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# FCPA Update

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## Judge Rejects Proposed Fine in ABB FCPA Prosecution

Judges traditionally have served a deferential role in the approval of settlement agreements between federal agencies and private parties. Over the past year, however, several judges have vocally refused to quickly sign off, and instead, have actively inserted themselves into the settlement process.[1] This recent trend has now migrated to the realm of FCPA cases.[2]

On September 29, 2010, the U.S Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") announced the resolution of enforcement actions against ABB Ltd. – a Swiss corporation with American Depositary Shares traded on the New York Stock Exchange – and two of its subsidiaries, ABB Inc. and ABB Ltd. – Jordan.[3]

ABB Ltd. entered into a three-year deferred prosecution agreement ("DPA") and agreed to the filing of a criminal information charging its Jordanian subsidiary with one count of conspiracy to commit wire fraud and to violate the books and records provisions of the FCPA.[4] ABB Ltd. admitted that ABB Ltd. – Jordan paid more than $300,000 in kickbacks to the Iraqi government to secure contracts worth $5.9

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1 Many of the recent examples of judicial involvement in the settlement process stem from cases arising out of the financial crisis. In August 2010, Judge Ellen S. Huvelle refused to sign a settlement between the SEC and Citibank because she was not satisfied that the deal was fair and reasonable. Even though the SEC determined that Citibank realized a benefit of up to $123 million, it offered to settle for a fine of $75 million and cited only one individual in its complaint. *See* Kara Scannell, "Judge Won't Approve Citi-SEC Pact" *The Wall Street Journal* (Aug. 17, 2010), http://online.wsj.com/article/SB10001424052748704868604575433833841630548.html. ("Scannell"). One month later, Judge Huvelle agreed to sign the same settlement agreement under the condition that the SEC certify Citibank's remedial efforts and that the $75 million would go to compensate aggrieved shareholders. Stephanie Kirchgaessner, "US Court Approves Settlement With Citi," *Financial Times* (Sept. 24, 2010), http://www.ft.com/cms/s/0/15e537e6-c810-11df-ae3a-00144feab49a.html#axzz18guFU8xf.

Similarly, Judge Jed S. Rakoff refused to sign a settlement between the SEC and Bank of America for $33 million because he thought the SEC should have sought a larger fine and brought enforcement actions against individual executives. Reluctantly, Judge Rakoff later signed a new settlement agreement for $150 million, which also included certain remedial requirements. *See Scannell, supra*.

2 In March 2010, Judge Huvelle was the first judge to question the opaque role and significant cost of independent compliance monitors, which have been a staple in FCPA settlement agreements. *See* Peter Henning, "When Judges Refuse to be Rubber Stamps," *New York Times Dealbook* (Mar. 22, 2010), http://dealbook.nytimes.com/2010/03/22/when-judges-refuse-to-be-rubber-stamps/.

3 DOJ Press Rel. 10-1096, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html.

4 *See id.*



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million under the U.N.'s Oil for Food Program.[5] ABB Ltd. also reached a settlement with the SEC and agreed to pay more than $39 million in disgorgement, pre-judgment interest and civil penalties.[6]

ABB Inc., a U.S.-based subsidiary, pleaded guilty to a criminal information charging it with one count of violating the anti-bribery provisions of the FCPA and one count of conspiracy to violate the same provisions.[7] ABB Inc. admitted that one of its business units paid $1.9 million in bribes to officials at a Mexican state-owned utility company from 1997 to 2004 in return for $81 million worth of contracts.[8]

Under the terms of the DPA, the DOJ explicitly credited ABB Ltd. for "voluntarily and timely" disclosing the misconduct; for conducting "a thorough internal investigation"; for "regularly report[ing] all of its findings"; for cooperating with the ongoing investigation; and for undertaking "substantial remedial measures," including an "enhanced compliance program."[9] Consequently, the DOJ recommended a combined fine at the lowest applicable range of the U.S. Sentencing Guidelines – $30,420,000.[10]

This fine also represented an upward adjustment in the applicable culpability score based on ABB Ltd.'s alleged status as a repeat offender. In 2003, ABB Ltd. voluntarily disclosed to the DOJ and SEC that two different subsidiaries paid bribes to Nigerian oil officials, and in 2004, those subsidiaries pleaded guilty to violating the anti-bribery provisions of the FCPA. ABB Ltd.'s most recent voluntarily-disclosed misconduct occurred within five years of the Nigerian violations, qualifying ABB Ltd. as a recidivist under the U.S. Sentencing Guidelines.[11]

During ABB Ltd. and ABB Inc.'s sentencing, however, Judge Lynn N. Hughes of the United States District Court for the Southern District of Texas took the DOJ, and, most likely, the defendants, by surprise by declaring that ABB Ltd. was not a recidivist because the entire corporation could not be held responsible for the rogue actions of a few individuals. He stated: "To call the whole thing corrupt because there are corrupt individuals is a misstatement of reality. [Y]ou would not call ABB Inc. a murderer because one of its employees in Australia murdered somebody, would you?"[12] The DOJ argued that companies have compliance programs to prevent individuals from violating the law, but Judge Hughes countered that no matter how strong the compliance program, even at the Department of Justice itself, individuals

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5 *See id.*

6 *See id.*

7 *See id.*

8 *Id.*

9 *United States v. ABB Inc.*, No. H-10-665, Deferred Prosecution Agreement at 4 (S.D. Tex. 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/docs/09-29-10abb-jordan-dpa.pdf ("ABB Ltd. DPA").

10 *See id.* at 11.

11 *See* U.S. Sentencing Guidelines § 8C2.5(c)(2)(A); ABB Ltd. DPA at 11.

12 *See United States v. ABB Inc.*, No. H-10-664, Transcript of Arraignment/Sentencing at 11 (S.D. Tex. Sept. 29, 2010).



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will still be able to violate the law if they choose. He said, "there is a failure rate of human beings, and no process is going to be able to anticipate who's going to turn bad. That's why a constructive response in ABB's case is so significant."[13] Judge Hughes heavily credited ABB Ltd.'s remedial efforts after its voluntary disclosure in 2004 and thought that it weighed against punishing ABB Ltd. as a recidivist.[14]

Judge Hughes discounted the proposed increased culpability score for repeat offenses and reduced the size of the fine by roughly $13,000,000 to $17,100,000 – a fine at the lowest end of the applicable range for non-recidivists. When the DOJ referred Judge Hughes to the U.S. Sentencing Guidelines' standard for repeat offenders, he asked, "Do I look like a rubber stamp?"[15]

Federal judges have scrutinized settlement agreements more closely in recent years, and Judge Hughes' reduction of ABB Ltd.'s penalty is but the latest example. It should no longer be expected that judges will simply "rubber stamp" the DOJ's recommended fines and sentences, particularly, it appears, when violations have been committed by rogue employees without any substantial support or ratification from company management. Judges may independently evaluate the weight of specific considerations such as voluntary disclosure, cooperation and remediation, which provides even more incentive for companies to ensure that they have comprehensive, effective compliance programs in place.

Private parties, moreover, should not assume that leniency will come their way. Under post-*Booker* Supreme Court precedent, federal district judges have substantial discretion when it comes to the imposition of criminal sentences,[16] and the rules governing corporate liability for the acts of employees can prove draconian in practice.[17] Although there is still controversy at the margins of corporate criminal liability doctrines, particularly on the topic of "collective scienter,"[18] *respondeat superior* – under which an employee performing his or her customary duties, and intending to benefit the corporation, may cause his or her corporate employer to become liable for a criminal act – remains the bedrock rule for corporate criminal liability.[19]

The fact that the DOJ did not appeal the reduced sentence imposed against ABB Ltd. only emphasizes the deference that will be afforded to federal trial judges when it comes to sentencing matters. It warrants emphasis as well that a trial judge's discretion may be exercised in either direction within the bounds of the law – in favor of the defendant and, as other cases have shown, in favor of a potentially heavier penalty.[20]

Rejection of plea agreements as either too lenient or too harsh are unusual, but the uncertainty such rejections generate only reinforces the importance of robust compliance programs and a quick response to allegations of impropriety in the corporate context. ■

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13 *Id.* at 12, 14.

14 *Id.*

15 *Id.* at 20.

16 *See United States v. Booker*, 543 U.S. 220 (2005) (holding that the U.S. Sentencing Guidelines were advisory and not binding on judges); *see also, e.g., Gall v. United States*, 552 U.S. 38 (2007) (holding that appellate courts must review trial courts' decisions under a more discretionary "abuse of discretion" standard); *Kimbrough v. United States*, 552 U.S. 85 (2007) (holding that judges can depart from the Sentencing Guidelines to resolve sentencing discrepancies related to drug offenses).

17 *See, e.g., Oklahoma Press Co. v. Walling*, 327 U.S. 186, 205 (1946) ("[C]orporations are not entitled to all of the constitutional protections which private individuals have in these related matters."); *Hale v. Henkel*, 201 U.S. 43 (1906) (holding that corporations have no privilege against self-incrimination).

18 *See, e.g., United States v. Science Applications International Corp.*, No. 08-5385 (D.C. Cir. Dec. 3, 2010) (distinguishing "collective knowledge" instructions in criminal cases as justified by the need to "prevent corporations from evading liability by 'compartmentaliz[ing] knowledge, subdividing the elements of specific duties and operations into smaller components.'" Slip op. at 31 (quoting *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987)).

19 *See New York Central & Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991); *Old Monastery Co. v. United States*, 147 F.2d 905 (4th Cir. 1945); *Zito v. United States*, 64 F.2d 772 (7th Cir. 1933).

20 Judges generally honor plea agreement provisions that favor defendants or that depart from the applicable guideline range for "justifiable reasons." *See* U.S. Sentencing Guidelines § 6B1.2 & Commentary.

# Senator Calls for Get-Tough Approach to FCPA Enforcement at Committee Hearing

On November 30, 2010, outgoing Senator Arlen Specter (D-PA) chaired a hearing of the Senate Judiciary Subcommittee on Crime and Drugs entitled "Examining Enforcement of the Foreign Corrupt Practices Act."[1] The hearing was held in the wake of Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") settlements earlier this fall with Panalpina, Royal Dutch Shell, and several other offshore oil services companies.[2] Senator Specter made clear at the outset of the hearing that the purpose was to exercise oversight of the law enforcement process.

The significant expansion of FCPA enforcement has drawn the attention of corporate executives, lawyers, and legislators, as the SEC and the DOJ continue to obtain significant fines and disgorgements, and an increased focus on criminal penalties for individuals has given rise to challenge to and criticism of the government's view of the law.[3] However, the Senate hearings focused not on the quantity of bribery-related investigations, but rather the quality of those investigations and the effectiveness of FCPA enforcement when companies are subject to multi-million dollar fines, which Senator Specter characterized as not "amount[ing] to a whole lot" without prison sentences for the corporate officials who committed the crime. A former District Attorney, Senator Specter criticized the fine-only approach, suggesting that "the only impact of matters of this sort is a jail sentence," and that fines have become "a cost of doing business" which ultimately fall on the shareholders.

Testifying at the hearing were Greg Andres, Deputy Assistant Attorney General in the Criminal Division of the DOJ, Andrew Weissmann, partner at Jenner & Block LLP, Michael Volkov, partner at Mayer Brown LLP, and Mike Koehler, Butler University professor and editor of the FCPA Professor Blog.

Speaking first, Mr. Andres reported on the DOJ's recent FCPA successes, suggesting that enforcement has been anything but weak. He observed that over $1 billion in criminal penalties under the FCPA has been imposed on corporations in the past year, the highest total ever. In addition, Mr. Andres reported that the DOJ is "vigorously pursuing" individual prosecutions, as evidenced by the prosecution of more than 50 individuals since January 2009. He also stated that the DOJ has no hesitation in seeking jail terms when appropriate, as individual enforcement is "a critical part of its FCPA enforcement strategy." Indeed, as Mr. Andres and other DOJ officials have stressed, the Organization of Economic Cooperation and Development ("OECD") recently praised the United States for its efforts in pursuing more foreign bribery investigations and prosecutions than any other signatory to the OECD's convention on combating foreign bribery.[4] Mr. Andres also stressed the DOJ's cooperation with foreign authorities to enforce anti-bribery laws.

When Mr. Andres finished his prepared remarks, Senator Specter asked exactly whom the government has prosecuted and caused to be sent to jail. Mr. Andres gave several examples, but Senator Specter seemed to suggest that this record was insufficient, especially considering the number of companies from which the DOJ has obtained fines. Mr. Andres noted that fines and criminal penalties were not an "either / or" proposition, but rather the DOJ considers both on a case by case basis.

Upon prompting by Senator Chris

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1 Video and Transcript available at http://wwww.c-spanvideo.org/program/FCP.

2 Joe Palazollo, "Specter Criticizes FCPA Enforcement at Senate Hearings," *The Wall Street Journal Corruption Currents Blog* (Nov. 30, 2010), http://blogs.wsj.com/corruption-currents/2010/11/30/specter-criticizes-fcpa-enforcement-at-senate-hearing/. Last month's *FCPA Update* covered the Panalpina settlements as related to the value of cooperation with investigating authorities. *See* Sean Hecker and Aaron Tidman, "The Panalpina Settlements: Additional Evidence Concerning the Costs and Benefits of Cooperation with U.S. Authorities," *FCPA Update* (Nov. 2010), http://www.debevoise.com/files/Publication/ad10aedb-1582-4e2e-b4bb-983a55cd6736/Presentation/PublicationAttachment/40a912f9-485a-45ef-89ca-be27b63b9ba6/FCPAUpdateNovember2010.pdf.

3 *See* Colby Smith, "DOJ Challenged on Meaning of 'Foreign Official,'" *FCPA Update* (Nov. 2010), note 2, *supra*. (discussing Joel Esquenazi's challenge to the meaning of "government official" in the DOJ's investigation of Haiti Teleco).

4 Paul Berger and Bruce Yannett, OECD Phase III Report Comments U.S. Anti-Bribery Enforcement and Notes Areas for Further Attention, *FCPA Update* (Oct. 2010), http://www.debevoise.com/files/Publication/049586e2-e8a1-4d9f-9db9-1fc982130d00/Presentation/PublicationAttachment/2a550ec8-8f14-4624-897d-518129e51d9d/FCPAUpdateOctober2010.pdf.

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Coons (D-DE), Mr. Andres commented on debarment, and noted that debarment is generally not a matter entrusted to the discretion of the DOJ, but rather the responsibility of contracting government agencies. The responsibility of the DOJ is to communicate the results of its investigations, and that information allows the officials with debarment authority to make their determinations. He stressed that the purpose of debarment was not punitive, but rather to protect the government from conducting business with unscrupulous and poorly performing companies. Officials with debarment authority decide if a company that is subject to debarment is presently a responsible contractor.

Senator Amy Klobuchar (D-MN) remarked that she has heard business people in her state express concern that compliance with the FCPA places U.S. companies on an uneven playing field with companies registered abroad, which may be subject to less scrutiny by their investigating authorities. Mr. Andres stressed international cooperation between the DOJ and foreign prosecutors and the DOJ's efforts to encourage foreign authorities to step up their efforts. He noted that the DOJ has not limited its prosecutions to U.S.-based companies, and stressed that good compliance with the FCPA is not bad for business, but rather it helps to prevent waste, fraud, and abuse.

Professor Mike Koehler disagreed with the notion that enforcement has been effective. Noting that the FCPA is a "fundamentally sound" statute, Professor Koehler attacked what he perceives as uneven enforcement and the weak deterrent effect that results.

Professor Koehler argued that deterrence is undermined when companies committing acts of bribery are neither charged under the anti-bribery provisions of the FCPA, nor barred from further business with the government, and in many cases, awarded with lucrative government contracts not long after the resolution of bribery prosecutions. Professor Koehler called for the passage of a Debarment Bill, to increase the chances of preventing companies guilty of violating the FCPA's anti-bribery provisions from contracting with the government. Noting that the House passed H.R. 5366 earlier this year, Professor Koehler noted that current draft of the bill – which would debar companies found to be in violation of the anti-bribery provisions of the FCPA, subject to waiver by contracting officials – and the way the DOJ conducts its FCPA enforcement program – with a focus on the FCPA's books and records provision, and pursuit of non-judicial remedies like non-prosecution agreements and deferred-prosecution agreements—would likely be impotent, if passed.[5]

Professor Koehler also expressed concern over uneven enforcement by the DOJ in considering penalties for large and small companies, noting that multi-national, billion-dollar corporations seem more likely to incur fines as a result of FCPA investigations, while executives at smaller companies more frequently seem to risk more vigorous prosecution.

Andrew Weissmann testified at the hearing on behalf of the Chamber of Commerce. Mr. Weissmann argued in favor of modifying the law to provide a defense for companies that conduct full reviews and disclose all relevant information to investigatory authorities. Such a provision is contained in the U.K.'s new Bribery Act, which will come into effect next year, and Mr. Weissman argued that such a defense would serve to separate responsible companies that take steps to combat corruption from those that do not.

Mr. Weissmann also suggested improvements to the statute to provide better notice to companies of what is and is not prohibited, and to encourage companies to be vigilant and compliant. Calling for clarification of the definitions of "foreign official" and "instrumentality" and arguing for limiting a parent company's criminal liability for the pre-acquisition conduct of an acquired subsidiary or affiliate, Mr. Weissman expressed the business community's concern that, even with the most robust compliance policies in place, companies are vulnerable to potential prosecution under present practice.

Both Professor Koehler and Mr. Weissmann commented on the lack of robust judicial oversight over most aspects of FCPA enforcement, insofar as the vast majority of FCPA-related cases are settled without judicial intervention. As such, interpretation of the statute frequently "begins and ends" with the DOJ (and with the SEC). As observed by the witnesses, although the DOJ has stated that the

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5 Bill Summary and Status, Overseas Contractor Reform Act, H.R. 5366 (introduced May 20, 2010), http://www.govtrack.us/congress/bill.xpd?bill=h111-5366. The Debarment Bill was unanimously passed by the House of Representatives in September 2010. With Congress's recent adjournment, the bill died in the 111th Congress without any favorable action in the Senate. For more information on the Debarment Bill, see Bruce Yannett and Amanda Ulrich, "FCPA-Related Legislative and Regulatory developments: Debarment Bill's House Passage and the Anticipated Dodd-Frank Rules," *FCPA Update* (Oct. 2010), http://www.debevoise.com/files/Publication/049586e2-e8a1-4d9f-9db9-1fc982130d00/Presentation/PublicationAttachment/2a550ec8-8f14-4624-897d-518129e51d9d/FCPAUpdateOctober2010.pdf.

## Senator Calls for Get-Tough Approach ■ Continued from page 5

courts are available to corporations or individuals who disagree with the DOJ's interpretation of the statute, the reality is that settling matters through deferred-prosecution agreements and non-prosecution agreements, free from judicial scrutiny, is often a more attractive option for companies faced with the costs and risks of defending a lawsuit.

Michael Volkov proposed an amnesty program, suggesting that there is a significant difference between companies that are responsible and compliant but fall victim to the actions of certain employees, and companies in which bribery is part of the culture. Retired Judge Stanley Sporkin was the initial proponent of the plan that Mr. Volkov endorsed, under which a company agrees to conduct a full internal review of its FCPA compliance for the five previous years, to disclose the results to the government and the public, and to take steps to remedy violations and avoid them in the future. The government would agree not to initiate an enforcement action, except in cases of flagrant violations.[6] This program is different than that proposed by Mr. Weissmann, in major part because Mr. Volkov's plan does not involve prosecution (and the assertion of a defense). Mr. Volkov also questioned why the FCPA, as written, fails to punish bribe-takers, while foreign authorities have outlawed the taking as well as the giving of bribes within and without their states. Senator Specter focused his questioning on enforcement and penalties, while Senators Klobuchar and Coons commented on the lack of clarity in the law, expressing sympathy for executives and in-house lawyers facing uncertain trends in enforcement and insufficient guidance from the DOJ on what FCPA compliance programs should look like.[7] Senator Klobuchar called for more clarity in the law, suggesting that "people in companies have to know what the law is to be able to comply with it."

As Congress closes out its lame duck session and Senator Specter ends his 30-year service in the Senate, it is unclear whether there will be sufficient motivation in the 112th Congress for the House of Representatives to hold companion hearings, for the Senate to hold further hearings, or for Congress as a whole to legislate any but the most non-controversial changes to the FCPA. With the DOJ and SEC expressing no intention to slow down their enforcement activities, the legislative outlook remains one of "watchful waiting," and companies should remain attentive to FCPA enforcement trends and continue to implement robust compliance policies and programs. ■

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[6] *See* Sue Reisinger, "Specter Blasts Fine-Only Approach," *Corporate Counsel* (Dec. 1, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202475479945.

[7] *See* Palazollo, note 1, *supra*.

## Upcoming Speaking Engagements

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# News from the BRICs: India's Recent Corruption Scandals Put a Spotlight on Compliance

As Asia's second most populous country and third largest economy, India represents an attractive investment opportunity for international business. This year alone, India's economy has grown at a rate of nearly 9%.[1] Notwithstanding its enormous population and vast disparities of wealth and economic development, India has enjoyed stable democratic governance and has been undergoing a process of economic liberalization that has turned the country into a significant player in the global economy, particularly in fields such as information technology and pharmaceuticals.

A slew of recent allegations in multiple business sectors, however, has brought forward a broad discussion of the risks of public corruption and graft and has highlighted the challenges for businesses seeking to operate lawfully and transparently in one of the world's most vibrant markets. Although these allegations have not resulted in announcements of U.S. government investigations of companies subject to the FCPA, or disclosures of internal investigations by such companies, their scope as well as the swift response by many actors in the Indian government highlight the need for strong compliance programs at companies doing business in India that are potentially subject to the FCPA.

The most serious of the three recently publicized scandals concerns the allocation of additional spectrum to private mobile telephone operators. The award of the spectrum licenses took place in 2008 under the auspices of India's telecommunications department and was reportedly executed in a way that suggests favoritism, arbitrariness and graft. The award of the spectrum to mobile phone operators is alleged to have included advance notice to some competitors and emphasized factors of little substantive relevance (such as granting spectrum licenses in the order in which the applications were received).[2] Ultimately, the telecommunications department allegedly applied 2001 prices and thus undervalued the licenses by approximately $39 billion, a figure equal to India's entire annual defense budget.[3]

It is not yet known whether the telecommunications minister, Andimuthu Raja, or other public officials received kick-backs in the licensing process, although the non-transparent process without an auction has proven fodder for speculation of potential malfeasance.[4] The telecommunications minister resigned just prior to the release of a report by a governmental auditor who identified false statements in several applications and alleged evidence that ineligible firms had received licenses. The telecommunications department is now seeking to issue notices to the allegedly ineligible firms to determine whether the licenses should be canceled or penalties imposed.[6]

The scandal has rocked the Indian political establishment. The country's top federal investigative agency, the Central Bureau of Investigation ("CBI"), has been investigating for a year and has searched the homes and offices of the minister and four other public officials.[7] India's Supreme Court has conducted hearings and criticized Prime Minister Manmohan Singh for delays in handling the matter, and opposition parties brought parliamentary action to a halt by blocking all business until the government agrees to a special parliamentary inquiry.[8] On December 20, 2010, Prime Minister Singh offered to appear before a parliamentary committee,[9] and Congress Party leader Sonia Gandhi launched a crackdown on corruption within her party and pledged support for additional reforms and new modes of investigating corruption, including a system of fast-track courts for

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1 *See* "Economic Growth Rate Above Expectations, May Reach 9 Pc: PMEAC," *The Economic Times* (Dec. 12, 2010), http://economictimes.indiatimes.com/news/economy/indicators/Economic-growth-rate-above-expectations-may-reach-9-pc-PMEAC/articleshow/7086610.cms.

2 Jim Yardley & Heather Timmons, "Telecom Scandal Plunges India into Political Crisis," *The New York Times* (Dec. 13, 2010), http://www.nytimes.com/2010/12/14/world/asia/14india.html.

3 "Factbox: Recent Corruption Scandals in India," *Reuters* (Dec. 1, 2010), http://www.reuters.com/assets/print?aid=USTRE6B032C20101201 (hereinafter "Factbox"); R. Jai Krishna et al., "India Agency Raids Former Telecom Minister's Houses," *The Wall Street Journal* (Dec. 8, 2010), http://online.wsj.com/article/SB10001424052748703921204576006392147290176.html. (hereinafter "Krishna").

4 *See, e.g.*, Rama Lakshmi, "Corruption Scandals in India Fuel Fears of Crony Capitalism," *The Washington Post* (Dec. 17, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121606812.html.

5 *See id.*; Factbox, note 3, *supra*.

6 *See* Krishna, note 3, *supra*.

7 *Id.*

8 *See* Heather Timmons, "India Stocks Sink on Telecommunications Scandal," *The New York Times* (Nov. 19, 2010), http://www.nytimes.com/2010/11/20/business/global/20rupee.html/; Factbox, note 3, *supra*.

9 Jim Yardley, "India Leader Offers to Testify in Scandal Inquiry," *The New York Times* (Dec. 21, 2010), http://www.nytimes.com/2010/12/21/world/asia/21india.html.

## News From the BRICs: India's Recent Corruption Scandals ■ Continued from page 7

hearing corruption cases.[10]

Meanwhile, in late November 2010, shortly after the spectrum allocation allegations came to light, bribery allegations were leveled against officials at several state-owned financial firms. The CBI is considering whether the chief executive of LIC Housing Finance and officials of several state-run banks received bribes via a mediator and facilitator, the private finance firm Money Matters Financial Services, in exchange for awarding corporate loans.[11] The identities of the entities allegedly making the bribes are not known.

The third alleged corruption scandal erupted over contracts awarded for the Commonwealth Games, which were held in New Delhi in October 2010.[12] The cost of the event exceeded the anticipated budget by approximately $2 billion. Indian prosecutors are now investigating whether the excessive costs arose from corruption and kickbacks involving the Games' executives. Allegations include tender manipulation for stadium construction and inflated invoices for equipment.[13] Swiss Timing, the Switzerland-based company in charge of official time keeping at the last four summer Olympics, is being investigated for supplying equipment at inflated rates and making alleged kickback payments.[14] As a result of the affair, the chairman of the organizing committee has been fired from his party post and several associates of the chairman have been charged with criminal conspiracy and corruption.[15]

The publicity over the reported scandals has sharpened the focus on bribery and corruption in India, which should serve as a warning to foreign companies that wrongdoing in India could result in domestic Indian investigations and prosecutions, as well as in FCPA liability, where jurisdiction exists. India's prosecutorial authorities appear to be pursuing the allegations with vigor. Moreover, as we have noted, Indian authorities have made use in the past of investigations undertaken by foreign counterparts to pursue their own claims, and may partner with other governments in connection with the new cases. In 2007, the SEC filed a cease and desist order and imposed a civil penalty of $325,000 against U.S.-based Dow Chemical Company for books and records and internal controls violations under the FCPA arising from alleged bribery by Dow Chemical's Indian subsidiary relating to the registration of insecticides.[16] The CBI subsequently conducted its own bribery investigation against the Indian subsidiary, Dow AgroSciences India Ltd, including by seeking information assistance from the SEC through a letter rogatory, and found the subsidiary guilty of bribing a senior government officer. There was speculation that India's agriculture ministry would blacklist Dow AgroSciences as a result of the company's failure to respond to show-cause notices of the bribery allegations.[17]

These scandals serve as a reminder of the need for companies doing business in India to remain vigilant. The recently published Transparency International Corruption Perception Index ranks India in 87th place out of 179 countries, with a score of 3.3 on a scale ranging from 0 (worst) to 10 (best).[18] As sobering as these scandals are for India, serious reactions by government authorities and the news media likely will contribute to increased transparency in the future. ■

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10 Dean Nelson, "Sonia Gandhi Launches Corruption Crackdown," *The Telegraph* (Dec. 20, 2010), http://www.telegraph.co.uk/news/worldnews/asia/india/8214423/Sonia-Gandhi-launches-corruption-crackdown.html.

11 "India Hit by Growing Banking Scandal, Shares Fall," *Reuters* (Nov. 25, 2010), http://www.reuters.com/article/idUSTRE6AO0PZ20101125.

12 Factbox, note 3, *supra*.

13 *See id.*

14 "Swiss Timing Charged in Delhi Games Corruption Case: Police," *Agence France Presse* (Dec. 1, 2010), http://news.yahoo.com/s/afp/20101201/wl_sthasia_afp/indiaswitzerlandcgamescorruptionswisstiming_20101201170811.

15 *Id.*

16 *SEC v. Dow Chem. Co.*, No. 07-cv-00336 (D.D.C. 2007); SEC Litig. Rel. No. 20000, SEC Files Settled Enforcement Action Against the Dow Chemical Company for Foreign Corrupt Practices Act Violations (Feb. 13, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20000.htm.

17 *See* Devesh Kumar, "Dow Agro Faces Ban on Bribery Charge," *The Economic Times* (Sept. 10, 2010), http://economictimes.indiatimes.com/articleshow/6527634.cms?prtpage=1.

18 Transparency International Corruption Perceptions Index 2010, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

# DOJ Provides FCPA Translations in Ten More Languages

Earlier this month, the Department of Justice ("DOJ") posted ten new translations of the FCPA statute to its website. The statute is now available for download in Bengali, Cantonese, French, German, Japanese, Javanese, Korean, Malay, Portuguese, and Urdu, adding to the DOJ's previous posting of translations in Arabic, Chinese, Russian, and Spanish.[1] These particular languages seem to have been deliberately chosen to reach employees working in emerging markets and high-risk compliance environments, and will be of significant assistance to compliance programs.[2]

The DOJ has indicated that these are "unofficial translations," created for the purpose of "increas[ing] the general awareness and understanding of the FCPA by both U.S. companies engaging in international business and their foreign counterparts."[3]

As *FCPA Update* noted last year, making the text of the statute available in an employee's native language is only a first step in encouraging compliance among non-English speakers. For example, when training employees outside of the United States, references to the phrase "foreign officials" should be converted to references to local officials in the countries of concern, or simply, "non-U.S. officials." In addition, training materials should indicate that "officials" under U.S. law include not only employees of the national government, but also employees of subdivisions, municiaplities, state-owned businesses, political candidates, and employees of international organizations such as the U.N., the World Bank, and the like.

For a longer discussion of compliance training programs for non-English-speaking employees, please see *FCPA Update's* October 2009 report entitled "Lost in Translations: FCPA Training Programs for a Multinational Workforce."[4] ■

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1 *See* Department of Justice, "Foreign Corrupt Practices Act of 1977," http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html (hereinafter "DOJ FCPA"); *see also* "Lost in Translations: FCPA Training Programs for a Multinational Workforce," *FCPA Update* (Oct. 2009), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=1d71c475-9d9e-4742-9a3e-0749c0f2bd21. (hereinafter "Lost in Translations"). The first four translations were originally made available on the the Department of Commerce's ("DOC") "Transparency and Anti-Bribery Initiatives" website in late 2009. Those four translations are still available on the DOC's website, but the ten new translations have not yet been posted. *See* U.S. Dep't of Commerce, Office of General Counsel, Transparency and Anti-Bribery Initiatives, http://www.ogc.doc.gov/trans_anti_bribery.html.

2 *See* "Seasons Greetings from Uncle Sam," *FCPA Blog* (Dec. 7, 2010), http://www.fcpablog.com/blog/2010/12/7/seasons-greetings-from-uncle-sam.html.

3 *See* DOJ FCPA, note 1, *supra*.

4 *See* Lost in Translations, note 1, *supra*.

## Upcoming Speaking Engagements

Continued from page 6

February 10, 2011
**Paul R. Berger**
**Mark P. Goodman,**
**Sean Hecker**
**Bruce E. Yannett**

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