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March 2010 ■ Vol. 1, No. 8

Update on BAE's Settlements with the DOJ and the SFO

In our last issue, we analyzed the settlements announced in February 2010 between U.K. defense company BAE Systems plc ("BAE") and U.S. and U.K. authorities relating to their bribery investigations.[1] We described the terms of the proposed settlements and made seven observations about the respective resolutions. This article discusses the potential implications for BAE's export license applications for defense articles resulting from the company's settlement with the Department of Justice ("DOJ"). We also update readers on reactions and legal action in the wake of BAE's settlement with the U.K.'s Serious Fraud Office ("SFO").

DOJ Settlement: Its Potential Effect on BAE's Export Licenses

On March 1, 2010, the U.S. District Court for the District of Columbia approved the settlement between the DOJ and BAE, pursuant to which BAE entered a guilty plea and agreed to a criminal fine of $400 million.[2] BAE was not charged with an FCPA violation despite conduct alleged in the DOJ's criminal information that appeared to describe offenses under the FCPA's anti-bribery provision. According to the Sentencing Memorandum, BAE concealed regular commission payments to third parties, such as marketing consultants, in the context of weapons system tenders in several countries, while being aware of the "high probability that part of the funds would be passed on to a foreign government official to influence a decision in favor of BAE."[3]

Corporate defendants in FCPA investigations are generally reluctant to plead guilty to the FCPA's anti-bribery provision due to a host of potential collateral effects, including the threat of debarment from public bids both in the U.S. and the E.U.[4] This is all the more so for companies like BAE, whose business portfolio consists of a significant number of national defense contracts in the U.S. and the E.U. For that

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1 *See* FCPA Update Vol. 1, No. 7 (Feb. 2010), "BAE Settlement Highlights Enforcement Trends," http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=9ea573d9-b41c-477b-9861-01f17cee6c9c.

2 DOJ Press Rel. 10-209, BAE Systems plc Pleads Guilty and Ordered to Pay $400 Million Criminal Fine, (Mar. 1, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

3 *United States v. BAE Systems plc*, Crim. No. 1:10-cr-035, Sentencing Memorandum at 5 (D.D.C. 2010).

4 *See* 48 C.F.R. § 9.406-2(a) (2008); European Union Directive 2004/18/EC (2004).

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reason, reaching a settlement with the DOJ that avoided a guilty plea under the FCPA was likely of substantial importance to BAE. Still, steering clear of FCPA liability in DOJ settlements will not necessarily keep other federal executive agencies from joining the fray and imposing potentially serious sanctions.

BAE settled with the DOJ by pleading guilty to a one-count charge of conspiracy to defraud the U.S. in violation of 18 U.S.C. § 371.[5] According to the Statement of Offense, BAE falsely assured the U.S. government of its compliance with the FCPA and the OECD Anti-Bribery Convention and failed to disclose certain facts in applications for export licenses of defense products required by the Arms Exports Control Act ("AECA") (22 U.S.C. §§ 2751, *et seq*.) and the International Traffic in Arms Regulations ("ITAR") (22 C.F.R. §§ 120, *et seq*.).[6] These statutes govern the export of controlled U.S. defense technology itemized in the United States Munitions List ("USML"). When applying for an export license, a party must, *inter alia*, inform the Directorate of Defense Trade Controls in the U.S. State Department whether, directly or indirectly, it has paid or offered to pay fees or commissions of more than $100,000 in the aggregate in connection with the sale of defense materials.[7]

Within days of the announcement of the DOJ settlement, the State Department had placed a temporary hold on pending and future export licenses for defense products containing BAE parts.[8] A consequence of conspiring to defraud the U.S. government under 18 U.S.C. § 371 by violating the AECA is a presumptive three-year revocation of the defendant's license to export any items on the USML, "except as may be determined on a case-by-case basis by the President…."[9] Tracking the AECA's statutory language, the State Department's web notice stated that "persons convicted of violating or conspiracy to violate the AECA are statutorily debarred by the Department of State and then placed under a resulting policy of denial."[10] The temporary hold notice was to remain in place "until the Statutory Debarment and resulting policy of denial has been published in the Federal Register."[11] The temporary hold was to apply not only to the U.K.-based parent company BAE Systems, but also where "any of its subsidiaries is an applicant, consignee, end user, manufacturer or source."[12]

Only 24 hours after posting the temporary hold notice, however, the State Department had removed it from its website, indicating that it was still reviewing BAE's settlement with the DOJ and that it had not determined its course of action.[13] The quick withdrawal of the notice may be explained in part by the fact that the DOJ had made no assertion that BAE's U.S. subsidiary was involved in any of its parent's allegedly improper actions. Indeed, the DOJ's Information emphasized that "the facts set out herein do not relate to or represent any conduct of [the U.S. subsidiary, which] was and is subject to a Special Security Agreement ("SSA") with the United States government…."[14] Moreover, the DOJ anticipated potential debarment moves arising from the settlement and declared its availability to communicate with U.S. and foreign debarment and regulatory authorities by offering facts to assess whether BAE is a responsible government contractor.[15]

The details of the State Department's

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5 *United States v. BAE Systems plc*, note 3, *supra*; DOJ Press Rel., note 2, *supra*.

6 *United States v. BAE Systems plc*, Crim. No. __, Statement of Offense (D.D.C. 2010), http://www.justice.gov/criminal/pr/press_releases/2010/03/03-01-10bae-plea-%20agreement.pdf.

7 22 C.F.R. § 130.9(a)(1)(ii).

8 William Matthews, "U.S. Puts Hold on Export Licenses for BAE: State Dept.," *DefenseNews*, (Mar. 3, 2010), http://www.defensenews.com/story.php?i=4523735.

9 22 U.S.C. § 2778(g)(4) (2004). Similarly, the ITAR stipulates statutory debarment for a period of three years for export license holders convicted of violating certain enumerated criminal statutes, pursuant to § 38(g)(4) of the AECA, while allowing for "[d]iscretionary authority to issue licenses […], but only if certain statutory requirements are met." 22 C.F.R. § 127.7(c) (2006).

10 Web Notice, U.S. Department of State, "Licenses and Other Approvals Involving BAE Systems plc," (Mar. 2010), available at *Financial Times*, http://www.ft.com/cms/4dd01aac-2c95-11df-be45-00144feabdc0.pdf.

11 *Id*.

12 *See* Matthews, note 8, *supra*.

13 "U.S. to Delay BAE Export Licenses After Plea Deal," *ABC News*, (Mar. 9, 2010), http://abcnews.go.com/Business/wireStory?id=10055410 .

14 *United States v. BAE Systems plc*, Crim. No.: 1:10-cr-035, Information at § 2 (D.D.C. 2010).

15 *United States v. BAE Systems plc*, Sentencing Memorandum, at 15 ("The Department will communicate with U.S. debarment and regulatory authorities, and relevant foreign authorities, if requested to do so, regarding the nature of the offense of which BAES has been convicted, the conduct engaged in by BAES, its remediation efforts, and the facts relevant to an assessment of whether BAES is presently a responsible government contractor.").

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decision on BAE export licenses are yet to be disclosed, although its contours are emerging. In light of the particularly close U.S.-U.K. defense relationship, formulation of the new policy is said to be expedited and put in place "within weeks."[16] The department reportedly will continue to grant export licenses to the company's U.S. subsidiary, BAE Systems, Inc.[17] Two exceptions to the temporary export license hold have apparently already been approved for U.S.-made BAE products that support U.S. and allied war efforts in Afghanistan and Iraq and existing programs for NATO and non-NATO allies.[18] A senior State Department official reportedly remarked off the record that the department would have to formulate a policy of presumptive denial of BAE export license applications – of which almost 200 are currently pending – with exceptions, primarily based on national security grounds, to be defined by the policy.[19] BAE produces defense equipment for ongoing war efforts and plays an integral role in the development of new weapons systems, such as the Joint Strike Fighter F-35 involving eight NATO members and Australia, which underscores the challenge to the U.S. government and its partners that would arise from a prolonged export license hold.

BAE would not be the first defense company to be granted exceptions on national security considerations. In a 2007 case involving ITT Corporation, which pleaded guilty to violating the AECA by exporting technical data relating to night vision goggle systems to Singapore, China, and the U.K. without authorization, the State Department permitted various exceptions to the statutorily mandated three-year debarment and allowed for a request for reinstatement after one year.[20] Pursuant to the debarment notice, any ITT business unit not implicated in the AECA violations would be excepted from debarment, and even ITT's culpable night vision division could be granted exceptions for equipment necessary to U.S. national security and foreign policy interests.[21]

It remains to be seen what action the State Department may take with respect to BAE's export licenses. The signals attributed to department officials indicate that the U.K.-based arms manufacturer may benefit from its substantial importance to U.S. national security and strategic interests, and that its U.S. subsidiary may escape debarment altogether due to its non-involvement in the wrongdoing. Nevertheless, the episode serves as a reminder that the DOJ settlement and the $400 million fine imposed in the U.S. may not be the only legacy of the investigations into BAE's alleged wrongdoing.

Companies should be aware of legal risks in the U.S. beyond prosecution by the DOJ and liability under the FCPA in connection with potential bribery and other improper payments. Not least among these risks is the possibility of debarment and other painful sanctions imposed by other U.S. government agencies with pertinent regulatory authority.[22]

SFO Settlement

Meanwhile, the viability of the settlement in the U.K. between BAE and the SFO that resolved investigations into transactions in multiple countries seems to be assured. The settlement foresees BAE making a £30 million payment for accounting violations under section 221 of the Companies Act 1985 in connection with the sale of radar equipment to Tanzania in 1999.[23] Some commentators attacked the settlement as too lenient in scope and amount,[24] and two arms control and social justice NGOs – Corner House

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16 Nicholas Kralev, "Guilty Plea May Not Hurt BAE's U.S. Arm," *Washington Times*, (Mar. 16, 2010), http://www.washingtontimes.com/news/2010/mar/16/bribery-plea-may-not-hurt-bae-systems-us-arm/.

17 Daniel Dombey, Stephanie Kirchgoessner, and Sylvia Pfeifer, "U.S. Suspended BAE Systems' Licenses," *Financial Times*, (Mar. 11, 2010), http://www.ft.com/cms/s/0/c20fc8a4-2c8b-11df-be45-00144feabdc0.html?catid=3&SID=google.

18 William Matthews, "U.S. Partially Lifts Freeze on BAE Export Licenses," *DefenseNews*, (Mar. 16, 2010), http://www.defensenews.com/story.php?i=4541961.

19 *See* Kralev, note 16, *supra* .

20 Statutory Debarment of ITT Corporation Pursuant to the Arms Export Control Act and the International Traffic in Arms Regulations, 72 Fed. Reg. 18, 310-10 (Apr. 11, 2007).

21 *Id.*

22 While the State Department's Directorate of Defense Trade Controls is responsible for the issuance of export licenses of defense products, additional U.S. regulatory authorities govern the export of other materials, including the Department of Energy (nuclear materials), the Department of Commerce's Bureau of Industry and Security (items with dual military/commercial use), and the Department of the Treasury's Office of Foreign Assets Control (administration and enforcement of trade sanctions).

23 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.

24 *See, e.g.*, Christopher M. Matthews, "Criticism of BAE Settlement with U.K., U.S. Continues," *Main Justice*, (Feb. 19, 2010), http://www.mainjustice.com/2010/02/19/criticism-of-bae-settlement-with-u-k-u-s-continues/; *see also* Sifi Schubert, "BAE: How Good a Plea Deal Was It?," *PBS Frontline World*, (Feb. 9, 2010), http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-too-good-a-deal-says-chair-of-anti-bribery-group.html.

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and Campaign Against Arms Trade – obtained a preliminary injunction barring the SFO from any further steps to close its investigation of BAE.[25] Issues raised by the NGOs included whether the SFO had followed the correct prosecution guidance on plea bargains and whether the settlement reflected the gravity of BAE's alleged wrongdoing.[26] After initially granting the request for an injunction, the British High Court ruled, however, that a full judicial review of the settlement was not warranted, thereby confirming the lawfulness of the proposed settlement.[27] The High Court also declined to review the SFO's decision to drop criminal charges against a former BAE lobbyist alleged to have bribed foreign officials.[28] Giving the groups time to appeal its rulings, the court extended the injunction period against formal court approval of the settlement for eight days.[29]

Here are two observations about the reaction to BAE's settlement in the U.K. and its comparison to the U.S. settlement:

First, plea bargains between companies and the SFO will attract close scrutiny in the British legal community. The response to the SFO's cessation of long-running investigations into BAE in connection with transactions in South Africa, the Czech Republic, Hungary, and elsewhere (including the SFO's earlier decision to stop its investigation relating to Saudi-Arabian military equipment deals) has been particularly vocal due to the high-profile nature and political dimensions of the investigations, the monetary amounts allegedly at stake, and the still novel use of plea bargains by the SFO to resolve corporate investigations. Look for continued criticism of plea bargains, especially if defendants are perceived to escape liability too easily.

Second, although the BAE settlements in the U.S. and the U.K. constitute yet another example of close cooperation between U.S. regulators and their foreign counterparts, coordinated settlements do not always result in commensurate resolutions. While the criminal fine of $400 million in the U.S. is the third highest to date stemming from DOJ investigations into potential FCPA violations, the £30 million penalty in the U.K. appears small in comparison. The contrast in the settlement amounts is especially noteworthy considering that BAE is a U.K.-based corporation.

The significantly lower fine in the U.K. can be explained, in part, by the fact that the SFO and the DOJ focused on different transactions; the proposed SFO settlement is the result of an accounting violation arising from alleged payments related to the sale of a radar system in Tanzania alone, whereas BAE's guilty plea to conspiring to defraud the U.S. government involved alleged payments pertaining to deals in Saudi-Arabia, the Czech Republic, and Hungary. Moreover, fines resulting from investigations by the SFO generally have been lower than those imposed in the U.S.; in fact, BAE's £30 million penalty is the largest-ever imposed by the SFO.[30] It remains to be seen how the U.K.'s new Bribery Bill, expected to be enacted in the next weeks or months, and the SFO's recent tougher stance in pursuing allegations of fraud and corruption, will affect the level of fines and penalties imposed in the U.K. in the future. ■

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25 Alistair Dawber, "BAE Protesters Win SFO Injunction," *The Independent*, (Mar. 3, 2010), http://www.independent.co.uk/news/business/news/bae-protesters-win-sfo-injunction-1914892.html.

26 *Id.*

27 "Campaigners lose bid to block SFO plea deal with BAE Systems," *Times Online*, (Mar. 24, 2010), http://timesonline.typepad.com/law/2010/03/campaigners-lose-bid-to-block-sfo-plea-deal-with-bae-systems.html.

28 Christopher M. Matthews, "U.K. Court Denies Review of BAE Fraud Settlement," *Main Justice*, (Mar. 24, 2010), http://www.mainjustice.com/2010/03/24/uk-court-denies-review-of-bae-settlement/.

29 *Id.*

30 "BAE reaches $450 mln settlement with U.S., Britain," *Reuters*, (Feb. 5, 2010), http://www.reuters.com/article/idUSTRE6143UZ20100205.

Vietnam – The Nexus Technologies Settlement and Broader Corruption Risks

The U.S. Department of Justice ("DOJ") announced on March 16, 2010 that Nexus Technologies, Inc. and three of its employees pleaded guilty to violations of the FCPA and other federal laws in connection with payments made to Vietnamese government officials.[1] The U.S.-based export company admitted that it had conspired to bribe public officials to obtain equipment and technology contracts with various Vietnamese government agencies. The company's president and owner, as well as two of his siblings (also Nexus employees), also pleaded guilty to various offenses, including participating in the same conspiracy to violate the FCPA, substantive violations of the FCPA, violations of the Travel Act, and money laundering.[2] The DOJ alleged that Nexus Technologies paid bribes of over $250,000 to the officials, and that the company, which will be dissolved, operated primarily through criminal means.[3] Nexus faces a maximum fine of $27 million at its sentencing, which is expected to occur this summer. The individual defendants face maximum prison sentences of up to 30 and 35 years, respectively.[4]

These guilty pleas and anticipated stiff penalties serve as a reminder of the serious bribery risks companies face in doing business in Vietnam. Vietnam has consistently been perceived as a high-corruption risk environment (ranking 120th out of 180 countries on Transparency International's 2009 Corruption Perception Index, 121st of 180 in 2008, and 123rd of 179 in 2007). A large government bureaucracy and the prevalence of state-owned enterprises increase the corruption risks, particularly for foreign companies active in Vietnam. Recall that the DOJ's interpretation of the definition of foreign official under the FCPA is broad and encompasses not just government agencies officials, but also employees of businesses under effective government control.[5]

Somewhat surprisingly, however, especially in light of Vietnam's rapid economic growth and the increased foreign investment in recent years, there have been few publicized FCPA investigations relating to Vietnam. Aside from the Nexus Technologies case, the settlements involving Siemens AG[6] and Daimler AG[7] in connection with their respective activities in numerous countries, including Vietnam, are the only charged FCPA cases to have been premised, in part, on business conducted in Vietnam. The just concluded investigations by the DOJ and the SEC into allegations that Daimler engaged in bribery in 22 countries resulted in a total fine of $185 million and a deferred prosecution agreement between the DOJ and Daimler AG.[8] Conduct alleged in Vietnam consisted of a variety of improper payments to government officials, including broker and sales commissions and sham consulting contracts in connection with the sale and leasing of Mercedes vehicles to Vietnamese entities.[9]

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1 DOJ Press Rel.10-270, Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials, (Mar. 16, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-270.html.

2 *Id.* On June 29, 2009, a former Nexus Technologies partner had already pleaded guilty to conspiracy and to violating the FCPA. *See* DOJ Press Rel. 09-635, Former Executive of Philadelphia Company Pleads Guilty to Paying Bribes to Vietnamese Officials, (Jun. 29, 2009), http://www.justice.gov/criminal/pr/press_releases/2009/06/06-28-09nexus-guilty.pdf.

3 DOJ Press Rel., note 1, *supra*.

4 *Id.*

5 *See* 15 U.S.C. § 78dd-1)(f)(1)(A) (definition of foreign official). In fact, Nexus Technologies' defense counsel argued in a motion to dismiss that the prosecution's interpretation of "foreign official" was unduly broad and that a mere allegation of government control over otherwise commercial enterprises is insufficient to turn these entities into instrumentalities of a foreign government under the FCPA. After the judge denied the motion to dismiss without comment, the parties subsequently settled. *See* Christopher M. Matthews, "*Daimler* Case Begs the Question: Who is a Foreign Official?" *Main Justice*, (Mar. 25, 2010), http://www.mainjustice.com/2010/03/25/daimler-case-begs-the-question-who-is-a-foreign-official/.

6 SEC Press Rel. 2008-294, SEC Charges Siemens AG for Engaging in Worldwide Bribery, (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm.

7 Vanessa Fuhrmans and Thomas Catan, "Daimler to Settle With U.S. on Bribes," *The Wall Street Journal*, (Mar. 24, 2010), http://online.wsj.com/article/SB10001424052748704896104575139891186752682.html?mod=WSJ_hpp_sections_business.

8 Deferred Prosecution Agreement, *United States v. Daimler AG*, Crim. No. 1:10-cr-00063 (D.D.C. 2010).

9 *Id.* at 47-52 (description of Vietnam allegations).

Vietnam – The Nexus Technologies Settlement ■ Continued from page 6

The Vietnamese government has recently taken some steps to combat corruption. Just last year, Vietnam ratified the UN Convention against Corruption, which requires countries to adopt certain legal standards in the fight against corruption, including criminalizing bribery of public officials.[10] One recent corruption case with prosecutions in Vietnam and Japan has garnered significant attention and possibly indicates greater emphasis by Vietnam on judicial methods to fight bribery and corruption. Illegal payments of $820,000 made by a Japanese company in connection with a large public infrastructure project to an official of the Ho Chi Minh City Department of Transport led to the conviction in Japan of three executives and their company, Pacific Consultants International. Subsequently, the Vietnamese bribe recipient and his deputy were arrested in February 2009 for "abuse of power" and sentenced by a Vietnamese appeals court to six and five years imprisonment, respectively.[11] The corruption scandal even caused Japan to suspend official development aid to Vietnam temporarily in 2008 before resuming it with certain conditions attached.[12]

Despite the absence of a large number of FCPA investigations or bribery prosecutions of foreign businesses by Vietnamese authorities, the guilty plea of Nexus Technologies and three of its employees provides a cautionary tale. The sustained aggressiveness of the DOJ in prosecuting FCPA violations should deter companies and their representatives from making or authorizing payments in violation of anti-bribery laws and encourage them to maintain effective compliance and internal controls mechanisms. ■

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10 John Ruwitch, "Vietnam Says Ready to Ratify UN Corruption Charter," *Reuters*, (May 29, 2009),http://www.reuters.com/article/idUSHAN406581; "Vietnam Ratifies Anti-corruption Pact," *Agence France-Presse*, (July 3, 2009), http://www.google.com/hostednews/afp/article/ALeqM5h9eQababsVect6oI--4q-nQIKojA.

11 "Vietnam Court Doubles Jail Term for Official," *Agence France-Presse* (Mar. 17, 2010), http://ca.news.yahoo.com/s/afp/100317/world/vietnam_japan_aid_corruption; "New Vietnam Probe Over Japan Aid Scandal: Reports," *Agence France-Presse* (January 26, 2010), http://news.malaysia.msn.com/regional/article.aspx?cp-documentid=3816758.

12 Jason Folkmanis and Nguyen Dieu Tu Uyen, "Japan Suspends Aid to Vietnam, Citing Corruption," *Bloomberg News,* (Dec. 5, 2008), http://www.bloomberg.com/apps/news?pid=20601080&sid=aTIhAZGLZ2Ko.

Innospec Settlement

Continuing a trend of cross-Atlantic cooperation, the U.S. Securities and Exchange Commission ("SEC"), in its first corruption-related "global" settlement involving parallel resolutions by the U.K. authorities, filed an enforcement action on March 18, 2010 charging Innospec, Inc. ("Innospec"), a specialty chemical company, with violating the FCPA and other federal laws.[1] The SEC action followed coordinating enforcement actions with the Department of Justice ("DOJ"), the Department of the Treasury's Office of Foreign Assets Control ("OFAC"), and the United Kingdom's Serious Fraud Office ("SFO").

Innospec allegedly bribed government officials from 2000 to 2007 in order to sell Tetra Ethyl Lead ("TEL"), a fuel additive that boosts the octane value of gasoline, to state-owned refineries and oil companies in Iraq and Indonesia.[2] The company purportedly paid Iraqi and Indonesian government officials about $6.3 million and promised an additional $2.9 million in exchange for $177 million in contracts and $60 million in revenues and profits.[3]

In the U.S. proceedings in the District Court for the District of Columbia, the company neither admitted nor denied the SEC's allegations, but consented to retaining an independent compliance monitor to review and evaluate its internal controls, financial reporting, and compliance with the FCPA and other anti-corruption laws, as well as to paying $11.2 million of disgorgement.[4] Under its agreement with the DOJ, Innospec pleaded guilty to FCPA violations and was fined $14.1 million.[5] Also on March 18, 2010, and an ocean away, Innospec pleaded guilty at Southwark Crown Court to conspiracy to corrupt, contrary to section 1 of the U.K. Criminal Law Act 1977 for bribing employees of Pertamina, the Indonesian state-owned oil concern, and other Indonesian government officials.[6] Following its guilty plea, Innospec will pay a fine of the sterling equivalent of $12.7 million.[7] Innospec will also pay $2.2 million to OFAC for unrelated conduct concerning violations of the US embargo against Cuba.[8]

These penalties are significantly lower than they could have been. In the process of coordinating the settlement, the various authorities conducted an analysis of the maximum amount that Innospec could pay without affecting the viability of its business.[9] The authorities decided upon a figure of $40 million before further agreeing that the DOJ was entitled to one-third of this amount, the SEC and OFAC to another third, and the U.K. authorities to the remaining third.[10] This amount is a fraction of the penalty that could have been imposed had Innospec had greater means to pay; the total fines could have exceeded $400 million in the U.S. and $150 million in the U.K.[11]

The charges against Innospec with respect to its activities in Iraq constitute an additional chapter in the efforts of American authorities to pursue the corruption that occurred under the United Nations ("UN") Oil for Food Program.[12] According to the Independent Inquiry Committee, Saddam Hussein's regime appropriated $1.8 billion in illicit kickbacks and surcharges from the

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1 SEC Litig. Rel. No. 21454, SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia with Total Disgorgement and Criminal Fines of $40.2 Million, (Mar. 18, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21454.htm.

2 *Id. See also* DOJ Press Rel., Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba, (Mar. 18, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

3 *See* SEC Litig. Rel., note 1, *supra*.

4 *SEC v. Innospec, Inc.*, Civ. No. 1:10-cv-00448 (D.D.C. 2010) (¶¶ 2, 6).

5 *See* DOJ Press Rel., note 2, *supra*.

6 SFO Press Rel., Innospec Limited Prosecuted for Corruption By the SFO, (Mar. 18, 2010), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.

7 *Id.*

8 OFAC, Innospec Inc. Settles Cuban Assets Control Regulations Allegations, (Mar. 19, 2010), http://www.ustreas.gov/offices/enforcement/ofac/actions/20100319.shtml.

9 Sentencing Remarks of Lord Justice Thomas, Crown Court at Southwark, Regina v. Innospec Ltd., (Mar. 26, 2010) (¶¶ 10, 42).

10 *Id.* at ¶ 13.

11 *Id.* at ¶ 7.

12 Independent Inquiry Committee into the United Nations Oil for Food Program, Illicit Oil-for-Food Program Payments of Nearly $2 Billion to Saddam Hussein; IIC Urges UN Reform, (Oct. 27, 2005), http://www.iic-offp.org/story27oct05.htm.

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Program, which was initially intended to provide humanitarian relief to the Iraqi people.[13] As of September 2009, the SEC had brought 12 Oil for Food related cases and had obtained over $150 million in monetary relief.[14] Innospec is notable as the first Oil for Food case in which the agencies alleged actual bribes under Section 30A of the Securities Exchange Act of 1934,[15] rather than only violations of the books and records provisions of Section 13 of the 1934 Act.[16]

The SEC alleged that between 2000 and 2003, Innospec entered into five contracts for the sale of TEL to the Iraqi Ministry of Oil and its component oil refineries ("MoO").[17] Innospec allegedly paid kickbacks equivalent to 10 percent of the contract value on three of the contracts and offered illicit payments on the other two.[18] The company also artificially inflated its prices in the Program contracts and did not notify the UN of its scheme.[19] After the Program was terminated in 2003 and until 2007, Innospec continued to use its agent in Iraq to secure additional TEL sales. Innospec allegedly provided MoO officials with gifts and entertainment such as a honeymoon, mobile phone cards and cameras, and thousands of dollars in "pocket money," as well as paying bribes to ensure that a fuel product of a competitor would fail a field test.[20]

According to the SFO, efforts to ban TEL in Indonesia on environmental grounds played a factor in Innospec's motivation to bribe government officials there.[21] TEL is not sold in the U.S. or in Europe for health and environmental reasons, but was lawful in Indonesia until 2006.[22] Between 2002 and 2006, Innospec supposedly paid its agents $11.7 million with which to bribe public officials to ensure that Pertamina favored TEL over unleaded alternatives. Innospec also allegedly maintained a slush fund for the purpose of corrupting senior officials in various ministries with the intention of blocking legislation to ban TEL.[23]

The sentencing remarks of Lord Justice Thomas are of particular interest when considering the extent of the U.K. courts' discretion to determine the appropriate sentence. While Lord Justice Thomas accepted Innospec's admission of guilt and many of the financial elements of the settlement, he pointed to an important distinction between U.S. and U.K. law in this area: in the U.S., the provisions of the Federal Rules of Criminal Procedure and other U.S. laws provide a basis for plea agreements, whereas the laws of England and Wales do not permit the SFO to enter into an agreement that specifies the penalty for the offense charged.[24]

This led Lord Justice Thomas to express concern over coordinated settlements and to state that his acceptance of the settlement was confined to the case's unique circumstances.[25] Lord Justice Thomas noted that an agreement between prosecutors on the penalty imposed "cannot be in accordance with basic constitutional provisions,"[26] before adding that "the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again."[27]

The Innospec case highlights the recent trend toward companies cooperating with

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13 *Id.*

14 SEC Press Rel. 09-212, AGCO Corporation Agrees to Pay $18.3 Million to Settle SEC Charges of FCPA Violations, (Sept. 30, 2009), http://www.sec.gov/news/press/2009/2009-212.htm.

15 15 U.S.C. §78dd-1 (2009).

16 15 U.S.C. §78M(B)(2)(a) (2009).

17 *See* SEC Litig. Rel., note 1, *supra*.

18 *Id.*

19 *Id.*

20 *Id.*

21 *See* SFO Press Rel., note 6, *supra*.

22 *Id.*

23 *See* Sentencing Remarks, note 9, *supra*, at ¶ 26.

24 *Id.* at ¶ 23.

25 *Id.* at ¶ 42.

26 *Id.* at ¶ 43.

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the SFO and either reaching civil settlements or agreements to plead guilty to criminal offenses.[28]

The approach of the SFO and the U.K. courts toward companies that self-report following instances of corruption is in a state of flux, as many of the procedures are being tested for the first time. We remain of the view that there are still considerable advantages to cooperating with the U.K. authorities, including the possibility of securing a civil settlement, agreeing to appropriate facts as the basis of a plea, and negotiating a suitable charge.[29] However, careful judgment should always be exercised in each case.

The Innospec case may also encourage countries to develop a uniform approach to financial penalties for companies that engage in bribing government officials. Lord Justice Thomas noted that although there were reasons to differentiate between the custodial penalties the U.S. and the U.K. impose for corruption, no such reasons existed for authorities to hand down varying financial penalties.[30] He elaborated that in adopting a uniform approach, authorities could ensure that the penalties of each country did not favor or disfavor a company in a given country: "If the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states, [while] businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states."[31]

In the U.S., Innospec proceedings also drew an impassioned response from the presiding judge, but for a different reason. Judge Ellen Segal Huvelle accepted Innospec's plea, but reportedly expressed "outrage" over the large sums independent monitors are paid, calling the monitorship imposed in by the U.S. settlement a "boondoggle."[32] Judge Huvelle expressed concern that the DOJ does not cap how much compliance monitors could be paid. She also asserted that it was unrealistic for the court to directly oversee the monitor and stated that she had a duty to the public to know the identity of the monitor, who had not yet been determined. She directed that the Justice Department inform her who is to serve as the monitor once the appointment is made.[33] The Court's remarks are likely to be of significant interest to all entities subject to the FCPA, given the prevalence of monitorships as key provisions in most recent settlements. ■

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27 *Id.* at ¶ 45.

28 One example of a civil settlement is the Balfour Beatty case (*see* SFO Press Rel., Balfour Beatty plc, (Oct. 6, 2008), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx), while an example of a case being resolved following a plea of guilty is the Mabey & Johnson case (*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).

29 *See* Attorney General, Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud, (Aug. 6, 2009), http://webarchive.nationalarchives.gov.uk/20090324094637/http://www.attorneygeneral.gov.uk/attachments/AG_s%20Guidelines%20on%20Plea%20Discussions%20in%20Cases%20of%20Serious%20or%20Complex%20Fraud%20doc.pdf.

30 *See* Sentencing Remarks, note 9, *supra*, at ¶ 31.

31 *Id.*

32 Christopher M. Matthews, "Judge Blasts Compliance Monitors at Innospec Plea Hearing," (Mar. 18, 2010), http://www.mainjustice.com/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/. The appointment of monitors is now commonplace in plea agreements and deferred prosecution agreements under the FCPA.

33 *Id.*