and "type" of "harm or potential harm" resulting from or threatened by the underlying violations, as well as "[t]he number of individuals or entities harmed."[7]

Other factors the SEC will consider, depending on the circumstances, are "the societal interest in holding the cooperating individual fully accountable for his or her misconduct," which will entail an analysis of the severity of the individual's misconduct, the culpability of the individual, including the degree to which the individual acted with actual knowledge, and the degree to which "the individual tolerated illegal activity including, but not limited to, whether he or she took steps to prevent the violations from occurring or continuing," as well as efforts by the individual to remediate the violations and sanctions that have been imposed by other state, federal or industry organizations.[8] The SEC will also consider other factors, such as "[t]he degree to which the individual has demonstrated an acceptance of responsibility for his or her past misconduct."[9]

DOJ Arrests 22 in an FCPA Sting, Indicts Another Foreign Official, and Brings FCPA Criminal Charges Alleging Bribery of a U.N. Employee

On the criminal enforcement side, individual prosecutions continue to make headlines. On January 19, 2010, DOJ unsealed a dozen indictments returned on December 11, 2009 by a federal grand jury in the District of Columbia, each charging FCPA and FCPA-related offenses.[10] The indictments resulted in arrests in Las Vegas and Miami of 22 individuals in the military and law enforcement products business in what the Department described as the "largest single investigation and prosecution against individuals in the history of DOJ's enforcement of the Foreign Corrupt Practices Act."[11]

This multi-jurisdictional sweep – apparently involving the first use of a sting operation to enforce the FCPA – puts into dramatic focus pledges by DOJ officials to utilize all the tools available to federal law enforcement to prosecute FCPA offenses. According to press reports, more than 150 FBI agents were involved in the operation.[12]

One day after the arrests in Las Vegas and Miami, in a follow-up to the *Green*

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7 *Id.* § 202.12(a) and (b).

8 *Id.* § 202.12(c).

9 *Id.* § 202.12(d).

10 *See* DOJ Press Rel. No. 10-048, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

11 *Id.*

12 Diana B. Henriques, "F.B.I. Charges Arms-Sellers With Foreign Bribes," *The New York Times* (Jan. 20, 2010), http://www.nytimes.com/2010/01/21/business/21sting.html.

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case in Los Angeles in which two individuals were prosecuted, convicted, and await sentencing for FCPA offenses involving payments to Thai officials overseeing the Bangkok International Film Festival, the Office of the U.S. Attorney for the Central District of California unveiled a nine-count conspiracy, money laundering and forfeiture action against Juthamas Siriwan, the official who allegedly received the payments in the *Green* case, as well as her daughter.[13] Following the December 2009 unsealing of an FCPA-related money-laundering indictment of former officials of Haiti's public telecom company,[14] the Siriwan case shows that prosecution of foreign officials and former foreign officials on FCPA-related charges is becoming much more routine. It remains to be seen whether this trend will result in fewer bribe requests or more witnesses against bribe-paying entities and persons as parties threatened with prosecution offer to provide evidence against bribe-payers. In the short term, at least, the latter seems highly likely.

In a final development this month, the DOJ on January 21, 2010, filed a criminal information against Richard T. Bistrong, one of the intermediaries alleged to have been involved in the arms and military hardware cases discussed above, with FCPA-related conspiracy offenses connected, among other things, to the sale of equipment to the United Nations mission in Iraq.[15] The case is a stark reminder that U.N. employees, as well as the employees of more than 75 other international and non-governmental organizations, such as the World Bank, and the African, Asian and Inter-American Development Banks are considered "foreign officials" for purposes of the FCPA.[16]

Whistleblowers and the Proposed Federal Investor Protection Act

The risks to individuals (as well as to companies), will be potentially magnified in 2010 should Congress pass legislation, such as that contained in the pending Investor Protection Act of 2009 (H.R. 3817), that would make whistleblowers who reported any federal securities law violations to the SEC eligible for bounty payments. The Investor Protection Act was reported out of the House Financial Services Committee on November 4, 2009, and awaits full action in the House as well as action in the Senate.[17]

In its current version, the bill expands the current bounty program, which is limited to those who blow the whistle on insider trading, by authorizing the SEC, in all U.S. securities law cases, including FCPA cases, that result in civil fines and penalties exceeding $1 million, to pay up to 30 percent of "the monetary sanctions imposed in [an enforcement action] or related actions to one or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the action."[18]

Should this legislation pass, FCPA cases at the SEC (and also at the DOJ) could be expected to increase dramatically over even today's

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13 *See United States v. Siriwan*, No. Cr. 09-00081 (C.D. Cal. indictment filed under seal Jan. 28, 2009). The indictment was unsealed on January 19, 2010. *See* "Sentence Delayed for Film Producers in Bribe Case," *Associated Press* (Jan. 21, 2010), http://hosted.ap.org/dynamic/stories/U/US_FILM_EXECUTIVES_CONVICTED?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2010-01-21-13-49-26.

14 *See* FCPA Update, Vol. 1, No. 5 (Dec. 2009), http://www.debevoise.com/files/Publication/a8b4614c-b6f2-4dea-8016-01c0d7807a4c/Presentation/PublicationAttachment/e8ed7d26-78f0-4c86-aa3a-1423a95d1c32/FCPAUpdateNumber5.pdf.

15 *See* Diana B. Henriques, "Supplier Accused of Bribes for UN Contracts," *The New York Times* (Jan. 22, 2010), http://www.nytimes.com/2010/01/23/business/23sting.html?scp=1&sq=%E2%80%9CSupplier%20Accused%20of%20Bribes%20for%20UN%20Contracts,&st=cse.

16 *See, e.g.*, 15 U.S.C. §§ 78dd-1(f)(1)(A) and 78dd-1(f)(1)(B) (2006).

17 *See* Investor Protection Act of 2009, H.R. 3817, 111th Cong. (as reported by H. Fin. Servs. Comm. Nov. 4, 2009).

18 H.R. 3817, 111th Cong. § 21F (2009).

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unprecedented levels.[19] Bounty payment systems and the provisions of the federal False Claims Act and its "qui tam" provisions have generated rafts of lawsuits and a cottage industry, and there is no reason to think that experience would be any different if an FCPA bounty program were passed by Congress as part of a general program of securities law reform.

If an expanded bounty program is adopted, multinational companies subject to the FCPA may face significant additional legal and compliance costs and burdens. It is possible that bounties for FCPA, financial fraud, and other securities related matters will force public companies to investigate each and every complaint, because the regulators (particularly in this post-Madoff environment) will push the companies to conduct internal investigations. Assuming there are a rash of whistleblower complaints seeking bounties, the SEC will have no choice but to leverage its resources by persuading the public companies to conduct the investigations and report the results to the SEC. Companies looking ahead may wish to take additional steps, by working with in-house and outside legal counsel and compliance professionals, to ensure that robust anti-bribery compliance programs are in place to minimize those costs and burdens, in the event that Congress determines to expand the scope of whistleblower bounty programs. ■

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Trends for 2010 Part II.

DOJ's Latest Case Regarding Monitors and Compliance

Despite DOJ's issuance in March 2008 of guidelines constraining the circumstances for appointment of corporate monitors,[20] the issue of corporate monitors and the burdens they impose on companies involved in FCPA regulatory proceedings continues to be a focus of criticism and congressional scrutiny.[21] The issues prompting concerns over the imposition of monitors in the FCPA arena can be particularly acute, in that monitors can impose many millions of dollars of remediation costs on a company seeking to resolve an FCPA dispute, on top of the indirect burdens of a monitorship.

Although DOJ representatives have made clear that monitors will continue to be deployed in many if not most FCPA resolutions, the December 31, 2009 settlement of criminal charges by telecommunications company UTStarcom made news when, despite reasonably significant FCPA allegations of improper payments in China, the DOJ did not insist on a corporate

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[19] Congress appears far less likely, however, to take up soon the issue of a private right of action to enforce the FCPA. Legislation on this subject has been introduced in the House of Representatives, but the bill, H.R. 2152, the Foreign Business Bribery Prohibition Act of 2009, remains pending in the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, with only a single co-sponsor and no companion bill in the Senate. *See* H.R. 2152, 111th Cong. (2009). Whether a private right of action gains much traction in Congress might depend on whether existing remedies for private litigants are deemed sufficient. Private collateral litigation in the state courts remains an uphill struggle for those bringing private claims against corporations and their directors and officers, as shown by the Delaware Chancery Court's January 11, 2010 dismissal of a derivative action against the current directors and officers of Dow Chemical Company. *See In re Dow Chemical Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769 (Del. Ch. Jan. 11, 2010). In that case, plaintiffs had alleged that, as a result of Dow's well-publicized settlement of an FCPA action in 2007 respecting its pesticide business in India, management should have been on notice of potential bribery in a subsidiary in Kuwait. Holding that, under Delaware law, this allegation did not impose liability for a failure to oversee lower-level company activities, the Delaware trial court dismissed derivative claims based on those allegations. *Id.* at *13.

[20] *See* Craig R. Morford, Acting Deputy Attorney General, U.S. DOJ, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), http://www.justice.gov/criminal/fraud/docs/dag-030708.pdf.

[21] *See*, e.g., U.S. H. R. Comm. on Judiciary, Press Rel., Judiciary Chairman Releases GAO Report on Criminal Corporate Settlement Agreements (Jan. 8, 2010), http://judiciary.house.gov/news/100108.html.

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monitor as part of its settlement with the company.[22] The UTStarcom settlement and other similar cases suggest the Obama Justice Department has become sensitive to the costs of FCPA remediation. This somewhat more flexible approach, in which the DOJ has not stringently adhered to the practice of requiring monitors (or independent compliance consultants) in all cases, however, appears conditioned on the remediating company being prepared to adopt, implement, test, and self-report violations of a state of the art and comprehensive compliance program.

The elements of the kind of compliance program sought and obtained by the DOJ in the *UTStarcom* case follow the familiar "COSO" framework[23] of (1) tone at the top; (2) enunciation of policies; (3) training and implementation of policies; (4) auditing and testing of implementation; and (5) self-remediation of misconduct and noncompliance. As stated in Appendix B to UTStarcom's deferred prosecution agreement, the minimum elements of a robust anti-bribery compliance program consist of the following, which all companies subject to the FCPA should consider, in consultation with counsel, adopting.[24]

"1. A clearly articulated corporate policy against violations of the FCPA, including its anti-bribery, books and records, and internal controls provisions, and other applicable counterparts (collectively, the 'anti-corruption laws')."

"2. Promulgation of compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and [the company] compliance code. These standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of [the company] in a foreign jurisdiction, including but not limited to, agents, consultants, representatives, distributors, teaming partners, and joint venture partners (collectively, 'agents and business partners')."

"3. The assignment of responsibility to one or more senior corporate officials of [the company] for the implementation and oversight of compliance with policies, standards, and procedures regarding the anti-corruption laws. Such corporate official(s) shall have the authority to report matters directly to [the company's] Board of Directors or any appropriate committee of the Board of Directors."

"4. Mechanisms designed to ensure that the policies, standards, and procedures of [the company] regarding the anti-corruption laws are effectively communicated to all directors, officers, employees, and, where appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors, officers, and employees, and, where necessary and appropriate, agents and business partners; and (b) annual certifications by all such directors, officers, and employees, and, where necessary and appropriate, agents, and business partners, certifying compliance with the training requirements."

"5. An effective system for reporting suspected criminal conduct and/or violations of the compliance policies, standards, and procedures regarding the anti-corruption laws for directors, officers, employees, and, where necessary and appropriate, agents and business partners."

"6. Appropriate disciplinary procedures to address, among other things, violations of the anti-corruption laws and [the company's] compliance code by [the company's] directors, officers and employees."

"7. Appropriate due diligence requirements pertaining to the retention and oversight of agents and business partners."

"8. Standard provisions in agreements, contracts, and renewals thereof with all agents and business

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22 *See* DOJ Press Rel. No. 09-1930, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html. *See also* SEC Lit. Rel. No. 21357, SEC Charges California Telecom Company With Bribery and Other FCPA Violations (Dec. 31, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21357.htm. The no-monitor settlement in UTStarcom was prefigured by the July 2009 non-monitor settlement in the Helmerich & Payne matter. *See* DOJ Press Rel. No. 09-741, Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/07/07-30-09helmerich-pays.pdf. Helmerich & Payne also resolved civil allegations in a settlement with the SEC. *See also Matter of Helmerich & Payne, Inc.*, No. 3-13565 (SEC July 30, 2009) (SEC settlement), http://www.sec.gov/litigation/admin/2009/34-60400.pdf.

23 *See* Comm. of Sponsoring Orgs. ("COSO"), Internal Control - Integrated Framework (1992), http://www.coso.org/guidance.htm.

24 *See* Letter from James Koukios, Trial Attorney, Fraud Section, U.S. DOJ, to Leo Cunningham, Wilson Sonsini Goodrich & Rosati (Dec. 31, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/12/12-31-09UTSI-%20NPA-Agreement.pdf.

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partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may, depending upon the circumstances, include: (a) anti-corruption representations and undertakings relating to compliance with the anti-corruption laws; (b) rights to conduct audits of the books and records of the agent or business partner to ensure compliance with the foregoing; and (c) rights to terminate an agent or business partner as a result of any breach of anti-corruption laws, and regulations or representations or undertakings related to such matters."

"9. Periodic testing of the compliance code, standards, and procedures designed to evaluate their effectiveness in detecting and reducing violations of anti-corruption laws and [the company's] compliance code."

Company counsel will confront the need to make difficult case-by-case assessments of how hard to press so-called business partners under the UTStarcom compliance program definitions for audit rights and submission to anti-corruption training programs, as well as anti-corruption undertakings and representations. Companies obtaining audit rights also will need to determine the appropriate level of expenditure on actual exercise of such audit rights. ■

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Trends for 2010 Part III.

Internationalization of Anti-Bribery Enforcement

The third key trend in FCPA enforcement likely to continue or intensify in 2010 is the unprecedented internationalization of anti-bribery enforcement efforts. Law enforcement officials in the U.S., the U.K., Germany, and other western countries have been very vocal in the recent past about their intentions to crack down on global corruption and to work together in doing so, increasingly realizing the benefits of cooperating and coordinating with each other.
Both the DOJ and the SEC[25] have stated through official publications and otherwise that they will be increasingly reaching out to their foreign counterparts in other jurisdictions to obtain documentary and testimonial evidence, to coordinate raids and searches, to receive assistance in tracing movements of funds across borders, and to coordinate resolutions of their investigations. U.S. Attorney General Eric Holder recently underscored that recovering the proceeds of corruption "is a global imperative" that requires international cooperation.[26] One concrete sign that indeed U.S. regulators are following through on their statements in practice is the roughly doubling of SEC information requests to non-U.S. regulatory counterparts from 2003 to 2008,[27] which growth is expected to continue by roughly another ten percent in 2010. And just this month an FBI sting operation resulted in the arrest of 22 defendants in Las Vegas and Miami on FCPA conspiracy charges,[28] which was the result of search warrants executed across the U.S. and in London.

25 *See, e.g.*, Robert Khuzami, Director, SEC Division of Enforcement, Remarks Before the New York City Bar: My first 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm.

26 Eric Holder, U.S. Attorney General, Remarks at Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html.

27 *See* U.S. SEC 2008 Performance and Accountability Report, http://www.sec.gov/about/secpar2008.shtml; U.S. SEC 2007 Performance and Accountability Report, http://www.sec.gov/about/secpar2007.shtml.

28 *See supra* Part IB for a discussion of the recent arrests.

Trends for 2010 Part III. ■ Continued from page 8

In Europe, regulators are also promising tougher enforcement and coordination with their U.S. counterparts. In the U.K., both the SFO and the FSA in 2009 repeatedly stated their intentions to take a firmer stance against companies and/or individuals and to work in concert with U.S. and other regulators.[29] New U.K. laws and regulations should support these expressed intentions: 1) the new U.K. Bribery Bill, which is expected to be passed into law sometime this year, seeks to introduce a new corporate offence of failure to prevent bribery;[30] 2) recently, the SFO's enforcement powers have been broadened by the U.K. Attorney General's first ever issuance of written guidelines on plea bargains and the granting to the SFO the right to apply for Civil Recovery Orders; and 3) the SFO in 2009 issued guidelines on self-reporting of overseas corruption, which essentially ask companies to come forward and self-report to the SFO instances of corruption and be rewarded for their cooperation, or else risk rigorous prosecution.[31] And indeed, the SFO announced its first ever corporate conviction for overseas corruption in September 2009 in its case against Mabey & Johnson,[32] while foreshadowing several additional corruption convictions forthcoming in the near future.

In Germany, the Munich prosecutors in particular have in the recent past become increasingly active in conducting far-sweeping corruption investigations, starting with the Siemens investigation in November 2006, in which prosecutors displayed no qualms in taking on one of Germany's largest flagship companies in an effort to prosecute corporate corruption. After settling the Siemens case in December 2008, that same Munich anti-corruption unit has over the course of the past year launched large-scale investigations into MAN AG, Hypo Real Estate, and Bayerische Landesbank. Since the Siemens investigation – which concluded in a coordinated resolution of the matter with the DOJ, SEC and the Munich prosecutors on the same day after only two years of investigation – the Munich prosecutors have underscored their intentions to continue to work closely with their U.S. counterparts in future transnational cases. These actions, as well as actions by regulators in other OECD nations, the BRIC countries and elsewhere to clamp down on conduct violating anti-bribery mandates makes it clearer than ever that multinational companies that fail to adopt genuine world-wide anti-bribery compliance programs, to take swift steps to investigate allegations of bribery, and then to remediate any improper conduct that is found, do so at their peril. ■

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29 The SFO sees an "urgent need" for governments to work together and learn from each other to combat transnational crime. *See* Vivian Robinson, General Counsel, Serious Fraud Office, Speech on International Cooperation in the Investigation of Serious Fraud and Corruption (Aug. 13, 2009), http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009/international-co-operation-in-the-investigation.aspx.

30 *See* Bribery Bill, 2009, H.L. 2009-10 (Gr. Brit.), http://www.publications.parliament.uk/pa/ld200910/ldbills/003/10003.i-ii.html.

31 Guidelines are available at http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx. The publication of these guidelines signals a major change of direction by the SFO – previously the Office saw its role essentially as an after-the-event investigator and prosecutor with whom it would be very difficult for a company to engage except in the context of a formal investigation. The FSA, too, has exhibited a similar change in approach, changing its enforcement guide to permit cooperation to be taken into account in determining whether, in cases involving two or more people, to commence a prosecution for market misconduct, or merely impose a civil sanction for market abuse.

32 *See* SFO Press Rel., Mabey & Johnson, Ltd. Sentencing (Sept. 25, 2009), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx.

News from the BRICs

The Year of the Tiger and Gift Giving in China

The festivities that are set to commence in connection with the Lunar New Year[1] holidays – this year Lunar New Year's day arrives on February 14, 2010 – celebrated in China and other Asian nations inevitably bring about questions to in-house legal and compliance departments at multinational firms as to what, if anything, is appropriate gift giving during the holiday season. In China (and Vietnam) the compliance issue is acute given the dominance of the state in the economy, the numbers of "foreign officials" as defined by the FCPA with whom businesses subject to the statute must deal on a regular basis, and the cultural expectations of the region, where gift-giving at this time of year is expected.

Unfortunately, neither the FCPA itself nor Opinion Releases issued by the DOJ provide clear-cut advice as to the lines that should be drawn. The last of the DOJ's Opinion Releases on the subject of gifts (as opposed to travel benefits, also a recurring issue in China and elsewhere) were issued in the 1980s. They effectively approved gift programs amounting to $2,000 in total (with a limit of $250 per gift) in one case,[2] and other gifts not exceeding $500, where the gifts were in compliance with local laws and regulations, the ceremonial value of the gift exceeded the gift's intrinsic value (such as in the case of a ceremonial bowl presented at a deal-closing) and the expense was consistent with the customary level of expense incurred in the particular region.[3]

Many FCPA experts have tried to distill from these rules guidance for corporate gift programs,[4] but few have addressed with specificity the unique environment of gift-giving in the context of the Lunar New Year holiday period in China and throughout Asia. Although all the relevant factors cannot be discussed here, and special issues involving unusual expenditures should be elevated within an organization before action is taken and resolved through consultation with skilled counsel, some general rules can be stated.

First, at whatever level gifts are given, expenses for gift programs must be accurately recorded in order to assure compliance with the FCPA's books and records provisions, or other accounting requirements under other OECD country regimes.

Second, there should be a robust compliance policy that sets understandable limits on gift giving, requiring pre-approval by appropriately-ranked compliance officers or in-house legal staff as to the general size of the program, limits on individual gifts, rules about when gifts are appropriate (*i.e.*, tied to holidays or other special occasions), eligible recipients, and controls on the number of gifts any one recipient may receive in a given period. Gift program "best practices" also include the accurate maintenance of a "gifts log" to keep track, company-wide, of gifts that are given (identifying recipients, the specific gift, those authorizing the gift, and other information) to assure compliance.

Third, notwithstanding the cultural tradition of giving cash in "red envelopes," cash gifts should be avoided if at all possible. Branded gifts that bear a company logo or that contain other product information are best in that they will likely fall within the FCPA's "safe harbor" for reasonable and bona fide product promotional expenses.

Fourth, companies should investigate and take feasible steps to understand the gift-receipt policies of their counterparties. No gifts should be given that knowingly violate a customer's policies or regulations, and, in general, no company should authorize the kind of gifts that it would not want its own employees receiving from parties to which those employees might be authorized to favor with company business. This "Golden Rule" – do not give unto others what you would not

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1 In China, the Lunar New Year is often referred to as the "Spring Festival."

2 *See* DOJ FCPA Opinion Rel. No. 81-02.

3 *See* DOJ FCPA Opinion Rel. No. 81-01.

4 *See, e.g.,* Thomas Fox, "Best Practices Regarding FCPA Policy on Gifts, Business Entertainment, and Travel for Government Officials," *Corporate Compliance Insights* (July 23, 2009), http://www.corporatecomplianceinsights.com/2009/best-practices-fcpa-doj-policy-on-gifts-business-entertainment-travel-foreign-governmental-officials.

News from the BRICs ■ Continued from page 10

want them giving to your own employees – provides a common-sense benchmark that answers many gift questions. Likewise, a "Front Page of the Paper" standard can be used – would you want this gift program exposed in the local media in a company's headquarters city or host country?

Fifth, gifts that are given openly, such as at ceremonial dinners, or that are likely to be displayed at company offices as opposed to converted to personal use, are less likely to trigger regulatory scrutiny. Even a more expensive gift at the upper end of the range discussed in the DOJ Opinion Releases or higher may be acceptable if it is given at a public or well-attended event, where both sides exchange gifts of commensurate value that have largely a ceremonial significance, where local law and company rules are followed on both sides and where the risk of conversion of the gift to cash is low. By the same token, gifts that are given secretly may provoke suspicion and regulatory interest.

Although recent FCPA settlements have highlighted the pitfalls of gift-giving in China, with gifts as low in value as a $125 pair of shoes meriting mention in a recent SEC complaint that also addressed tens of thousands of dollars in other alleged improper payments,[5] what compliance officers and in-house counsel and managers must ultimately be very attentive to is the issue of systemic breaches of company policy or situations in which gifts are genuinely given with corrupt intent – an intent to cause a non-U.S. official to breach his or her duty to act in the best interest of his or her employer in a specific case. Such breaches, particularly by senior managers who set the ethical tone at a business unit, or the lack of a robust compliance policy, are cause for concern, as those kinds of breaches may signal larger problems that are at the core of regulators' interests.

The backdrop for Lunar New Year's giving in Asia is a festive and family-driven period in which many millions of gifts are no doubt given to government officials each year in good faith and with no expectation of reward. Yet so long as the risks of corruption in China remains significant, as demonstrated by a recent Chinese government report showing that Chinese officials misused or embezzled as much as $35 *billion*,[6] compliance managers and in-house counsel must inevitably take the risks of seasonal gift giving seriously. Right-sizing the gift program compliance effort inevitably takes balance, and judgment, as well as sensitivity to business needs and the regional culture. ■

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5 *See In re Avery Dennison Corp.*, Order Instituting Cease-and-Desist Proceedings, Admin. Proc. No. 3-13564 (SEC July 28, 2009), http://www.sec.gov/litigation/admin/2009/34-60393.pdf; *see also* SEC Litig. Rel. No. 21156 (SEC July 28, 2009), http://www.sec.gov/litigation/litreleases/2009/lr21156.htm.

6 *See* David Barboza, "China Finds Huge Fraud by Officials," *The New York Times* (Dec. 29, 2009), http://www.nytimes.com/2009/12/30/world/asia/30fraud.html?_r=1&emc=eta1.