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FCPA Update

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Delayed Implementation of the U.K. Bribery Act

The U.K. Ministry of Justice (the "Ministry") has delayed the long-awaited implementation of the U.K. Bribery Act of 2010 (the "Bribery Act" or "Act")[1] until no earlier than May 2011. The Act will not be implemented until three months after the Ministry has published guidance required under Section 9 of the Act.

The Ministry's guidance is now expected to be published on the same day as the so-called "Directors' Guidance," a policy statement from the Serious Fraud Office ("SFO") and the Director of Public Prosecutions.[2] But the date of publication of the Ministry's guidance, on which the Act's implementation depends, and the content of both the Ministry's guidance and the Directors' Guidance, each remain unknown, generating continued uncertainty as to the practical scope and risk posed by perhaps the most significant new anti-bribery law since the FCPA itself.

For companies already subject to the FCPA and other anti-bribery regimes, the Bribery Act poses a host of new challenges, including potentially broad grounds of jurisdiction, including against any company that does business in the U.K.,[3] the lack of express defenses for reasonable meals, hospitality, and entertainment expenses incident to business discussions about a company's products or services,[4] provisions that criminalize "facilitation payments," which are exempt under U.S. law,[5] and the lack of scienter requirements for several kinds of violations.

At the same time that the Act expands liability when compared to U.S. law, the Act also contains a much-lauded defense to the new corporate offense of failure to prevent bribery[6] for any company that maintains an adequate compliance program.[7]

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1 Bribery Act, 2010, c.23 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/contents.

2 Chris Walker, Head of Policy, Serious Fraud Office, Address at the International Chamber of Commerce U.K. Conference: "Best Practices in Fighting Bribery and Corruption – The Bribery Act 2010" (Feb. 15, 2011) [hereinafter "ICC Conference"], http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2011/icc-conference-hosted-by-herbert-smith.aspx.

3 Bribery Act § 7(5).

4 *But see* Ministry of Justice, Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act) (Sept. 14, 2010) [hereinafter "Consultation on Guidance"] at 22 (stating circumstances under which hospitality is more or less likely to attract prosecution), http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf.

5 *See id.* at 22-23.

6 Bribery Act § 7.

7 *Id.* § 7(2).

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U.K. Bribery Act ■ Continued from page 1

The jurisdictional reach of the Act cannot be underestimated. The Section 7 corporate offense extends to any foreign corporation or partnership which "carries on business or part of a business" in the U.K. Recent statements by officials from the SFO have confirmed that the SFO will avail itself of this broad jurisdiction to pursue foreign corporations for overseas bribery in circumstances where an ethical U.K. company has been harmed.[8]

The Act was originally expected to come into force on April 1, 2011, and the stated ground for delayed implementation was the Ministry's need for more time to complete its keenly awaited guidance. There are also signs that the guidance will cover more topics, and in greater detail, than was originally expected.

Under Section 9 of the Bribery Act, the Ministry was required to publish guidance about "adequate procedures" that commercial organizations can put in place to prevent "associated persons" from committing bribery on their behalf. The implementation of such adequate procedures constitutes a defense to the new corporate offense of failing to prevent bribery, under Section 7 of the Act.

In September 2010, the Ministry published a consultation paper seeking public views on the guidance,[9] with the expectation that the guidance would be published early in 2011, thus allowing adequate time prior to the intended implementation of the Act in April. The period for comment on the guidance closed in November 2010. On January 31, 2011, the Ministry announced that the publication of the guidance would be delayed and that the Act would not enter into force until three months after the guidance is published, meaning that the April deadline will be missed.[10]

There appear to be two principal reasons for the delay.

First, the response to the consultation paper was unprecedented. According to an official at the Department of Business, Innovation and Skills, every major business association responded, as did an unexpected number of small firms, many of which raised interesting questions.[11] The Ministry intends that the guidance will take account of all these responses.[12]

Second, the Act has come under increasingly heavy criticism from the press and business groups in the first months of 2011.[13] The head of the Confederation of British Industry, for example, stated that the Act was "not fit for purpose."[14]

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8 *See e.g.*, Walker, note 2, *supra* (stating that the SFO might seek to prosecute a foreign company that, for example, makes a facilitating payment in order to get telephones installed the next week, while a British company that refuses to make the payment has to wait four months for telephone service).

9 *See* Consultation on Guidance, note 4, *supra*.

10 *See* Nicholas Cecil, "Ken Clarke Delays Bribery Act After Protests from Business Chiefs," *Evening Standard* (Jan. 31, 2011), http://www.thisislondon.co.uk/standard/article-23918950-ken-clarke-delays-bribery-act-after-protests-from-business-chiefs.do.

11 Nick van Benschoten, Head of Anti-Corruption Unit, Department of Business, Innovation and Skills, Address at ICC Conference.

12 Roderick Macauley, Bribery Act Manager, Ministry of Justice, Address at ICC Conference.

13 *See, e.g.*, Cecil, note 10, *supra*.

14 David Leigh, "British Firms Face Bribery Blacklist, Warns Corruption Watchdog," The Guardian (Jan. 31, 2011), http://www.guardian.co.uk/business/2011/jan/31/british-firms-face-bribery-blacklist.

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Delayed Implementation of the U.K. Bribery Act ■ Continued from page 2

Businesses have expressed particular concerns relating to facilitation payments and hospitality.[15] Facilitation payments are already illegal under existing U.K. law[16] and the local law of virtually all jurisdictions worldwide, despite their exemption under the FCPA, but the need for clear guidance concerning the prospective treatment of both facilitation payments and corporate hospitality is well-founded.

Section 6 of the Bribery Act criminalizes the provision of any advantage to a foreign public official with the intention to influence him and to obtain or retain business or a business advantage.[17] On its face, this section could be interpreted to criminalize the provision of almost any hospitality to a foreign public official. There have been statements from the Ministry and the SFO aimed at assuring the business community that this section will catch only serious wrongdoing. Recently, Kenneth Clarke, the Minister for Justice, told the House of Commons: "Ordinary hospitality to meet and network with customers and to improve relationships is an ordinary part of business and should never be a criminal offence. I hope to put out very clear guidance for businesses of all sizes to make that clear...."[18]

In consequence, the guidance is now expected to cover more topics than merely "adequate procedures." It is also expected to address, in some detail:

- facilitation payments;
- hospitality and promotional expenditure in aid of sales;
- jurisdiction; and
- specific areas of concern for small firms.

Although there has been no confirmation from government officials, the guidance may also provide:

- a more precise definition of "associated persons," particularly as regards supply chains and joint ventures;
- further information as to what does and does not constitute "influence;" and
- a broader definition of the circumstances under which a company or individual can plead excusable duress when faced with a demand for payment.

The "Directors' Guidance," in turn, is expected to illustrate, for each offense under the Act, what needs to be proved for a conviction (*i.e.*, the elements of each offense), along with the public interest considerations prosecutors are required to take into account when deciding whether to bring a prosecution.[19] It is expected to deal specifically with, *inter alia*, facilitation payments and hospitality.[20] As such, it should provide further clarity on the implementation of the Act.

One other item of guidance is expected. Under E.U. procurement law, companies can be debarred permanently from bidding for public contracts if they are found guilty of corruption. The Ministry has indicated that conviction for failing to prevent bribery under Section 7 of the Act is not an offense of corruption.[21] The Ministry is expected to promulgate a formal opinion in this regard.[22]

It is still unknown when the guidance will be published; thus far, officials have said only that the guidance will be published "soon."[23] Companies seeking in the short term to frame compliance programs to meet the requirements of both the FCPA and the U.K. Act are well advised to consult with in-house or outside counsel to calibrate expenditures, policy roll-outs, and revisions to company guidance in a way that maximizes compliance and coordination with a changing legal landscape at a time of tight budgets and limited resources. ■

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15 *See* Martin Bentham, "Bribery Act Lawsuits 'Could Ruin Bosses,'" *Evening Standard* (Feb. 21, 2011), http://www.thisislondon.co.uk/standard/article-23925017-bribery-act-lawsuits-could-ruin-bosses.do; Andrew Berkeley, Legal Advisor, ICC U.K., Address at ICC Conference.

16 *See, e.g.*, Letter from Chandrashekhar Krishnan, Executive Director, Transparency International U.K., to Geordie Greig, Editor, Evening Standard (Jan. 11, 2011), http://www.transparency.org.uk/publications/132-letter-to-evening-standard-on-bribery-act-11-jan-2011-/.

17 Bribery Act § 6.

18 Feb. 15, 2011, Parl. Deb., H.C. (2011) 793, http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110215/debtext/110215-0001.htm#11021556000006.

19 Walker, note 2, *supra*.

20 *Id.*

21 *See* ICC U.K., *ICC United Kingdom Response to the Consultation on Guidance About Commercial Organisations Preventing Bribery (Section 9 of the Bribery Act 2010)*, at ¶ 3 ("In a presentation in Paris to the OECD Working Group on Bribery, an MOJ official was at pains to state the view that Section 7 did not cover an offence of bribery").

22 Walker, note 2, *supra*.

23 *See, e.g.*, Macauley, note 12, *supra*.

Tyson Foods Case Illustrates FCPA Risks for Food and Consumer Products Companies

On February 10, 2011, Tyson Foods, Inc., the world's largest meat protein company and the second-largest food production company in the Fortune 500, settled criminal and civil investigations by the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") arising out of alleged corrupt payments by its Mexican subsidiary, Tyson de Mexico ("TDM"), to so-called "official" veterinary inspectors in Mexico.[1] The DOJ's settlement related to an alleged $90,000 in corrupt payments to two such inspectors and the SEC's settlement alleged more than $100,000 in largely overlapping payments. Settlement payments to the United States included a $4 million criminal penalty and $1.2 million in disgorgement and pre-judgment interest.

Tyson Foods, Inc., also entered into a two-year Deferred Prosecution Agreement ("DPA") with DOJ, requiring ongoing cooperation with DOJ investigations of FCPA matters at the company, specified improvements in its FCPA compliance program, and self reporting.[2] The company consented to a permanent injunction against further violations.[3]

Given that Tyson, by the government's own estimate, reaped no more than $1.2 million in business from the alleged improper payments, the well over 5,000 percent negative rate of return on the alleged corrupt payments of just over $100,000 (not counting the cost of its internal investigation, damage to reputation, or other collateral consequences) illustrates just how quickly seemingly small individual payments can generate significant FCPA liabilities. The payments involved were spread over 2.5 calendar years[4] — an average of only $40,000 per year.

As the government acknowledged, the case also involved a situation that emerged over time, in which payments that once were nominally lawful under Mexican law became improper under local law when the veterinarians changed their status to "official" inspectors.[5] Prior to 2004, the two veterinarians at the heart of the controversy were not "official" inspectors but were "approved" inspectors, who under Mexican law could receive part of their compensation from the entities whose facilities they inspected. Although the circumstances in which payments were made to the "approved" inspectors were suspicious and raised red flags in that they were routed by TDM through the inspectors' wives, who were put on the TDM payroll without any apparent duties, the DOJ and SEC did not seem to emphasize those underlying facts.[6]

> "[T]he well over 5,000 percent negative rate of return on the alleged corrupt payments... illustrates just how quickly seemingly small individual payments can generate significant FCPA liabilities."

Rather, the principal allegations in both the DOJ and SEC settlement documents focus on TDM's failure to heed local law requirements and the fact that payments continued for two and a half years after the new status of the veterinarians was communicated to

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1 *See* DOJ Press Rel., Tyson Foods Inc. Agrees to Pay $4 Million Criminal Penalty to Resolve Foreign Bribery Allegations (Feb. 10, 2011), http://www.justice.gov/opa/pr/2011/February/11-crm-171.html; SEC Press Rel. No. 2011-42, SEC Charges Tyson Foods with FCPA Violations (Feb. 10, 2011), http://www.sec.gov/news/press/2011/2011-42.htm; SEC Litig. Rel. No. 21851, SEC Charges Tyson Foods With FCPA Violations; Tyson Foods to Pay Disgorgement Plus Pre-Judgment Interest of More than $1.2 Million; Tyson Foods to Pay Criminal Penalty of $4 Million (Feb. 10, 2011), http://www.sec.gov/litigation/litreleases/2011/lr21851.htm.

2 Deferred Prosecution Agreement at 3, 5, 7-10, *In re Tyson Foods, Inc.*, (Feb. 4, 2011) [hereinafter "DPA"], http://www.scribd.com/doc/48614639/Tyson-Foods-Deferred-Prosecution-Agreement.

3 *See* SEC Litig. Rel. No. 21851, note 1, *supra*.

4 *See id.*

5 *See* DPA at 13, 15, note 2, *supra*.

6 *See id.*

Tyson Foods Case Illustrates FCPA Risks ■ Continued from page 4

corporate headquarters in the United States. A key allegation related to a decision purportedly made in July 2004 by several U.S. citizens who were appointed as managers of the Mexican subsidiary. At a meeting in Mexico, these individuals, who were then subject to the FCPA by reason of their U.S. citizenship, decided to engage in a program of "replacing the payroll payments [previously made to the wives of the veterinarians] with invoice payments [made to the veterinarians ostensibly for other lawful services]."[7] The affirmative decision to change the payment mechanism, while continuing to make the payments, presumably made it difficult to defend the case on the ground that it involved mere negligence. Moreover, in various meetings in the relevant period, personnel at the subsidiary appeared to have communicated concerns and red flags about the payments to the veterinarians, and internal audit at the parent company noted irregularities to management at Tyson headquarters, yet nothing was done by headquarters personnel to end the improper practices.[8]

To the contrary, the uncontested statement of facts in the DPA indicated that parent company personnel were aware that payments were being made that were invalid under Mexican law and for the purpose of "keep[ing] the TIF veterinarians from making problems at the plant."[9]

Highlighting the potential risk to the food products company from the disclosures made in the settlement announcements, almost immediately after the settlements were made public at least one blogger raised questions about whether Tyson's products sold to customers in the United States were unsafe.[10] Tyson anticipated this risk and preemptively countered with its own press release, stressing that "[n]one of the products exported from Tyson de Mexico during the time period involved were shipped to the U.S., nor where there any issues with the safety of the products."[11]

Indeed, for all that Tyson suffered by reason of alleged corrupt payments totaling a tiny fraction of its combined global revenues of more than $75 billion in the three calendar years in question (2004-06), the damage to Tyson could have been worse. In its settlements with U.S. authorities, Tyson avoided imposition of an independent corporate monitor or an independent compliance consultant with unappealable authority to impose compliance reforms. Tyson also paid a criminal penalty of less than 40 percent of the high-end of the calculated Sentencing Guidelines range ($10,080,000) set forth in its DPA.[12]

In the DPA, the DOJ identified a dozen factors that justified the disposition, including that Tyson: (1) voluntarily disclosed the misconduct; (2) conducted a thorough internal investigation; (3) reported all of its findings to the DOJ; (4) cooperated in the DOJ's own investigation; (5) undertook remedial measures; (6) agreed to continue to cooperate with the DOJ in any further investigations of Tyson and its directors, officers, employees, agents, consultants, subsidiaries, contractors, and subcontractors relating to violations of the FCPA; (7) cooperated and agreed to continue to cooperate with the SEC in its separate investigation; (8) implemented an enhanced compliance program; (9) earned only 10-15 percent of its revenues abroad; (10) operates only six wholly-owned production facilities overseas; (11) has no direct government customers outside the United States; and (12) earned less than one percent of its global net sales from the "problematic operations" in Mexico.[13]

The lessons of the Tyson settlement are several, and familiar. First, the case emphasizes how poorly bribery pays. Whether or not the plant inspectors would have caused the plants in question to lose business but for the improper payments, once the evidence of intent to cause those inspectors to breach their duty came to the DOJ's and SEC's attention, Tyson was unable to persuade the government that the income from the affected plants was untainted. Second, the case illustrates how payment schemes that might at first seem

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7 *See id.* at 16.

8 *Id.*

9 *Id.* at 15.

10 William Neuman, "Tyson Settles U.S. Charges of Bribery," *The New York Times* (Feb. 10, 2011), http://www.nytimes.com/2011/02/11/business/11tyson.html.

11 Press Release, "Tyson Foods Resolves Claims Involving Mexican Subsidiary" (Feb. 10, 2011), http://www.tysonfoods.com/Media/News-Releases/2011/02/Tyson-Foods-Resolves-Claims-Involving-Mexican-Subsidiary.aspx.

12 DPA at ¶ 6, note 2, *supra*.

13 *Id.* at ¶ 4.

Tyson ■ Continued from page 5

compliant with local law can quickly cross the line under local regulations and creep into illegality under both local law and U.S. law. Third, the bribery scheme put at risk something perhaps even more valuable than any government contract – Tyson's reputation with consumers in the United States. Finally, although Tyson management ultimately acted admirably, the delays in shutting down the improper payment program at TDM and knowledge and involvement of U.S. nationals and management at the parent company made a declination by the U.S. authorities highly unlikely. To compliance officers, internal audit staff, and in-house counsel facing the challenges of addressing potential red flags in multiple foreign jurisdictions, the Tyson case is another lesson in the need for swift and certain action when evidence of impropriety appears. ■

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DOJ Prevails for Now on SHOT Show Defense Challenges

Perhaps nowhere has the Department of Justice's ("DOJ's") commitment to employing aggressive law enforcement techniques in FCPA cases[1] been clearer than in the so-called "SHOT Show" cases. In those cases, 22 individuals in the military and law enforcement products business were ensnared in a "sting" operation replete with wiretaps, undercover cooperating witnesses, and coordinated arrests and execution of search warrants.[2] On February 9, 2011, defendants suffered yet another blow as Judge Richard J. Leon, of the U.S. District Court for the District of Columbia, issued an order denying motions for an evidentiary hearing on whether the government wrongfully destroyed evidence and for dismissal of the indictment.[3]

Although the defense motions almost certainly will be renewed or reformulated as the case continues, and the issues will likely permeate any appeal from any convictions, Judge Leon's order serves as a stark reminder of the enormous challenges for any defendant once an FCPA matter formally enters the criminal justice system. Further proceedings, however, may well provide a vehicle for exploring the strength of the government's rationale for not taking further steps to preserve evidence in a case in which, as is true in nearly all sting operations, its own witness was present at key meetings during the sting operation.

The background of the SHOT Show motions is instructive. In the underlying case, which is the subject of an April 16, 2010 superseding indictment,[4] FBI agents, posing as representatives of the Gabon Ministry of Defense, and Richard Bistrong, a cooperating defendant facing separate FCPA charges,[5] invited the defendants to participate in a $15 million deal to outfit Gabon's Presidential Guard with military-related products.[6] The DOJ alleges that, while under audio and video surveillance, the defendants agreed to pay a commission of $3 million to a sales agent, believing that half of the commission would be paid as a bribe to the Minister of Defense.[7] The DOJ charged the defendants with 43 counts of FCPA violations.[8]

"Judge Leon's order serves as a stark reminder of the enormous challenges for any defendant once an FCPA matter formally enters the criminal justice system."

On December 7, 2010, the SHOT Show defendants filed a motion requesting an evidentiary hearing for the purpose of obtaining exculpatory evidence.[9] Defendants alleged that the government failed to produce, and may have destroyed, text messages between its cooperating witness, Bistrong, and the FBI agents that contained exculpatory

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1 *See* Lanny A. Breuer, Asst. Attorney General, Remarks at Practising Law Institute, New York (Nov. 4, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101104.html (stating that the DOJ has "begun increasingly to rely, in white collar cases, on undercover investigative techniques that have perhaps been more commonly associated with the investigation of organized and violent crime").

2 *United States v. Goncalves*, No. CR-09-335, Superseding Indictment (D.D.C. 2010).

3 *United States v. Goncalves*, No. CR-09-335, Order, 2 (D.D.C. 2011).

4 Superseding Indictment, note 2, *supra*.

5 Bistrong pleaded guilty to FCPA charges on September 16, 2010. *See* Jeremy Pelofsky, "Ex-Arms Salesman Pleads Guilty to US Bribe Charges," *Reuters* (Sept. 16, 2010), http://www.reuters.com/article/2010/09/16/us-bribery-plea-idUSTRE68F5A920100916.

6 Superseding Indictment, note 2, *supra*, at 9, 11.

7 *Id.* at 12.

8 *Id.* at 10–27.

9 *United States v. Goncalves*, No. CR-09-335, Defendants' Motion for an Evidentiary Hearing for the Purpose of Obtaining Exculpatory Evidence, 1 (D.D.C. 2010).

DOJ Prevails for Now on SHOT Show Defense Challenges ■ Continued from page 7

and discoverable evidence.[10] This evidence, the defense argued, was material to the defendants' ability to bring certain pretrial motions, including a motion to dismiss the indictment due to entrapment,[11] a defense commonly employed in the context of government sting operations.[12]

In its response, the government argued that it had complied with its discovery obligations by producing recorded conversations between Bistrong and the defendants, as well as thousands of text messages that "contain likely impeachment value for use at trial."[13] The government argued further that it had already produced the evidence that might arguably be relevant to the defendants' entrapment defense, namely the recorded conversations between Bistrong and the defendants.[14]

The government, however, acknowledged that "not every text message during the investigation has been retrieved,"[15] because the FBI had directed Bistrong to delete text messages between him and the FBI from his personal handheld wireless devices "due to law enforcement concerns for the safety of Bistrong while he was working covertly in an undercover investigation."[16] The government also acknowledged that text messages on the FBI agents' handheld wireless devices dated prior to November 2009 were no longer available because the FBI had replaced the agents' handheld devices and the text messages could not be located.[17]

After receiving this information, on January 14, 2011 the defendants filed a motion requesting that the court either dismiss the indictment or order an evidentiary hearing on the issue of discovery sanctions against the government.[18] Defendants argued that the government violated its disclosure obligations by failing to preserve and deleting text messages that would have provided the defense with discoverable, exculpatory and impeachment material, given that Bistrong was likely to testify at trial.[19] Defendants reiterated that these text messages contained evidence that

> "One likely consequence of the DOJ's use of such aggressive law enforcement techniques will be the increased availability of discovery and defensive challenges, including entrapment, that have not previously been asserted in FCPA cases."

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10 *Id.* at 3, 6–7, 12–13; see Fed. R. Crim. P. 16(a)(1)(E) (requiring government, upon a defendant's request, to permit the defendant to inspect and to copy or photograph data, "if the item is within the government's possession, custody, or control and . . . the item is material to preparing the defense"); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires government to produce evidence favorable to an accused, where such evidence is material to guilt or punishment); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (holding that *Brady* material includes evidence which weakens a cooperating witness's credibility).

11 Defendants' Motion for an Evidentiary Hearing, note 9, *supra*, at 7, 11–13.

12 "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). The entrapment defense, therefore, is "inseparable from sting operations. Not all sting operations would constitute entrapment; but entrapment almost definitionally involves sting operations." Dru Stevenson, "Entrapment and the Problem of Deterring Police Misconduct," 37 *Conn. L. Rev.* 67, 103 (2004). To prove entrapment, the defense must show: (1) government inducement of a crime; and (2) a lack of predisposition on the part of the defendant to engage in criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988). In federal court, predisposition is "the principal element of the defense of entrapment." *Id.* (quoting *United States v. Russell*, 411 U.S. 423, 433 (1973)).

13 *United States v. Goncalves*, No. CR-09-335, Government's Response to Defendants' Motion for an Evidentiary Hearing for the Purpose of Obtaining Exculpatory Evidence, 2, 3 (D.D.C. 2010).

14 *Id.* at 26.

15 *Id.* at 21.

16 *Id.* at 20.

17 *Id.* at 21.

18 *United States v. Goncalves*, No. CR-09-335, Defendants' Motion to Dismiss or for Discovery Sanctions, 1–2 (D.D.C. 2011).

19 *Id.* at 1, 12–16; *see* Fed. R. Crim. P. 16(a)(1)(E); *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154–55; Jencks Act, 18 U.S.C. § 3500 (b) ("After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.").

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was material to their entrapment defense.[20]

The government filed its opposition brief on January 27, 2011.[21] The government argued that although some text messages between Bistrong and the FBI agents had not been preserved, it had produced the "vast majority" of text messages between Bistrong and the FBI's lead case agent. The government reiterated that it had produced "the best possible evidence to establish an entrapment defense," namely thousands of recorded conversations between Bistrong and the defendants, as well as materials that may be used to impeach Bistrong's credibility as a witness.[22] The defendants' inability to put forth an entrapment defense, the government argued, was due to the defense's lack of merit, rather than to any missing text messages.[23]

On February 9, 2011, Judge Leon denied the defense motions without issuing a formal opinion.[24]

As the SHOT Show case demonstrates, one likely consequence of the DOJ's use of such aggressive law enforcement techniques will be the increased availability of discovery and defensive challenges, including motions addressing entrapment, that have not previously been asserted in FCPA cases. That said, an entrapment defense is "rarely successful."[25] Although zealous defense advocates will and—absent mitigating strategic or tactical countervailing considerations—should pursue motions that have any reasonable prospects of success, and the final chapter in the SHOT Show cases is potentially years away from being written, the court's most recent decision is yet another example of the difficulty defendants face in putting forth and winning such discovery and defensive challenges.[26] ■

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20 Defendants' Motion to Dismiss, note 18, *supra*, at 4–5, 12.

21 *United States v. Goncalves*, No. CR-09-335, Government's Opposition to Defendants' Motion to Dismiss or for Discovery Sanctions (D.D.C. 2011).

22 *Id.* at 2–3.

23 *Id.* at 2.

24 Order, note 3, *supra*, at 2.

25 *See, e.g.*, Carrie Casey & Lisa Marino, "Federal Criminal Conspiracy," 40 *Am. Crim. L. Rev.* 577, 599 (2003).

26 *See* Order, note 3, *supra*.