DEBEVOISE & PLIMPTON LLP

FCPA Update

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House Subcommittee Holds Hearing on FCPA Reform; Judge Mukasey Testifies

On June 14, 2011, the Crime, Terrorism and Homeland Security Subcommittee of the Judiciary Committee of the U.S. House of Representatives held a hearing on possible amendments to the FCPA.

The Subcommittee heard testimony from four witnesses, including Debevoise & Plimpton LLP partner and former federal judge and U.S. Attorney General Michael B. Mukasey, who testified on behalf of the U.S. Chamber Institute for Legal Reform.

The other witnesses were Deputy Assistant Attorney General Greg Andres, appearing on behalf of the U.S. Department of Justice ("DOJ"); George Terwilliger, a former U.S. Deputy Attorney General and current partner at White & Case LLP; and Shana-Tara Regon, Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers. As described below, Judge Mukasey, Mr. Terwilliger and Ms. Regon advocated an array of reforms and clarifications to the FCPA, while Mr. Andres, on behalf of the DOJ, opposed such revisions to the statute. The comments and questions from Representatives at the hearing indicated that there is bipartisan support on the Subcommittee for at least some of the reforms that were proposed. Near the end of the hearing, Subcommittee Chairman and Representative James Sensenbrenner announced that the Subcommittee would begin drafting legislation.[1]

At the hearing, Judge Mukasey described and endorsed two specific reforms to the FCPA: the addition of an affirmative compliance defense and a clarification of the meaning of "foreign official."[2]

Adding a Compliance Defense

Judge Mukasey endorsed amending the FCPA to include an affirmative compliance defense that would permit companies to rebut the imposition of criminal liability for FCPA violations if the people responsible for the violations circumvented compliance measures that were otherwise reasonably designed to identify and prevent

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1 *The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee,* 112th Cong. (June 14, 2011) ("Hearing Tr.") at 41.

2 *Id.* at 8-10.

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such violations. Contrasting the FCPA with Title VII of the Civil Rights Act of 1964, which affords a company accused of improper workplace discrimination with a defense to allegations of wrongdoing by employees if it had an effective and functioning anti-discrimination policy in place, Judge Mukasey testified that the availability of such a defense actually encourages "robust systems of compliance" and would have the same effect under the FCPA.[3] Judge Mukasey also testified that the adoption of a compliance defense also would make the FCPA consistent with the U.K. Bribery Act of 2010, which expressly recognizes such a defense.[4]

Clarifying the Meaning of "Foreign Official": Under the FCPA, a "foreign official" is defined to include any officer or employee of a foreign government or any "instrumentality" thereof, but the FCPA (unlike, for example, the Foreign Sovereign Immunities Act) does not define "instrumentality."[5] This lack of clarity presents an acute challenge for businesses interacting with foreign companies that are partially state-owned. Judge Mukasey noted that "[t]he DOJ and SEC consider everyone who works for an instrumentality, from the most senior executive to the most junior mailroom clerk, to be a foreign official."[6] Furthermore, the lack of a clear definition makes it difficult for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA and thereby conform their conduct to the requirements of the law. Accordingly, Judge Mukasey stated, the FCPA "should be amended to clarify the meaning of foreign official [and] indicate the percentage of ownership by a foreign government that would qualify [an] entity as an instrumentality," with "majority ownership [as] the most plausible threshold."[7]

In his written testimony, Judge Mukasey also called for four other reforms: expanded procedures for advisory opinions from both the DOJ and the SEC (the latter of which does not currently provide any such guidance to businesses); limitations on the circumstances in which a corporation may be held criminally culpable on a successor liability theory for FCPA violations by a company that it acquires or merges with; the addition of a "willfulness" requirement for the imposition of corporate criminal liability (which would make the standard consistent with the *mens rea* threshold for individual criminal liability under the FCPA); and restrictions on parent company liability for anti-bribery violations by a subsidiary unless the conduct was directed or authorized by, or at least known to, the parent.[8]

Although Mr. Terwilliger and Ms. Regon also endorsed the need for reform of the FCPA to provide greater clarity to businesses and reduce the level of prosecutorial discretion currently afforded by the statute, Mr. Andres, appearing on

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3 *Id.* at 9.

4 Written Testimony of The Honorable Michael B. Mukasey, *The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcommittee of the House Judiciary Committee*, 112th Cong. (June 14, 2011) at 4, http://judiciary.house.gov/hearings/hear_06142011.html (hereinafter, "Mukasey Written Testimony").

5 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

6 Hearing Tr. at 9.

7 *Id.* at 10.

8 Mukasey Written Testimony at 9-15.

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behalf of the DOJ, rejected the need for each of the proposed reforms.[9] Mr. Andres stressed the breadth and depth of the DOJ's enforcement efforts under the FCPA, citing several recent examples of serious violations of the anti-bribery provisions of the FCPA. He argued that the DOJ exercises its discretion to prosecute systemic bribe schemes involving substantial amounts, not nominal payments or isolated incidents. He also suggested that a compliance defense is unnecessary because the DOJ already is required, under the Principles of Federal Prosecution of Business Organizations, to take into consideration the existence and strength of a company's compliance programs when deciding whether to charge the company.[10] He noted that the DOJ also currently provides guidance regarding FCPA compliance through its opinion release program, although Judge Mukasey pointed out in his written testimony that the program is rarely used and that the SEC has no such program.[11] In the course of questioning, Judge Mukasey also responded that even if prosecutors such as Mr. Andres exercise their discretion reasonably, companies' in-house and outside counsel necessarily tend to advocate the most risk-averse course with regard to FCPA compliance, resulting in foregone business opportunities and unnecessary and burdensome self-investigation and voluntary disclosure of even the most minor of potential FCPA concerns.[12]

The Members of the Subcommittee generally appeared receptive to the prospect of legislative reform and clarification of the FCPA. Chairman Sensenbrenner supported the proposals described by Judge Mukasey, announced that the Subcommittee would begin drafting legislation, and warned Mr. Andres that the DOJ should "get the message."[13] Other Republicans on the Subcommittee also expressed interest in the reforms, and support extended to the Democratic side of the aisle: Representative Bobby Scott, the Ranking Member of the Subcommittee, began his remarks by endorsing nearly all the proposals described by Judge Mukasey, and Representative John Conyers, the Ranking Member of the full Judiciary Committee, was the only Democrat to express a clear rejection of the argument that the FCPA left too much discretion to prosecutors.[14] Even Representative Conyers, however, indicated that he could be open to the addition of a compliance defense and a clarification of the definition of "foreign official."[15]

By the end of the hearing, it appeared likely that that Congress soon will consider legislation to amend the FCPA, the first such effort in well over a decade. ■

"Chairman Sensenbrenner supported the proposals described by Judge Mukasey, [and] announced that the Subcommittee would begin drafting legislation."

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9 Hearing Tr. at 7-8, 10-14, 39.
10 *Id.* at 7-8, 19-20.
11 *Id.* at 32; Mukasey Written Testimony at 9-10.
12 Hearing Tr. at 15, 17, 19.
13 *Id.* at 37-38, 40-41.
14 *Id.* at 3-5.
15 *Id.* at 5.

E&Y and KPMG Surveys Shed Light on Anti-Corruption Trends

In recent months, two of the Big Four accounting firms – Ernst & Young and KPMG – have conducted surveys to determine the attitudes about, and trends in, the anti-bribery, anti-fraud, and anti-corruption compliance measures undertaken by companies around the world.

Ernst & Young's *European Fraud Survey 2011: Recovery, Regulation and Integrity*,[1] surveyed more than 2,300 employees of European companies in thirteen mature and ten emerging markets – at all levels of seniority – about their opinions and attitudes regarding the tolerance for unethical behavior in their companies or business areas and the compliance policies implemented by their employers.

KPMG's *Global Anti-Bribery and Corruption Survey 2011*[2] surveyed 214 executives in the United States and the United Kingdom who reported they were in charge of anti-bribery and corruption matters within their companies regarding their compliance programs and challenges they face.

Both surveys indicated that many employees responsible for compliance, as well as rank-and-file employees, believe that unethical behavior continues to be tolerated in a number of countries and that, in some of them, it is impossible to do business in a compliant manner. The Ernst & Young survey shows that 46% of the respondents responsible for business in mature markets and 81% responsible for business in emerging markets believe that bribery and corruption are commonplace in their country.[3] In fact, more than one-third of all respondents stated that they are prepared to offer cash payments, gifts, or entertainment to win or retain business and 59% expected company managers to "cut corners" when economic times are tough.[4] Compliance executives surveyed by KPMG largely confirm Ernst & Young's findings, with 70% of U.S. executives surveyed stating that there are places in the world where business cannot be done without engaging in bribery and corrupt conduct.[5]

These findings are particularly troubling given the cost-cutting measures implemented by many corporations in the wake of the financial crisis. Approximately 60% of the employees surveyed by Ernst & Young stated that the biggest pressure affecting their company is to reduce costs.[6] Only 24% of the respondents cited the need to comply with regulations as a major pressure, despite the passage of the U.K. Bribery Act in 2010 and the fact that eight of the ten largest FCPA settlements occurred in 2010.[7]

The KPMG survey suggests that U.S. and U.K. multinationals have made progress in developing and bolstering their formal compliance programs. For example,

- The number of U.K. companies that have instituted a written anti-bribery and corruption compliance program has grown from only 57% in 2009 to 86% in 2010, most likely due to the passage of the U.K. Bribery Act. On this score, the United Kingdom now outpaces the United States, where 78% of surveyed companies have such written policies, down from 85% in 2008.[8]
- Almost all U.S. and U.K. respondents whose companies have written anti-bribery and anti-corruption policies reported that those policies are distributed to all employees. 64% of U.K. and 58% of U.S. respondents whose companies have such policies also distribute them to their third-party agents.[9] Moreover, 63% of U.S. and 76% of U.K. companies require employees to undergo compliance training at least once a year.[10]
- Companies overwhelmingly prohibit facilitating payments, even though such payments are not prohibited by the FCPA.

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1 *Ernst & Young, European Fraud Survey 2011: Recovery, Regulation and Integrity* (2011), http://www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/European-fraud-survey-2011--recovery--regulation-and-integrity (hereinafter "E&Y Survey").

2 KPMG, *Global Anti-Bribery and Corruption Survey 2011* (2011), http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Pages/global-abc-survey-2011.aspx (hereinafter "KPMG Survey").

3 E&Y Survey at 10.

4 *Id.* at 7-8.

5 KPMG Survey at 18.

6 E&Y Survey at 5.

7 *Id.*; KPMG Survey at 1 & n.1.

8 KPMG Survey at 9.

9 *Id.* at 12.

10 *Id.* at 14.

Surveys Shed Light on Anti-Corruption Trends ■ Continued from page 4

Only 9% of U.K. companies and 13% of U.S. ones (down from 24% in 2008) allow facilitating payments.[11]

Unfortunately, these positive developments on the formal compliance-policy level do not yet translate to a meaningful improvement in compliance awareness and attitudes among the business executives and rank-and-file employees of multinational companies, as indicated by the results of the Ernst & Young survey.

First, although the vast majority of compliance executives surveyed by KPMG state that their companies have compliance policies and distribute them to all employees, only half of those surveyed by Ernst & Young state that their company has an anti-bribery policy or code of conduct.[12] Furthermore, among those, only 45% believe that such codes are adequate for preventing or detecting compliance violations and 43% could not identify to whom they could report concerns of impropriety.[13]

Second, although most companies appear to require annual compliance training, fewer than 25% of surveyed employees, and less than one-third of surveyed board directors, stated that they personally have received compliance training.[14] Low levels of training extend to employees in higher-risk positions such as marketing, sales and business development. Among those, fewer than 40% reported that they have received compliance training and, perhaps not coincidentally, almost 25% stated they could not see the relevance of their company's compliance policy to their work.[15]

Third, fewer employees are aware of the existence in their companies of a wide variety of anti-fraud measures, including internal and external auditing, a code of conduct, legal due diligence, and anti-fraud training. Between 2009 and 2011, employees' awareness of these measures has fallen significantly, suggesting that, policies notwithstanding, they are not sufficiently publicized within the organizations.[16]

Even as far as formal compliance policies (and awareness about them) go, there still is substantial room for improvement. The KPMG survey shows that, although the U.S. and U.K. companies are attuned to the requirements of their national laws, few consider how the other country's legal framework affects their business. Only 46% of the U.K. companies and 43% of U.S. companies in the KPMG survey address compliance with the FCPA or the U.K. Bribery Act, respectively.[17] Given the unique requirements of each law and their broad jurisdictional application, it is important for all multinationals to consider the applicability of the FCPA, the U.K. Bribery Act, and other relevant laws to their businesses and adjust their compliance policies accordingly.

Moreover, a large number of executives responsible for compliance matters report that performing due diligence and auditing of third-party agents present significant challenges.[18] Although most surveyed said that their companies include the right to audit the counterparties in their contracts with third parties, approximately two-thirds of those respondents said that their companies have never exercised that right with respect to any counterparties.[19] Taken together, these findings suggest that the implementation of an effective third-party due diligence system continues to be a challenge for many companies.

> "Both surveys indicated that many employees responsible for compliance, as well as rank-and-file employees, believe that unethical behavior continues to be tolerated in a number of countries and that, in some of them, it is impossible to do business in a compliant manner."

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11 *Id.* at 17.
12 E&Y Survey at 12.
13 *Id.* at 12-13.
14 *Id.* at 14-15.
15 *Id.* at 14.
16 *Id.* at 16.
17 KPMG Survey at 10.
18 *Id.* at 3-4.
19 *Id.* at 11, 16.

Surveys Shed Light on Anti-Corruption Trends ■ Continued from page 5

Roughly 39% of U.S. and U.K. executives charged with compliance believe that anti-bribery and corruption regulations put companies at a competitive disadvantage and 33% believe that such regulations impose costly and excessive requirements.[20] Rank-and-file employees and business executives appear not to share that pessimism: 70% of them think that new anti-bribery legislation would have little impact on economic growth and two-thirds agree that there are commercial advantages for companies with strong reputations for ethical behavior.[21] In fact, the number of employees surveyed by Ernst & Young who would welcome additional anti-fraud oversight and regulation has tripled between 2009 and 2011, from 13% to 45%.[22]

The Ernst & Young and KPMG surveys offer a valuable perspective on the compliance issues from the position of those on the "front lines" – including compliance executives, senior management, and rank-and-file employees – who develop and implement compliance policies. As such, the surveys provide a useful basis for identifying areas of continuing concern and targeting areas for improvement and enhancement. ■

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20 *Id.* at 8.
21 E&Y Survey at 20, 22.
22 *Id.* at 17.

Upcoming Speaking Engagements

August 1 and 2, 2011
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The U.K. Bribery Act and What it Means for India
Deloitte-Sponsored Lectures in Delhi and Mumbai

5:00 p.m. at the Lalit Hotel in Delhi (August 1)
5:00 p.m. at the Trident Hotel (Nariman Point) in Mumbai (August 2)

(by invitation only: contact Steven S. Michaels (ssmichaels@debevoise.com) or Peter Ferenz (pferenz@debevoise.com) for additional details)

August 4, 2011
Lord Goldsmith QC

The U.K. Bribery Act and What it Means for Asia
Deloitte-Sponsored Lecture in Singapore

11:30 a.m. at Marina Bay Sands Hotel

(by invitation only: contact Steven S. Michaels (ssmichaels@debevoise.com) or Peter Ferenz (pferenz@debevoise.com) for additional details)

Victim or Villain? A Costa Rican State Entity's Claim for Restitution from Alcatel

Despite speeches in which U.S. Department of Justice ("DOJ") officials have stressed how foreign bribery victimizes, among others, "international democratic institutions, the worldwide marketplace, and American business,"[1] the issue of who is entitled to receive proceeds of U.S. government recoveries in FCPA cases is a recurring one that has become salient in the last two months as a result of litigation arising out of the DOJ's plea agreements and deferred prosecution agreement ("DPA") with French communications company Alcatel Lucent S.A. and several of its subsidiaries (together, "Alcatel"). In the end, the state-owned enterprise ("SOE") whose employees were caught up in one aspect of the Alcatel matter lost in its effort to obtain a part of the revenues generated by the settlement, but it remains possible, if not likely, that other foreign entities and governments may seek benefits from FCPA enforcement, potentially complicating future negotiation of FCPA cases with the DOJ.

In the latest round in the Alcatel litigation, on June 17, 2011 the U.S. Court of Appeals for the Eleventh Circuit denied a petition for a writ of mandamus by the Costa Rican power and electric company, Instituto Costarricense de Electricidad ("ICE"), which had asked the court of appeals to instruct a federal district court to recognize ICE as a crime victim and to award it substantial restitution pursuant to U.S. federal victims statutes.[2] As a result, with the district court's June 1, 2011 approval of the long-negotiated plea agreements with Alcatel, the Alcatel DPA became effective.[3] The plea agreements and DPA detail widespread FCPA violations, including in Costa Rica, and will lead to payment by Alcatel of $92 million to the U.S. treasury.[4] Separately, Alcatel agreed to pay $45 million to resolve a parallel civil investigation by the U.S. Securities and Exchange Commission.[5]

Although unsuccessful, ICE's litigation has raised questions about who are properly deemed "victims" of FCPA violations and the extent to which SOEs, whose employees or former employees allegedly received bribes, will seek to affect resolutions of FCPA cases between the U.S. government and a corporate defendant in the future. ICE's attempt to do so failed as a result of a pervasive history of corruption at ICE, including active involvement of senior personnel in soliciting bribes from Alcatel, and the inherent complexity of calculating a non-speculative loss. Although there certainly is an incentive in this era of ever increasing FCPA enforcement for a more sympathetic SOE to follow ICE's lead, it remains to be seen whether restitution under victims' rights statutes will become a part of the FCPA settlement process.

I. Factual Background

In early May 2011 – just weeks before the agreements were to be court-approved – ICE, a state-owned entity at the time of the alleged conduct, petitioned the federal district court in Miami to reject the plea agreements and DPA.[6] ICE's reason for doing so was that it had not received recognition as a victim under the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771 and the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663(A).[7] The CVRA and MVRA are federal laws designed to provide procedural rights and restitution to certain crime victims. ICE argued it had suffered a pecuniary loss from Alcatel's conspiracy to bribe several ICE officials and that the anticipated settlement had not adequately considered its interests.[8]

At the time of the alleged bribery, ICE was governed by a board of directors acting on behalf of the nation of Costa Rica. Among other duties, the board was responsible for evaluating and approving telecommunications bid proposals.[9] According to the DPA, one of Alcatel's subsidiaries paid approximately $18

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1 *See, e.g.*, DOJ Justice News, "Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act" (Nov. 16, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

2 *See In re Instituto Costarricense de Electricidad*, No. 11-12707-G, Petition for Writ of Mandamus (11th Cir. June 15, 2011) (hereinafter, "Mandamus Petition"); *In re Instituto Costarricense de Electricidad*, No. 11-12707-G, Order Denying Writ of Mandamus (11th Cir. June 17, 2011) (hereinafter, "Order Denying Writ").

3 Joe Palazzolo, "Costa Rican Telecom Is Denied Victim Status," *The Wall Street Journal* (June 2, 2011), http://blogs.wsj.com/corruption-currents/2011/06/02/costa-rican-telecom-is-denied-victim-status/.

4 *See* DOJ Press Rel. 10-1481, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

5 *Id.*

6 Mandamus Petition at 1-2.

7 *See id.*

8 *Id.* at 3. Alcatel-Lucent S.A., the parent company, agreed to admit violations of the FCPA's books and records and internal controls provisions. As part of the company's resolution with the Department of Justice, three subsidiaries, including Alcatel Centroamerica S.A. and Alcatel-Lucent France, S.A., were also charged and agreed to plead guilty to conspiring to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. *See* DOJ Press Rel., note 4, *supra*.

9 *United States v. Alcatel-Lucent, S.A.*, Case No. 10-CR-20907-COOKE, Deferred Prosecution Agreement at A-6 (S.D. Fla. 2010) (hereinafter, "Alcatel DPA").

Costa Rican State Entity's Claim for Restitution ■ Continued from page 7

million to consultants on the basis of vaguely described marketing agreements and fictitious invoices. The funds were intended, at least in part, for six now-former high ranking officials at ICE.[10] According to the DPA, the value of contracts ICE awarded to Alcatel exceeded $300 million and the company earned a profit of approximately $23.6 million.[11]

II. ICE's Federal Claim

In its petition for relief, ICE characterized itself as a victim of Alcatel's bribery conspiracy and thus sought recognition as a crime victim under the CVRA and restitution for the loss it had suffered pursuant to the MVRA. Both statutes define victim as "a person directly and proximately harmed as a result of the commission" of the federal offense in question.[13] The CVRA grants victims with certain procedural guarantees, such as "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding" and the "right to full and timely restitution as provided in law."[14]

In claiming its right to restitution, ICE argued that the bribes paid by Alcatel to several of its former directors and executives deprived ICE of their honest services. ICE also contended that its attempts to rectify the damages resulting from Alcatel's poor delivery of services occurring after the collapse of the corrupt scheme led to losses in excess of $100 million.[15] To support its claim, ICE invoked several federal cases for the proposition that "[i]t is universally recognized, in a scheme for bribery, that an entity whose employees accept improper benefits to affect corporate decisions is a victim."[16] The cases cited by ICE were distinguishable from its own case and did not directly involve restitution to a SOE, employees of which took bribes. Rather, the cases awarded restitution to the foreign government based on a clearly identifiable and calculable loss.[17] In the FCPA context, several unpublished opinions cited by ICE similarly granted restitution to foreign governments, but not to state-owned entities.[18]

III. DOJ's Response to ICE's Petition for Victim Status and Restitution

The DOJ opposed ICE's petition, arguing that ICE should not be designated a victim under the CVRA because the facts discovered during a multi-year long investigation "reflect profound and pervasive corruption at the highest levels of ICE."[19] The DOJ emphasized that nearly half of ICE's executive board at the time received bribes from Alcatel and that corruption was so pervasive at ICE that it became a vehicle of complicity in the solicitation of bribery.[20] Accordingly, recognition of ICE as a victim would contradict the purpose behind the victim rights statutes. The DOJ supported its position by citing to various federal appellate court holdings that generally preclude a participant in an offense from being considered a victim under the CVRA and the MVRA.[21]

The DOJ emphasized statements by a former Alcatel CIT executive, Christian Sapsizian, who provided extensive testimony about the long-standing culture of corruption at ICE.[22] Sapsizian himself was convicted of FCPA violations and sentenced in September 2008 by the federal district court in Miami to 30 months imprisonment and forfeiture of $261,000 for his involvement in the bribery of ICE officials.[23] The plea deal required Sapsizian to cooperate with U.S. and foreign

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10 *Id.* at A-16-17.

11 *Id.* at A-18-20.

12 *See* Mandamus Petition at 1-2; 18 U.S.C. § 3663(c)(1)(A)(ii) (2006) (offenses against property under Title 18 include fraud or deceit).

13 18 U.S.C. § 3663A(a)(2); 18 U.S.C. § 3771(e) (2006). *See In re James R. Fisher and Odyssey Residential Holdings, LP*, No. 11-10452, Denial of Writ (5th Cir. May 9, 2011) (holding that restitution under the CVRA requires a showing of direct and proximate harm to the victim, i.e. that defendant's criminal offense was but-for cause of harm and harm was a reasonably foreseeable consequence of defendant's criminal conduct).

14 18 U.S.C. § 3771(a)(4), (6) (2006).

15 *See United States v. Alcatel-Lucent, S.A.*, 10-CR-20907-COOKE, Victim Instituto Costarricense de Electricidad's Memorandum of Law in Support of Petition for Relief Pursuant to 18 U.S.C. § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement at 6-8, 14 (S.D. Fla. May 3, 2011) (hereinafter, "ICE Memo of Law").

16 *See id.* at 5; *United States v. Martin*, 128 F.3d 1188 (7th Cir. 1997) (finding in a conspiracy to defraud the United States government that there was no reason that a U.S. government agency could not receive restitution under a victims rights statue).

17 *See Pasquantino v. United States*, 544 U.S. 349 (2005) (holding that Canada possessed a property interest to uncollected excise taxes on illegally imported liquor and thus was permitted restitution in amount of evaded taxes); see also *United States v. Bengis*, 631 F.3d 33 (2d. Cir. 2011) (holding that defendants who had pleaded guilty to Lacey Act conspiracy had to make restitution to government of South Africa for lost property interest in over-harvested lobsters).

18 *See United States v. F.G. Mason Eng'g, Inc. and Francis G. Mason*, Cr. B-90-29 (D. Conn. 1990) (ordering defendant to make restitution to German government because of artificially inflated prices and services emanating from corrupt arrangement with West German military intelligence service official); *see also United States v. Kenny Int'l Corp.*, Cr. No. 79-372 (D.D.C. 1979) (ordering restitution to the government of Cook Island in the amount of funds paid to benefit the then Prime Minister and his political party to secure renewal of stamp distribution agreement); *see also United States v. Diaz*, No. 20346-CR-JEM, Transcript of Sentencing Hearing at 22-23 (S.D. Fla. Aug. 5, 2009) (finding that government of Haiti was victim of improper payments to Haitian telecommunication company and ordering restitution).

19 *United States v. Alcatel-Lucent, S.A.*, Case No. 10-CR-20906/07-COOKE, Government's Response to ICE's Petition for Victim Status and Restitution at 1 (S.D. Fla. May 23, 2011) (hereinafter "Government's Response").

20 *Id.* at 12.

21 *See id.* at 22-23; *United States v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008) (denying restitution of co-conspirators); see also *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) (holding that treating co-conspirators as victims "contains an error so fundamental" that it "reflect[s] on the public reputation of judicial proceedings"); *United States v. Lazarenko*, 624 F.3d 1247, 1250-52 (9th Cir. 2010) (holding that victim and participant of money laundering scheme could not qualify as a victim eligible for restitution).

22 Government's Response at 22-23.

23 *See* DOJ Press Rel. 08-848, Former Alcatel CIT Executive Sentenced for Paying $2.5 Million in Bribes to Senior Costa Rican Officials (Sept. 23, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-848.html.

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law enforcement authorities during its investigations.[24] The DOJ also cited in its response to ICE's petition to the testimony of Jose Antonio Lobo, a former director of ICE who pleaded guilty in Costa Rican proceedings to accepting bribes.[25]

In addition to essentially characterizing ICE as a co-conspirator, the DOJ suggested that ICE had been accorded all relevant procedural rights reserved for victims under the CVRA but that it would be difficult, if not impossible, for the district court to calculate the amount of loss purportedly suffered by ICE. Thus, the DOJ argued that restitution should be denied on the separate ground that determination of ICE's purported actual loss resulting from Alcatel's bribery would be entirely speculative. Not only, according to the DOJ, was the entire tender process for the contract award soaked with corruption, but there was also no obvious measure to identify whether the bribes paid by Alcatel had monetarily harmed ICE.[26] The MVRA contains an exception that permits a district court to decline to award restitution if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."[27] The DOJ predicted that the court's attempt to calculate ICE's purported losses would take months and thus significantly delay the fully negotiated plea agreement and DPA. To support this point, the DOJ pointed out that ICE had sought for years to sue Alcatel for claimed contract damages of $73 million and that ICE also filed a civil RICO suit in Florida state court in April 2010, which was dismissed on *forum non conveniens* grounds.[28]

In its original petition and in reply to the DOJ's arguments, ICE invoked principles of agency law. ICE argued that the criminal conduct of six, now-former, ICE employees could not be imputed to the entity consisting of more than 15,000 employees, because the persons who solicited the bribes acted for their own benefit and adversely to ICE's best interests.[29] ICE stated that it promptly terminated the relevant employees and supported prosecutorial efforts as soon as it learned of the criminal acts in 2004. In reply to the DOJ's arguments, ICE also submitted a sworn affidavit of the former head of Alcatel's Costa Rican subsidiary declaring that no one at ICE, other than the recipients of funds, knew of Alcatel's bribery.[30]

IV. Denial of Petitions by District Court and Appellate Court

On June 1, 2011, the district court ruled in the DOJ's favor, holding that ICE was not a victim under the CVRA because the entity served effectively as a co-conspirator in Alcatel's bribery scheme. Moreover, the district court agreed that even if it were to recognize ICE as a victim, no restitution would be in order because of the enormous complexity in calculating ICE's actual loss and the adverse impact on the Alcatel settlement.[31] Accordingly, the district court approved Alcatel's $92 million settlement.

In response, ICE filed a petition for a writ of mandamus under the CVRA with the U.S. Court of Appeals for the Eleventh Circuit, requesting the appellate court to instruct the district court to recognize ICE as a victim and to award restitution. ICE repeated the basic agency arguments it had made to the district court as to why it should be considered a victim, rather than, essentially, a co-conspirator.[32] ICE also argued that the district court gave inappropriate weight to hearsay statements, on which the DOJ had relied in its description of a pervasive culture of corruption at ICE.[33] For example, ICE disputed the DOJ's characterization of the testimony of one of the recipients of the bribes, stating that the testimony did not demonstrate a culture of corruption at ICE but instead expressed a perception that companies had generally developed policies to bribe senior officials at potential customers.[34] ICE also challenged the district court's characterization of ICE as a co-conspirator, pointing out that nowhere in the government's criminal information against Alcatel was ICE described as such.[35] Finally, ICE posited that even if ICE were to have acted as a co-conspirator, the CVRA does not contain an exemption pursuant to which such party would be barred from recovery as a victim.[36]

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24 Government's Response at 8-9.
25 *Id.* at 11-12.
26 *Id.* at 15-21; 24-26.
27 18 U.S.C. § 3663A(c)(3)(A)-(B).
28 Government's Response at 28, n. 15.
29 Mandamus Petition at 19-20; ICE Memo of Law, 19-21.
30 *United States v. Alcatel-Lucent, S.A.*, Case No. 10-CR-20907-COOKE, Sworn Statement of Edgar Valverde Acosta ¶ 3 (S.D. Fla. May 31, 2011).
31 Palazzolo, note 3, *supra*.
32 Mandamus Petition at 19-20.
33 *See id.* at 12.
34 *See id.* at 16-17.
35 *See id.* at 22-23.
36 *See id.*

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Not surprisingly in light of the deference shown to a district court's findings in mandamus proceedings, the court of appeals dismissed ICE's petition, holding that the district court did not commit clear error in finding that ICE acted as a co-conspirator due to the "pervasive, constant, and consistent illegal conduct by the 'principals' (i.e. members of the Board of Directors and management) of ICE."[37] Nor did the two-judge panel find clear error in the district court's finding that ICE had failed to establish direct and proximate harm by Alcatel's conduct, noting the general rule that participants in a crime are not eligible to recover restitution.[38]

V. Conclusion

The denial of ICE's petition to be designated a victim of Alcatel's bribery scheme and to obtain restitution was not unexpected. The DOJ's allegations relating to the extensive participation of senior personnel in the bribery scheme and the apparently engrained culture of corruption created a factual hurdle that would have been difficult to overcome and that strengthened the DOJ's argument that calculating a restitution amount would have been too complex.

The briefing and rulings in the ICE case raise the question if and when a more sympathetic SOE might be a victim under the CVRA and MVRA. In response to ICE's petition, the DOJ left open the possibility that SOEs whose employees accepted bribes could be considered victims.[39] However, neither the DOJ's briefs nor the courts' decisions provide guidance as to when such circumstance might be present. Given the increasingly higher fines and penalties arising from FCPA settlements, other SOEs may have an incentive to explore potential opportunities for restitution.

Even in a factually more sympathetic context, the calculation of an appropriate restitution award may nevertheless constitute a considerable practical hurdle for prospective victims. According to the DOJ and the district court, even if ICE had been a victim, the complexity of the case would have made calculation of the restitution extraordinarily difficult, constituting an undue burden on the sentencing process. Similar challenges in calculating a non-speculative loss would likely exist in other, even less complex, bribery scenarios. Intricate questions of fact associated with loss calculation and the nature of FCPA cases mean that relevant evidence and witnesses are typically found outside the United States, which suggests a heavy burden for a putative victim seeking restitution. It thus remains uncertain whether the CVRA or MVRA will become an effective tool for foreign government instrumentalities in the FCPA context.

Finally, the ICE petition raises intriguing normative questions about the identity of real victims in corruption cases. The "FCPA Professor" Mike Koehler commented about the ICE case on his blog that "I am not sure where criminal fines should go when a *French* company bribes *Costa Rican* 'foreign officials,' but I am pretty sure tha[t] the answer should not be 100% to the U.S. Treasury."[40] Notwithstanding a certain underlying logic that the principal victims of bribery most deserving of restitution are located in the country where the bribes were paid, the ICE matter also illustrates that the entity that – knowingly or unknowingly – tolerated its principals pocketing bribes likely will need to seek recompense by means other than restitution in U.S. court proceedings.

Indeed, even in the instant case, the U.S. courts' refusal to recognize ICE as a victim did not mean that Costa Rica was left without an opportunity to seek reparations from Alcatel for harm its bribery may have caused. In January 2010 Alcatel-Lucent France, S.A. agreed to a settlement of $10 million in "moral damages" to Costa Rica,[41] which constituted the first instance of a foreign corporation paying reparations for corruption to the Costa Rican government. ■

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37 *See* Order Denying Writ at 2.

38 *Id.*

39 Government's Response at 7 ("This is not to say that in each instance in which a foreign official has solicited and been paid bribes the ministry or state owned entity for which he or she worked could never be considered a victim.").

40 Mike Koehler, "Is ICE a Victim? And an Open Question!", *FCPA Professor Blog* (May 25, 2011), http://fcpaprofessor.blogspot.com/search/label/Alcatel-Lucent (emphasis in original).

41 Government's Response at 3, Ex. 1.

Global-Tech Appliances, Inc. v. SEB S.A.: From Deep Fryers into the Fire of the "Willful Blindness" Doctrine

Although June is traditionally the month in which the U.S. Supreme Court hands down its most divided and controversial decisions, an 8-1 ruling on the last day of May in a case involving alleged contributory infringement of patents for "cool-touch" deep fryers may end up as one of the more important enforcement related decisions of the year. The decision will be of interest to government lawyers, FCPA practitioners, and in-house counsel considering the question of what constitutes "willful blindness" under the FCPA.

As FCPA practitioners are well aware, the notion of "willful blindness" can arise in a number of settings under the FCPA, most particularly in analyzing whether the statutory "willful blindness" proxy for actual knowledge has been satisfied in the context of payments routed through agents or other third parties for the corrupt purpose of influencing foreign officials to obtain or retain business or other advantages.[1]

The statute makes it unlawful for any person subject to the FCPA (and provided other jurisdictional requirements are established) corruptly to provide money or any thing of value to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official" for the improper purposes identified in the FCPA.[2]

Although this "third party payment" provision is the only subsection of the FCPA that explicitly requires "knowing," general rules of statutory construction demand that proof of other primary anti-bribery offenses must include sufficient evidence to sustain the government's burden that relevant actors knew, for example, that a payment was being made to a foreign official, or that U.S. commerce was implicated.[3]

Whether and how the Court's May 31 decision in *Global-Tech Appliances, Inc. v. SEB S.A.*,[4] which includes a lengthy review, the first in many decades, of the doctrine of "willful blindness," will affect FCPA enforcement remains to be seen. However, by making clear that "deliberate indifference to a known risk" is not the same thing as actual knowledge,[5] the Court has emphasized that a definitional proxy for "actual knowledge" requires more than negligence or recklessness. By defining the judge-made doctrine of "willful blindness" to require that the government prove that a defendant not only (1) "subjectively believe[d] that there is a high probability that a fact exists" but (2) also has "take[n] deliberate actions to avoid learning of that fact,"[6] the Court has placed pressure on the FCPA's statutory definition of "knowledge" and "knowing," which does not expressly contain the second element of the *Global-Tech* willful blindness definition,[7] raising whether the second element of the *Global-Tech* formulation must be imposed through principles of statutory interpretation.

The *Global-Tech* Litigation and the Supreme Court's Decision

The *Global-Tech* litigation arose out of claims by SEB S.A. ("SEB"), a French maker of home appliances, that Pantalpha Enterprises, Ltd. ("Pantalpha"), a Hong Kong company, and its corporate parent, Global-Tech Appliances, Inc. ("Global-Tech"), contributorily infringed SEB's patents for "cool touch" deep fryers – deep frying cookers that contained a special air layer that left the fryer's surfaces cool while hot oil cooked the food inside. SEB alleged that defendants developed and then marketed through its sales channels in the United States a knock-off of a non-U.S. version of SEB's patented products that, in accordance with then current practice, were not embossed or labeled with U.S. patent markings.[8] SEB sued Pantalpha and Global-Tech in federal court for contributory infringement pursuant to 35 U.S.C. § 271(b), which provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer."

After a jury returned a verdict for SEB, Pantalpha and Global-Tech appealed to the United States Court of Appeals for the Federal Circuit, arguing that Section 271(b) required actual knowledge that

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1 15 U.S.C. §§ 78dd-1(a)(3), (f)(2); 78dd-2(a)(3),(h)(3); 78dd-3(a)(3), (f)(3).

2 *Id.*

3 *See, e.g., United States v. Kay*, 513 F.3d 432, 448 (5th Cir. 2007) (although defendant need not be shown to have knowledge that he was violating the FCPA, the government in a criminal enforcement action must prove beyond a reasonable doubt that the defendant had "knowledge of the facts that constitute the offense").

4 563 U.S. __, 131 S. Ct. 2060 (2011)

5 131 S. Ct. at 2070-71.

6 *Id.*

7 *See* 15 U.S.C. §§ 78dd-1(f)(2); 78dd-2(h)(3); 78dd-3(f)(3).

8 131 S. Ct. at 2063-65.

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the plaintiff's products were patented and that no evidence of such actual knowledge had been presented at trial. The court of appeals affirmed, holding that even if actual knowledge was required, the record showed that defendants were "deliberately indifferent" to a "known risk" that SEB's products were patented.[9] The Supreme Court granted defendants' petition for certiorari to determine whether actual knowledge was required and whether the Federal Circuit's use of the "deliberate indifference" test as a proxy for actual knowledge was correct.

The Supreme Court affirmed, holding, first, that "actual knowledge" that plaintiff's products were patented was required by Section 271(b), and that, even though the "deliberate indifference" standard was not a proper proxy for "actual knowledge," the record demonstrated that defendants were "willfully blind" to knowledge that plaintiff's products were patented, and, accordingly, liable.[10] Before coming to that judgment, however, the Court emphasized the notion that "willful blindness" may serve as a proxy for "actual knowledge" only pursuant to "an appropriately limited" definition that requires that "(1) the defendant must subjectively believe that there is a high probability that the fact exists and (2) the defendant must take deliberate actions to avoid learning the facts."[11] In analyzing whether the evidence met this restrictive view, Justice Alito, writing for the majority, held that "one who merely knows of a substantial and unjustified risk of such wrongdoing" (the standard for recklessness) or "one who should have known of a similar risk, but, in fact, did not" (the standard for negligence), cannot be willfully blind, quoting a treatise stating "'[a] court can find willful blindness only where it can almost be said that the defendant actually knew."[12] The Court went on to state:

> The test applied by the Federal Circuit in this case departs from the proper willful blindness standard in two important respects. First, it permits a finding of knowledge when there is merely a "known risk" that the induced acts are infringing. Second, in demanding only "deliberate indifference" to that risk, the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.[13]

Given what it found to be the active and knowing efforts to conceal information from patent counsel, the Court had no difficulty in concluding that the record supported a willful blindness, and, derivatively, an "actual knowledge" finding.[14] And, because defendants had not challenged the sufficiency of the jury instructions on appeal, the sufficiency of the factual record to sustain the verdict required affirming the judgment.[15]

Justice Kennedy dissented, taking issue with the willful blindness doctrine as a general matter, viewing it as an improper judicial effort to import "moral theory" into the law, and, more particularly, with the potentially broad sweep of the Court's decision. Justice Kennedy wrote that the majority's decision "appears to endorse the willful blindness doctrine here for all federal criminal cases involving knowledge," through the vehicle of a "civil case where it has received no briefing from the criminal defense bar."[16] Justice Kennedy argued that the majority's rationale for its view of willful blindness as a proxy for actual knowledge, *i.e.*, that the Court had in other cases upheld willful blindness as a proxy for such knowledge when Congress had clearly specified that outcome in a federal criminal statute, did not counsel adopting the doctrine as a matter of judge-made law.[17] In the end, however, Justice Kennedy agreed that the record would support an inference of actual knowledge, and would not have reversed, but rather would have remanded the case to the Federal Circuit to allow the court of appeals in the first instance to assess the record unburdened by any doctrinal proxy, *i.e.*, willful blindness or otherwise, for the actual knowledge element.[18]

The *Global-Tech* Decision's Impact Upon the FCPA

The *Global-Tech* decision has several important ramifications for interpretation of the FCPA. First and foremost, it emphasizes that the knowledge elements of the FCPA's primary anti-bribery offenses cannot be

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9 *Id.* at 2064-65.
10 *Id.* at 2065-72.
11 *Id.* at 2070-71.
12 *Id.*
13 *Id.* at 2071.
14 *Id.*
15 *Id.* at 2071 n.10.
16 131 S. Ct. at 2072-73 (Kennedy, J., dissenting).
17 *Id.*
18 *Id.* at 2074.

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proved by evidence of mere negligence or recklessness, whether defined as deliberate indifference to a known risk, or something else. Merely being aware of a "known risk" of bribery and simply not taking further action would not subject one to prosecution if the logic of *Global-Tech* holds.

Indeed, in *Global-Tech*, the Court took pains to distinguish the facts proved at trial from those giving rise to mere "deliberate indifference." At trial, SEB presented evidence that Pantalpha and Global-Tech marketed their products in the United States after obtaining an opinion from outside patent counsel who reported that the defendants' products "did not infringe any of the patents he had found."[19] Pantalpha and Global-Tech did not inform the outside patent attorney that the defendants' products were a knock-off of an SEB "cool-touch" design, and, moreover, before commencing manufacture of the knock-offs, defendants "performed 'market research' and 'gather[ed] information as much as possible,'" thus evidencing a belief that "SEB's fryer embodied advanced technology that would be valuable in the U.S. market."[20] In addition, the record showed that Pantalpha's CEO was a named inventor on a number of U.S. patents, would likely have been aware of the fact that U.S.-patented products do not carry patent markings when sold overseas, had no reason for not informing the patent attorney of the fact that the defendants' design was a knock-off of an SEB design and was "nonresponsive" when asked whether it would have assisted the patent attorney's performance of his task to provide him with this highly relevant information."[21] Such evidence clearly showed deliberate steps to avoid learning whether there were valid and existing U.S. patents through sabotage of the patent attorney's effort to learn the answer.

Second, the fact that the *Global-Tech* decision "appropriately limited" the definition of willful blindness to include the second element not included in the FCPA's express statutory definition of "knowledge" could be significant in affecting how courts apply the concept of willful blindness in FCPA cases. In short, there could be an effect on litigation under the FCPA, as well as on negotiation of FCPA-related settlements, because the Supreme Court has concluded that the well-settled notion of willful blindness, dating back to the Court's decision in *Spurr v. United States*, 174 U.S. 728 (1889), properly requires proof that a defendant has "take[n] deliberate actions to avoid learning" the facts.[22]

Even though the statutory definition of "knowledge" and "knowing" set forth in the FCPA does not contain this additional requirement expressly, the *Global-Tech* decision could give rise to an argument that the law mandates proof of such "deliberate actions." Indeed, the FCPA's legislative history demonstrates that Congress specifically intended that the term "knowingly" would not provide a defense for "those who shield themselves from the facts,"[23] in line with the more restrictive definition adopted by the Supreme Court in *Global-Tech*. Thus, regardless whether the statutory definitions of knowledge include the second element of the *Global-Tech* standard, defendants could well rely on *Global-Tech* (and the FCPA's legislative history) to insist that the "deliberate actions" to avoid knowledge element must be proved, either as a component of corrupt intent in a case in which willful blindness is asserted by the government, or simply as a matter of Due Process of Law.

Third, however, to those companies seeking to steer clear of FCPA-related inquiries by the U.S. Department of Justice and the U.S. Securities and Exchange Commission, the distinctions among concepts of negligence, recklessness, willful blindness and "true" actual knowledge will likely be viewed as among a variety of legal arguments that are no doubt important, but largely relevant only when the company is on the wrong end of an indictment or complaint, or in the midst of negotiations over the necessity and form of a resolution of a pending investigation.

To those managing day-to-day FCPA compliance risks, compliance programs will continue to need to prevent, detect, and remediate problematic conduct long before issues of "willful blindness" arise. That it took over a decade for the Supreme Court to untangle the law in this area is perhaps the most compelling lesson of the *Global-Tech* case – that the costs of activities giving rise to a mere appearance of impropriety can be enormous. ■

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19 131 S. Ct. at 2064.

20 *Id.* at 2071.

21 *Id.*

22 *Id.* at 2070-71.

23 S. Comm. on Banking, Housing, and Urban Affairs, Foreign Corrupt Practices Act of 1977, S. Rep. No. 95-114, 95th Cong., 1st Sess., at 9, *reprinted* in 1977 U.S.C.C.A.N. 4098, 4107.