DEBEVOISE & PLIMPTON LLP

FCPA Update

January 2013 ■ Vol. 4, No. 6

The FCPA in 2012: Release of the Government's Guidance Caps a Year of Disparate Developments

I. Introduction

The year 2012 will probably be remembered in the annals of FCPA history as the year of the Guidance (formally known as "A Resource Guide to the U.S. Foreign Corrupt Practices Act"). Its release had been eagerly anticipated since Assistant Attorney General Lanny A. Breuer announced in November 2011 that the government would issue detailed guidance on the FCPA. One year later, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") jointly released a 120-page policy paper that, in some detail, sets forth the agencies' views on the statute and criteria for bringing enforcement actions. Those who had hoped that the Guidance would resolve controversies over the appropriate interpretation and application of the FCPA were disappointed. Disputes remain and, absent new legislation, will have to be addressed and ultimately resolved by the judiciary through litigation. But those who treat the Guidance for what it purports to be – the government's effort to summarize how it understands its enforcement mandate – will find much useful information.

Next to the Guidance, perhaps the most reported development in 2012 was the DOJ's and the SEC's decision not to bring charges against Morgan Stanley. Although not as momentous a precedent as the DOJ and SEC have suggested (most likely because most declination decisions have not been made public), it helpfully identifies the government's reasoning for abstaining from an enforcement action notwithstanding the law of *respondeat superior* that subjects companies broadly to liability under the FCPA for acts of their employees.

The FCPA enforcement landscape in 2012 was otherwise devoid of blockbuster events. No nine-figure settlement amounts characterized corporate enforcement actions, none of which stood out in size or substance. Newly-commenced prosecutions of individuals (measured by court filings) also decreased in 2012, following the flurry of activity in 2011. And, finally, 2012 featured no significant appellate or district court opinions that broke major new ground or helped to clarify the most pressing existing statutory uncertainties.

Yet, as we discuss in the following pages, despite these metrics, no signs point to a slowdown in FCPA enforcement by either the DOJ or the SEC. Indeed, with significant FCPA cases in the pipeline and a commitment from the Obama Administration to deploying resources to the fight against foreign corruption, we expect that the FCPA, which turned 35 in December, will continue to be enforced vigorously for the foreseeable future.

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Recent and Upcoming Speaking Engagements

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Bruce E. Yannett
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Forum on White Collar Litigation
American Conference Institute
New York, NY
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Publication Announcement:

"Defending Corporations and Individuals in Government Investigations"

Debevoise's recent Client Update "U.S. Enforcement Agencies Issue Extensive New FCPA Guidance" is now available in Japanese, Mandarin, Portuguese and Russian. Click here to read the Update in those languages.

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II. Overview of Corporate and Individual Enforcement Actions in 2012

A. Corporate Enforcement

The number of FCPA enforcement actions against corporate entities in 2012 fell only slightly compared to 2011, but the dollar value of the cumulative settlement amounts decreased by nearly half. The DOJ and SEC resolved twelve enforcement actions against companies and their subsidiaries in 2012 (down from 15 in 2011 and 23 in 2010), pursuant to which the United States Treasury collected approximately $259 million in fines, penalties, disgorgement and pre-judgment interest (a little over half of the $508.6 million collected in 2011 and far less than the almost $1.8 billion of 2010).[1] Five of the

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1. **Eli Lilly & Co.**, *see SEC v. Eli Lilly & Co.*, 12-cv-2045 (D.D.C. Dec. 20, 2012), SEC Press Rel. No. 2012-273, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), http://www.sec.gov/news/press/2012/2012-273.htm (disgorgement of $13,955,196, prejudgment interest of $6,743,538, and a penalty of $8.7 million for a total payment of $29,398,734); **Allianz S.E.**, *see SEC v. Allianz S.E.*, Admin Pro. No. 3-15132 (Dec. 17, 2012), SEC Press Rel. No. 2012-266, SEC Charges Germany-Based Allianz SE with FCPA Violations (Dec. 17, 2012), http://www.sec.gov/news/press/2012/2012-266.htm (disgorgement of $5,315,649, prejudgment interest of $1,765,125, and a penalty of $5,315,649 for a total of $12,396,423); **Tyco Int'l, Ltd./ Tyco Valves & Controls Middle East, Inc.**, *see In Re Tyco International, Ltd.*, Non-Prosecution Agreement (Sept. 24, 2012), *U.S. v. Tyco Valves and Controls Middle East, Inc.*, 12-cr-00418 (E.D. Va. Sept. 24, 2012), DOJ Press Rel. No., No. 12-1149, Subsidiary of Tyco Int'l Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html ($13.6 million penalty against Tyco Valves); *SEC v. Tyco Int'l Ltd.*, 12-CV-1583 (D.D.C. Sept. 25, 2012), SEC Press Rel. No. 2012-196, SEC Charges Tyco for Illicit Payments to Foreign Officials (Sept. 24, 2012), http://www.sec.gov/news/press/2012/2012-196.htm (Tyco to pay disgorgement of $10,564,992 and prejudgment interest of $2,566,517 for a total of 13,131,509); **Oracle Corp.**, *see SEC v. Oracle Corp.*, 12-cv-4310 (N.D. Cal. Aug. 16, 2012), SEC Press Rel. No. 2012-159, SEC Charges Oracle Corp. With FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012), http://www.sec.gov/news/press/2012/2012-158.htm ($2 million penalty); **Pfizer H.C.P. Corp./Wyeth, Inc.**, *see U.S. v. Pfizer H.C.P. Corp.*, 12-cr-169 (D.D.C. Aug. 7, 2012), DOJ Press Rel. No. 12-980, Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), http://www.justice.gov/opa/pr/2012/August/12-crm-980.html ($15 million penalty against Pfizer); *SEC v. Pfizer Inc.*, 12-cv-1303 (D.D.C. Aug. 7, 2012), SEC Press Rel. No. 2012-152, SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012), http://www.sec.gov/news/press/2012/2012-152.htm (disgorgement of $16,032,676 and prejudgment interest of $10,307,268 for a total of $26,339,944); *see SEC v. Wyeth, Inc.*, 12-cv-1304 (Aug. 7, 2012), SEC Press Rel. No. 2012-152, SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012), http://www.sec.gov/news/press/2012/2012-152.htm (disgorgement of $17,217,831 and prejudgment interest of $1,658,793 for a total of $18,876,624); **The NORDAM Group, Inc.**, *see In Re The NORDAM Group, Inc.*, Non-Prosecution Agreement (July 17, 2012), DOJ Press Re. No. 12-881, The Nordam Group Inc. Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay $2 Million Penalty (July 17, 2012), http://www.justice.gov/opa/pr/2012/July/12-crm-881.html ($2 million penalty); **Orthofix Int'l, N.V.**, *see U.S. v. Orthofix Int'l, N.V.*, 4:12-cr-00150, Deferred Prosecution Agreement at 6 (E.D. Tex. July 10, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix.html ($2.2 million penalty); *SEC v. Orthofix Int'l, N.V.*, 12-cv-419 (E.D. Tex. July 10, 2012), SEC Press Rel. No. 2012-133 (July 10, 2012), http://www.sec.gov/news/press/2012/2012-133.htm ($4,983,644 in disgorgement and more than $242,000 in prejudgment interest); **Data Systems & Solutions, LLC** *see U.S. v. Data Systems & Solutions LLC*, 12-cr-262 (E.D. Va. June 18, 2012), DOJ Press Rel. No. 12-768, Data Systems & Solutions LLC Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay $8.82 Million Criminal Penalty (June 18, 2012), http://www.justice.gov/opa/pr/2012/June/12-crm-768.html ($8.82 million penalty); **Biomet, Inc.**, *see U.S. v. Biomet, Inc.*, 12-cr-080 (D.D.C. Mar. 26, 2012), DOJ Press Rel. No. 12-373, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-373.html ($17.28 million penalty); *SEC v. Biomet, Inc.*, 12-cv-454 (D.D.C. Mar. 26, 2012), SEC Press Rel. No. 2012-50, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), http://www.sec.gov/news/press/2012/2012-50.htm (disgorgement of $4,432,998 and prejudgment interest of $1,142,733 for a total of $5,575,731); **Bizjet Int'l Sales & Support, Inc./Lufthansa Technik AG**, *see U.S. v. Bizjet Int'l Sales and Support, Inc.*, 12-cr-061 (N.D. Ok. Mar. 14, 2012), *In Re Lufthansa Technik AG*, Non-Prosecution Agreement (Mar. 14, 2012), DOJ Press Rel. No. 12-321, Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-321.html ($11.8 million penalty against Bizjet); **Smith & Nephew, Inc.**, *see U.S. v. Smith & Nephew, Inc.*, 12-cr-030 (D.D.C. Feb. 6, 2012), DOJ Press Rel. No. 12-166, Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation (Feb. 6, 2012), http://www.justice.gov/opa/pr/2012/February/12-crm-166.html ($16.8 million penalty); *SEC v. Smith & Nephew Inc.*, 12-cv-187 (D.D.C. Feb. 6, 2012), SEC Press Rel. No. 2012-25, SEC Charges Smith & Nephew PLC with Foreign Bribery (Feb. 6, 2012), http://www.sec.gov/news/press/2012/2012-25.htm (disgorgement of $4,028,000 and prejudgment interest of $1,398,799 for a total $5,426,799); **Marubeni Corp.**, *see U.S. v. Marubeni Corp.*, 12-cr-022 (S.D. Tex. Jan. 17, 2012), DOJ Press Rel. No. 2012-60, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), http://www.justice.gov/opa/pr/2012/January/12-crm-060.html ($54.6 million penalty).

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twelve enforcement actions of 2012 were resolved through simultaneous criminal and civil settlements with the DOJ and the SEC; three were exclusive SEC actions and four were exclusive DOJ actions.[2]

The decline in the number and scope of corporate resolutions in 2012 compared to previous years is obvious. But those subject to the FCPA and related laws should not conclude from short-term statistical movements that FCPA enforcement is on the decline. Although recoveries may not return to those garnered by the government in the banner year 2010 – in part because many U.S.-based or U.S.-listed companies have greatly enhanced their compliance programs in response to the ramped-up FCPA enforcement of the past decade – very significant enforcement actions appear to be in the pipeline and will likely produce substantial settlements in the months and years to come.[3]

B. Individual Enforcement

Following 2011 – which we termed "the year of the trial" in our last annual FCPA review – new prosecutions of individuals all but disappeared in 2012. The number of individuals against whom criminal and civil charges were initiated in 2012 declined to five.[4] The SEC filed civil complaints against three former oil executives tied to an alleged Nigerian bid-rigging scheme at Noble Corp., an oil drilling company which in 2010 settled criminal and civil FCPA enforcement actions.[5] The fourth individual to be charged in 2012, a managing director of Morgan Stanley's real estate business in China, pleaded guilty to conspiring to evade his employer's internal accounting controls.[6] The fifth individual defendant, a former vice president of a Florida-based telecommunications firm embroiled in the long-running Haiti Teleco investigation, was indicted in federal court in Miami in January 2012 but apparently remains a fugitive.[7]

Similar to the case of corporate enforcement actions, the decline in individual prosecutions in 2012 is noteworthy but does not necessarily signal a change in the priority that the DOJ and the SEC have assigned to pursuing those responsible for bribe payments. Indeed, 16 previously-charged defendants were sentenced in 2012 in FCPA-related matters.[8] And with potentially significant corporate enforcement actions expected to be resolved in the coming year or thereafter, the prospects for individual prosecutions remain very much alive.

III. The Government Speaks: FCPA Guidance and DOJ Opinion Procedure Releases

A. FCPA Guidance

Without question, the headline event for FCPA enforcement in 2012 was the long-awaited joint issuance by the DOJ and SEC in November 2012 of their FCPA Guidance.[9] Its value to practitioners and the business community derives not from any novel enforcement theories or statutory interpretations, which are largely absent from the document, but from the detailed summary that enunciates the government's positions on key statutory terms and current enforcement practices and priorities. The various illustrative examples and hypothetical scenarios also will help companies and their compliance counsel to assess and implement appropriate

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2. For comparison, in 2010, seven of 23 enforcement actions were resolved in parallel by the DOJ and the SEC. *See* Richard L. Cassin, "2010 Enforcement Index," *FCPA Blog* (Jan. 3, 2011), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html. In 2011, 7 of 15 enforcement actions resulted in parallel DOJ/SEC resolutions. *See* Richard L. Cassin, "2011 Enforcement Index," *FCPA Blog* (Jan. 2, 2012), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html.

3. Among the prominent examples are publicly disclosed ongoing investigations of Wal-Mart, News Corp., Avon, Weatherford, Alstom and Total.

4. In 2012, 21 individuals were indicted, charged, tried or sentenced in connection with FCPA-related actions (including some for alleged money laundering). In comparison, more than three dozen individuals fell into those categories in 2011. *See* Richard L. Cassin, "2012 Enforcement Index," *FCPA Blog* (January 2, 2013), http://www.fcpablog.com/blog/2013/1/2/2012-enforcement-index.html#. *See also* Paul R. Berger, Bruce E. Yannett, Sean Hecker, David M. Fuhr & Noelle Duarte Grohmann, "The FCPA in 2011: The Year of the Trial Shapes FCPA Enforcement," *FCPA Update*, Vol. 3, No. 6 (Jan. 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=20960d4e-4743-40b8-bd29-27e9ed1a16c3 [hereinafter, "FCPA Update 2011 Year in Review"].

5. SEC Press. Rel. No. 2010-214, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm.

6. *See* DOJ Press Rel. No. 12-534, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Mar. 26, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html; *see generally* Paul R. Berger, Sean Hecker, Bruce E. Yannett & Elizabeth Kostrzewa, "Hints and Olive Branches in the Morgan Stanley Declinations," *FCPA Update*, Vol. 3., No. 10 (May 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=71aba13d-70d9-4e81-803b-4231ab73f0d1.

7. *See* DOJ Press Rel. No. 12-656, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012) (mentioning the fact that Zurita is a fugitive), http://www.justice.gov/opa/pr/2012/May/12-crm-656.html.

8. *See* 2012 Enforcement Index, note 4, *supra*.

9. U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (Nov. 14, 2012), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [hereinafter, "FCPA Resource Guide"].

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anti-corruption policies, internal controls and compliance programs.

The Guidance, unsurprisingly, does not put an end to the ongoing disputes over lingering statutory ambiguities or the government's aggressive jurisdictional reach. Yet it appears that promulgation of this non-binding 120-page document – in conjunction with *The New York Times*' investigative reporting of Wal-Mart's compliance problems in Mexico – may have dampened legislators' enthusiasm for amendments to the FCPA.

Key points addressed in the Guidance include:[10]

- **Jurisdiction:** The Guidance reasserts the government's broad jurisdictional position that the FCPA's anti-bribery provisions may be triggered even by conduct that has only a fleeting connection to the United States. For issuers, domestic concerns, and their representatives, any use of interstate commerce in furtherance of a corrupt payment to a foreign official will suffice – including "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States" or "sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system…."[11] Similarly, acts within the United States may ensnare co-conspirators who are neither issuers nor domestic concerns and remain outside the United States: "a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting."[12] Further, the Guidance makes clear that no U.S. nexus is required for application of the anti-bribery provisions to U.S. companies and persons, pointing out that the "alternative jurisdiction" provision of the FCPA eliminates the need for any use of interstate commerce in actions against these defendants.[13]
- **"Foreign Official" and "Government Instrumentality":** The Guidance reiterates the position the DOJ has taken successfully before a number of federal district courts concerning the statutory definition of "instrumentality" of a foreign government. The Guidance asserts that whether a state-owned enterprise is an instrumentality of a foreign state requires a fact-specific analysis that addresses ownership, control, status and function.[14] What is noteworthy about the government's presentation of the non-exclusive multifactor inquiry is that the Guidance concedes that a lack of control or majority ownership makes it unlikely as a practical matter that an entity qualifies as a state instrumentality.[15] Absent judicial clarification – which may come from the Eleventh Circuit in the *Esquenazi* appeal (discussed below) – the multifaceted and fact-specific analysis of an instrumentality of a foreign government (and thus the scope of "foreign official") will continue to pose challenges for those subject to the FCPA.
- **Gifts and Business Hospitality:** Addressing concerns by some in the business community that small gifts and business hospitality may run afoul of the FCPA, the Guidance emphasizes that the ordinary and legitimate promotion of a business would likely not run afoul of the FCPA because of an absence of corrupt intent. For that reason, it is "difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value" or moderately priced gifts and "tokens of esteem or gratitude" would be

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10. *See* Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Erich O. Grosz & Erin W. Sheehy, "U.S. Enforcement Agencies Issue Extensive New FCPA Guidance," *FCPA Update*, Vol. 4, No. 4 (Nov. 2012), http://www.debevoise.com/files/Publication/4991d9f7-b7dc-495f-a767-4e75adc4a7f8/Presentation/PublicationAttachment/ce5f6ffa-f028-4252-a1fb-6480ba48d93e/FCPA_Update_Nov_112812.pdf.
11. FCPA Resource Guide at 11.
12. *Id.* at 12.
13. *Id.*
14. *Id.* at 20.
15. *Id.* at 21 ("as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares"). There are hints that the government is beginning to move away from previous assertions that entities may qualify as instrumentalities of a foreign government even in the absence of direct government control or a majority of equity ownership. The SEC recently formulated Final Rules for Dodd-Frank's Section 1504 (which requires both U.S. and non-U.S. issuers engaged in the commercial development of oil, natural gas or minerals to disclose certain payments made to the U.S. federal government or foreign governments on an annual basis). In formulating the Final Rules, the SEC concluded that the term "foreign government" encompasses "companies owned by the foreign government," but it chose a narrow definition that requires majority-ownership, rather than "control-in-fact," for a company to be considered part of the foreign government. *See* SEC Press Rel. No. 34-67717, Disclosure of Payments by Resource Extraction Issuers, Final Rule at 98-101 (Aug. 22, 2012), http://www.sec.gov/news/ press/2012/2012-164.htm.

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deemed to violate the FCPA.[16] The payment of travel and entertainment expenses for foreign officials, according to the Guidance, has resulted in enforcement action only where such hospitality was extravagant or "occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent."[17] In perhaps one of the most significant aspects of the Guidance, the DOJ and SEC have, in principle, endorsed a rule of proportionality that authorizes companies and others subject to the statute to provide business class airfare when this is customary for long-haul flights. The Guidance also allows payors to take into account the income and stature of a government official, permitting somewhat higher gift, travel and hospitality expenditures for those for whom such spending is less likely to have an influence.[18]

- **Principles Governing Enforcement Decisions:** The Guidance summarizes the policies pursuant to which the DOJ and SEC consider whether to press charges or commence and resolve enforcement proceedings. Special emphasis is given to the now familiar elements such as self-reporting, cooperation and remediation.[19] Seeking to respond to the calls of lawmakers and some in the business community for concrete examples of "declinations," *i.e.*, situations in which the DOJ or SEC declined to bring an enforcement action after initial review and a determination that a charge might otherwise have been appropriate, the Guidance offers a number of factors that have resulted in specific declinations.[20] Yet, even so, the examples provided in the Guidance possess limited practical use because they do not chart a clear framework identifying the circumstances in which a company may expect a declination; in fact, the conduct underlying several of the declinations offered as examples in the Guidance likely did not even constitute violations of the FCPA.
- **Compliance Programs:** While noting that the DOJ and the SEC "have no formulaic requirements regarding compliance programs," the Guidance offers elements of an effective compliance program: (1) a commitment from senior management and a clear anti-corruption policy; (2) a concise, accessible code of conduct as well as "policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures"; (3) oversight responsibility vested with senior executives who have sufficient authority, autonomy and resources; (4) strong risk assessment and internal audit procedures; (5) periodic training and advice on FCPA compliance; (6) appropriate disciplinary procedures and positive incentives; (7) risk-based due diligence on third parties; (8) mechanisms for confidential reporting and efficient, reliable internal investigation; (9) periodic testing and review of compliance procedures; and (10) for mergers and acquisitions, thorough pre-acquisition due diligence and post-acquisition integration of compliance programs in the new business.[21]
- **Successor Liability:** The Guidance provides advice on how successor companies might minimize the risks of inheriting FCPA liabilities of an acquired company or predecessor entity in a merger or acquisition. Appropriate pre-transaction FCPA diligence (or post-transaction diligence, if pre-transaction diligence is impractical), voluntary reports of discovered violations to the DOJ and SEC, and prompt remedial actions, including implementation of compliance programs and internal controls, will greatly reduce the likelihood of an enforcement action against the successor company: "DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in

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16. *Id.* at 15, 17.
17. *Id.* at 15.
18. *Id.* at 17-18.
19. *Id.* at 54.
20. *Id.* at 77-79.
21. *Id.* at 56-63.

the violations or failed to stop the misconduct from continuing after the acquisition."[22] Even after being acquired, a predecessor company previously subject to the FCPA – whose past conduct constituted a violation – will remain subject to DOJ and SEC enforcement action.

B. Two New DOJ Opinion Procedure Releases

While overshadowed by the publication of the Guidance, the DOJ also issued two Opinion Procedure Releases in 2012.

In the first, dated September 18, 2012, a U.S. lobbying firm wished to retain a consulting firm to facilitate its planned representation of a foreign government's embassy and foreign ministry.[23] One of the consulting firm's partners was a member of the foreign country's royal family, but he held no current government positions, titles, or privileges, was not in line for succession, and would serve merely as a local sponsor (such a sponsor being required by law) for the lobbying firm in the foreign country. The DOJ responded that, under these facts, the royal family member was not a foreign official for FCPA purposes so long as he or she "does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family."[24]

The second Opinion Procedure Release, dated October 18, 2012, answered a request from numerous non-profit adoption agencies headquartered in the United States.[25] The Requestors proposed to host 18 foreign government officials, all of whom had some responsibility for, or influence over, adoption processes in their countries (where the Requestors had operations). The purpose of the trip to the United States was to allow the officials to learn more about the Requestors' work. The DOJ opined that funding such a trip was a reasonable and *bona fide* expenditure that is directly related to the promotion, demonstration, or explanation of the Requestors' products or services and thus not prohibited under the FCPA.

IV. Corporate Resolutions

A. Overview

Our key observations relating to corporate resolutions in 2012 are:

- **Prevalence of DPAs and NPAs:** Without exception, all criminal enforcement actions in 2012 were resolved through deferred prosecution agreements ("DPAs") or non-prosecution agreements ("NPAs").[26] Pursuant to a DPA or an NPA, the government foregoes prosecution in return for the company's payment of a penalty and commitment to specific compliance, cooperation and reporting obligations. At least in the case of DPAs, the government retains the right to commence prosecution in case the company fails to satisfy its obligations spelled out in the agreement. To date, no such follow-on prosecutions have arisen in the FCPA context. Because of their popularity in the corporate world and with current DOJ leadership,[27] it appears likely that the resolution of FCPA enforcement actions will continue to involve DPAs or NPAs, notwithstanding criticism by some that these mechanisms can insufficiently penalize companies that engaged in severe wrongdoing. What remains shrouded in mystery is on what basis the DOJ and SEC determine which type of available resolution mechanism (DPA, NPA, declination, prosecution) to apply in which circumstance. In particular, the SEC's "Enforcement Cooperation Initiative," which expressly touts DPAs and NPAs, does not appear to have been robustly implemented. Since its promulgation in 2010, the SEC has resolved only two enforcement actions through NPAs and two through DPAs – just one of these cases (Tenaris, S.A.) pertained to alleged FCPA violations. Until the SEC starts resolving more FCPA enforcement actions through DPAs or NPAs, its "Enforcement Cooperation Initiative" will continue to have limited practical effect.
- **Focus on healthcare industry:** Five of the twelve settlements of 2012 involved companies engaged in the healthcare industry (Pfizer/Wyeth, Eli

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22. *Id.* at 28.
23. DOJ Op. Rel. No. 12-01 (Sept. 18, 2012), http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf.
24. *Id.*
25. DOJ Op. Rel. No. 12-02 (Oct. 18, 2012), http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1202.pdf
26. The only guilty plea came from a Middle Eastern subsidiary of Tyco; the parent company entered into an NPA with the DOJ.
27. *See, e.g.,* U.S. Department of Justice News, "Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association" (Sept. 13, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

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Lilly & Co., Biomet Inc., Orthofix, and Smith & Nephew). This doubtless arose from the government's industry-wide focus on the medical device/pharmaceutical sector and serves as another warning sign to the industry of its potentially unique compliance risks and the government's focus on them.

- **Ascendance of internal compliance assessments over external monitors:** More companies were permitted in their settlements to undertake their own internal compliance assessments than were required to retain an external compliance monitor. Only four of the twelve corporate settlements last year required an external monitor, while six provided for internal compliance monitoring over a specified period.[28] The prospect of conducting compliance self assessments, albeit with periodic reports to the government, in lieu of much more costly and onerous external monitors, constitutes a material cooperation incentive for companies subject to an enforcement action.
- **Enforcement actions based on very old conduct:** Companies continue to pay the price for compliance failings that in some cases reach back more than a decade. Pfizer reported potential FCPA problems to the government in 2004 involving conduct reaching back into the 1990s. Tyco's settlement was based on conduct identified as a result of a global compliance review dictated by a previous settlement in 2006. The investigation of Eli Lilly commenced in 2003. The misconduct at issue in the Smith & Nephew enforcement action originated in 1998. Targets of enforcement actions also run the risk that regulators – whether consciously or not – apply current expectations of appropriate compliance measures and effective internal controls mechanisms when evaluating the adequacy of procedures that existed at times when less rigorous standards may have commonly been considered acceptable. This risk is acute in an environment in which corporate resolutions prescribe in detail the elements of exemplary compliance programs and remedial measures, as exemplified by Pfizer's DPA.
- **Tangible benefits from voluntary disclosure and cooperation:** Voluntary disclosure of apparent compliance failings and subsequent extensive cooperation may come at a steep price. But they can return significant dividends in the resolution of enforcement actions (or even their complete avoidance). Examples from 2012 include the dispositions in Pfizer, Tyco, and, most prominently, the declination in the Morgan Stanley matter. In all three matters, the companies received substantial credit for their voluntary disclosures, extensive and long-running cooperation, and significant remediation measures.
- **Several serious compliance and controls failures:** Conversely, not all enforcement actions in 2012 featured companies with exemplary compliance and internal controls systems. The SEC's description of wrongdoing at subsidiaries of Allianz S.E. and Eli Lilly exemplify the Commission's view that a parent company's mere identification of a compliance failure in a subsidiary is not enough without appropriate follow-up and continued monitoring to ensure that identified problems no longer persist. In the Biomet matter, according to the SEC's civil charges, management participated in improper payments over an eight-year period and, even more disturbingly, "Biomet's compliance and internal audit functions failed to stop the payments to doctors even after learning about the illegal practices."[29]
- **New SEC settlement policy:** The SEC has implemented a policy change, announced in January 2012, not to allow companies to "neither admit nor deny" civil allegations in circumstances in which the company simultaneously admitted the same conduct in criminal enforcement actions.[30] Accordingly, Biomet, Tyco, and Orthofix, which were subject to parallel enforcement actions by the DOJ and the SEC, were precluded from inserting the previously typical "neither admit nor deny" language in their settlement agreements with the SEC.
- **Whistleblower program's early stages:** While the SEC's Dodd-Frank Whistleblower Program is up and

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28. In the remaining two enforcement actions from 2012, Oracle and Allianz, the government did not impose any monitoring or ongoing reporting obligations.
29. *See* SEC Press Rel. 2012-50, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26, 2012), http://www.sec.gov/news/press/2012/2012-50.htm.
30. *See* "Public Statement by SEC Staff: Recent Policy Change" (Jan. 7, 2012), http://www.sec.gov/news/speech/2012/spch010712rsk.htm.

running – with 3,001 tips received in FY 2012 from various individuals residing in all 50 states as well as 49 foreign countries (of which 115 tips related to purported FCPA violations), there has been no publicly discernable effect on SEC enforcement actions to date.[31] According to the SEC's FCPA Unit Chief Kara Brockmeyer, however, the whistleblower program is producing valuable and specific tips, and whistleblower awards may be in the offing in future FCPA enforcement actions.[32] We thus expect that the increasing influx of whistleblower complaints could result in the disclosure of several new FCPA investigations over the coming year and beyond.

B. Major Corporate Resolutions in 2012

1. Pfizer/Wyeth (DOJ/SEC, $60 million)

The DOJ's and SEC's parallel settlement with two Pfizer entities and Wyeth LLC were the largest cumulative settlements of 2012 – at $60 million. The investigations dated back to a voluntary self-disclosure in 2004. Notable were the very substantial remedial measures to which Pfizer committed itself in the DPA.

In August 2012, a New York-based subsidiary of Pfizer, Pfizer H.C.P. Corp., entered into a DPA with the DOJ and agreed to pay a $15 million penalty stemming from allegedly improper payments in the healthcare sectors in Bulgaria, Croatia, Kazakhstan and Russia.[33] Considering the conduct in question spanned from 1997 through 2006, the alleged cumulative bribes of $2 million pale in comparison to many other bribery schemes and are far below the criminal penalty imposed on the entity. In addition to the financial penalty, the DPA between the DOJ and Pfizer H.C.P. Corp. obligated Pfizer to continue to "implement enhanced compliance measures" throughout its subsidiaries; "to provide to the Department written reports on its progress and experience in maintaining and enhancing its compliance policies and procedures"; and to pledge continued cooperation with the DOJ and foreign law enforcement authorities.[34] Pfizer also escaped imposition of an external compliance monitor or compliance consultant, largely thanks to its timely voluntary disclosure of possible corruption and a massive and costly multi-year internal investigation accompanied by significant remedial efforts.[35]

Pfizer Inc., the parent company, simultaneously settled civil charges brought by the SEC that alleged violations of the FCPA's accounting provisions. The SEC contended that Pfizer falsely recorded improper payments made by various subsidiaries in the parent company's consolidated financial reports.[36] Pfizer Inc. paid disgorgement of approximately $16 million and prejudgment interest of just over $10 million.

Separately, Pfizer's subsidiary Wyeth LLC, which the pharmaceutical giant acquired in 2009, settled an SEC complaint by paying approximately $18.8 million in disgorgement and pre-judgment interest. Pfizer identified improper payments during its FCPA due diligence review following Wyeth's acquisition and quickly reported the findings to the SEC; most of the improper payments attributed to Wyeth thus occurred prior to its acquisition by Pfizer. The SEC alleged that a Wyeth subsidiary in Saudi Arabia made improper customs payments and that subsidiaries in China, Indonesia and Pakistan bribed state-owned hospital doctors to recommend the company's nutritional products to patients and offered cash payments, telephones and travel incentives. Wyeth then allegedly used phony invoices to record the illegal transactions.[37]

2. Marubeni Corp. (DOJ, $54.6 million)

The DOJ rung in 2012 by bringing criminal charges against the Japanese trading

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31. *See* U.S. Sec. and Exch. Comm'n, Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012 at 4-5 (Nov. 2012), http://www.sec.gov/about/offices/owb/annual-report-2012.pdf ["SEC 2012 Whistleblower Report"].

32. *See* Paul R. Berger, Bruce E. Yannett & Michael A. Janson, "DOJ and SEC Officials Discuss FCPA Guidance and Current Enforcement Issues," *FCPA Update*, Vol. 4, No. 5 (Dec. 2012), http://www.debevoise.com/files/Publication/a83abfb6-5543-4768-9cdb-77270867ec2d/Presentation/PublicationAttachment/e3ecf53d-895b-42b7-b0e3-a2a875d0bb5c/FCPA_Update_DEC_122112.pdf

33. DOJ Press Rel. 12-980, Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), http://www.justice.gov/opa/pr/2012/August/12-crm-980.html. *See also U.S. v. Pfizer H.C.P. Corp.,* 1:12-cr-00169, Information (D.D.C., Aug. 7, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-info.pdf.

34. *U.S. v. Pfizer H.C.P. Corp.,* 1:12-cr-00169, Deferred Prosecution Agreement at ¶ 4 (D.D.C., Aug. 7, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf.

35. DOJ Press Rel. No. 12-980, Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012), http://www.justice.gov/opa/pr/2012/August/12-crm-980.html.

36. *SEC v. Pfizer Inc.,* 1:12-cv-01303, Complaint (D.D.C. Aug. 7, 2012).

37. *SEC v. Wyeth LLC,* 1:12-cv-01304, Complaint (D.D.C. Aug. 7, 2012).

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company Marubeni Corporation.[38] The $54.6 million settlement pursuant to a DPA provided not only the single largest criminal fine of 2012, but is also noteworthy because it completed the DOJ's largest prosecution of a single bribery scheme, that of the TSKJ joint venture related to Bonny Island, Nigeria.[39] Of the twelve companies that settled FCPA enforcement actions in 2012, Marubeni is the only one that was neither an issuer nor a registrant nor a domestic concern.[40] The DOJ asserted U.S. jurisdiction over Marubeni on the basis of its agency relationship with the TSKJ joint venture, on whose behalf Marubeni allegedly made bribe payments exceeding $50 million to lower-level Nigerian officials.[41] Under the terms of the DPA, Marubeni agreed to retain an external compliance consultant for two years, to enhance its compliance program and to cooperate with the DOJ in ongoing investigations.[42]

3. Tyco (DOJ/SEC, $26 million)

In September 2012, the DOJ settled an enforcement action against Tyco International Ltd. and its subsidiary, Tyco Valves & Controls Middle East Inc., pursuant to which the Switzerland-based maker of security, fire protection and energy products agreed to pay a criminal fine of $13 million.[43] While the parent company and the DOJ agreed to an NPA to resolve alleged books and records violations, Tyco's subsidiary pleaded guilty to FCPA anti-bribery violations arising from improper payments in Saudi Arabia. In parallel, Tyco settled civil charges brought by the SEC by agreeing to pay disgorgement and pre-judgment interest in the same amount.[44] The charging documents allege corrupt payment schemes by Tyco subsidiaries in multiple countries, including China, India, Thailand, Laos, Indonesia, Bosnia, Croatia, Serbia, Slovenia, Slovakia, Iran, Saudi Arabia, Libya, Syria, the UAE, Mauritania, Congo, Niger, Madagascar, and Turkey.[45]

This disposition is notable in that the DOJ rewarded Tyco with an NPA, which acknowledged the company's voluntary disclosure of improper conduct and its extensive cooperation and remedial efforts.[46] Among other measures, Tyco fired employees implicated in the bribe payments and their cover-up, terminated contracts with third party agents, and shut down subsidiaries that had experienced compliance failures. Tyco's exemplary cooperation and remediation likely spared the company from far harsher settlement terms or amounts; as recently as 2006, Tyco had resolved charges brought by the SEC for accounting fraud and suspected FCPA violations by paying a $50 million penalty. The conduct at issue in the most recent settlement was discovered and reported to the government as a result of Tyco's commitment to undertake a global compliance review pursuant to its 2006 settlement with the SEC.

4. Biomet, Inc. (DOJ/SEC, $22.78 million)

Biomet Inc. entered into a DPA with the DOJ in March 2012 over payments and benefits conferred upon medical staff at state-owned hospitals in Argentina, Brazil and China.[47] Specifically, the DOJ charged Biomet with conspiracy to violate the FCPA's anti-bribery provisions and its accounting provisions, alleging improper payments of $1.5 million over an eight-

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38. *See* DOJ Press Rel. No. 12-060, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), http://www.justice.gov/opa/pr/2012/January/12-crm-060.html. *See also U.S. v. Marubeni Corp.,* 4:12-cr-00022, Information (S.D. Tex. Jan. 17, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-information.pdf.

39. DOJ Press Rel. No. 12-060, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), http://www.justice.gov/opa/pr/2012/January/12-crm-060.html. In total, the U.S. government recouped more than $1.7 billion in penalties and forfeiture orders from the five corporate entities involved in the Bonny Island bribery scheme.

40. Allianz S.E., the German insurer, also no longer is a U.S. registrant, but was at the time of the operative conduct in question.

41. DOJ Press Rel. No. 12-060, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), http://www.justice.gov/opa/pr/2012/January/12-crm-060.html.

42. *U.S. v. Marubeni Corporation,* 4:12-cr-00022, Deferred Prosecution Agreement (S.D. Tex. Jan. 17, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf

43. DOJ Press Rel. No. 12-1149, Subsidiary of Tyco International Ltd. Pleads Guilty, Is Sentenced for Conspiracy to Violate Foreign Corrupt Practices Act (Sept. 24, 2012), http://www.justice.gov/opa/pr/2012/September/12-crm-1149.html.

44. *See* SEC Press Rel. No. 2012-196, SEC Charges Tyco for Illicit Payments to Foreign Officials (Sept. 24, 2012), http://www.sec.gov/news/press/2012/2012-196.htm; *SEC v. Tyco International Ltd.,* 12-cv-01583, Complaint (D.D.C. Sept. 24, 2012), http://www.sec.gov/news/press/2012/2012-196.htm.

45. *Tyco International, Ltd.*, Non-Prosecution Agreement at A-5-A-6 (Sept. 20, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/tyco-intl/2012-09-20-tyco-intl-npa-sof.pdf.

46. *Id.* at 1.

47. DOJ Press Rel. No. 12-373, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-373.html.

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year period by Biomet and its subsidiaries that were concealed in company books as "commissions, royalties, consulting fees, other sales and marketing, and scientific incentives."[48] In reality, according to the government, Biomet employees and distributors rewarded orthopedic surgeons and other doctors with cash payments and travel benefits.[49] Biomet agreed to a $17.28 million criminal penalty and promised to implement rigorous internal controls and to retain an external compliance monitor for 18 months.[50] In parallel, Biomet also settled a civil complaint brought by the SEC that asserted the same FCPA violations, agreeing to pay $5.5 million in disgorged profits and prejudgment interest.[51]

5. Smith & Nephew, Inc. (DOJ/SEC, $22.2 million)

In February 2012, the DOJ entered into a DPA with yet another medical device maker, Smith & Nephew. The government accused the U.K.-based company of operating a scheme between 1998 and 2008, pursuant to which company employees allowed distributors to accumulate off-shore slush funds derived from inflated product prices. With the knowledge of company employees, proceeds from the offshore slush funds – as much as $9.4 million – were then allegedly used by the distributors to bribe health care providers in Greece with cash incentives and other measures to entice them to purchase the company's products.[52]

Pursuant to the DPA, Smith & Nephew was required to pay a $16.8 million penalty, implement rigorous internal controls, cooperate fully with the DOJ, and retain an external compliance monitor for 18 months.[53] Smith & Nephew's U.K. parent company, Smith & Nephew Plc, also settled civil SEC charges and agreed to pay $5.4 million in disgorgement and interest.[54]

C. The Morgan Stanley Declination – Limited to Its Facts or the Beginning of a Trend?

The would-be enforcement action that did not happen may have been accorded more attention than any of the twelve corporate settlements of 2012. That matter related to the DOJ's April 2012 indictment of Garth Peterson, a former managing director of Morgan Stanley's China real estate business for evading the bank's internal controls.[55] The SEC filed a civil complaint against Peterson, asserting violations of the FCPA and investment advisor rules.[56]

Both enforcement agencies declared that, while pursuing charges against the former employee, they would not bring an enforcement action against Morgan Stanley for FCPA violations deriving from Peterson's misconduct.[57] Central to this decision not to bring charges – in addition to Morgan Stanley's voluntary disclosure and its extensive cooperation with the government – appears to have been the fact that the alleged misconduct involved a single employee who enriched himself at his company's expense and went to extraordinary lengths to evade the bank's well-developed internal control structures and lied and deceived to obscure his wrongful conduct.[58] Features of Morgan Stanley's compliance program,

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48. *U.S. v. Biomet, Inc.,* 12-cr-00080, Information ¶¶ 20-22 (D.D.C. Mar. 26, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/biomet.html.
49. *Id.* at ¶ 22.
50. *U.S. v. Biomet, Inc.,* 12-cr-00080, Deferred Prosecution Agreement ¶¶ 5, 7-8 (D.D.C. Mar. 26, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-dpa.pdf.
51. SEC Press Rel. No. 2012-50, SEC Charges Medical Device Company Biomet with Foreign Bribery (Mar. 26. 2012), http://www.sec.gov/news/press/2012/2012-50.htm; *see also SEC v. Biomet, Inc.,* No. 12-cv-00454, Complaint (D.D.C., Mar. 26, 2012), http://www.sec.gov/litigation/complaints/2012/comp22306.pdf.
52. DOJ Press Rel. No. 12-166, Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation (Feb. 6, 2012), http://www.justice.gov/opa/pr/2012/February/12-crm-166.html; *U.S. v. Smith & Nephew, Inc.,* 12-cr-00030, Information (D.D.C. Feb. 6, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew.html; *U.S. v. Smith & Nephew, Inc.,* 12-cr-00030, Deferred Prosecution Agreement (D.D.C. Feb. 1, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew.html.
53. *Smith & Nephew, Inc.,* 12-cr-00030, Deferred Prosecution Agreement at ¶¶ 4-5, 7-8.
54. SEC Press Rel. No. 2012-25, SEC Charges Smith & Nephew PLC with Foreign Bribery (Feb. 6, 2012), http://www.sec.gov/news/press/2012/2012-25.htm; *SEC v. Smith & Nephew Plc,* No. 12-cv-00187, Complaint (D.D.C. Feb. 6, 2012), http://www.sec.gov/litigation/complaints/2012/comp22252.pdf.
55. *See* DOJ Press Rel. No. 12-534, note 6, *supra; U.S. v. Peterson,* 12-cr-224, Information ¶¶ 44-45 (E.D.N.Y. Apr. 25, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/petersong/petersong-information.pdf.
56. SEC Press Rel. No. 2012-78, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (Apr. 25, 2012), http://www.sec.gov/news/press/2012/2012-78.htm; *SEC v. Peterson,* 12-cv-2033, Complaint, ¶¶ 27-39 (E.D.N.Y. Apr. 25, 2012), http://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf.
57. DOJ Press Rel. No. 12-534, note 6, *supra*; SEC Press Rel. No. 2012-78, note 56, *supra*. Parts of the business community and members of Congress have long encouraged the DOJ to articulate when and why the government may choose to decline to bring an enforcement action. *See* Letter from Representatives Sandy Adams & F. James Sensenbrenner, Jr. to Greg Andres, Deputy Assistant Attorney General, Criminal Division, DOJ (June 22, 2011), http://www.scribd.com/doc/68419036/DOJ-Declination-Responses-to-Congress.
58. *See* DOJ Press Rel. No. 12-534, note 6, *supra*; SEC Press Rel. No. 2012-78, note 56, *supra* (finding Peterson to be a "rogue employee who took advantage of his firm and its investment advisory clients").

as highlighted in the DOJ's criminal information against Peterson, included (1) frequent training of employees; (2) frequent compliance reminders, including the distribution of written compliance materials; (3) annual employee certification of anti-corruption policies; (4) robust staffing and region-specific compliance personnel; (5) the existence of a compliance hotline; and (6) continued evaluation and improvement of compliance programs and internal controls.[59]

While the number of declinations by the enforcement agencies seems to be on the rise,[60] in light of the fact that Peterson appears to have been the proverbial "bad apple" who victimized his employer, and given Morgan Stanley's impressive corporate compliance program, the question arises whether the government's decision not to charge Morgan Stanley serves as a meaningful precedent for future corporate FCPA resolutions. The DOJ itself has held up the decision not to charge as providing an incentive for companies to self-disclose and cooperate.[61] To be sure, large corporations and financial institutions may benefit from benchmarking their compliance programs and internal controls measures against the features of Morgan Stanley's program, which the government held up as exemplary. And undoubtedly, companies subject to FCPA enforcement actions will seek to analogize their compliance regimes to that of Morgan Stanley with the goal of advocating for a declination or otherwise favorable resolution.[62]

But in other ways, the government's response in Morgan Stanley is not well suited to set precedent for the resolution of future FCPA enforcement actions. Indeed, it bears little resemblance to what is generally understood to constitute a declination. The facts were unusual: a rogue employee who, having been trained on the FCPA seven times and reminded to comply with the law 35 times, went to great lengths to deceive Morgan Stanley's pre-existing and well developed compliance system in furtherance of his self-enriching corrupt scheme that, in the end, involved likely theft of corporate opportunities. Unlike in virtually all other FCPA enforcement actions, no other company employees or executives participated in or knew about the wrongful conduct. For that reason, presenting a criminal or civil enforcement action against Morgan Stanley, even under *respondeat superior* principles, on the basis of Peterson's conduct could have been difficult. Viewed through this lens, the government's inaction represents a hardly controversial exercise of prosecutorial discretion, rather than a harbinger of a new era of declinations.

V. Individual Prosecutions

A. The Termination of the Africa Sting Prosecutions

While the most significant corporate enforcement action of 2012 was the one – Morgan Stanley – that was declined, the most noteworthy individual prosecutions of 2012 were those that the DOJ abandoned following several adverse rulings, hung juries, and acquittals – the "Africa sting" cases.

The DOJ's prosecution of 22 defendants ended in early 2012, following a two-and-a-half-year sting operation into sham military equipment deals with Gabon's Ministry of Defense. After securing guilty pleas from three defendants in early 2011,[63] the government secured no convictions in multiple trials against the remaining defendants and suffered several dismissals and adverse jurisdictional rulings.[64] Accordingly, in February 2012, the DOJ moved to dismiss with prejudice

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59. *See* Berger, et. al., "Hints and Olive Branches in the Morgan Stanley Declinations," note 6, *supra*.

60. *See* Marc Alain Bohn, "Final count for 2012 declinations," *FCPA Blog* (Jan. 24, 2013), http://www.fcpablog.com/blog/2013/1/24/final-count-for-2012-declinations.html.

61. *See* DOJ Justice News, *Assistant Attorney General Lanny A. Breuer Speaks at IBC Legal's World Bribery & Corruption Compliance Forum* (Oct. 23, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121023.html.

62. *See* Berger, et. al., "Hints and Olive Branches in the Morgan Stanley Declinations," note 6, *supra*. Indeed, during a keynote address at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act held in November 2012 in Washington, D.C., Assistant Attorney General Lanny A. Breuer highlighted the Morgan Stanley declination as an example of the DOJ's increasing transparency and willingness to reward companies that have robust compliance systems in place. *See* DOJ Justice News, Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.; *see also* Paul R. Berger, Bruce E. Yannett & Michael Janson, "DOJ and SEC Officials Discuss FCPA Guidance and Current Enforcement Issues," *FCPA Update*, Vol. 4, No. 5 (Dec. 2012), http://www.debevoise.com/files/Publication/a83abfb6-5543-4768-9cdb-77270867ec2d/Presentation/PublicationAttachment/e3ecf53d-895b-42b7-b0e3-a2a875d0bb5c/FCPA_Update_DEC_122112.pdf.

63. *See U.S. v. Alvirez,* 09-cr-335, Plea Agreement (D.D.C. Mar. 1, 2011); *U.S. v. Spiller,* 09-cr-335, Plea Agreement (D.D.C. Mar. 29, 2011); *U.S. v. Geri,* 09-cr-335, Plea Agreement (D.D.C. Apr. 28, 2011).

64. *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; *see also* C.M. Matthews, "Judge Tosses Conspiracy Charges In Landmark Bribery Case," *The Wall Street Journal* (Dec. 22, 2011), http://online.wsj.com/article/BT-CO-20111222-712797.html; *see also* Richard L. Cassin, "Second Mistrial in Africa Sting Prosecution," *FCPA Blog* (Jan. 31, 2012), http://www.fcpablog.com/blog/2012/1/31/second-mistrial-in-africa-sting-prosecution.html.

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all indictments against the remaining defendants pursuant to Criminal Rule 48(a), pointing to the outcomes of the trials that had thus far been conducted, the impact of certain evidentiary and legal rulings, and the resources required to see the remaining trials through to completion.[65] In an ironic twist, while all 22 defendants went free, the prosecution's key witness and central player in the sting operation, Richard Bistrong, was sentenced in July 2012 to 18 months in prison, followed by three years of supervised release.[66] Bistrong had pleaded guilty to unrelated FCPA charges in 2010 and during the course of the Africa sting trials, in the words of a jury member, "freely admitted on the stand more illegal acts than the entire group of defendants was accused of."[67] Despite the outcomes in the Africa sting trials, it cannot be expected that the government will be deterred from bringing FCPA charges against individuals if the standards in the U.S. Attorney's Manual are met – namely, that there is a reasonable likelihood that a jury will find guilt beyond a reasonable doubt.[68]

B. Other Individual Prosecutions in 2012

1. SEC Action Against Former Noble Corp. Executives

The SEC's civil complaints against former Noble Corp. executives have led to important motion practice concerning a number of key issues under the FCPA.

Following a settlement by the DOJ and the SEC with oil drilling firm Noble Corp. in 2010,[69] the SEC filed civil complaints in February 2012 against one current and two former Noble executives, alleging violations of the FCPA's anti-bribery and books and records provisions and other securities laws. According to the SEC, former CEO and CFO Mark Jackson and the director of its Nigerian subsidiary, James Ruehlen, bribed Nigerian customs officials to entice them to process false paperwork allowing the company to avoid substantial costs relating to the import of oil rigs to Nigeria.[70] Thomas O'Rourke, a former controller and head of internal audit at Noble, allegedly helped approve the bribe payments and allowed them to be booked improperly.[71]

O'Rourke settled the SEC's charges.[72] Jackson and Ruehlen moved to dismiss, contending that the SEC failed adequately to plead (1) the identity of a specific foreign official, either by name or position; (2) that the payments in question were not facilitating payments; (3) and that the defendants acted corruptly; they also contended (4) that the FCPA's facilitation payments exception is unconstitutionally vague; and (5) that the SEC's action had been brought in an untimely manner.[73]

United States District Judge Keith Ellison of the Southern District of Texas rejected the defendants' argument that the government must plead the identity of the intended bribe recipient. While acknowledging tension between this ruling and oral statements made by Judge Lynn Hughes in the *O'Shea* matter concerning the need of the defendant to know the precise identity of the foreign official to be bribed,[74] Judge Ellison explained that requiring the government to plead the identity of the recipient would create a perverse incentive for the defendant to "simply avoid liability by ensuring that his agent never told him

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65. *See U.S. v. Goncalves,* 09-cr-335, Gov't's Motion to Dismiss Pursuant to Fed. R. Crim. P. 48(a) (D.D.C. Mar. 27, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/goncalvesa/2010-03-05-goncalvesa-government-motion-to-dismiss-as-to-alvirez-spiller-geri.pdf.

66. *See* Christopher M. Matthews, "Cooperator Gets 18 Months in Complicated Bribery Case," *The Wall Street Journal* (July 31, 2012), http://blogs.wsj.com/corruption-currents/2012/07/31/cooperator-gets-18-months-in-complicated-bribery-case/. In sentencing Bistrong to a prison term over the DOJ's recommendation of probation in light of Bistrong's cooperation, U.S. District Judge Leon remarked: "We certainly don't want the moral of the story to be: Steal big. Violate the law big. Cooperate big. Probation." *Id.*

67. "A Guest Post from the Africa Sting Jury Foreman," *FCPA Professor* (Feb. 6, 2012), http://www.fcpaprofessor.com/a-guest-post-from-the-africa-sting-jury-foreman.

68. *See* DOJ United States Attorneys Manual § 9-27.220, "Grounds for Commencing or Declining Prosecution," http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220.

69. DOJ Press Rel. No. 10-1251, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html; SEC Press Rel. No. 2010-214, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm.

70. *SEC v. Jackson et al,* 12-cv-00563, Complaint (S.D. Tex. Feb. 24, 2012), https://www.sec.gov/litigation/complaints/2012/comp-pr2012-32-2.pdf; SEC Litig. Rel. No. 22290, SEC Charges Three Executives At Noble Corporation With Bribing Customs Officials In Nigeria (Mar. 14, 2012), http://www.sec.gov/litigation/litreleases/2012/lr22290.htm.

71. *SEC v. O'Rourke,* 12-cv-00564, Complaint (S.D. Tex., Feb. 24, 2012), https://www.sec.gov/litigation/complaints/2012/comp-pr2012-32-1.pdf; SEC Litig. Rel. No. 22290, note 70, *supra.*

72. SEC Litig. Rel. No. 22290, note 70, *supra.*

73. *SEC v. Jackson,* 12-cv-00563, Memorandum and Order at 18 (S.D. Tex. Dec. 11, 2012).

74. *See id.* at 25 n. 10.

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which official was being targeted and what precise action the official took in exchange for the bribe."[75]

As to whether the SEC was required – and failed – to plead that the FCPA's facilitating payments exception was not applicable, the district court held that, although the SEC must negate the exception, its pleadings easily do so with respect to certain allegations.[76] However, the court found that the SEC failed to allege facts sufficient to support the allegation that certain decisions of the Nigerian officials that were influenced by payments were discretionary rather than routine and thus outside the scope of the facilitating payments exception. The court granted the SEC leave to amend its complaint in this regard.[77]

The district court then rejected the defendants' motion to dismiss on the ground that the SEC had failed to allege that the defendants acted "corruptly," explaining that the SEC was required to allege in this respect that the defendant acted with wrongful purpose and was aware of the general illegality of his actions.[78] The court also rejected the void-for-vagueness argument concerning the FCPA's facilitating payments exception,[79] and left intact all charges regarding violations of the FCPA's accounting provisions, as well as control person and aiding and abetting liability.[80] Finally, the district court rejected most of the defendants' statute of limitations arguments, granting the SEC leave to amend its complaint to plead (1) the existence of tolling agreements that would extend the limitations period to mid-2006; and (2) that it acted diligently in bringing the complaint upon discovery of the defendants' alleged fraudulent concealment.[81] The court also rejected the defendants' argument that the continuing violations doctrine does not apply and deferred a ruling on whether injunctive relief requested by the SEC is governed by the five-year statute of limitations.[82]

2. Garth Peterson

Criminal and civil charges levied against Garth Peterson, the former managing director of Morgan Stanley's real estate business, alleged that he conspired with a Chinese official secretly to acquire millions of dollars worth of real estate investments from Morgan Stanley's funds for themselves and a third party. In return for paying themselves almost $2 million disguised as finder's fees, the Chinese official agreed to steer business to Peterson and Morgan Stanley, according to the government's charges.[83]

Peterson pleaded guilty to the criminal indictment and, in August 2012, was sentenced by U.S. District Judge Jack Weinstein of the Eastern District of New York to nine months imprisonment (far below the 51 months requested by the prosecution), followed by three years of supervised release.[84] Peterson also agreed to a civil settlement with the SEC, pursuant to which he must pay more than $250,000 in disgorgement, and will be permanently barred from the securities industry and must relinquish his interest in approximately $3.4 million worth of Shanghai real estate acquired through his alleged misconduct.[85]

C. Noteworthy Sentences in 2012

Many of the defendants sentenced for FCPA violations in 2012 were executives, employees or agents of corporate entities that had previously settled FCPA enforcement actions. The government's increasing frequency in prosecuting these individuals suggests that its strategy of using the blueprint of corporate resolutions to pursue company employees for the same conduct is paying large dividends and has become a mainstay of FCPA enforcement.

Overall, 16 individual defendants were sentenced by federal district courts following guilty pleas or convictions for FCPA-related

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75. *Id.* at 21.
76. *Id.* at 31-34.
77. *Id.* at 34-36.
78. *Id.* at 36-39.
79. *Id.* at 40-41.
80. *Id.* at 41-48
81. *Id.* at 48-55. The district court's ruling on the "fraudulent concealment" issue is of particular relevance because the Supreme Court is currently reviewing the Second Circuit's decision in *SEC v. Gabelli,* 653 F.3d 49 (2011), *cert. granted,* 133 S. Ct. 97 (2012). The Second Circuit had held that the SEC's claim based on fraud does not accrue until the government discovers the fraud, thus tolling the five-year statute of limitations governing 28 U.S.C. § 2462. *Id.* at 60. The Supreme Court's grant of certiorari signals a clarification of and possible shift in the continued use of the "accrual discovery rule" in civil cases may be in the offing.
82. *Jackson,* 12-cv-00563, Memorandum and Order at 55-60.
83. DOJ Press Rel. No. 12-534, note 6, *supra*; SEC Press Rel. No. 2012-78, note 56, *supra*.
84. *U.S. v. Peterson,* 1:12-cr-00224, Judgment (E.D.N.Y. Aug. 28, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/petersong/petersong-judgment.pdf.
85. SEC Press Rel. No. 2012-78, note 56, *supra*.

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wrongdoing in 2012. Several of these defendants received significant sentences; the longest prison term – nine years – was imposed on a Haitian public official who was found guilty of money laundering in connection with the receipt of proceeds from a bribery scheme.

1. Bonny Island TSKJ Bribery Scheme

Three key players involved in substantial bribe payments in connection with the Bonny Island, Nigeria TSKJ joint venture – which collectively produced the largest FCPA enforcement action in history, with cumulative corporate fines and penalties exceeding $1.7 billion – were sentenced in 2012. Jack Stanley, a former CEO and director of Kellogg, Brown & Root LLC, one of the four Bonny Island joint venture partners, had pleaded guilty in 2008 to conspiring to violate the FCPA and to committing mail and wire fraud and subsequently cooperated with the DOJ's investigation.[86] In 2012, Stanley was sentenced by the federal district court in Houston to 30 months in prison, to be followed by three years of supervised release; he was ordered to pay $10.8 million in restitution to KBR.[87] Wojciech Chodan, a former commercial vice president and consultant to a U.K. subsidiary of KBR, and Jeffrey Tesler, who was hired as an agent of the joint venture, were both extradited from the United Kingdom to face charges in the United States in 2010 and subsequently pleaded guilty to FCPA violations.[88] In 2012, Chodan was sentenced to one year in prison and a fine of $20,000,[89] while Tesler received a 21-month sentence, followed by two years of supervised release, and a $25,000 fine.[90] Chodan and Tesler had previously also agreed to forfeit approximately $727,000 and $149 million, respectively.[91]

2. Former Control Components Inc. Executives

The DOJ last year secured guilty pleas of four former executives of Control Components Inc. (CCI). CCI, a valve maker based in California, had pleaded guilty in 2009 to FCPA and Travel Act violations in connection with improper payments in 36 countries. The four former executives who entered into plea agreements admitting violations of the FCPA and were sentenced by the United States District Court for the Central District of California in 2012 held senior positions in the company at the time of the illegal payment scheme.[92] The defendants received sentences ranging from six months in prison (for the former CEO) to home confinement,[93] and each defendant was fined $20,000.

3. Former Latin Node, Inc. Employees

Three former employees of the telecommunications company Latin Node, Inc., which pleaded guilty to FCPA violations in connection with payments in Honduras and Yemen in 2009,[94] were sentenced in 2012. The former Latin Node executives were arrested in 2010, with each pleading guilty to one count of conspiracy to violate the FCPA.[95] In 2011, the company's former CEO, Jorge Granados, was sentenced to just under four

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86. DOJ Press Rel. No. 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.

87. *U.S. v. Stanley,* 4:08-cr-00597, Judgment (S.D. Tex., Mar. 1, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/stanleya/2012-03-01-stanleya-judgment.pdf.

88. DOJ Press Rel. No. 10-1391, UK Citizen Pleads Guilty to Conspiring to Bribe Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Dec. 6, 2010), http://www.justice.gov/opa/pr/2010/December/10-crm-1391.html; DOJ 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.

89. *U.S. v. Tesler,* 4:09-cr-00098, Judgment (S.D. Tex., Feb. 27, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/tesler/2012-02-27-teslerj-chodan-judgment.pdf.

90. *Id.*

91. DOJ Press Rel. No. 10-1391, note 88, *supra*; DOJ Press Rel. No. 11-313, note 88, *supra*.

92. *See U.S. v. Carson,* 8:09-cr-00077, Plea Agreement for Defendant Hong Carson (C.D. Cal. Apr. 16, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/2012-04-16-carson-rose-plea-agreement.pdf; *U.S. v. Carson,* 8:09-cr-00077, Plea Agreement for Defendant Stuart Carson (C.D. Cal. Apr. 16, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/2012-04-16-carson-stuart-plea-agreement.pdf; *U.S. v. Carson,* 8:09-cr-00077, Plea Agreement for Defendant Paul Cosgrove (C.D. Cal. May 25, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/2012-05-25-cosgrove-plea-agreemnt.pdf; *U.S. v. Carson,* 8:09-cr-00077, Plea Agreement for Defendant David Edmonds (C.D. Cal. June 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/2012-06-14-edmonds-plea-agreement.pdf.

93. *See U.S. v. Carson,* 8:09-cr-00077, Judgment (C.D. Cal. Sept. 14, 2012); *U.S. v. Carson,* 8:09-cr-00077, Judgment (C.D. Cal. Nov. 7, 2012).

94. DOJ Press Rel. No. 09-318, Latin Node Inc., Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), http://www.justice.gov/opa/pr/2009/April/09-crm-318.html. Latinode's corporate parent, eLandia International Inc. had disclosed the potential FCPA violations to the DOJ after acquiring Latinode and discovering the improper payments post-closing. *Id.*

95. *See U.S. v. Salvoch,* 10-cr-20893, Plea Agreement (S.D. Fla. Jan. 12, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/salvoch/01-12-11salvoch-plea.pdf; *U.S. v. Vasquez,* 10-cr-20894, Plea Agreement (S.D. Fla. Jan. 21, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/vasquezjp/01-21-11vasquez-juan-plea.pdf; *U.S. v. Granados,* 1:10-cr-20881, Granados Plea Agreement (S.D. Fla. May 19, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/granados-jorge/05-19-11granados-plea.pdf; *U.S. v. Granados,* 1:10-cr-20881, Caceres Plea Agreement (S.D. Fla. May 20, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/cacercesj/2011-05-20-cacercesj-plea-agreement.pdf.

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years in prison and to two additional years of supervised release.[96] The remaining three executives were sentenced in 2012. Manuel Caceres, responsible for developing the company's business in Honduras, was sentenced to 23 months in prison and one year of supervised release.[97] Manuel Salvoch, the company's former CFO who, according to the DOJ, was principally tasked with facilitating the bribe payments to the relevant government officials, was sentenced to 10 months in prison and three years of supervised release.[98] The only individual defendant to avoid prison time, Juan Pablo Vasquez, who was responsible for the company's long-distance commercial and sales relationships, was sentenced to three years probation and a $7,500 fine.[99]

4. Money Laundering Sentences in Haiti Teleco Matter

The long-running investigation and prosecution of participants in the Haiti Teleco corruption scheme – which has now embroiled two Florida-based telecommunications companies and several Haitian government officials – produced one new indictment (that of the fugitive Cecilia Zurita) in 2012, as well as one guilty plea and one conviction for money laundering offenses committed by alleged bribe recipients.

In May 2012, Jean Rene Duperval, a former director of Haiti Teleco, a state-owned telecommunications company, was sentenced by the United States District Court for the Southern District of Florida to nine years in prison and three years of supervised release and ordered to forfeit nearly $500,000 in ill-gotten gains. A federal jury had convicted Duperval in March 2012 of 21 counts of money laundering for funneling bribes amounting to approximately $500,000 from two Miami-based telecommunications companies to himself through two shell companies.[100] Assistant Attorney General Breuer announced that the length of the sentence "sends a strong message to foreign officials and others who would facilitate foreign corruption that they will face serious consequences."[101]

Like Duperval, Patrick Joseph also served as an official at Haiti Teleco as director of international relations. Joseph pleaded guilty in 2012 to conspiracy to commit money laundering and was sentenced to one year and one day in prison. Pursuant to the plea agreement, Joseph also agreed to forfeit $956,000 in apparent bribes he received from the telecommunications companies.

Duperval and Joseph were not charged with violations of the FCPA, which prohibits the payment of bribes to foreign officials. Instead, as the alleged recipients of bribes and possible interlocutors, prosecutors indicted these "foreign officials" pursuant to U.S. anti-money laundering laws, a tactic the DOJ has been increasingly using when it is unable to meet the FCPA's jurisdictional requirements.

D. Jurisdictional Hurdles in Prosecutions of Foreign Nationals

The past year has also illustrated the difficulty for both the DOJ and the SEC in bringing to trial defendants located abroad. Several former executives or agents of Siemens AG and Siemens Argentina, who were criminally charged in late 2011 with FCPA violations and are each foreign nationals residing abroad, have refused voluntarily to appear before the U.S. courts or even to enter the United States. None of the defendants has been arraigned, and the prospects for extradition appear uncertain at best.

The SEC, having civilly charged several of the same individuals, served a summons in *The International Herald Tribune* in June,[102] which prompted one former Siemens manager to file a motion to dismiss, asserting the U.S. district court's lack of personal jurisdiction and a statute of limitations defense.[103]

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96. *U.S. v. Granados,* 1:10-cr-20881, Judgment (S.D. Fla. Sept. 13, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/granados-jorge/09-13-11granados-judgment.pdf.
97. *U.S. v. Granados,* 1:10-cr-20881, Indictment (S.D. Fla. Dec. 21, 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/granados-jorge/12-21-10granados-indict.pdf.
98. *U.S. v. Salvoch,* 10-cr-20893, Statement of Offense (S.D. Fla. Jan. 12, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/salvoch/01-12-11salvoch-statement.pdf.
99. Richard L. Cassin, "No Prison For LatiNode Exec," *FCPA Blog* (Apr. 25, 2012), http://www.fcpablog.com/blog/2012/4/25/no-prison-for-latinode-exec.html.
100. DOJ Press Rel. No. 12-310, Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies (Mar. 13, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-310.html.
101. *See* DOJ Press Rel. No. 12-656, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012), http://www.justice.gov/opa/pr/2012/May/12-crm-656.html. *See also United State v. Duperval,* 09-CR-21010, Judgment (S.D. Fla. May 22, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/esquenazij/2012-05-22-dupervaljr-judgment.pdf.
102. Christopher M. Matthews, "SEC to Serve Former Siemens Execs through Newspaper in FCPA Case," *The Wall Street Journal* (June 20, 2012), http://blogs.wsj.com/corruption-currents/2012/06/20/sec-to-serve-former-siemens-execs-through-newspaper-in-fcpa-case/.
103. Richard L. Cassin, "From Siemens 8, Sharef settles with SEC, Steffen fights," *FCPA Blog* (Oct. 22, 2012), http://www.fcpablog.com/blog/2012/10/22/from-siemens-8-sharef-settles-with-sec-steffen-fights.html#.

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The SEC's suit against three former Magyar Telekom executives also charged in late 2011 with FCPA violations relating to alleged payments in Eastern Europe is facing similar jurisdictional hurdles. The defendants have moved to dismiss based on an alleged lack of personal jurisdiction and have asserted that the alleged wrongful acts did not satisfy the territorial jurisdictional requirements of the FCPA.

The courts in the Siemens and Magyar Telekom matters have yet to rule on these motions, but, as we predicted in last year's annual FCPA review, further personal and subject matter jurisdictional challenges, as well as extradition issues and the questions about default judgments and trials *in absentia*, may arise as more individual defendants who reside outside the United States are charged under the FCPA.

E. Upcoming Appellate Review in *Bourke* and *Esquenazi/Rodriguez*

Three individuals previously convicted of FCPA violations have sought appellate review of their convictions. Frederic Bourke was sentenced in 2009 by a federal court in the Southern District of New York to one year and one day for payments he made as an investor in connection with a planned acquisition of a previously state-owned oil company in Azerbaijan.

Having lost two appeals in the United States Court of Appeals for the Second Circuit challenging his conviction, including in December 2011, when the appellate court held that Bourke acted with requisite knowledge by showing willful blindness to the risk that his investment would be used to pay bribes,[104] Bourke in October 2012 petitioned the Supreme Court of the United States to review the Second Circuit's judgment and its rulings concerning, among other matters, the district court's jury instruction on "willful blindness".[105]

In his petition for review, Bourke invoked the Court's 2011 decision in *Global-Tech Appliances, Inc. v. SEB S.A.,* a patent case holding that willful blindness requires that "(1) the defendant must subjectively believe that there is a high probability that [the] fact [at issue] exists and (2) the defendant must take deliberate actions to avoid learning of the fact." Bourke asserts that the "willful blindness" jury instruction in his case failed to comport with the requirement that the defendant took deliberate action to avoid knowledge (which exceeds mere negligence or even recklessness).

Meanwhile, the United States Court of Appeals for the Eleventh Circuit is expected in *Esquenazi/Rodriguez* to weigh in on the repeatedly litigated statutory interpretation of the term "instrumentality" of a foreign government, and thus on the scope of the term "foreign official." Although the federal district courts that have addressed statutory challenges on this point have sided with the government's argument that such inquiries must be fact-dependent, the Eleventh Circuit will be the first federal appellate court squarely to address this question.[106]

Joel Esquenazi and Carlos Rodriguez were convicted of FCPA and money laundering offenses in 2011 in connection with payments to officials at Haiti Teleco, a state-owned telecommunications company. They appealed, alleging that Haiti Teleco is not an instrumentality of the government of Haiti (and thus its employees are not "foreign officials") as a matter of law. Esquenazi and Rodriguez argue in relevant part that "state-owned or state-controlled entities that are not political subdivisions that perform governmental functions should not be granted the status of 'instrumentality.'"[107] The government, in turn, recites in its brief the factors applied by multiple district courts and outlined in its FCPA Guidance that turn the issue of whether a state-owned enterprise is an "instrumentality" of the foreign government into a multi-factor inquiry, including (1) whether the entity provides services to the citizens and inhabitants of the country; (2) whether its key officers and directors are government officials or are appointed by government officials; (3) the extent of the government's ownership of the company, including whether the government owns a majority of the company's shares; (4) the company's obligations and privileges under the country's law; and (5) whether the company is widely perceived and understood to be performing official or governmental functions.[108]

However the Eleventh Circuit decides the issue, its ruling is likely to have a lasting impact on FCPA prosecutions going forward.

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104. *U.S. v. Kozeny,* 667 F.3d 122, 127-134 (2d Cir. 2011).

105. Petition for Writ of Certiorari, *Bourke v. United States,* No. 12-531 (filed Oct. 25, 2012) [hereinafter, "Bourke Petition"].

106. *U.S. v. Esquenazi,* 11-15331-C, Corrected Brief of Appellant at 39-40 (11th Cir. May 31, 2012); *U.S. v. Esquenazi,* 11-15331-C, Brief for the United States (11th Cir. Aug. 21, 2012).

107. *Esquenazi,* 11-15331-C, Corrected Brief of Appellant at 39-40.

108. *Id.*

VI. Developments Outside the United States

A. UK Bribery Act

1. The Impending Introduction of DPAs

There had been relatively little anti-corruption news from the United Kingdom since the Bribery Act ("UKBA") entered into force on July 1, 2011. But the past year ended with a flurry of activity at both the Ministry of Justice ("MOJ") and the Serious Fraud Office ("SFO"), with both entities making important policy announcements that could have far-reaching implications for future UKBA enforcement.

In May, the MOJ published a consultation paper seeking views on its proposal to introduce deferred prosecution agreements ("DPAs") in England and Wales.[109] While the MOJ recognized that there were "opportunities to learn from" the U.S. model, it chose to follow its own approach in light of the different constitutional arrangements and legal traditions in England and Wales, which would ensure "better transparency and greater judicial involvement in the process."[110]

At least in the first instance, DPAs, according to the MOJ proposal, would be limited to economic crimes, such as fraud, bribery and money laundering, committed by commercial organizations. Judicial oversight of the DPA process would take place in two stages: (1) a preliminary hearing, held in private, where a judge would assess whether the terms of the proposed DPA are "fair, reasonable, adequate, and in the public interest" and thus in "the interests of justice," and (2) an approval hearing, at which point the agreed DPA would be returned for final judicial approval in open court, with the terms of the DPA published (subject to certain restrictions). In the event an entity were to fail to comply with the DPA, the MOJ proposed that the terms and conditions of the DPA could be renegotiated, formal breach proceedings could be brought, or the original prosecution would be revived.[111]

Following overwhelmingly favorable responses to the MOJ's consultation, the MOJ announced in October 2012 that it would introduce DPAs through an amendment to the Crime and Courts Bill, heralding "the next instrument in the battle against economic crime."[112] The government will also require the Director of Public Prosecutions and the Director of the SFO to develop and publish a DPA Code of Practice for Prosecutors, which would set out the factors which prosecutors should consider before entering into a DPA, as well as sentencing guidelines and specific criminal procedure rules to help govern the DPA process.[113] The government expects the DPA proposal to be passed into law and available for use by the start of 2014.

2. The SFO Reasserts Its Primary Function as a Prosecuting Agency

Also in October, the SFO announced changes to its policies and guidance concerning enforcement of the UKBA.[114] The revised policies aim to "restate the SFO's primary role as an investigator and prosecutor of serious or complex fraud," ensure consistency with other prosecutorial agencies, and respond to criticism from the OECD.[115] The SFO's new posture heightens the need for businesses to ensure the existence of effective anti-corruption compliance programs that prevent violations of the UKBA.[116]

Notable policy shifts arose in a number of areas. *First,* the SFO announced that it would no longer provide advice to companies concerning its enforcement policies, either on a named or an anonymous basis, because it views such guidance as incompatible with its role as a prosecutorial agency.

Second, the SFO withdrew its official guidance from 2009 on self-reporting. Instead, the SFO announced that "[s]elf-reporting is no guarantee that a prosecution

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109. Ministry of Justice, "Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements" (May 2012), http://www.official-documents.gov.uk/document/cm83/8348/8348.pdf.

110. *Id.* at 19.

111. *See* Karolos Seeger, Matthew H. Getz & Lucy Grouse, "U.K. Ministry of Justice Publishes Consultation Paper on Deferred Prosecution Agreements," *FCPA Update,* Vol. 3, No. 10 (May 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=71aba13d-70d9-4e81-803b-4231ab73f0d1.

112. *See* Ministry of Justice, "Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organizations" at 3, 53 (Oct. 23, 2012), https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements [hereinafter, "MOJ Response"].

113. *Id.* at 53.

114. *See* Serious Fraud Office, Revised Policies (Oct. 9, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx.

115. *Id.*

116. *See* Lord Peter Goldsmith, Karolos Seeger, John Dockery & Matthew H. Getz, "U.K. Serious Fraud Office Issues New Bribery Act Policies," *FCPA Update*, Vol. 4, No. 3 (Oct. 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=8cc917ab-1009-43b3-b10a-78f694d59dc7.

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will not follow,"[117] which is a change from previous guidance that had expressed the SFO's goal to settle self-reported cases civilly whenever possible.[118] The shift is especially relevant because the SFO expects self-reporting companies to provide "all supporting evidence."[119]

Third, the SFO has now clearly expressed its desire to increase transparency in setting forth the terms of settlements: "if the SFO uses its [civil recovery] powers under the proceeds of crime legislation, it will publish its reasons, the details of the illegal conduct and the details of the disposal."[120]

Fourth, the SFO has withdrawn its previous endorsement of a six-step program for phasing out and eradicating facilitation payments and reiterated their illegality: "[f]acilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency."[121] Meanwhile, the SFO provided some measure of comfort by retaining its policy that "[b]ona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business."[122]

3. Enforcement of Pre-Existing Laws to Pursue Bribery and Corruption

Although the SFO has yet to bring a corporate prosecution under the UKBA, it employed pre-existing laws to pursue several criminal and civil actions in 2012. In March, the SFO obtained custodial sentences ranging from one to five years against four individuals who conspired to obtain corrupt payments in exchange for confidential information relating to oil and gas engineering and procurement projects in Iran, Egypt, Russia, Singapore and Abu Dhabi.[123]

In July, the SFO reached a civil settlement with Oxford Publishing Ltd. ("OPL"), a subsidiary of Oxford University Press ("OUP"), under which OPL agreed to pay just under £1.9 million and to the appointment of an independent monitor.[124] An internal investigation launched by OUP uncovered evidence that two subsidiaries of OPL may have paid bribes in order to win competitive tenders and / or secure contracts in the schoolbook market in East Africa. Because OPL voluntarily self-reported the discovery and cooperated in the investigation, and in light of the difficulty of obtaining evidence abroad for a successful prosecution, the SFO agreed to dispose of the case by means of a civil recovery.[125] The importance of this case lies both in the factors enumerated by the SFO as supporting its decision to pursue the case civilly, rather than criminally, as well as the increased transparency surrounding the settlement (the SFO published the relevant documents filed in court), which stands in contrast to previous civil settlements that had been criticized by the OECD Working Group on Bribery.[126]

The SFO rounded off the year by bringing charges against four senior UK-based executives of Swift Technical Energy Solutions Ltd. ("Swift"), the Nigerian subsidiary of a U.K. company that provides manpower for the oil and gas industry. The defendants were accused of conspiring to corrupt Nigerian tax officials by paying bribes of approximately £180,000 to Internal Revenue officials to avoid, reduce or delay Swift's required tax payments.

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117. Serious Fraud Office, "Corporate self-reporting" (Oct. 9, 2012), http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx [hereinafter, "SFO Corporate Self Reporting"].

118. *See* Debevoise & Plimpton Client Update, "UK Serious Fraud Office Releases Guidelines on Self-Reporting of Overseas Corruption" (Aug. 10, 2009), http://www.debevoise.com/files/Publication/7ffd9fba-bb35-4f35-863f-d785ce1fca29/Presentation/PublicationAttachment/617a98f9-6a1d-434e-b3dd-ef379f51c11a/UKSeriousFraudOfficeReleasesGuidelinesonSelfReportingofOverseasCorruption.pdf.

119. SFO Corporate Self Reporting.

120. *Id.*

121. Serious Fraud Office, "Facilitation Payments" (Oct. 9, 2012), http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx.

122. Serious Fraud Office, "Business Expenditure" (Oct. 9, 2012), http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/business-expenditure.aspx.

123. *See* SFO Press Rel., Four Guilty in £70 Million Contracts Corruption Case (Jan. 25, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-guilty-in-70-million-contracts-corruption-case.aspx; SFO Press Rel., Prison Terms for Corruption in Oil and Gas Contracts (Jan. 31, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/prison-terms-for-corruption-in-oil-and-gas-contracts-.aspx. *See also* Karolos Seeger, Matthew H. Getz & Lucy Norris, "SFO Successfully Prosecutes Four Individuals for Private Sector Corruption in Offshore Oil and Gas Projects," *FCPA Update,* Vol. 3, No. 8 (Mar. 2012), http://www.debevoise.com/files/Publication/77fb1c92-6867-4893-a5ea-22ac586e7bdf/Presentation/PublicationAttachment/3bbbefcb-7a82-428c-a453-85e4ff724780/FCPAUpdateMarch2012.pdf.

124. SFO Press Rel., Oxford Publishing Ltd to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African operations (July 3, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx.

125. *Id.*

126. Karolos Seeger, Matthew H. Getz & Michael Howe, "The SFO's Latest Bribery-Related Settlement," *FCPA Update,* Vol. 3, No. 12 (July 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=b3766732-ab24-44f7-bc43-b5cc2a308754.

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A preliminary hearing in the matter is set for February 2013.[127]

B. Russia

Although the ultimate proof of Russia's commitment to anti-bribery enforcement will lie in implementation of legislative and regulatory reforms, 2012 was a year of progress for anti-corruption efforts in Russia.[128] On February 1, 2012, Russia acceded to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[129] Joining the OECD Convention, which requires member states to criminalize the foreign bribe payments and encourages vigorous enforcement of anti-corruption laws, has been seen as a prerequisite for any country intent on demonstrating its anti-corruption enforcement *bona fides*.[130]

In March 2012, Russia signed into law then-President Dmitry Medvedev's proposal for a National Anti-Corruption Plan for 2012–2013.[131] The Plan imposed various tasks on the Russian government, including tasks to issue new regulations requiring disclosure by public officials of gifts received and business trips made as public officials,[132] to devise proposals for Russia's first lobbying regulations,[133] and to devise strategies to better identify and resolve public officials' potential conflicts of interest.[134] It remains to be seen how successfully the plan will achieve its goals.

The Bill No. 47244-6,[135] introduced by then-President Medvedev on April 3, 2012, passed through the legislative review and was adopted as a law on December 3, 2012.[136] As a result of the law, beginning January 1, 2013 officials of state and municipal bodies, state corporations, and enterprises established by the state are required to provide information on their spouse's and minor children's expenditures if the amount of such expenditures exceeds their total income over the three previous years. Failure to report expenditures may result in dismissal of that official. Currently there is an initiative to develop this regulation further and expand the list of persons required to declare their income and expenditures by adding adult children, parents, brothers and sisters, grandfathers and grandmothers, grandchildren, adoptive parents and adopted children. The relevant bill is being considered by the State Duma and is included in the legislative plan for December 2013.[137]

Russian anticorruption efforts resulted in the initiation of a number of major anticorruption cases in 2012 including:

- Oboronservis case[138] – in October 2012 the Chief Military Department of the Investigation Committee initiated five criminal cases for fraud connected with the disposal of state property by OJSC Oboronservis, a company controlled by the Ministry of Defense; this resulted in the dismissal of the Minister of Defense, Anatoly Serdyukov. The investigation is currently underway, and several people have been arrested.

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127. SFO Press Rel., Four charged in Nigerian corruption investigation (Dec. 17, 2012), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-charged-in-nigerian-corruption-investigation.aspx.

128. According to the Transparency International Corruption Perception Index (CPI), which gives a rating of how transparent a government's activities are to the public and how effective the fight against corruption is, in 2012 Russia gained 28 points out of 100 and was placed in 133rd position out of 176 countries, which shows a low level of corruption perception and low effectiveness of the fight against corruption. *See* Transparency Int'l, "Corruption Perceptions Index 2012," http://cpi.transparency.org/cpi2012/results/. But compared with previous results, Russia's CPI has steadily been growing since 2010. *See* Transparency Int'l, "Corruption Perceptions Index 2011," http://www.transparency.org/cpi2011/results (143rd); Transparency Int'l, "Corruption Perceptions Index 2010," http://www.transparency.org/cpi2010/results (154th).

129. Gillian Dell, "Russia Confirms Plans to Join the OECD Convention Against Bribery," *Transparency International Blog* (Feb. 6, 2012), http://blog.transparency.org/2012/02/06/russia-confirms-plans-to-join-the-oecd-convention-against-bribery/.

130. Organisation for Economic Co-operation and Development, "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," http://www.oecd.org/daf/briberyininternationalbusiness/oecdantibriberyconvention.htm.

131. *See* "Executive Order on National Anti-Corruption Plan for 2012–2013: Dmitry Medvedev signed Executive Order *On the National Anti-Corruption Plan for 2012-2013 and Amendments to Certain Acts of the President of the Russian Federation on Countering Corruption*" (Mar. 13, 2012), http://eng.kremlin.ru/news/3539.

132. Item 2 of National Anti-Corruption Plan for 2012–2013.

133. Item 15 of National Anti-Corruption Plan for 2012–2013.

134. Item 18 of National Anti-Corruption Plan for 2012–2013.

135. Another bill on the similar topic was tabled. See Bill No. 2832-6.

136. Federal Law No. 230-FZ on Oversight of Conformity between Expenditures and Income of Officials and Other Persons dated December 3, 2012.

137. Bill No. 139518-6 on Amendments to the Federal Law "On Combating Corruption" and some legislative acts of the Russian Federation, http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=139518-6&02) [Russian].

138. "Fraud Cases against Officials of the Ministry of Defense are Initiated," *View Business News* (Oct. 25, 2012), http://vz.ru/news/2012/10/25/604165.html [Russian].

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- Ministry of Regional Development case[139] – the theft of roughly 180 million rubles (approximately USD $6 million) in the course of preparation for the APEC summit in Vladivostok was discovered in November 2012. The Minister of Regional Development, Oleg Govorun, resigned. The investigation is currently underway, and the Deputy Minister of Regional Development has been charged with fraud.
- Russian Space Systems case[140] – in November 2012 the Ministry of Internal Affairs opened a criminal case to look into the abuse of authority in the execution of state contracts for the GLONASS system by state-owned company OJSC Russian Space Systems, resulting in the resignation of the General Director of Russian Space Systems, Yuriy Urlichich. The investigation is currently underway and to date, no one has been arrested or charged.
- Rosagroleasing case[141] – in spring 2012, the Ministry of Internal Affairs initiated a criminal case for fraud against the state company Rosagroleasing and its branch offices in connection with the illegal acquisition and laundering of budget subsidies of up to 150 million rubles (approx. USD $5 million) while supplying agricultural goods. The investigation is currently underway, and several senior managers of Rosagroleasing have been arrested. Russia's former Minister of Agriculture, Elena Skrynnik, is also suspected of participation in the scheme.

C. Italy

In November 2012, Italy also enacted anti-corruption legislation. The new anti-corruption law provides for the creation of an agency, the National Anti-Corruption Authority ("NACA"), to coordinate anticorruption efforts, as well as numerous other measures, including increased penalties for corruption and whistleblower protections.[142] The law incorporates changes recommended by the OECD Working Group on Bribery and the Council of Europe Group of States Against Corruption, and builds on Italy's prior anti-corruption measures (both by augmenting existing provisions and by enacting new measures).

D. Mexico

Mexico took steps to strengthen its anti-corruption enforcement by enacting the Ley Federal Anticorrupción en Contrataciones Públicas ("LFACP") (Federal Law Against Corruption in Public Procurement), which entered into force in June 2012.[143] The LFACP creates a parallel non-criminal enforcement system in Mexico, pursuant to which domestic and foreign companies (as well as individuals) participating in federal public contracts can be sanctioned administratively for bribing Mexican officials. The LFACP also prohibits Mexican individuals or companies from bribing foreign public officials (*i.e.,* non-Mexican officials) in international commercial transactions. Violators of the LFACP may face financial penalties and potential blacklisting from participating in federal government procurement.[144]

E. Hong Kong

There was also an uptick in high profile anti-corruption activity in the Hong Kong Special Administrative Region ("SAR"). In March, the co-chairmen of Sun Hung Kai Properties, the second largest property developer in the world, as well as a senior official in the SAR government, were arrested and charged with a series of offenses, including conspiracy to offer advantages to a public servant and misconduct in public office.[145] The Independent Commission against Corruption ("ICAC") alleged that the government official received substantial

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139. "APEC -12: Criminal cases for 90 Million Rubles," *Interfax* (Nov. 8, 2012), http://www.interfax.ru/society/txt.asp?id=274965 [Russian].
140. "Case GLONASS has no suspects," *Interfax* (Nov. 13, 2012), http://www.interfax.ru/society/txt.asp?id=275536 [Russian].
141. "Director General of the branch Rosagroleasing was sent to house arrest," *Investia* (Dec. 7, 2012), http://izvestia.ru/news/541092 [Russian].
142. Disposizioni per la prevenzione e la repressione della corruzione e dell'illegalità nella pubblica amministrazione ("Provisions for the prevention and combating of corruption and illegality in public administration") (C. 4434-B), Art. 1(2), 3, 12, 19(1), http://www.camera.it/_dati/leg16/lavori/stampati/pdf/16PDL0064270.pdf [Italian].
143. Official Federal Daily Gazette, Decree Issuing the Federal Law Against Corruption in Public Procurement (June 11, 2012), http://dof.gob.mx/nota_detalle.php?codigo=5251641&fecha=11/06/2012 [Spanish].
144. Federal Law Against Corruption in Public Procurement (June 11, 2012), http://www.diputados.gob.mx/LeyesBiblio/doc/LFACP.doc [Spanish].
145. ICAC Press Rel., Former Chief Secretary and Four Others Face ICAC Charges of Bribery and Misconduct (July 13, 2012), http://www.icac.org.hk/en/news_and_events/pr2/index_uid_1311.html [hereinafter, "ICAC Press Rel."]; "ICAC Releases Former CS & Kwok Brothers," *Radio Television Hong Kong* (Mar. 30, 2012), http://www.rthk.org.hk/rthk/news/englishnews/20120330/news_20120330_56_829856.htm; Kelvin Wong, "Sun Hung Kai Rode Boom to Become World's Second Largest," *Bloomberg* (Mar. 30, 2012), http://www.bloomberg.com/news/2012-03-29/sun-hung-kai-rode-boom-to-become-world-s-second-largest.html.

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amounts of cash and loans and the rent-free use of a luxury flat as a reward to remain favorably disposed to the real estate developers.[146] A preliminary hearing in October was adjourned until January 25, 2013 in order to give the prosecution time to collect evidence and appoint an overseas counsel to prosecute the case.[147] Prosecution and two defendants have appointed British barristers for the trial.[148] Both the former and current Chief Executive of the SAR have also come under scrutiny for alleged corruption,[149] and in July, the Secretary for Development resigned after twelve days on the job following his arrest for misuse of civil servant rent subsidies.[150] In May, the recently created Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests reported to the SAR government and made a number of recommendations to remedy insufficiencies in current controls.[151] These developments suggest that, after years of focusing on small-scale crimes and the private sector, the ICAC's new focus is on Hong Kong's wealthy business community and public officials.[152]

F. China

Last year was an important year for anti-corruption related issues in China. Developments included a high profile removal from office (in part related to corruption), a once-in-a-decade leadership transition which might signal a renewed focus on anti-corruption efforts by the Communist Party of China ("CPC") and a new interpretation of Chinese Criminal Law that could suggest future focus on bribe payers.

In a reaction to the reverse merger scandals of 2011, anti-corruption due diligence in China became more difficult in 2012 as the State Administration of Industry and Commerce ("SAIC") and provincial and local Administrations of Industry and Commerce restricted access to previously public corporate records[153] That trend is likely to continue. Perhaps the biggest story of 2012 (apart from the leadership changes brought in by the 18th National Congress of the CPC) was the removal of Chongqing Communist Party Chief Bo Xilai,[154] which focused attention on his family's business dealings. In the months following Bo's fall, *The New York Times* and *Bloomberg News* published several articles which, while not alleging any illegal activity, reported on the alleged family wealth of other members of China's political elite. These articles (which generally are not available in China), drew condemnations and threats of legal action from some of those concerned. The articles were based, at least in part, on publicly filed corporate documents and it is unlikely that these types of public records will become more available in the near future.

China also began its once-in-a-decade leadership transition at the 18th National Congress of the CPC. Wang Qishan, who as vice premier in the outgoing government was well known internationally for his expertise in finance and economic reform, was appointed to the party's Politburo Standing Committee as Secretary of the Central Commission for

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146. ICAC Press Rel.

147. Simpson Cheung and Austin Chiu, "Both sides seek out top overseas lawyers in Kwok brothers graft trial," *South China Morning Post* (Oct. 13, 2012), http://www.scmp.com/news/hong-kong/article/1059933/both-sides-seek-out-top-overseas-lawyers-kwok-brothers-graft-trial.

148. Austin Chiu, "Top QC David Perry approve to prosecute Kwok bribery trial" *South China Morning Post* (Nov. 14, 2012), http://www.scmp.com/news/hong-kong/article/1081828/top-qc-david-perry-approved-prosecute-kwok-bribery-trial.

149. Kent Ewing, "Corruption Cloud Hangs Over Hong Kong," *Asia Times Online* (Apr. 3, 2012), http://www.atimes.com/atimes/China/ND03Ad01.html; Keith Bradsher, "In Hong Kong, Rival Protests Are Divided Over Leader," *The New York Times* (Jan. 1, 2013), http://www.nytimes.com/2013/01/02/world/asia/thousands-protest-over-hong-kongs-leader.html?_r=0.

150. Joyce Ng, Clifford Lo, Colleen Lee, and Gary Cheung, "Minister Arrested By ICAC Resigns," *South China Morning Post* (July 13, 2012), http://www.scmp.com/article/1006609/minister-arrested-icac-resigns.

151. Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests Press Rel., Government Responds to Report of Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests (May 31, 2012), http://www.info.gov.hk/gia/general/201205/31/P201205310415.htm; Report of the Independent Review Committee for the Prevention and Handling of Potential Conflicts of Interests (May 2012), http://www.irc.gov.hk/pdf/IRC_Report_20120531_eng.pdf.

152. *See* Paul R. Berger, Philip Rohlik & Sarah Thomas, Recent Anti-Bribery Enforcement in Hong Kong," *FCPA Update,* Vol. 4, No. 1 (Aug. 2012), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=d7857ee2-488e-46f4-950a-f6d743f4672b.

153. *See, e.g.,* Dinny McMahon and Kathy Chu, "Clampdown in China on Corporate Sleuthing," *The Wall Street Journal* (July 19, 2012), http://online.wsj.com/article/SB10000872396390444097904577536483359775436.html.

154. David Barboza, "As China Official Rose, His Family's Wealth Grew," *The New York Times* (April 23, 2010), http://www.nytimes.com/2012/04/24/world/asia/bo-xilais-relatives-wealth-is-under-scrutiny.html?pagewanted=all.

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Discipline Inspection, the CPC's internal anti-corruption body. Although many had assumed that Wang would receive an economic portfolio, some commentators suggest that the appointment of a well known problem solver to the Discipline Commission highlights the importance of the fight against corruption to the CPC.

In the wake of the 18th Party Congress, there has been an outburst of press coverage in the Chinese state-controlled media on official corruption and other forms of impropriety, many of which were first exposed in online communities such as Sina Weibo, a microblogging service that is similar to Twitter. Officials who have been detained, arrested or placed under investigation range from low-level officials in Guangdong Province who stockpiled dozens of apartments to a deputy party chief of Sichuan Province accused of disciplinary violations in connection with real estate projects in Chengdu.[155] The newly reconstituted Central Commission for Discipline Inspection held a news conference in early January 2013 and pledged to pay close attention to whistle-blowing on the Internet and in the news media. On January 22, 2013, all seven members of the new Politburo Standing Committee attended the second plenary meeting of the 18th Central Commission for Discipline Inspection, where General Secretary Xi Jinping delivered a strongly-worded speech and vowed to crack down on corrupt officials.[156] PRC media has reported that the renewed attention on impropriety has led to an "unprecedented" rise in fire sales of luxury property across the country.[157]

Along with the increasing condemnation of corrupt officials in the political branches, the Supreme People's Court and the Supreme People's Procuratorate issued an interpretation on December 26, 2012 regarding the application of laws in criminal cases involving bribe paying.[158] The Interpretation expands on a December 2000 document, the Supreme People's Procuraturate's Provisions on the Prosecution Standards for Crimes of Offering Bribes, which specified that offering bribes in the amount of RMB 10,000 or greater should be prosecuted (and under limited circumstances and with certain aggravating factors, bribes under RMB 10,000 should also be prosecuted).[159] The new Interpretation is significant in that it is co-issued with the state's highest judicial organ and goes beyond the RMB 10,000 threshold, defining amounts corresponding to the "degrees" of "serious cases" of bribery and "especially serious cases" of bribery, which are punished more severely.[160] The Interpretation also sets forth "aggravating factors," including the bribery of officials with duties related to various industries ("food, drugs, production safety, environmental protection, etc.").[161] Although it is impossible to predict the future of Chinese anti-corruption enforcement, many, including commentators in mainland China,[162] have pointed out that the Interpretation could signal that judicial and prosecutorial organs, whose primary focus has been on bribe takers, are now intending to focus on bribe payers as well. This fact, combined with a perceived need in political circles to balance the largely one-sided condemnation of corrupt officials, could signal the beginning of a crackdown on bribe payers, something that should provide even more encouragement to the anti-corruption efforts of international companies doing business in China.

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155. A running list of corruption scandals publicized since the 18th Party Congress is available in English at "Chinese Officials Behaving Badly: New Dawn for China? Corruption crackdown nets big and small officials," *The South China Morning Post* (last updated Jan. 22, 2013), http://www.scmp.com/author/chinese-officials-behaving-badly.

156. "Xi Jinping vows to crack down on corrupt officials in China," *South China Morning Post* (Jan. 23, 2013), http://www.scmp.com/news/china/article/1133961/xi-jinping-vows-crack-down-corrupt-officials-china; Kenneth Zhai, "Communist Party Watchdog to Launch 5-year war on graft," *South China Morning Post* (Jan. 24, 2013), http://www.scmp.com/news/china/article/1134742/communist-party-watchdog-launch-5-year-war-graft.

157. Keith Zhai, "Cadres suspected of trying to offload luxury properties ahead of crackdown," *South China Morning Post* (January 25, 2013), http://www.scmp.com/news/china/article/1135381/cadres-suspected-trying-offload-luxury-properties-ahead-crackdown (citing report in China's *Economic Observer* regarding plan by Commission for Discipline Inspection to conduct checks of property holdings of party cadres).

158. "Interpretation on Criminal Bribery Cases Involving Bribe Offering," Fa Shi [2012] No. 22.

159. Provisions on the Prosecution Standards for Crimes of Offering Bribes (Dec. 7, 2000).

160. "Interpretation on Criminal Bribery Cases Involving Bribe Offering," Fa Shi [2012] No. 22. at Art. 2 and Art. 4.

161. *Id.*

162. Yang Weihan, "Supreme People's Court and Supreme People's Procuratorate Issue 'Interpretation on Several Issues Concerning Specific Application of Laws in Handling Criminal Cases Involving Bribe Offering,'" *Xinhua* (Dec. 31, 2012). The article is available (in Chinese) on the website of the Ministry of Supervison (the ministry charged with oversight of civil servants), http://www.mos.gov.cn/mos/cms/html/3/21/201301/26061.html.

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VII. Conclusion

The risks generated by the FCPA (and anti-corruption laws of other jurisdictions) to companies and individuals engaged in foreign bribery remain real. As corporate FCPA compliance overall has improved markedly over the years, so have expectations from the enforcement agencies as to what constitutes appropriate compliance mechanisms and effective systems of internal controls. With that in mind, companies and their senior officers and managers can ill afford to relax compliance standards or reduce the resources devoted to training, auditing, and remediation of compliance incidents.

Although settlements and filings in 2012 were both fewer and smaller than in the previous extraordinary years, this does not appear to signal a trend away from continued vigorous enforcement. Indeed, 2013 likely will produce again significant corporate enforcement actions with parallel or subsequent individual prosecutions. The SEC's Dodd-Frank whistleblower program also may begin to have a greater impact. And finally, DOJ and SEC resources previously devoted to formulating the Guidance are freed for other tasks, namely implementing the Guidance. All signs point to a busy year ahead.

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Debevoise Announces the Publication of
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We are pleased to announce the publication of the 2012/2013 Edition of "Defending Corporations and Individuals in Government Investigations," a valuable resource for white collar lawyers compiled and edited by Mark P. Goodman (http://www.debevoise.com/attorneys/detail.aspx?id=0d903f0e-fe29-4d94-bb1fac18b161375c& type=showfullbio) of Debevoise & Plimpton LLP and Daniel J. Fetterman (http://www.kasowitz.com/daniel-j-fetterman/) of Kasowitz, Benson, Torres & Friedman LLP. The book contains chapters authored by Mr. Goodman, Mr. Fetterman and prominent former prosecutors and leading white collar defense lawyers who share an insider's perspective gained from years of prosecuting and defending significant, high-profile and complex criminal and regulatory cases. This treatise provides in-house lawyers, outside counsel and compliance professionals with a practical, accessible guide to representing corporate and individual clients in white collar matters.

The book is now available from West at www.west.thomson.com (http://store.westlaw.com/defending-corporations-individuals-in-government-investigations-2012/172281/40824893/productdetail).

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- Former U.S. Attorney for the Southern District of New York John Martin says, "[b]oth in-house lawyers and outside counsel will benefit from the wisdom and experience of the outstanding group of lawyers who contributed to this exhaustive review of how to effectively defend companies and individuals in white collar matters."
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- Ben W. Heineman Jr., former General Electric General Counsel and Senior Vice President, now Distinguished Senior Fellow at Harvard Law School and lecturer at Yale Law School and Michael S. Solender, former Ernst & Young Americas Vice Chair and General Counsel, now lecturer at Yale Law School and Distinguished Visitor at Harvard Law School, say, "[w]e have used several chapters of 'Defending Corporations and Individuals in Government investigations' in our 'Challenges of a General Counsel' course at Yale and Harvard Law Schools. The book provides an excellent balance of underlying legal principles and practical, real-world answers to the types of tough questions in-house counsel have to grapple with regularly."

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