DEBEVOISE & PLIMPTON LLP

# FCPA Update

**February 2010 ■ Vol. 1, No. 7**

## BAE Settlement Highlights Enforcement Trends

Continuing an aggressive pursuit of foreign bribery, on February 5, the U.S. Department of Justice ("DOJ"), in conjunction with the UK's Serious Fraud Office ("SFO"), announced settlements with U.K. defense company BAE Systems plc. The settlements end long SFO and DOJ investigations of BAE and underscore trends in multi-jurisdictional law enforcement that all companies doing cross-border business should be aware of. BAE's alleged conduct also provides compelling reminders about recurring red flags that bribery may be afoot in a company's business.

Under the DOJ settlement – which is scheduled for an approval hearing on March 1 in the U.S. District Court for the District of Columbia – BAE will plead guilty to one count of conspiring to make false statements to the U.S. government, pay a $400 million fine, and agree to enhance its compliance systems.[1] Under the SFO settlement, which is also pending court review, BAE will plead guilty to one count of failing to keep reasonably accurate financial records and pay £30 million.[2] BAE is not pleading guilty to any charge under the FCPA in the U.S. or to any bribery count in the U.K.

BAE's agreed guilty plea in the U.K. will focus on the company's operations in Tanzania, with the SFO stating that a yet-to-be-determined portion of the £30 million payment will go to "the benefit of the people of Tanzania."[3] The criminal information filed against BAE by the DOJ as part of the U.S. settlement process refers to alleged commissions paid by BAE in connection with the lease of fighter jets to the Czech Republic and Hungary, and to alleged payments and benefits granted by BAE to a Saudi official in 2001 and 2002 in connection with BAE's sale of military aircraft and other hardware to Saudi Arabia.[4]

Here are seven points to take away from the BAE settlements:

(1) ***Countries increasingly cooperate to enforce anti-corruption laws.*** The simultaneous resolutions in the U.S. and U.K. reflect a trend of cooperation between British and American authorities. Only two weeks earlier, in an unrelated case, search warrants were executed simultaneously across the U.S. and in London as part of an investigation that involved the arrest of 22 defendants in Las Vegas and Miami on FCPA

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1 BAE Systems plc News Rel. No. 014/2010, BAE Systems plc Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (Feb. 5, 2010), http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html.

2 SFO Press Rel., BAE Systems plc (Feb. 5, 2010), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx.

3 *Id.*

4 *United States v. BAE Systems plc*, No. __, Information (D.D.C. filed Feb. 5, 2010), ¶¶ 22-23, 33-47.

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**FCPA Update**

*FCPA Update* is a publication of

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conspiracy charges. Anglo-American cooperation is part of a broader growth of international cooperation among law enforcers in corruption cases. And even where authorities are not overtly working together, companies are more and more likely to confront investigations in multiple countries when alleged wrongdoing crosses borders. News reports have stated that at least Sweden, Switzerland and Chile also opened investigations into alleged bribery by BAE.[5] For further analysis of the BAE case, listen to the podcast of a recent BBC interview of Debevoise partner Lord (Peter) Goldsmith QC, former U.K. Attorney General, *available at* http://news.bbc.co.uk/today/hi/today/newsid_8501000/8501758.stm.

(2) ***U.K. authorities are taking a more aggressive approach to pursuing foreign bribery offenses.*** The BAE settlement is the first instance of a plea bargain being used in the U.K. to resolve a major criminal investigation against a corporation. It comes on the heels of new guidelines from the U.K. Attorney General on the conduct of plea bargaining in serious, complex fraud cases, and a new framework from the SFO that holds out the carrot of lenient treatment for companies that self-report instances of bribery. At the same time, Parliament is likely to enact this year a new Bribery Bill that would, among other things, create new offenses for bribery of a foreign public official and corporate offense for failure to prevent bribery. What we are seeing in the U.K. is a new emphasis on aggressive pursuit of foreign corruption, a movement toward holding companies liable if a failure of internal controls permits bribery to occur, and an opening of the door to negotiated resolutions for companies involved in corruption cases.

(3) ***Nine-figure penalties for foreign bribery continue to proliferate.*** BAE's $400 million agreed payment in its settlement with the DOJ joins the growing ranks of penalties above $100 million that companies have paid to U.S. authorities in the last three years to resolve cases of foreign bribery. Daimler AG (settlement reported this month), Alcatel-Lucent SA (also reported this month), Halliburton Co. and two KBR entities (February 2009), and Siemens AG (December 2008) all agreed to pay settlement amounts of that magnitude. Before 2008, the largest FCPA penalty was the $44 million assessed against Baker Hughes Inc. in 2007. While DOJ officials lately have emphasized prosecutions of individuals, especially senior executives, for foreign bribery offenses, it is clear that heavy financial penalties in major cases against corporations are here to stay.[6]

(4) ***The DOJ can use a variety of charges besides the FCPA.*** BAE is not charged under the FCPA. Indeed, it seems questionable whether BAE, a U.K. company, would be subject to jurisdiction under the FCPA for the conduct in 2001 to 2002 alleged in the DOJ's criminal information. Rather than charge a violation of the FCPA, the criminal information charges BAE under 18 U.S.C. § 371 with conspiracy to make false statements to the U.S. government. Specifically, BAE sent a letter to the U.S. Department of Defense ("DOD") in November 2000 affirming that BAE and non-U.S. entities that it controlled were "committed to conducting business in compliance with the anti-bribery standards in the OECD Anti-Bribery Convention."[7] BAE re-affirmed its commitment in a second letter to the DOD in May 2002 and also, according to the DOJ, knowingly and willfully submitted false applications to the U.S. Department of State for arms export licenses where it failed to disclose commissions it paid to third parties.[8] Expect to see more of this type of charging creativity by DOJ. Late last year, in connection with an FCPA case against American telecommunications executives, the DOJ charged two former Haitian officials, who it alleged had received bribes from the executives, with money laundering offenses. The officials could not be charged under the FCPA, which does not reach bribe recipients.[9] In other cases involving alleged foreign bribery, U.S. authorities have augmented FCPA charges with counts for offenses such as Travel Act violations, mail and wire fraud, and tax fraud.

(5) ***The DOJ's criminal information paints a picture of familiar red flags at BAE.*** The mechanisms that BAE allegedly used to make questionable payments will be familiar

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5 James Fowler, "'False Accounting' Plea By British Arms Giant May Implicate Former Chilean Dictator," *Santiago Times* (Feb. 9, 2010), http://www.santiagotimes.cl/index.php?option=com_content&view=article&id=18210:false-accounting-plea-by-british-arms-giant-may-implicate-former-chilean-dictator&catid=43:human-rights&Itemid=39; Nicola Clark, "Swiss confirm BAE investigation," *The New York Times* (May 14, 2007), http://www.nytimes.com/2007/05/14/business/worldbusiness/14iht-bae.html.

6 *See* FCPA Update Vol 1, No. 4 (Nov. 2009), "FCPA Enforcement: The Latest From U.S. DOJ and SEC Representatives," at 3 (reporting that Assistant U.S. Attorney General Lanny Breuer, Deputy Chief of the DOJ Criminal Division's Fraud Section Mark Mendelsohn, and Associate Director of the Securities and Exchange Commission's Division of Enforcement Cheryl Scarboro have all said that individual prosecutions are a cornerstone of FCPA enforcement), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=f461b32f-41ab-42a6-b4f9-4f5a87d40aaf.

7 BAE, Information ¶¶ 9-11 & Ex. A.

8 *Id.* ¶¶ 12-24.

9 *See* FCPA Update Vol. 1, No. 5 (Dec. 2009), "Former Foreign Officials Charged in FCPA-Related Indictment," at 3, http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=a8b4614c-b6f2-4dea-8016-01c0d7807a4c.

## BAE Settlement Highlights Enforcement Trends ■ Continued

to anyone who follows FCPA enforcement actions. The DOJ criminal information alleges that BAE made payments to intermediaries called "marketing advisors," sometimes via offshore shell entities beneficially owned or established either by BAE (including an entity in a bank secrecy jurisdiction, the British Virgin Islands) or by the advisors themselves.[10] The DOJ alleges that BAE "maintained inadequate information related to who its advisors were and what work the advisors were doing to advance [BAE's] business interests."[11] The allegations against BAE highlight the importance of effective corporate controls over relationships with business partners however denominated, and over the payments made to them.

(6) ***A company that settles an anti-bribery corruption investigation should try to reduce the risk of debarment, as BAE's settlement does.*** The DOJ criminal information against BAE states at the outset that BAE's wholly-owned U.S. subsidiary BAE Systems, Inc. was not involved in the charged conduct.[12] This type of statement can be very important to avoiding debarment from U.S. government contracting when the parent or affiliate of a U.S. company pleads guilty or is otherwise implicated in bribery of foreign officials. The U.S. government may debar an entity from federal contracts or grants for up to three years for a conviction or civil judgment for, among other things, fraud or a criminal offense in public contracting, tax evasion, violating federal criminal tax laws, making false statements, falsification or destruction of records, or "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor."[13] In addition, federal contractors face suspension or debarment for failure to disclose FCPA violations.[14] When debarment is imposed, it generally applies to the legal entity that has demonstrated a lack of business honesty and integrity, and to any entities owned or controlled by the debarred entity– which is why the DOJ's statement about BAE's U.S. subsidiary is vital.[15] A parent or affiliate that contributed to an entity's wrongful conduct by action or inaction (*e.g.*, lack of internal controls, training, or an ethics and compliance program) also may face debarment. While any debarment decision is up to the lead government agency involved in contracting with the company, a helpful statement by the DOJ, sometimes coupled with an agreement from the DOJ that it will not ask any federal agency to initiate debarment proceedings, can go a long way to reducing the risk of debarment.

***(7) Watch for more efforts to compensate nations that are victims of their officials' corruption.*** According to the SFO, part of the £30 million to be paid by BAE in the U.K. settlement will go to the people of Tanzania. This may signal a trend in resolutions of foreign bribery cases. Last November, U.S. Attorney General Eric Holder said in a speech in Doha, Qatar that recovery of assets from corrupt officials is "a global imperative," because "[w]hen kleptocrats loot their nations' treasuries, steal natural resources, and embezzle development aid, they condemn their nations' children to starvation and disease." Holder went on to list instances in which the U.S. recovered assets from foreign officials via forfeiture proceedings and repatriated the assets to Peru, Italy and Nicaragua.[16] Efforts to make whole the victims of official bribery are an expansion of the concept of equitable resolution in FCPA cases, which U.S. authorities first applied when they required disgorgement of ill-gotten gains in the case of ABB Ltd. in 2004.[17]

In sum, the BAE settlement provides companies with valuable insights into anti-foreign bribery enforcement in the U.S. and U.K. ■

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10 BAE, Information ¶¶ 26-29.

11 *Id.* ¶ 30.

12 Id. ¶ 2. By not pleading guilty to a bribery count, BAE also avoids or reduces the possibility of being debarred from EU contracting.

13 48 C.F.R. § 9.406-2(a).

14 Final Rule on Mandatory Disclosure and Contractor Business Ethics, 73 Fed. Reg. 67,064 (Nov. 12, 2008).

15 *See* 48 C.F.R. § 9.406-1(b).

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

17 SEC Litig. Rel. No. 18775, SEC Sues ABB Ltd. In Foreign Bribery Case (July 6, 2004) (Swiss power and automation technologies company agreed to disgorge $5.9 million in settling FCPA action), http://www.sec.gov/litigation/litreleases/lr18775.htm.

# News from the BRICs

## Brazil: President Lula Submits New Anti-Fraud Bill to Congress

On February 8, 2010, President Luiz Inácio Lula da Silva sent a new anti-fraud proposal to the Brazilian Congress that also includes anti-bribery provisions. The bill, which is intended to stiffen existing anti-fraud laws,[1] is significant because it would severely increase civil fines and punitive measures for corrupt or fraudulent acts. The legislation's chances of passage, however, are uncertain, as this latest proposal joins many other anti-corruption bills that have thus far unsuccessfully awaited debate and voting in the Brazilian Congress.[2]

Factors influencing passage, however, could include the continuing pressure on OECD Convention signatories to take aggressive steps to enforce anti-bribery mandates, as well as the desire to improve transparency in advance of the 2014 Soccer World Cup tournament and the 2016 Olympic Games, both scheduled to be held in Brazil.

The proposed law would create civil and administrative liability for acts committed "against national or international public entities."[3] Those entities include foreign states and "companies directly or indirectly controlled by a foreign government," as well as public international organizations.[4] The bill would apply to all legal entities, whether incorporated or not, and regardless of their form of organization. Corporate liability would attach to acts committed by controlled or controlling entities and consortium partners,[5] as well as agents, even if the acts occur without authorization or in excess of powers of representation.[6]

President Lula's bill would include a broad set of offenses, including bribing public officials; bidding or contract fraud; deriving an undue benefit from a contract modification in violation of bidding rules or the contract itself; using an intermediary to conceal the beneficiary's identity; defrauding the "economic-financial equilibrium" of public contracts; and failing to make payroll or social security tax contributions arising from a public contract.[7]

The bill would grant tougher and broader enforcement powers and sanctions than are currently available to Brazilian regulators. Violations could result in a variety of penalties, ranging from widely circulated publications of condemnation, to consequential damages, to the repeal of licenses or contracts and a ban on receiving future public contracts, incentives, subsidies or loans. Companies could be fined in amounts of up to thirty percent of gross revenues, or alternatively BRL 6,000-6,000,000 (US$ 3,300-3,300,000).[8] According to Comptroller General Jorge Hage, this provision would allow Brazilian anti-fraud authorities, for the first time, to go after a company's capital.[9]

In choosing appropriate sanctions and penalties, the bill would allow the relevant authorities to take into account the entity's degree of cooperation provided to regulatory authorities, as well as the existence of functional internal controls, codes of conduct, and whistle-blower mechanisms. Administrative and civil enforcement jurisdiction would be granted to any "competent public authority," although a special enforcement role for acts against foreign public entities is carved out for the Comptroller General.[10] ■

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1 *See, e.g.*, Constituição Federal, Art. 37, 54, 55, 93; Código Penal, Law 8,666 of June 21, 1993 (Law on Government Tendering and Contracting); Law 8,429 of June 2, 1992 (Government (Administrative) Impropriety Act); Law 8,027 of April 12, 1990 (Code of Conduct of Federal Public Servants); and Law 8,027 of April 12, 1990 (Code of Conduct of Federal Public Servants).

2 See Business Anti-Corruption Portal, Brazil: Anti-Corruption Initiatives, http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/brazil/initiatives/public-anti-corruption-initiatives/.

3 Proposed Law, Chapter I, art. 1.

4 Proposed Law, Chapter II, art. 6, § 1.

5 Proposed Law, Chapter I, art. 5.

6 Proposed Law, Chapter I, art. 3, § 2.

7 Proposed Law, Chapter II, art. 6.

8 Proposed Law, Chapter III, art. 7.

9 Márcio Falcão, "Lula envia ao Congresso projeto que pune empresas que pratiquem atos de corrupção," Folha en Linha, Aug. 2, 2010, http://www1.folha.uol.com.br/folha/brasil/ult96u691308.shtml.

10 Proposed Law, Chapter IV, art. 11, 12.

# Daimler AG Reportedly to Pay $200 Million to Settle Bribery Allegations

Bloomberg reported on February 13 that the DOJ and SEC submitted settlement papers to the U.S. District Court for the District of Columbia to resolve allegations of bribery against German car manufacturer Daimler AG and two of its subsidiaries.[1] According to the report, Daimler agreed to pay $200 million to settle FCPA charges and two subsidiaries entered guilty pleas. The settlement requires U.S. District Court approval. As of the time of this writing, the settlement papers have not been approved and/or made publicly available. The SEC began investigating Daimler in 2004, after a whistleblower in corporate audit filed a complaint with the Department of Labor and sued DaimlerChrysler Corp. in Michigan federal court alleging that he was fired because he spoke out about at least forty "secret bank accounts" allegedly maintained by business units within Daimler AG (at the time, DaimlerChrysler AG) and its subsidiaries to bribe government officials.[2] In a 2005 annual report, Daimler disclosed that an internal investigation determined that "improper payments" implicating the FCPA and other applicable laws had been made, primarily in Africa, Asia and Eastern Europe.[3] In July 2005, Daimler disclosed that it was also being investigated in connection with the United Nations Oil-for-Food Program bribery scandal.[4] ■

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1 David Voreacos, Justin Blum, and Joshua Gallu, "Daimler Said to Agree to Pay $200 Million Over Probe of Bribes," *Bloomberg* (Feb. 13, 2010), http://www.bloomberg.com/apps/news?pid=20601087&sid=aXucdCIxUGoo&pos=5.

2 *Bazzetta v. DaimlerChrysler Corp.*, No. 2:04-cv-73806 (E.D. Mich. Nov. 22, 2004), ¶¶ 23, 24, 25, 26. The complaint was dismissed with prejudice in July 2005. *See Bazzetta v. DaimlerChrysler Corp.*, No. 2:04-cv-73806 (E.D. Mich. Jul. 1, 2005).

3 DaimlerChrysler AG, Annual Report (Form 20-F), at 94-95 (Mar. 6, 2006).

4 DaimlerChrysler AG, Report of Foreign Issuer (Form 6-K), at 29 (Jul. 2005).