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The FCPA in 2011: The Year of the Trial Shapes FCPA Enforcement

The adage that "things that cannot go on forever will not" frames an essential theme for analysis of FCPA enforcement in 2011. As the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") turned their sights on a raft of cases against individuals, the monetary recoveries by the U.S. enforcement agencies in 2011 declined significantly from the nearly $1.8 billion recovered in 2010.

But in-house counsel and corporate compliance departments would be wise not to take from this singular statistic the message that FCPA enforcement is on the wane. Aside from the fallacy of drawing from one year's decline in recoveries the conclusion that the government has lost some, or even any, of its ability to extract concessions from errant companies, it is necessary to gauge the effectiveness of the U.S. government's programs by focusing on the specifics of individual and corporate prosecutions, the less visible ways the enforcement program exerts pressure on companies to upgrade compliance, the effects of new anti-corruption programs overseas and the U.S. effort to foster enforcement by and cooperate with other nations, and, perhaps most important, the pipeline of cases yet to be filed by regulators in the United States.

In the sections below, we review the record of anti-corruption enforcement in 2011 with these background concerns in mind. The picture that emerges is decidedly mixed, with both significant victories and defeats for U.S. prosecutors in the courts, significant interest expressed by legislators in both major political parties to amend the FCPA in order to "right-size" U.S. enforcement, and significant new resources being devoted to anti-corruption enforcement by the United Kingdom and other nations.

I. Overview of Corporate and Individual Enforcement Actions in 2011

The number of FCPA enforcement actions against corporate entities in 2011 and attendant financial recoveries significantly decreased from the record year 2010.[1] Overall, the government reached settlements with 15 companies in 2011, and those settlements required the companies involved to pay the United States approximately $508.6 million.[2] Seven of the 15 enforcement actions resulted in parallel settlements in which both criminal

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1. In 2010, corporate entities in 23 different enforcement actions paid nearly $1.8 billion in fines, penalties, disgorgement, and interest, making that year far and away the record-breaker in terms of the amount of money recovered by the United States government in connection with FCPA enforcement. *See* 2010 Enforcement Index, *FCPA Blog* (Jan. 3, 2011), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html.

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"Enforcement and Criminal Investigations"
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investigations by the DOJ and civil investigations by the SEC were resolved; six involved exclusively SEC actions and two were solely DOJ actions.

Despite the lack of new records in 2011 either as to the size of individual settlements or cumulative recoveries, all indications are that enforcement will continue with unabated vigor.[3] The quantity and diversity of individual prosecutions – more than three dozen persons were indicted, charged in a civil complaint, tried, or sentenced in connection

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2. *See* 2011 Enforcement Index, *FCPA Blog* (Jan. 2, 2012), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html. The 15 companies that reached resolutions with the government were: **Magyar Telekom/ Deutsche Telekom**, *see* DOJ Press Rel. 11-1714, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html; SEC Litig. Rel. 22213, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22213.htm; **Aon Corporation**, *see* DOJ Press Rel. 11-1678, Aon Corporation Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 20, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html; SEC Litig. Rel. 22203, SEC Files Settled FCPA Charges Against Aon Corporation (Dec. 20, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22203.htm; **Watts Water Technologies, Inc.**, *see* SEC Rel. 65555, *In re Watts Water Technologies, Inc.*, (Oct. 13, 2011), http://www.sec.gov/litigation/admin/2011/34-65555.pdf; **Bridgestone Corporation**, *see* DOJ Press Rel. 11-1193, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), http://www.justice.gov/opa/pr/2011/September/11-at-1193.html; **Diageo plc**, *see* SEC Press Rel. 2011-158, SEC Charges Liquor Giant Diageo with FCPA Violations (July 27, 2011), http://www.sec.gov/news/press/2011/2011-158.htm; **Armor Holdings Inc.**, *see* DOJ Press Rel. 11-911, Armor Holdings Agrees to Pay $10.2 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (July 13, 2011), http://www.justice.gov/opa/pr/2011/July/11-crm-911.html; SEC Litig. Rel. 22037, SEC Files Settled Anti-Bribery, Books and Records, and Internal Controls Charges Against Armor Holdings, Inc. (July 13, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22037.htm; **Tenaris S.A.**, *see* DOJ Press Rel. 11-629, Tenaris S.A. Agrees to Pay $3.5 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (May 17, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-629.html; SEC Press Rel. 11-112, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112.htm; **Rockwell Automation, Inc.**, *see* SEC Rel. No. 64380, *In re Rockwell Automation, Inc.* (May 3, 2011), http://www.sec.gov/litigation/admin/2011/34-64380.pdf; **Johnson & Johnson**, *see* DOJ Press Rel. 11-446, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-446.html; SEC Litig. Rel. 21922, Johnson & Johnson to Pay More than $70 Million in Settled FCPA Enforcement Action (Apr. 8, 2011), http://www.sec.gov/litigation/litreleases/2011/lr21922.htm; **JGC Corporation**, *see* DOJ Press Rel. 11-431, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-431.html; **Comverse Technology, Inc.**, *see* DOJ Press Rel. 11-438, Comverse Technology Inc. Agrees to Pay $1.2 Million Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Apr. 7, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-438.html; SEC Litig. Rel. 21920, SEC Files Settled FCPA Case Against Comverse (Apr. 7, 2011), http://www.sec.gov/litigation/litreleases/2011/lr21920.htm; **Ball Corp.**, *see* SEC Rel. 64123, *In re Ball Corp.* (Mar. 24, 2011), http://www.sec.gov/litigation/admin/2011/34-64123.pdf; **International Business Machines Corp.**, *see* SEC Litig. Rel. 21889, IBM to Pay $10 Million in Settled FCPA Enforcement Action (Mar. 18, 2011), http://www.sec.gov/litigation/litreleases/2011/lr21889.htm; **Tyson Foods, Inc.**, *see* DOJ Press Rel. 11-171, 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 Litig. Rel. 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; **Maxwell Technologies, Inc.**, *see* DOJ Press Rel. 11-129, Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $8 Million Criminal Penalty (Jan. 31, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-129.html; SEC Litig. Rel. 21832, SEC Charges Maxwell Technologies Inc. for Bribery Scheme in China – Maxwell to Pay Over $6.3 Million in Disgorgement and Interest (Jan. 31, 2011), http://www.sec.gov/litigation/litreleases/2011/lr21832.htm.

3. For example, speaking at the ACI national conference in November 2011, the Assistant Director of the SEC's FCPA Unit, Charles E. Cain, pointed out that the smaller number of resolved enforcement actions in 2011 should not be read to signal a downward trend in enforcement activity, especially in light of the small year-to-year sample size. At the same event, the DOJ's Fraud Section Deputy Chief Charles E. Duross counseled against any conclusion that the decrease in the number of enforcement actions in 2011 might hint at decelerated enforcement activity. *See* P. Berger, S. Hecker & D. Fuhr, "DOJ's and SEC's Enforcement Priorities," *FCPA Update* (Nov. 2011), http://www.debevoise.com/files/Publication/0f4c1703-b083-4622-ac28-27f36e5f10dc/Presentation/PublicationAttachment/41b5e776-9403-4311-a47a-8fae3badb6f3/FCPAUpdateNovember2011.pdf.

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with FCPA-related actions in 2011[4] – underscore the resources the DOJ and SEC are investing in pursuing putative violations. Accordingly, although 2011 may not stand out compared to the recent past when measured by the number and dollar value of corporate resolutions, the never-before-seen focus on individual alleged wrongdoers serves as an urgent reminder of the potential consequences of violating the FCPA. Two of the three longest prison sentences in the history of the FCPA resulted from convictions after trials of executives embroiled in a rather unremarkable bribery scheme in the Haiti Teleco matter. Another individual – Jeffrey Tesler – pleaded guilty to distributing massive bribe payments on behalf of the TSKJ consortium in Nigeria and agreed to a record-breaking nearly $150 million forfeiture.

The government's activities in 2011 also reminded senior executives of companies implicated in bribery schemes that they are not necessarily free of risk just because the government long ago settled enforcement actions against their employer. In December 2011, the U.S. Attorney's Office for the Southern District of New York and the SEC filed criminal and civil charges, respectively, against eight individuals formerly associated with Siemens AG in connection with bribes paid in Argentina. The scheme set forth in those cases featured in the 2008 enforcement action against Siemens AG and its Argentine subsidiary.[5] Similarly, employees of valve components manufacturer CCI Inc. are currently facing trial long after their employer settled an enforcement action in 2009.[6]

The unprecedented number of trials and active pre-trial proceedings in 2011 has produced long overdue analyses by federal district courts of a number of statutory issues that frequently arise under the FCPA. Individual defendants contesting the government's charges under the FCPA and related statutes have not yet succeeded in challenging what they perceived to be overly broad interpretations of such statutory terms as "foreign officials" or "instrumentality" of a foreign government.[7] And even on the appellate level, the DOJ won a significant victory in 2011. On December 14, 2011 the U.S. Court of Appeals for the Second Circuit, in a long-awaited opinion affirming the conviction of Frederic Bourke, not only held that willful blindness may suffice to establish a defendant's knowledge of a likely FCPA violation, but articulated the kinds of evidence, including knowledge of the risk of corruption in a high-risk jurisdiction, and half-hearted compliance steps, that could give rise to a "conscious avoidance" jury instruction and lead to a conviction for conspiracy to violate the FCPA, paving the way for future cases against parent companies, subsidiaries, investors, advisors, and individuals.[8]

Despite the favorable win-loss record for the government, not all went well in individual prosecutions. The DOJ suffered withering criticism and loss of credibility as a result of the district court's vacatur of the *Lindsey* convictions and dismissal of the underlying indictments based on the court's conclusion that the DOJ had engaged in a pattern of prosecutorial misconduct.[9] Although the court's rulings on the alleged failings of individual DOJ prosecutors in *Lindsey*, the dismissal of FCPA charges against John O'Shea, and the dismissal of conspiracy charges against six of the SHOT show defendants have no direct bearing on the viability of the FCPA or enforcement as a whole, they colored the perceptions of FCPA prosecutions in general and cast a dark shadow over an otherwise successful year for the DOJ.

II. Focus on Individual Prosecutions

A. Sentences to Significant Prison Terms

Five individuals were sentenced for FCPA violations in 2011. Joel Esquenazi was convicted following a jury trial of multiple counts under the FCPA and money laundering laws and received a prison term of 15 years – more than doubling the previous longest FCPA-related sentence.[10] Esquenazi was held accountable for his role as President and

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4. *See* 2011 Enforcement Index, note 2, *supra*.
5. *United States v. Sharef, et al.*, No. 11-CR-1056, Indictment (S.D.N.Y. Dec. 12, 2011); *SEC v. Sharef, et al.*, No. 11 Civ. 9073, Complaint (S.D.N.Y. Dec. 13, 2011).
6. *See* Judge Denies Travel Act Challenge, *FCPA Blog* (Aug. 15, 2011), http://www.fcpablog.com/blog/2011/8/15/judge-denies-travel-act-challenge.html.
7. *See, e.g.*, *United States v. Aguilar, et al.*, No. 02:10-cr-01031 (AHM), Criminal Minutes – General (C.D. Cal. Apr. 20, 2011); *United States v. Carson,* No. 08:09-cr-00077 (JVS), Criminal Minutes – General (C.D. Cal. May 18, 2011); *see also* C.M. Matthews, "A New Approach to the FCPA's Foreign Official Question," *Wall Street Journal Corruption Currents Blog* (Jan. 6, 2012), http://blogs.wsj.com/corruption-currents/2012/01/06/a-new-approach-to-the-fcpas-foreign-official-question/.
8. *United States v. Kozeny*, No. 09-4704-cr(L), 2011 WL 6184494 (2d Cir. Dec. 14, 2011).
9. *United States v. Aguilar, et al.*, No. 10-cr-1031 (AHM), Order Granting Mot. to Dismiss (C.D. Cal. Dec. 1, 2011).
10. The longest prison sentence for FCPA violations prior to Esquenazi's was the 87-month term imposed on Charles Jumet. *See* DOJ Press Rel. 10-442, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

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Chief Executive of a company engaged in a corruption scheme that facilitated payments of approximately $890,000 to officials at state-owned Haiti Teleco.[11] The amounts allegedly paid in bribes in the Haiti Teleco matter paled in comparison to many other enforcement actions, yet Esquenazi was given a severe sentence.[12]

Two other defendants in the Haiti Teleco affair also received prison sentences last year. The company's former Executive Vice-President Carlos Rodriguez was found guilty of violations of the FCPA and money laundering laws and received a sentence of seven years in prison.[13] Former Controller Antonio Perez did not face trial and instead reached a plea agreement that brought him a prison sentence of two years.[14] Four other defendants previously pleaded guilty and were sentenced in 2009 and 2010; yet others still await trial.[15]

Other FCPA defendants sentenced in 2011 were Jorge Granados, who received a 46-month sentence as part of the Latin Node prosecution for a scheme involving payments to officials of a state-owned telecom company in Honduras,[16] and Ousama Naaman, who was sentenced to 30 months for his role as an agent for Innospec in paying bribes to Iraqi officials and in defrauding the U.N. Oil-for-Food program.[17]

B. The Second Circuit's Decision in *Bourke*

In a widely anticipated ruling, the U.S. Court of Appeals for the Second Circuit on December 14, 2011 affirmed the FCPA-related conviction of Frederic Bourke.[18] After a five-week trial and three days of deliberations, a jury returned a verdict in July 2009 finding Bourke guilty of several charges, including conspiracy to violate the FCPA and the Travel Act, for his involvement in an unsuccessful bid to privatize Azerbaijan's state-owned oil company, SOCAR.[19] The government alleged that Bourke's business partner, Victor Kozeny, had orchestrated a scheme that resulted in the payment of millions of dollars in bribes to Azeri officials to entice them to privatize the oil company on terms favorable to the putative investors and that Bourke knew about the bribes or intentionally failed to learn about the bribes.[20] Bourke challenged the "conscious avoidance" jury instruction because the prosecution had argued actual knowledge of the bribery scheme rather than conscious avoidance.[21] The Second Circuit affirmed the judgment below, holding that the evidence established at trial sufficed to support a so-called "ostrich" jury instruction on conscious avoidance.[22] The day after the Second Circuit issued its opinion, the district court denied Bourke's motion for a new trial.[23] The Second Circuit's analysis of the propriety of the conscious avoidance instruction highlights, perhaps more than

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11. *See* DOJ Press Rel. 11-1407, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html; B. Yannett, S. Hecker & D. Fuhr, "Esquenazi Sentence of 15 Years in Prison More Than Doubles Previous FCPA Record," *FCPA Update* (Nov. 2011).
12. The fact that Esquenazi did not cooperate with the government and instead insisted on a trial, combined with his indictment alleging multiple money laundering counts, contributed to the length of his sentence.
13. DOJ Press Rel. 11-1407, note 11, *supra*.
14. DOJ Press Rel. 11-091, Former Controller of a Miami-Dade County Telecommunications Company Sentenced to 24 Months in Prison for His Role in Foreign Bribery Scheme (Jan. 21, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-091.html.
15. DOJ Press Rel. 11-1407, note 11, *supra*.
16. *See* DOJ Press Rel. 11-1155, Former CEO of U.S. Telecommunications Company Sentenced to 46 Months in Prison for Bribing Foreign Government Officials (Sept. 8, 2011), http://www.justice.gov/opa/pr/2011/September/11-crm-1155.html. Latin Node, Inc. ("LatiNode") provided wholesale telecommunications services to countries throughout the world. In December 2005, LatiNode learned it had been awarded an exclusive "interconnection agreement" with Honduras's state-owned telecommunications company, Empresa Honureña de Telecommunicaciones ("Hondutel") to establish long-distance telecommunications services between Honduras and the United States. The indictment charged Granados (as well as several other LatiNode senior executives) with a scheme to pay more than $500,000 in bribes to Hondutel employees, including a senior attorney, the general manager, and a member of the Board of Directors. Granados pleaded guilty on May 19, 2011 to conspiracy to violate the anti-bribery provisions of the FCPA. *Id.*
17. DOJ Press Rel. 11-1701, Innospec Agent Sentenced to 30 Months in Prison for Bribing Iraqi Officials and Paying Kickbacks Under the U.N. Oil for Food Program (Dec. 22, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1701.html.
18. *United States v. Kozeny*, No. 09-4704-cr(L), 2011 WL 6184494 (2d Cir. Dec. 14, 2011).
19. *Id.* at *1-4.
20. *Id.* at *1-3.
21. *Id.* at *7-8.
22. *Id.* at *7-9.
23. *United States v. Bourke*, No. 1:05-cr-00518 (SAS), Order (S.D.N.Y. Dec. 15, 2011).

any other legal development in 2011, the perils of ignoring red flags in corporate transactions and dealings with third parties operating in high-risk jurisdictions.

C. The Convictions in *Lindsey* and Their Vacatur

Other individuals convicted on FCPA-related charges in 2011 included the CEO and former CFO of Lindsey Manufacturing Co. ("LMC"), both of whom were found guilty after trial of one count of conspiracy to violate the FCPA and five counts of FCPA violations.[24] The *Lindsey* defendants, which included LMC itself, were charged in connection with bribes allegedly paid to government officials at the Comisión Federal de Electricidad, a state-owned electrical utility company in Mexico, in the expectation that the payments would facilitate the award of more than $19 million in contracts.[25] The conviction of LMC marked a milestone in FCPA enforcement – the first time a company had been found guilty of FCPA violations following a jury trial.

The government's victory was short-lived, however. In the most high-profile setback for the government in FCPA prosecutions to date, in December 2011 the convictions and indictment of LMC and its employees were overturned and dismissed, respectively. In a lengthy opinion, U.S. District Judge A. Howard Matz concluded that repeated misconduct by DOJ prosecutors over a three-year period "add[s] up to an unusual and extreme picture of a prosecution gone badly awry."[26] The court chastised the prosecution for a litany of misdeeds, including (i) submitting false statements in affidavits in support of applications for several warrants authorizing searches for and seizure of evidence; (ii) conducting an unauthorized warrantless search; (iii) introducing false or misleading grand jury testimony; (iv) failing to produce to the defense transcripts of certain grand jury testimony; (v) wrongfully obtaining privileged communications; (vi) making misrepresentations regarding certain evidence at trial; and (vii) presenting improper statements during closing argument.[27] The government filed a notice of appeal the same day the district court entered its order and opinion.[28]

D. *O'Shea* and the District Court's Judgment of Acquittal

The DOJ also suffered a setback in its prosecution of John Joseph O'Shea, the former manager of the Texas unit of ABB, Ltd., a Swiss electrical engineering company engaged in international business. In November 2009, the government arrested and indicted O'Shea on one count of conspiracy to violate the FCPA, 12 substantive FCPA counts, four counts of international money laundering, and one count of falsifying records in a federal investigation.[29] The indictment charged that O'Shea and a Mexican citizen he hired to work for ABB, Fernando Basurto, agreed to pay bribes to officials of Comisión Federal de Electricidad (the same Mexican state-owned utility at issue in the *Lindsey* prosecutions) in connection with contracts with ABB to upgrade and maintain Mexico's electrical network system and hid the bribery by creating false invoices.[30] Basurto pleaded guilty to one count of conspiracy to violate the FCPA in November 2009,[31] and ABB of Switzerland settled enforcement actions with the DOJ and SEC for $58 million in September 2010.[32]

O'Shea fought the charges against him and, at the conclusion of the government's case, moved the district court for acquittal.[33] On January 16, 2012, U.S. District Judge Lynn Hughes granted that motion and

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24. DOJ Press Rel. 11-596, California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico (May 10, 2011), http://www.justice.gov/opa/pr/2011/May/11-crm-596.html.
25. *Id.*
26. *United States v. Aguilar, et al.,* No. 10-cr-01031 (AHM), Order Granting Mot. to Dismiss (C.D. Cal. Dec. 1, 2011) at 5.
27. *Id.* at 8-24.
28. *United States v. Aguilar et al.*, No. 10-cr-01031 (AHM), Notice of Appeal (C.D. Cal. Dec. 1, 2011).
29. *United States v. O'Shea*, No. 09-cr-629, Indictment (S.D. Tex. Nov. 16, 2009), http://www.justice.gov/criminal/pr/documents/11-16oshea-indict.pdf.
30. *Id.* at ¶¶ 8, 15-16, 18.
31. *United States v. Basurto*, No. 09-cr-325, Plea Agreement ¶ 1 (S.D. Tex. Nov. 23, 2009), http://www.justice.gov/criminal/fraud/fcpa/cases/basurto/11-23-09basurto-plea-agree.pdf.
32. *United States v. ABB, Inc.*, No. 10-cr-664, Plea Agreement (S.D. Tex. Sept. 29, 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbinc-plea.pdf; *SEC v. ABB, Ltd*, 10-cv-1648, Complaint, http://www.sec.gov/litigation/complaints/2010/comp-pr2010-175.pdf.
33. "O'Shea Acquitted on All Counts," *FCPA Blog* (Jan. 17, 2012), http://www.fcpablog.com/blog/2012/1/17/oshea-acquitted-on-all-counts.html.

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entered a judgment of acquittal as to 12 FCPA counts and one count of conspiracy to violate the FCPA.[34] The court questioned the government's decision to grant immunity to Basurto, who did not testify at trial, but gave information to the prosecution.[35] Because O'Shea's motion for judgment of acquittal was made and decided before the case was submitted to the jury, double jeopardy bars the government from appealing the court's decision, and this part of the case is thus over.[36]

E. Sting Defendants

Prosecutors also experienced difficulties in the so-called "SHOT Show" cases, which stem from a two and a half-year sting operation during which FBI agents posed as representatives of Gabon's Ministry of Defense. Twenty-two individuals were charged and, with one exception, arrested in January 2010 at the SHOT Show in Las Vegas, an annual trade show for the firearms industry, including military and law enforcement equipment companies.[37] Three defendants, Jonathan Spiller, Daniel Alvirez, and Haim Geri, pleaded guilty in 2011.[38]

The remaining 19 defendants face trial on a 44-count superseding indictment in four trial groups. The first set of trial proceedings, held in July 2011, ended in a mistrial after the jury deadlocked following five days of deliberations; a retrial for this group of defendants is scheduled for May 2012.[39] In September 2011, prosecutors began to present their cases against the next six defendants, but the district court in December 2011 dismissed all conspiracy counts against the group, producing a full acquittal of one defendant.[40] Proceedings against the five remaining individuals in this group will continue in 2012.

The government's case relies heavily on a key witness, Richard Bistrong, who pleaded guilty to unrelated FCPA charges in 2010 and played a central role in the government's sting operation. Resulting significant credibility issues inhering in Bistrong's testimony have triggered multiple challenges from the defendants throughout the proceedings.[41]

Commentators have criticized the government's tactics in the SHOT Show sting operation and ensuing prosecutions arising from a fictitious bribery scheme. They question in particular the DOJ's allocation of resources on a low-decibel sting case with serious evidentiary and jurisdictional problems, and have also noted that there are enough real anti-corruption targets that there is no need to "manufacture" cases.[42]

The sting cases have also resulted in a significant development in the application of 15 U.S.C. § 78dd-3, specifically a vigorous challenge to and judicial ruling adverse to the government's aggressive jurisdictional theories under this prong of the statute, which criminalizes bribe schemes based solely on part of the scheme's activity taking place "in the territory of

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34. *Id.*

35. *Id.*

36. *See* Fed. R. Civ. P. 29; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575–76 (1977). O'Shea may still face trial on the remaining charges against him, which were previously carved out: four counts of money laundering and one count of falsifying records. *See* C.M. Matthews, "Houston Judge Tosses Foreign Bribery Case, Hands DOJ New Setback," *Wall Street Journal Corruption Currents Blog* (Jan. 17, 2012), http://blogs.wsj.com/corruption-currents/2012/01/17/houston-judge-tosses-foreign-bribery-case-hands-doj-new-setback/.

37. The Shooting, Hunting and Outdoor Trade Show ("SHOT Show") is owned and sponsored by the National Shooting Sports Foundation. *See* SHOT Show – Show Information, http://www.shotshow.org/Show-Info/.

38. *See United States v. Alvirez*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Mar. 1, 2011); *United States v. Spiller*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Mar. 29, 2011); *United States v. Geri*, No. 1:09-cr-335 (RJL), Plea Agreement (D.D.C. Apr. 28, 2011).

39. *See* "Retrial In Africa Sting Case Set for May 2012," *FCPA Blog* (Jan. 6, 2012), http://www.fcpablog.com/blog/2012/1/6/retrial-in-africa-sting-case-set-for-may-2012.html.

40. *See* C.M. Matthews, "Judge Tosses Conspiracy Charges In Landmark Bribery Case," *Dow Jones Newswires* (Dec. 22, 2011), http://online.wsj.com/article/BT-CO-20111222-712797.html.

41. *See, e.g.*, *United States v. Goncalves, et al.*, No. 1:09-CR-335 (RJL), Defs' Mot. for an Evidentiary Hearing for the Purpose of Obtaining Exculpatory Evidence and Incorporated Mem. of Law (D.D.C. Dec. 7, 2010); *United States v. Patel, et al.*, No. 1:09-CR-335 (RJL), Def. Pankesh Patel's Mot. to Strike Hearsay, Rule 806 Mot., and Mot. *In Limine* (D.D.C. May 23, 2011), 7.

42. *See, e.g.*, "Feds Should Forget the Shot Show Defendants," *FCPA Blog* (July 10, 2011), http://www.fcpablog.com/blog/2011/7/10/feds-should-forget-the-shot-show-defendants.html; *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Crime and Drugs Subcomm. of the S. Judiciary Comm.*, 111th Cong. 71 (2010) (prepared statement of Mike Koehler, Assistant Professor of Business Law, Butler University) ("Prosecuting individuals is a key to achieving deterrence in the FCPA context and should thus be a 'cornerstone' of the DOJ's FCPA enforcement program. However, the answer is not to manufacture cases or to prosecute individuals based on legal interpretations contrary to the intent of Congress in enacting the FCPA while at the same time failing to prosecute individuals in connection with the most egregious cases of corporate bribery."), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf; "Second Thoughts About the Second Sting Trial," *FCPA Blog* (Sept. 29, 2011), http://www.fcpablog.com/blog/2011/9/29/second-thoughts-about-the-second-sting-trial.html.

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the United States." In particular, section 78dd-3, which was added to the FCPA in 1998, brings within the statute's jurisdiction persons or entities not otherwise subject to jurisdiction if, "while in the territory of the United States," the "mails or any means or instrumentality of interstate commerce" are used or "any other act" is undertaken in furtherance of an improper payment or offer.

In June 2011, the district court granted defendant Pankesh Patel's Rule 29 motion, dismissing an FCPA charge that was based on his sending a DHL package from London to the United States. Patel is a U.K. citizen who operated a U.K.-based company; the package contained a purchase agreement for the alleged corrupt scheme. The DOJ argued that section 78dd-3 applied because Patel had carried out other acts in furtherance of the scheme while in the United States.[43] Despite this one trial-level loss, the DOJ appears to continue to believe that jurisdiction may broadly be asserted, at least when 15 U.S.C. § 78dd-1, applicable to issuers, is invoked, on the basis of communications merely directed to, rather than initiated from, the United States. Indeed, in the *Magyar Telekom* matter, the DOJ alleged jurisdiction based, in part, on email from one non-U.S. national, sent from outside the United States, to another non-U.S. national, located outside of the United States, merely because the e-mail was transmitted via a server located on U.S. soil.[44]

F. Siemens Indictments

Eight former executives or agents of Siemens AG or its subsidiaries – none of whom is, or at any relevant time was, a citizen or resident of the United States – were indicted in federal district court in New York City in December 2011 for their alleged participation in a scheme to pay $100 million in bribes to Argentine government officials for a $1 billion contract to manufacture national identification cards.[45] In parallel proceedings, the SEC brought civil charges against seven of these individuals.[46] This enforcement action comes almost exactly three years after Siemens AG and three of its subsidiaries resolved the largest corporate FCPA investigation in history.[47]

Prosecutions of senior personnel under whose tenure large-scale bribery occurred did not just begin in 2011. Three persons at the core of the single most substantial bribery scheme prosecuted under the FCPA to date, the Bonny Island oil exploration project in Nigeria executed by the four-member TSKJ consortium, have pleaded guilty to violations of the FCPA and agreed to prison terms and substantial financial penalties. The former CEO of consortium member KBR, Albert Stanley, admitted in September 2008 – months before his former employer reached its settlement with the DOJ and SEC – to committing violations of the FCPA's anti-bribery provisions resulting from his coordination of systematic bribe payments to Nigerian officials and accepted a prison sentence of up to seven years and a criminal penalty of $10.8 million.[48] More recently, Wojciech Chodan and Jeffrey Tesler, who acted as consultants on behalf of the consortium and facilitated the corrupt payments, pleaded guilty in federal district court following their extraditions from the United Kingdom. Chodan agreed to a prison sentence of up to five years and a penalty of $727,000 in December 2010,[49] while Tesler's March 2011 plea agreement provides for imprisonment of up to five years in addition to a $149 million forfeiture.[50]

It remains to be seen whether criminal and/or civil charges against senior executives and associated individuals will accompany or follow other recent high-profile FCPA corporate resolutions. Whether they do or not, the Siemens example serves as a reminder that senior and mid-level managers can remain in the sights of U.S. authorities even years after corporate

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43. "Significant dd-3 Development in Africa Sting Case," *FCPA Professor* (June 9, 2011), http://www.fcpaprofessor.com/significant-dd-3-development-in-africa-sting-case.

44. *United States v. Magyar Telekom, Plc.*, No. 11-cr-597, Deferred Prosecution Agreement (E.D. Va. Dec. 29, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-dpa-magyar.pdf.

45. *United States v. Sharef, et al.*, No. 11-CR-1056 (DLC), Indictment (S.D.N.Y. Dec. 12, 2011).

46. *SEC v. Sharef, et al.*, No. 11-CV-9073 (SAS), Complaint (S.D.N.Y. Dec. 13, 2011).

47. The 2008 settlement of the Siemens corporate matters included a guilty plea by the Siemens regional company in Argentina to conspiracy to violate the FCPA's books and records provisions. *See* DOJ Press Rel. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

48. DOJ Press Rel. 08-772, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges (Sept. 3, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-772.html.

49. *United States v. Chodan*, No. 4:09-cr-00098, Plea Agreement (S.D. Tex. Dec. 6, 2010).

50. DOJ Press Rel. 11-313, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), http://www.justice.gov/opa/pr/2011/March/11-crm-313.html.

resolutions of FCPA investigations. And geographic barriers, while they certainly complicate efforts to exercise jurisdiction over and obtain custody of individuals, do not appear to be deterring the DOJ or the SEC from seeking indictments and filing complaints. Considering that nine of the ten largest corporate FCPA settlements involved foreign-based entities, extradition issues and constitutional and statutory limits on default judgments or trials *in absentia* may come to the fore if the DOJ and SEC increasingly pursue executives of the largest bribe-payers.

III. Corporate Resolutions

It would be wrong to conclude from the relative decline in corporate enforcement actions that 2011 was a quiet year for the DOJ and SEC. In addition to the fact that more than a significant number of FCPA investigations remain pending,[51] two corporate resolutions reached in 2011 currently rank among the ten most expensive settlements of all time – a statistic that underlines the continued potency of the government's enforcement apparatus and the risk incurred even by companies that cooperate with government investigations. These and one other corporate settlement in 2011 are presented here because they highlight and reinforce key principles: (i) *Magyar Telekom/Deutsche Telekom* demonstrates the statutory mechanisms for generating subsidiary, parent company and individual employee liability; (ii) *JGC Corp.* exemplifies the jurisdiction of the DOJ over foreign non-issuers; and (iii) *Tenaris S.A.* showcases the use of a Deferred Prosecution Agreement ("DPA"), a previously unused tool in the SEC's arsenal.

A. Magyar Telekom/Deutsche Telekom

In late December 2011, the DOJ and SEC in parallel resolved enforcement actions against Magyar Telekom, a Hungarian subsidiary of Deutsche Telekom, arising from allegedly improper payments of approximately $15 million to government officials in Macedonia and Montenegro.[52] The U.S. government contended that Magyar Telekom bribed officials in Macedonia to mitigate the effects of a new competitive telecommunications law and officials in Montenegro to acquire a majority of the state-owned telecommunications company on favorable terms.[53]

Pursuant to a DPA with the DOJ, Magyar Telekom paid a penalty of $59.6 million, as well as $31.2 million in disgorgement and pre-judgment interest to settle a civil SEC complaint.[54] Both the DOJ and SEC charged Magyar Telekom, a U.S. issuer at the time of the operative conduct, with violations of the FCPA's anti-bribery provisions and, as well, its books and records provisions. Deutsche Telekom, which owns 60% of Magyar Telekom, entered into a two-year non-prosecution agreement ("NPA") with the DOJ, agreeing to pay nearly $4.4 million, and into a settlement with the SEC relating to alleged violations of the books and records and internal controls provisions of the FCPA.[55]

The SEC also charged three senior executives of Magyar Telekom with various violations of the FCPA for orchestrating, approving and executing the bribery schemes in Macedonia and Montenegro.[56] Coming on the heels of the complaints against former Siemens executives, the charges against the Magyar Telekom executives – none of whom is a national of or resides in the United States – represent yet another demonstration of the SEC's recent focus on pursuing individual wrongdoers alongside their employers. That said, in only one other enforcement action in 2011, *Watts Water Technologies*, did the SEC simultaneously charge companies and individuals.

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51. As of December 31, 2011, 78 companies were known to be the subject of pending FCPA investigations. *See* J. Cody Worthington, "The Corporate Investigations List (January 2012)," *FCPA Blog* (Jan. 4, 2012), http://www.fcpablog.com/blog/2012/1/4/the-corporate-investigations-list-january-2012.html. The actual number is likely to be higher, as in 2010 DOJ disclosed that it had more than 150 open criminal FCPA investigations, and 80 civil FCPA investigations (many of which are parallel). *See* OECD Working Group on Bribery, United States: Phase 3 ¶ 21 (Oct. 15, 2010), http://www.oecd.org/dataoecd/10/49/46213841.pdf.

52. *SEC v. Magyar Telekom, Plc.*, No. 11-CV-9646, Complaint (S.D.N.Y. Dec. 29, 2011); *United States v. Magyar Telekom, Plc*, No. 1:11–CR-00597, Deferred Prosecution Agreement (E.D. Va. Dec. 29, 2011); DOJ Press Rel. 11-1714, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html; SEC Litig. Rel. 22213, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22213.htm.

53. *See id.*; *United States v. Magyar Telekom, Plc.*, No. 1:11-CR-00597, Information (E.D. Va. Dec. 29, 2011).

54. *United States v. Magyar Telekom, Plc.*, No. 1:11-CR-00597, Deferred Prosecution Agreement (E.D. Va. Dec. 29, 2011); *see* DOJ Press Rel. 11-1714, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html.

55. *In re Deutsche Telekom, AG*, Non-Prosecution Agreement (Dec. 29, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/deutsche-telekom/2011-12-29-deustche-telekom-npa.pdf.

56. *SEC v. Straub, et. al.*, No. 11-CV-9645, Complaint (S.D.N.Y. Dec. 29, 2011).

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B. *JGC*

The resolution of the DOJ's investigation of the Japanese construction firm JGC Corporation in April 2011 is noteworthy for its fine of $218.8 million, which ranks as the sixth largest FCPA-related government recovery against a company to date.[57] The settlement agreement also imposed a compliance monitor on the company for a two-year period. JGC Corp. was the fourth – and thus final – consortium member of the TSKJ joint venture to reach a settlement with the U.S. government arising from the massive Bonny Island bribery scheme. As a result of the JGC action and prior resolutions with KBR/Halliburton, Snamprogetti Netherlands B.V./ENI S.p.A. and Technip S.A., the U.S. government obtained approximately $1.5 billion in FCPA-related penalties and disgorgement from members of the TSKJ joint venture.[58]

The DOJ's resolution of the *JGC* matter constitutes the largest settlement to date against a foreign company whose shares are not traded in the U.S. securities markets, or which was not a subsidiary of a U.S. issuer. The DOJ asserted that JGC was subject to FCPA liability because it conspired to carry out the bribery scheme with its TSKJ joint venture partners, which were domestic concerns or issuers, and because JGC aided and abetted a domestic concern (KBR) in making corrupt payments for use in the scheme.[59] The *JGC* criminal information mentions the use of correspondent bank accounts in New York to make corrupt payments via wire transfers from the Netherlands to Switzerland[60] – suggesting the DOJ may view this minimal "U.S. nexus" as a basis for jurisdiction.

The *JGC* enforcement action exemplifies the DOJ's expansive application of the FCPA, including to corporations and individuals located anywhere in the world who conduct business with U.S. issuers or domestic concerns. Here, as in the realm of prosecutions of individuals, clarification of the law in the courts or by Congress appears needed to resolve the recurring question whether physical presence by a defendant or one of its employees is required or whether some other intermediary may generate jurisdiction over those whose acts outside U.S. territory are the sole basis for asserting jurisdiction.

C. *Tenaris S.A. and Aon Corp.*

Having employed an NPA for the first time in December 2010 to resolve an accounting fraud investigation of Carter's Inc.,[61] the SEC premiered in May 2011 another tool from its new enforcement arsenal that had been introduced as part of its 2010 Cooperation Initiative: the DPA. Tenaris S.A., a Luxembourg-based pipe manufacturer, entered into a DPA that required payment of $5.4 million in disgorgement and prejudgment interest, but no civil penalty.[62] The SEC contended that Tenaris had made payments to Uzbekistani government officials who had helped Tenaris to win supply contracts with a wholly government-owned oil and gas company.[63] Tenaris's voluntary disclosure to the U.S. government of the potentially wrongful conduct and its genuine cooperation with the government's probe, along with the company's implementation of remedial actions in the course of and following a world-wide internal investigation, won it praise from SEC officials and led the SEC to defer prosecution for two years, during which Tenaris must undertake further remediation.[64]

In a case illustrating the fine distinctions sometimes drawn by U.S. enforcement agencies, the DOJ and SEC, with nearly the same enthusiasm, also applauded

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57. DOJ Press Rel. 11-431, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

58. *Id.*; Aruna Viswanatha, "U.S. Sanctions on Bonny Island Project to Top $1.5 Billion, *Main Justice – Just Anti-Corruption* (Feb. 1, 2011), http://www.mainjustice.com/justanticorruption/2011/02/01/u-s-sanctions-on-bonny-island-project-to-top-1-5-billion/.

59. *United States v. JGC Corp.*, No. 11-cr-260, Information ¶¶ 17, 22 (S.D. Tex. Apr. 6, 2011)

60. *Id.* ¶ 22.

61. *SEC v. Carters, Inc.*, Non-Prosecution Agreement (2011), http://www.sec.gov/litigation/cooperation/2010/carters1210.pdf; SEC Press Rel. 2010-252, SEC Charges Former Carter's Executive with Fraud and Insider Trading (Dec. 20, 2010) (noting that SEC would not prosecute Carter's in light of "the relatively isolated nature of the unlawful conduct, Carter's prompt and complete self-reporting of the misconduct to the SEC, its exemplary cooperation in the investigation, including undertaking a thorough and comprehensive internal investigation, and Carter's extensive and substantial remedial actions"), http://www.sec.gov/news/press/2010/2010-252.htm.

62. SEC Press Rel. 2011-112, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://sec.gov/news/press/2011/2011-112.htm. Tenaris simultaneously entered into an NPA with the DOJ and agreed to a criminal penalty of $3.5 million. *United States v. Tenaris*, Non-Prosecution Agreement (DOJ 2011).

63. *SEC v. Tenaris, S.A.*, Deferred Prosecution Agreement (2011) [hereinafter "Tenaris DPA"], http://www.sec.gov/news/press/2011/2011-112-dpa.pdf.

64. SEC Press Rel. 2011-112, note 62, *supra*; *see also* "DOJ's and SEC's Enforcement Priorities," note 3, *supra* (noting that at the 26th National Conference on the FCPA organized by the American Conference Institute in November 2011, SEC officials implied that the DPA was intended to credit Tenaris for self-reporting immediately after it identified misconduct, and for fully cooperating with the SEC).

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Aon Corp.'s response to evidence of misconduct at the resolution of their FCPA investigations against the global insurance brokerage firm. Aon Corp. settled charges in December 2011 that its subsidiaries had made improper payments to officials in Costa Rica and elsewhere. The DOJ acknowledged "Aon's extraordinary cooperation with the department and the [SEC]; its timely and complete disclosure of improper payments in Costa Rica and other countries" and "its early and extensive remedial efforts," and took notice of the prior penalty of £5.25 million paid in 2009 by its U.K.-based subsidiary to the U.K.'s Financial Services Authority.[65] Accordingly, the DOJ rewarded Aon with an NPA and a criminal penalty of only $1.76 million.[66] Aon's parallel settlement with the SEC, however, required Aon to pay approximately $14.5 million in disgorgement and prejudgment interest. Significantly, the SEC's resolution with the company did not involve either a DPA or an NPA.[67]

Why did the SEC not follow in the DOJ's footsteps and work out a DPA or an NPA with Aon in recognition of the company's exemplary cooperation? For one, despite ultimately productive cooperation with the government and implementation of extensive remedial measures, unlike Tenaris, it appears that Aon did not voluntarily disclose the suspected misconduct to the U.S. government.[68] So long as the SEC maintains its position that entry into NPAs or DPAs almost always requires voluntary self-disclosure, many companies will remain ineligible because they question whether the uncertain rewards of self-reporting outweigh its substantial risks. In the *Tenaris* matter, for example, despite taking aggressive action after discovering its compliance problem, the company still had to pay millions in disgorgement and was compelled to adopt a number of onerous remedial compliance requirements, in addition to the measures it had already implemented. Tenaris also had to agree not to contest the SEC's conclusion that the company had failed to detect or prevent illegal payments[69] and admitted that it had been "aware or substantially certain" that its agent would pay at least part of a commission to government officials.[70]

Whether NPAs and DPAs carry any material advantage in the civil context over traditional enforcement mechanisms that have until now permitted a company to not admit the facts alleged by the SEC remain important issues under the Cooperation Initiative. In light of these realities, it remains to be seen whether SEC officials' predictions that the Commission would use NPAs and DPAs more regularly in the future will prove accurate.[71]

IV. DOJ Focus: Questions about Future Interpretation of FCPA

A. Congressional Hearings on Potential Statutory Amendments

Court challenges by individual defendants to the government's interpretation of certain provisions of the FCPA[72] were not the only efforts to curb the breadth of the statute. Bringing to a head a perception by many in the business community that certain provisions of the FCPA should be applied more narrowly than advocated by the DOJ and the SEC, the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security in June 2011 held hearings into possible amendments to the statute. Witnesses appearing before the subcommittee included Debevoise & Plimpton LLP partner and former Chief Judge of the United States District Court for the Southern District

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65. *See* DOJ Press Rel. 11-1678, Aon Corporation Agrees to Pay a $1.76 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 20, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html.

66. *See id.*

67. *See* SEC Lit. Rel. No. 22203, *SEC Files Settled FCPA Charges Against Aon Corporation* (Dec. 20, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22203.htm.

68. *See* Aon Corp., Quarterly Report (Form 10-Q), Nov. 4, 2011 at 24 (stating that Aon began an internal review of its anti-corruption compliance "[f]ollowing inquiries from regulators").

69. Tenaris DPA at ¶ 6(y).

70. Tenaris NPA at ¶ 9.

71. *See* "DOJ's and SEC's Enforcement Priorities," note 3, *supra* (noting that at the 26th National Conference on the FCPA organized by the American Conference Institute in November 2011, SEC officials suggested that the agency would make greater use of NPAs and DPAs).

72. *See, e.g.*, *United States v. Aguilar, et al.*, No. 02:10-cr-01031 (AHM), Criminal Minutes – General (C.D. Cal. Apr. 20, 2011); *United States v. Carson, et al.*, No. 08:09-cr-00077 (JVS), Criminal Minutes – General (C.D. Cal. May 18, 2011); *see also* C.M. Matthews, "A New Approach to the FCPA's Foreign Official Question," *Wall Street Journal Corruption Currents Blog* (Jan. 6, 2012) (discussing John O'Shea's challenge to the meaning of "foreign official"), http://blogs.wsj.com/corruption-currents/2012/01/06/a-new-approach-to-the-fcpas-foreign-official-question/.

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of New York and U.S. Attorney General Michael B. Mukasey, who testified on behalf of the U.S. Chamber Institute for Legal Reform.[73]

Principal issues discussed at the hearing and otherwise brought into the public debate by the lobbying efforts of the U.S. Chamber of Commerce and other business interests pertained to the lack of a compliance defense for business entities under the FCPA and the statute's definition of the term "foreign official."[74] The proposed affirmative compliance defense, similar to the "adequate procedures" provision under the U.K. Bribery Act of 2010 ("UKBA"),[75] as well as compliance defenses under other U.S. statutes, such as Title VII of the Civil Rights Act of 1964,[76] would allow a company to avoid criminal liability for FCPA violations triggered by persons who circumvented compliance measures reasonably designed to prevent such violations.[77]

The second key aspect debated at the congressional hearing – and a topic at the forefront of several legal challenges by individual defendants in FCPA prosecutions in 2011 – pertained to the words "foreign official," which the FCPA defines as including "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization . . . ."[78] The lack of a definition of the term "instrumentality" and resulting scope of "foreign official," according to those lobbying for a statutory amendment to clarify the scope of the term, has for years challenged companies and individuals alike when dealing with state-owned entities.

Calls for reforms to the FCPA have not been universally applauded. The DOJ has strongly opposed what it perceives as efforts to weaken its enforcement powers in the fight against international bribery.[79] Others, most prominently the Open Society Foundations, have also opposed amendments to the statute.[80]

B. Detailed DOJ Guidance on FCPA Enforcement Expected in 2012

The prospects for legislative reforms to the FCPA remain subject to the challenges of moving substantive legislation through a politically divided Congress in a presidential election year. Although Representative James F. Sensenbrenner (R-WI), Chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, indicated agreement with many of the suggested reform proposals during the June hearing,[81] he has not introduced a reform bill, and the relevant Senate committees have not even held hearings since 2010. There appears to be at least limited support for reform from the other side of the aisle as Reps. Robert C. Scott (D-VA), the Ranking Member of the Subcommittee, and John Conyers (D-MI), the Ranking Member of the full House Judiciary Committee, in their opening statements noted, as did Rep. Sensenbrenner, the need for a clear definition of who is a "foreign official."[82] In earlier hearings concerning the FCPA

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73. *The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcomm. of the H. Judiciary Comm.*, 112th Cong. 18-20 (2011) (statement of Hon. Michael Mukasey, former Att'y Gen., Partner, Debevoise & Plimpton LLP) [hereinafter "Mukasey Statement"], http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF; *see also* P. Berger, B. Yannett & E. Grosz, "House Subcommittee Holds Hearing on FCPA Reform, Judge Mukasey Testifies," *FCPA Update* (June 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=027aee9f-9006-4037-8195-6da0c6a55c00.

74. *See* Mukasey Statement, note 73, *supra*, at 20, 26-29.

75. *See* Bribery Act, 2010, c.23 (Eng.), § 7(2), http://www.legislation.gov.uk/ukpga/2010/23/section/7.

76. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing affirmative defense to vicarious liability for Title VII sexual harassment claims in certain circumstances); *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 745 (1998) (same).

77. *See* Mukasey Statement, note 73, *supra*, at 19-20, 23-26.

78. 15 U.S.C. § 78dd-1(f)(1)(A).

79. At the same congressional hearing, DOJ Acting Deputy Assistant Attorney General Greg Andres rejected the proposed compliance defense as unnecessary and remarked that the DOJ already takes into account the adequacy of a company's compliance program when deciding whether to charge a company. *See The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcom. of the H. Judiciary Comm.*, 112th Cong. 7, 12 (2011) (statement of Greg Andres, Acting Deputy Assistant Att'y Gen., Criminal Div.), http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF; *see also* DOJ Press Rel., Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) (arguing that "whether or not certain clarifications to the Act are appropriate," it is "precisely the wrong moment in history to weaken the FCPA"), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

80. The Open Society Foundations in September 2011 published a voluminous report defending the FCPA as it currently exists, arguing that proposed amendments would create loopholes and exceptions that would diminish the FCPA's effectiveness. David Kennedy & Dan Danielsen, Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act (Sept. 2011), http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916.

81. *The Foreign Corrupt Practices Act: Hearing Before the Crime, Terrorism and Homeland Security Subcomm. of the H. Judiciary Comm.*, 112th Cong. 1-2 (2011) (statement of Rep. James F. Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism and Homeland Security), http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF.

82. *Id.* at 3 (statement of Rep. Robert C. Scott, Ranking Member, H. Subcomm. on Crime, Terrorism and Homeland Security); *id.* at 4-5 (statement of Rep. John Conyers, Jr., Ranking Member, H. Judiciary Comm.).

on November 30, 2010, Senator Amy Klobuchar (D-MN) supported reforms to the Act to clarify how DOJ plans to enforce the FCPA and what constitutes good compliance.[83] Accordingly, the most important clarification about the scope and application of the FCPA in election year 2012 may come from the DOJ's anticipated guidance, which, more than 20 years after Congress invited such guidance in the 1988 amendments to the FCPA, was announced in a statement in November 2011 by Assistant Attorney General Lanny A. Breuer.[84] Assistant Attorney General Breuer's announcement may alleviate some of the concerns of those pressing for legislative reform, although it remains to be seen if DOJ will significantly alter its long-held positions concerning specific provisions of the FCPA.

C. Beyond the FCPA: DOJ's Use of Other Laws to Combat Foreign Bribery

The DOJ invoked in 2011 a broad array of laws other than the FCPA in its fight against international bribery. In individual prosecutions, the DOJ resorted to the Travel Act and anti-money laundering statutes, among others, to pursue alleged improper payments abroad.

1. Use of the Travel Act and Anti-Money Laundering Laws to Prosecute Foreign Bribery

In *United States v. Carson*, the DOJ has indicted several employees of valve manufacturer CCI[85] for violations of the FCPA and the Travel Act. Scheduled to go to trial in mid-2012, the case illustrates the use of the Travel Act, in combination with state commercial bribery statutes, as a tool to pursue foreign commercial bribery, which is not prohibited by the FCPA's anti-bribery provisions.[86] The Travel Act, passed in 1961, criminalizes travel in interstate or foreign commerce with the intent to promote or engage in an "unlawful activity," defined as including "extortion, bribery or arson in violation of the laws of the State in which committed or of the United States."[87]

In *Carson*, the DOJ seeks to apply the Travel Act in conjunction with California's Penal Code § 641.3, which prohibits commercial bribery, to punish alleged corrupt wire transfers facilitated by the defendants to persons in foreign jurisdictions.[88] A defense motion to dismiss the Travel Act counts in light of the U.S. Supreme Court's 2010 holding in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), that federal statutory prohibitions do not extend extraterritorially absent a clear indication by Congress, was denied in September 2011.[89]

The district court rejected the *Carson* defendants' argument that the FCPA was designed by Congress to occupy the field of foreign bribery and that nothing in the Travel Act suggests intended extraterritorial application. The court ruled that the wire transfers in question commenced from the defendants' offices in California and thus constituted a domestic activity, even if the recipients of the funds were located abroad. Moreover, the district court – citing the 1922 U.S. Supreme Court case *United States v. Bowman* – found that the Travel Act may be inferred to apply extraterritorially due to the nature of the offense at issue and its full title, which includes the words "foreign travel."[90] Similarly, the district court disposed of defendants' argument that the California commercial bribery statute, the

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83. *Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Crime and Drugs Subcomm. of the S. Judiciary Comm.*, 111th Cong. 6-8 (2010) (statement of Sen. Amy Klobuchar, Member, S. Subcomm. on Crime and Drugs), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

84. DOJ Press Rel., Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act, note 79, *supra*.

85. CCI pleaded guilty to FCPA violations in 2009. *See* DOJ Press Rel. 09-754, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-754.html.

86. Commercial bribery can be subject to prosecution under the FCPA's books and records and internal controls provisions, however. *See* 15 U.S.C. §§ 78m(b)(2)(A) and (B) and (b)(5). The government also has previously used the mail and wire fraud statutes to prosecute foreign commercial bribery. *See, e.g.*, DOJ Press Rel. 06-707, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine (Oct. 16, 2006), on file with author (foreign bribery guilty plea based on violations of FCPA, conspiracy law and wire fraud statute); *see also* DOJ Press Rel. 10-278, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010) (guilty plea for violations of FCPA and wire fraud statute in connection with kickbacks to the former Iraqi government under the U.N. Oil for Food program), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html.

87. 18 U.S.C. § 1952(b)(2).

88. *United States v. Carson, et al.*, No. 8:09-cr-77 (JVS), Indictment ¶ 35 (C.D. Cal. Apr. 8, 2009).

89. *United States v. Carson, et al.*, No. 8:09-cr-77 (JVS), Criminal Minutes – General at 4 (C.D. Cal. Sept. 20, 2011).

90. *Id.* at 7-10 (citing *United States v. Bowman*, 260 U.S. 94 (1922)).

vehicle supporting the Travel Act counts, does not apply to foreign commercial bribery. Issues of extraterritorial application, like those raised by *Carson,* are likely to recur and may be increasingly addressed by the appellate courts if the government continues to prosecute alleged bribes that fall outside the FCPA's ambit.

The DOJ has also continued its practice of using U.S. anti-money laundering statutes to target corrupt practices. The record prison terms in the Haiti Teleco cases were triggered in large part by the multiple money laundering counts in the indictment.[91] Although in recent years DOJ has alleged anti-money laundering violations to enable it to charge recipients as well as payees of bribes,[92] the Haiti Teleco prosecutions also illustrate how anti-money laundering laws increase legal exposure to bribe-payers.

2. DOJ Kleptocracy Asset Recovery Initiative

In addition to urging foreign nations to develop law enforcement institutions and sharing information with non-U.S. enforcement agencies,[93] the DOJ's program for fighting corruption abroad includes the use of civil forfeiture lawsuits aimed at repatriating the proceeds of foreign corruption.[94] Pursuant to its "Kleptocracy Asset Recovery Initiative," the DOJ Criminal Division in October 2011 filed a civil suit against the real and personal property of a government minister from Equatorial Guinea, Todoro Nguema Obiang Mangue, who is also the son of the country's president. The complaint, filed in federal district court in the Central District of California, alleges that property worth approximately $70.8 million was acquired by Nguema as a result of corruption and money laundering. The DOJ alleges that Nguema, whose official annual government salary is less than $100,000, used intermediaries and corporate entities to obtain assets in the United States, including almost $2 million worth of Michael Jackson memorabilia, a Gulfstream G-V jet valued at $38.5 million, and a $30 million mansion in Malibu, California.[95]

V. SEC Focus

Two recent developments related to the SEC's enforcement program will likely have significant impact on FCPA compliance. First, in response to a variety of criticisms that were crystallized by United States District Judge Jed Rakoff's ruling in *SEC v. Citigroup*, the SEC earlier this month modified its long-standing practice of permitting companies to "neither admit nor deny" the SEC's allegations in the course of settling civil cases filed by the Commission where there is a parallel resolution with the DOJ. Second, in May 2011 the SEC promulgated its rules implementing the whistleblower bounty and related expanded whistleblower protection provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The application of the SEC's whistleblower rules is not confined to the FCPA context but the rules significantly change the calculus for companies subject to the SEC's authority.

A. "Neither Admit nor Deny" Language Under Scrutiny

The much-publicized rejection in November 2011 by Judge Rakoff of the United States District Court for the Southern District of New York of a proposed consent judgment between the SEC and Citigroup raises serious questions about a long-standing practice used in SEC settlements under the FCPA.[96] In order to resolve allegations of fraudulent marketing of collateralized debt obligation instruments, the SEC and Citigroup sought a court-approved $285 million settlement in October 2011. Despite giving "substantial

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91. *See* DOJ Press Rel. 11-1407, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html.

92. *See, e.g.*, S. Hecker & C. Russell, "Prison Sentences, Fines, and Forfeitures in Recent Cases Against Individuals," *FCPA Update* (Sept. 2010), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=867154b8-ceaf-467d-9a53-eb60a063e316 (discussing money-laundering charges against Juan Diaz, who served as an intermediary in the Haiti Teleco scheme).

93. The SEC continued to file Mutual Legal Assistance Treaty requests in FY 2011, making 772 requests of foreign authorities (up from 605 in FY 2010) and receiving 492 requests (up from 457 in FY 2010). *Compare* SEC, FY 2011 Performance and Accountability Report 66 (2011), http://www.sec.gov/about/secpar/secpar2011.pdf *with* SEC, FY 2010 Performance and Accountability Report 31 tbl.1.4 (2010), http://www.sec.gov/about/secpar/secpar2010.pdf. It cannot be readily ascertained from published data how many of these requests are FCPA-related, but experience teaches that the figures contain a substantial number of such requests.

94. DOJ Press Rel., Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

95. *See* DOJ Press Rel. 11-1405, Department of Justice Seeks to Recover More than $70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1405.

96. *SEC v. Citigroup Global Mkts., Inc.*, No. 11. Civ. 7387 (JSR), Order (S.D.N.Y. Nov. 28, 2011).

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deference" to the views of the SEC, the district court found that the settlement was "neither fair, nor reasonable, nor adequate, nor in the public interest."[97] In particular – and of special relevance for the FCPA context – the court stated that it doubted that the SEC's policy in consent judgments of permitting corporations to "neither admit nor deny" the charges served any interests other than those of the parties.[98] Rather, the court noted, "a consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies."[99]

Accordingly, the court refused to accept the proposed settlement in light of the absence of an admission of wrongdoing and support by proven or acknowledged underlying facts to ensure a fair, adequate and reasonable resolution.[100] The court set a trial date of July 16, 2012. In response, the SEC appealed to and alternatively sought a writ of mandamus from the United States Court of Appeals for the Second Circuit.[101] The case has been stayed by the Second Circuit until a ruling by the motions panel.[102]

With the outcome of the *Citigroup* matter pending, the SEC on January 6, 2012 announced in a statement by Robert S. Khuzami, Director of the Division of Enforcement, that it would no longer permit defendants to "neither admit nor deny" the factual underpinnings of SEC charges under certain circumstances. In particular, the SEC would apply this new policy to situations in which the defendant in parallel civil and criminal actions with overlapping facts (i) was convicted of a crime or (ii) entered into and an NPA or a DPA agreement with the DOJ in which the defendant made admissions of or otherwise acknowledged committing criminal misconduct. In such scenarios, which frequently occur in parallel resolutions of FCPA allegations, the SEC will henceforth note the fact and nature of the parallel criminal conviction or NPA or DPA and, at the staff's discretion, may describe the relevant facts set forth during the plea allocution or jury verdict form. The new policy does not alter the SEC's policy of refusing to permit settling defendants to deny, in or outside of court, the allegations in the SEC's civil complaint or to characterize them as lacking a factual basis. Importantly, the new SEC policy leaves in place the "neither admit nor deny" language for civil settlements unaccompanied by parallel U.S. criminal resolutions.

The impact of the SEC's policy change will likely be felt immediately in the FCPA realm, as corporate resolutions by the DOJ and the SEC tend to occur in parallel. Accordingly, defendants in SEC matters – if the new SEC policy is faithfully followed – could be required to accept settlements lacking the previously-standard "neither admit nor deny" language. Yet – barring an expansion of the SEC's new policy to settlements without parallel criminal action – the practical importance of this change will likely be minimal. Defendants that admitted criminal violations in parallel DOJ enforcement actions or entered into an NPA or DPA containing acknowledgements of wrongdoing already faced the risk that such admissions or acknowledgements would be introduced in subsequent civil litigation. And because the new SEC policy does not implicate "admissions or adjudications of fact beyond those already made in criminal cases," defendants need not be concerned that their admissions in the civil proceeding would exceed those in the parallel criminal case. Under the new policy, the limited circumstances in which companies will no longer be able to "neither admit nor deny" allegations of misconduct– a practice Judge Rakoff challenged in the *Citigroup* matter as

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97. *Id.* at 8.

98. *Id.* at 11.

99. *Id.* at 10.

100. *Id.* at 14-15. A federal court in Wisconsin is also currently questioning a settlement proposed by the SEC that contains the "neither admit nor deny" language. *SEC v. Koss Corp., et al.*, No. 11 Civ. 991 (RTR), Letter from the Court to Plaintiff's Counsel (E.D. Wis. Dec. 20, 2011).

101. *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 7387 (JSR), Notice of Appeal (S.D.N.Y. Dec. 15, 2011); *In re SEC*, No. 11 Civ. 5375, Pet. for Writ of Mandamus (2d Cir. Dec. 29, 2011).

102. *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 5227, Order Granting Stay Pending Appeal (2d Cir. Dec. 27, 2011); *SEC v. Citigroup Global Mkts., Inc.*, No. 11 Civ. 5227, Order Consolidating Mots. (2d Cir. Jan. 3, 2012).

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"hallowed by history, but not by reason" – may make little difference in practice.[103]

B. Dodd-Frank Whistleblower Rules

The determination whether to self-report potential FCPA violations to U.S. authorities will remain one of the critical decision points following a company's identification of possible FCPA-related misconduct. Adding further urgency to this inquiry, the whistleblower bounty provisions of Dodd-Frank, particularly as implemented by the SEC's administrative rules, created a legal framework and infrastructure that provides incentives to corporate employees to report securities violations to the SEC, rather than to report them internally in the first instance.[104]

The relevant whistleblower provision, found in Section 922 of Dodd-Frank, came into effect following the SEC's May 2011 promulgation of its implementing rules, which became effective in August 2011.[105] The provision directs the SEC to award eligible individuals who voluntarily provide original information that leads to successful enforcement actions resulting in monetary sanctions of over $1 million with a bounty of 10-30% of that amount.[106]

The relevant rule exempts individuals employed in certain company functions from eligibility for whistleblower bounties, such as legal, compliance, and audit personnel, whose responsibility includes monitoring compliance for the firm. Under certain circumstances, however, these persons can become eligible for whistleblower awards, if (i) they believe disclosure to the SEC is necessary to prevent an entity from causing substantial injury to the financial interest or property of the entity or its investors; (ii) they believe the entity is engaging in conduct that will impede an investigation of the misconduct; and (iii) more than 120 days have elapsed since either the whistleblower or someone else has provided the information to the audit committee, chief legal officer or chief compliance officer. Deeming 120 days to provide adequate time for a company to begin to address identified problems – though not necessarily complete an investigation – the whistleblower rules grant an issuer 120 days to address the matter before a previously ineligible employee may report the matter to the SEC and win a bounty payment.[107] The rules do not purport to alter an attorney's duties under the law bearing on attorney-client privilege or related bar ethics mandates.

The SEC purported to give effect to concerns that its proposed whistleblower rules strongly incentivized reporting to the Commission over internal reporting and thus undercut internal reporting and issuers' remedial compliance systems.[108] The SEC portrayed this explicit recognition in the final rules of a whistleblower's initial internal efforts as a compromise: specifically, Rule 21F-6 permits the SEC to consider, when issuing an award, the extent to which the whistleblower had first raised his or her complaint internally and assisted or interfered with internal compliance efforts.[109] Yet even the current language, although providing a modicum of inducement for whistleblowers to report wrongdoing internally, leaves almost unaffected the financial incentive structure that favors disclosures to the SEC over internal reporting.

The full impact of the new whistleblower provisions is yet to be seen. In a November 2011 report, the SEC stated that, since opening its Whistleblower Hotline in May 2011, it had received more than 900 reports from purported whistleblowers, including 334 tips in the six weeks between the time the Final Rules became effective on August 12, 2011 and

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103. *SEC v. Citigroup Global Mkts., Inc.*, No. 11. Civ. 7387 (JSR), Order (S.D.N.Y. Nov. 28, 2011).

104. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841-49 (2010); *see also* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 76 Fed. Reg. 34,300 (May 25, 2011) [hereinafter "Whistleblower Rules"], http://www.sec.gov/rules/final/2011/34-64545.pdf.

105. *See id.*

106. 15 U.S.C. § 78u-6.

107. Whistleblower Rules, 76 Fed. Reg. at 34,319. The SEC does not view the 120 days as a grace period to not self-report in determining what level of leniency to grant. *Id.*

108. *Id.* at 34,331.

109. *Id.* at 34,319; 17 C.F.R. §§ 240.21F-6(a)(2)(ii) & 240.21(a)(4) (2011). The remaining factors include the (i) significance of the information provided by the whistleblower to the success of the SEC's enforcement action; (ii) level of assistance provided by the whistleblower, including cooperation with the SEC's investigation, timeliness or delay of the initial report, SEC resources that were conserved as a result of the whistleblower's assistance, the whistleblower's efforts to encourage others to cooperate and assist the SEC's investigation; remediation efforts undertaken by the whistleblower, and any "unique hardships" experienced by the whistleblower; (iii) programmatic and policy interests of the SEC in making whistleblower awards; (iv) role, involvement and culpability of the whistleblower in the conduct and violations at issue in the SEC's enforcement action. 17 C.F.R. § 240.21F-6(a).

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the end of the government's fiscal year on September 30, 2011.[110]

The whistleblower bounty rules have given rise to the perceived need to devote additional resources to compliance and internal audit and investigations functions, so that issuers can maximize their capacity to deal timely with whistleblower allegations and minimize the risks of early reports to the SEC or "circuit breaker" reporting by otherwise ineligible individuals. The rules also inevitably place greater pressure on issuers to self-report to reduce the risk of bounty payments in connection with company activities.

VI. Developments Outside the U.S.

The year 2011 was also significant for anti-bribery efforts in the United Kingdom, as the UKBA entered into force on July 1. Ahead of that date, the Ministry of Justice ("MOJ") released long-awaited guidance that sets out six principles characterizing a company's "adequate procedures" to prevent bribery.[111] "Adequate procedures" constitute an affirmative defense to the new corporate offense of failure to prevent bribery under UKBA section 7. The MOJ Guidance also provided welcome clarification on a number of issues of concern to the business community, in particular facilitation payments and hospitality, the jurisdictional reach of the UKBA, and the meaning of "associated persons" that can trigger the corporate offense.

The Directors of Public Prosecutions and the Serious Fraud Office ("SFO") – one of whom will be required to consent to any prosecution under the UKBA – also published the "Directors' Guidance," which sets out, for each offense under the UKBA, what needs to be proved for a conviction, along with public interest considerations prosecutors are required to consider before bringing an action.[112] The Directors' Guidance also specifically addresses facilitation payments and hospitality and promotional expenditures.

Following the first conviction under the UKBA, Munir Patel, a former administrative clerk at a magistrates' court in London, received a three-year sentence under the new law for accepting a £500 bribe to keep the details of traffic tickets from being recorded in a court database. Patel, who pleaded guilty, also received a six-year sentence for misconduct in public office, with the sentences to run concurrently. Although the court noted that the 22-year-old's misconduct lasted for more than a year and involved at least 53 cases,[113] the prosecution of a relatively low-level offender suggests that the U.K. will not hesitate to enforce the UKBA against other individuals in the future. With respect to pursuing foreign bribery cases, outgoing SFO Head Richard Alderman stated that what his office is "looking for in particular is evidence that [companies with a U.K. business presence] have undermined ethical U.K. businesses."[114]

Meanwhile, in 2011 China took a significant step to combat foreign bribery. A one-sentence addition to Article 164 of China's criminal law, which took effect in May 2011, criminalizes the giving of money or property to a foreign (*i.e.*, non-Chinese) public official or an official of an international public organization for the purpose of seeking illegitimate commercial benefit.[115]

The Russian government also adopted new anti-bribery legislation, paving the way for Russia's accession to the OECD anti-bribery convention.[116] While that

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110. SEC, Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2011 4-5 (2011), http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf. Whistleblower tips have come in from the United States and abroad. Of the 334 tips received by the end of September 2011, 10% came from foreign countries, including China and the United Kingdom. *Id.* at app. B & C. Only 3.9% of these tips were self-identified as FCPA-related. *Id.* at app. A.

111. *See* Ministry of Justice, The Bribery Act 2010: Guidance 20-31(2011) [hereinafter "MOJ Guidance"], http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf.

112. *See* Serious Fraud Office, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (Mar. 30, 2011) [hereinafter "Directors' Guidance"], http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf.

113. "Bribe Conviction for Court Clerk Munir Patel UK-first," *BBC News* (Oct. 14, 2011), http://www.bbc.co.uk/news/uk-england-london-15310150; Lindsay Fortado, "London Court Clerk Sentenced to Six Years in Bribery Act Case," *Bloomberg* (Nov. 18, 2011), http://www.bloomberg.com/news/2011-11-18/london-court-clerk-sentenced-to-six-years-in-bribery-act-case.html.

114. Richard Alderman, "The UK Bribery Act: Engagement With Companies and Compliance Effects", *FCPA Professor* (Nov. 29, 2011), http://www.fcpaprofessor.com/the-uk-bribery-act-engagement-with-companies-and-compliance-effects.

115. *See* P. Berger, B. Yannett, N. Wu, T. Wu, & N. Grohmann, "China's New Push to Combat Foreign Bribery," *FCPA Update* (Mar. 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=d263dadf-70e8-4bbd-b543-00fafbae8044.

116. *See* S. Hecker, B. Yannett, A. Dulova, A. Tidman & A. Konovalov, "Developments in Russian Anti-Corruption Laws," *FCPA Update* (May 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=064c31c9-70b6-4a0a-b4e1-370afcc230a3.

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legislation was pending, Russia's anti-monopoly enforcement agency, however, took action against a non-Russian company seeking to police its sales channel's compliance with anticorruption standards. In January 2011, the Federal Anti-Monopoly Service ("FAS") confirmed an earlier verdict against Danish pharmaceutical company Novo Nordisk Ltd, for "unlawfully evading contracts" with properly licensed distributors that, among other things, failed anti-corruption screening based on company-mandated compliance standards.[117] Novo Nordisk appealed the decision and settled with FAS in July 2011 – bringing resolution to its case, but leaving the interplay among Russian anti-monopoly laws and the Russian, U.S. and U.K anti-corruption laws highly uncertain.[118]

VII. Conclusion

A clear take-away from 2011 is that anti-corruption law enforcement remains serious business. While the number of nine-figure corporate settlements decreased, the government achieved significant victories on legal issues before the trial and appellate courts, obtained record-breaking prison sentences, and a record-breaking individual forfeiture agreement in the Tesler case. We have little doubt that 2012 will bring more large corporate settlements, more individual prosecutions and trials, and further opportunities to test in the courts the government's broad interpretations of key FCPA provisions.

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117. *See* B. Yannett, S. Hecker, A. Kucher, J. Amler, J. Shvets & A. Maximenko, "Anti-Bribery Compliance in Russia: One Step Forward, Two Steps Back?" *FCPA Update* (July 2011), http://www.debevoise.com/files/Publication/b088cc4d-0970-4cbb-881d-4a75d186f5f1/Presentation/PublicationAttachment/4f73fef6-ca4e-44c6-8551-68605df0007e/FCPAUpdateJuly2011.pdf.

118. *See* B. Yannett, S. Hecker, J. Shvets & A. Maximenko, "Novo Nordisk Settles with Russia's Anti-monopoly Service," *FCPA Update* (Aug. 2011), http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf.

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