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The Total S.A. Action: Are Administrative Orders the SEC's FCPA Resolution of Choice for the Future?

I. Introduction

The Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") recently announced a $398 million settlement with Total S.A. ("Total"), a company organized and headquartered in France whose American Depositary Receipts trade on the NYSE.[1] The settlement consisted of $153 million in disgorgement, as agreed in a settled SEC order, and a $245.2 million penalty, as agreed in a deferred prosecution agreement ("DPA") with the DOJ.[2]

With the combined settlement figure reaching nearly $400 million, Total was the largest FCPA settlement in years. It represents the fourth largest FCPA settlement on record and the third largest FPCA-related disgorgement to date.[3] Total is the third French company on the top 10 FCPA settlements list and the first new entry to the top 10 list since December 2011.[4]

As described in the SEC's administrative order, Total entered into an agreement with the National Iranian Oil Company ("NIOC") in 1995 to help develop multiple oil fields in Iran.[5] Prior to signing this contract, Total allegedly entered into a sham consulting agreement with an intermediary designated by an Iranian official in order to induce the Iranian official to use his influence with the NIOC to help Total secure the development contract. According to the order, under the "consulting agreement," Total paid the intermediary roughly $60 million from September 1995 to November 2004,[6]

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1. *In re Total, S.A.*, SEC Admin. Proc. No. 3-15338, Order Instituting Cease and Desist Proceedings (May 29, 2013) [hereafter, "Total Order"], ¶ 3, http://www.sec.gov/litigation/admin/2013/34-69654.pdf. *See also* SEC Press Rel. No. 2013-94, SEC Charges Total S.A. for Illegal Payments to Iranian Official, http://www.sec.gov/news/press/2013/2013-94.htm.
2. *See* SEC Press Rel. No. 2013-94, note 1, *supra*.
3. *See* "France's Total SA Cracks Our Top 10 List," *FCPA Blog* (May 29, 2013), http://www.fcpablog.com/blog/2013/5/29/frances-total-sa-cracks-our-top-10-list.html; "Total lands third on the Top 10 disgorgement list," *FCPA Blog* (May 31, 2013), http://www.fcpablog.com/blog/2013/5/31/total-lands-third-on-the-top-10-disgorgement-list.html.
4. *See* "France's Total SA Cracks Our Top 10 List," *FCPA Blog*, note 3, *supra*. *See, e.g., SEC v. Technip S.A.*, No. 4:10-cv-02289, Final Judgment (S.D. Tex. 2010); *United States v. Technip S.A.*, No. 10-cr-00439 (S.D. Tex. 2010); *SEC v. Alcatel-Lucent*, S.A., No. 10-cv-24620, Final Judgment (S.D. Fla. 2010); *United States v. Alcatel-Lucent, S.A.*, No. 10-20907 (S.D. Fla. 2010).
5. Total Order, note 1, *supra* at ¶ 1.
6. *Id.*

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mischaracterizing these payments as "business development expenses."[7] The development interests with the NIOC netted Total approximately $150 million in profits.[8]

Although the amount of the disgorgement and the overall settlement make the Total settlement noteworthy, it also highlights a potential trend in SEC FCPA enforcement—the increased use of administrative proceedings instead of civil court actions. After discussing a likely major driver of the use of administrative proceedings, *i.e.*, the uncertainty of federal court action on court-filed settlements requiring judicial approval, this article outlines the different resolutions available to the SEC in FCPA cases and highlights the key distinctions between a court-ordered injunction and an administrative cease-and-desist order. We also point out what companies should keep in mind about FCPA settlements achieved via administrative orders. Finally, we examine recent trends in SEC FCPA settlements and explain why companies should expect, as in Total, to see more FCPA cases settle through administrative proceedings.

II. Recent Court Actions and Policy Changes at the SEC

The use of administrative proceedings is noteworthy in an environment in which federal judges are increasingly questioning the merits of proposed settlements submitted by the SEC and defendants for approval. This trend began with an opinion by United States District Court Judge Jed S. Rakoff in late 2011, refusing to approve a proposed consent judgment submitted by the SEC and defendant Citigroup.[9] Judge Rakoff's opinion focused on the defendant's choice to neither admit nor deny the SEC's allegations in the submitted judgment. As the court stated: "it does not provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified…."[10]

Since Judge Rakoff's opinion in the *Citigroup* matter (presently on appeal),[11] several other federal district court judges have raised questions about proposed final judgments submitted by the SEC and defendants. A number of these judges have echoed Judge Rakoff's concerns about the "neither admit nor deny" language commonly found in SEC settlements.[12] Judges have also questioned the appropriateness of some equitable remedies sought—injunctions and disgorgement, in particular—imposing additional delays on the approval of settled orders.[13]

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7. *Id.* at ¶ 17.
8. *Id.* at ¶ 19.
9. *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011).
10. *Id.* at 332.
11. *SEC v. Citigroup Global Mkts. Inc.*, No. 11-5227 (2d Cir. 2013).
12. *See SEC v. CR Intrinsic Investors, LLC*, No. 12-cv-8466, Decision and Order (S.D.N.Y. Apr. 16, 2013). The court expressed concern over the "neither admit nor deny" language but also conveyed understanding of its usefulness to the SEC. Ultimately, the court granted approval of the Final Judgment; however, this approval is conditioned on the disposition of the pending Second Circuit appeal in *SEC v. Citigroup*. *Id.* at 9–11; *see also SEC v. Bridge Premium Finance, LLC*, No. 1:12-cv-02131-JLK-BNB, Order Denying Entry of Final Judgments, at 1 (D. Colo. Jan. 17, 2013) ("I refuse to approve penalties against a defendant who remains defiantly mute as to the veracity of the allegations against him.").
13. *See, e.g., SEC v. Koss*, No. 11-C-991, Letter from Judge Randa to SEC Seeking Additional Support for Final Judgments, at 2–3 (E.D. Wis. Dec. 20, 2011) (questioning the adequacy of injunctive relief and requesting a factual predicate for the disgorgement calculation to aid in determining its adequacy).

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In the wake of these cases, SEC Chairman Mary Jo White announced on June 18, 2013, that the Commission intends to scale back its use of the "neither admit nor deny" policy in "certain cases."[14] This announcement expands upon changes made to the SEC's "neither admit nor deny" policy in early 2012, which limited the policy's use in certain cases involving criminal wrongdoing.[15] Prior to the 2012 SEC policy changes, a "defendant could be found guilty of criminal conduct and, at the same time, settle parallel SEC charges while neither admitting nor denying civil liability."[16] In early 2012, Robert Khuzami, the then-Director of the SEC's Division of Enforcement, announced that, when settling cases in which the defendant has admitted to violations of criminal law in related criminal proceedings, the SEC would no longer allow the defendant to neither admit nor deny wrongdoing.[17]

As judicial review continues to inject uncertainty into the once perfunctory settlement approval process, the use of administrative proceedings to resolve FCPA violations may become a preferred forum for SEC settlements.

III. Resolutions Available to the SEC

FCPA violations are pursued by the SEC through civil actions and by the DOJ through both civil and criminal proceedings.[18] Although this article focuses on resolutions available to the SEC, the SEC and the DOJ frequently cooperate on FCPA matters through parallel civil and criminal proceedings. The DOJ also has exclusive criminal and civil enforcement authority with respect to violations of those provisions of the FCPA that relate to domestic concerns as well as to matters as to which the FCPA applies solely by reason of conduct committed in U.S. territory.[19]

After an FCPA inquiry or investigation, the SEC may choose not to pursue an enforcement action. In such situations, FCPA matters can be resolved in three ways: (1) a deferred prosecution agreement ("DPA"), (2) a non-prosecution agreement ("NPA"), or (3) a declination.[20] If the SEC chooses to file an enforcement action for FCPA-related violations, it has two options: (1) filing an enforcement action in United States District Court, or (2) bringing an administrative proceeding before the Commission.[21] In bringing FCPA charges, both methods allow the SEC to seek disgorgement of illegal profits, and now, as a result of the Dodd-Frank Act, civil monetary penalties.[22] Additionally, the SEC can pursue remedies that prohibit future violations of the law in both forums. This is accomplished through an injunction in federal court and through a cease-and-desist order in an administrative proceeding.[23] Below we discuss the differences between an administrative action and a federal court proceeding and the implications of the Commission's ability to obtain civil money penalties in administrative actions.

A. Elements of a Cause of Action

A key distinction between injunctions and cease-and-desist orders is the required

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14. Dina El Boghdady,, "SEC to Require Admissions of Guilt in Some Settlements," *Wash. Post* (June 18, 2013), http://www.washingtonpost.com/business/economy/sec-to-require-admissions-of-guilt-in-some-settlements/2013/06/18/9eff620c-d87c-11e2-a9f2-42ee3912ae0e_story.html. An email sent to SEC staff suggests that "certain cases" refers to those in which there is "egregious intentional misconduct" or the misconduct that harmed a large number of investors. *Id.*

15. *See* "Public Statement by SEC Staff: Recent Policy Change" (Jan. 7, 2012), http://www.sec.gov/news/speech/2012/spch010712rsk.htm.

16. *Id.*

17. *Id.*

18. U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" at 2 (Nov. 14, 2012) ("FCPA Resource Guide"), http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

19. *See* 15 U.S.C. §§ 78dd-1 and 78dd-2(a).

20. FCPA Resource Guide, note 18, *supra* at 76–77. In an NPA, the SEC agrees that it will not pursue an enforcement action based on the company's agreement to (1) cooperate truthfully and fully in the investigation and related actions and (2) comply with express undertakings. *Id.* at 77. In a DPA, the SEC agrees to forego an enforcement action based on undertakings made by the company. *Id.* at 76. These include the same undertakings required in an NPA as well as (1) entry into a long-term tolling agreement and (2) an agreement to admit or not to contest certain facts that the SEC can use to establish a violation of federal securities laws. *Id.* In a declination, the SEC decides to close an investigation without recommending enforcement action. *Id.* at 77.

21. *Id.* at 69; Securities Enforcement Remedies and Penny Stock Reform Act, Pub. L. No. 101-429, 104 Stat. 931 §§ 102, 201, 202, 301, 401, and 402 (1990). (codified in various sections of Title 15, United States Code).

22. *See* 15 U.S.C. § 78u (describing authority to impose monetary penalties and seek other equitable relief in actions filed in U.S. district courts); *id.* § 78u-3 (e) (describing authority to enter administrative order for accounting and disgorgement); Dodd-Frank Act § 929P(a)(2), amending 15 U.S.C. § 78u-2 (giving the SEC the power to seek civil monetary penalties in administrative proceedings).

23. 15 U.S.C. § 78u-3 (describing cease-and-desist authority in administrative actions); *id.* § 78u(d) (authorizing the SEC to bring an action seeking an injunction in the proper district court).

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showing by the SEC to obtain each form of relief. This distinction is most important when a defendant intends to contest the FCPA action instead of negotiating a settlement with the SEC.

> "[In contrast to injunction proceedings in federal court,] cease-and-desist orders…require a less stringent showing than reasonable likelihood of a future violation."

The SEC may bring an action to enjoin from committing future violations any person who engaged, or is about to engage, in any violations of federal securities laws.[24] To succeed in obtaining an injunction, the SEC is required to show that there is a "reasonable likelihood that the defendant will violate the securities laws in the future."[25] In determining whether a future violation is likely, courts typically consider several factors: (1) the isolated or recurrent nature of the conduct, (2) the degree of scienter exhibited by defendant, (3) the ability to violate the law in the future, and (4) the degree to which the wrongfulness of the conduct has been recognized.[26] To defend against an injunction in a contested FCPA action a defendant may argue either that there was no securities law violation or that there is no likelihood of future violation. Additionally, a few courts have become increasingly uncomfortable with "obey-the-law" injunctions that broadly direct defendants to refrain from any future violations of securities laws.[27]

Cease-and-desist orders, on the other hand, require a less stringent showing than reasonable likelihood of a future violation. Section 21C of the Exchange Act gives the Commission the power to enter cease-and-desist orders against a person who is violating, has violated, or is about to violate the federal securities laws.[28] This has been interpreted as requiring a showing of likelihood of a future violation that is considerably less stringent than that required to issue an injunction.[29]

B. Appeal

The differences in the two avenues of resolution also affect how defendants may appeal an unfavorable decision. At the conclusion of an SEC administrative proceeding, the administrative law judge ("ALJ") issues an "initial decision." To appeal, a defendant may file a petition for the Commission to review the decision.[30] The Commission renders judgment based on the submitted materials and issues a final order.[31] Only after entry of a final Commission order may the defendant appeal to a regional United States Court of Appeals.[32]

C. Rules in Proceedings

If the parties anticipate litigation instead of settlement, then the procedural rules in an administrative proceeding, which are distinct from those in federal court, are an important consideration.[33] If the SEC is seeking monetary penalties in a civil proceeding, then the defendant would have the right to a jury trial.[34] An administrative proceeding, on the other hand, proceeds in

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24. *Id.* § 78u(d).
25. *SEC v. Goble*, 682 F. 3d 934, 948 (11th Cir. 2012).
26. *SEC v. Calvo*, 378 F. 3d 1211, 1216 (11th Cir. 2004).
27. *See Goble*, 682 F. 3d at 949; *SEC v. Smyth*, 420 F.3d 1225, 1229 n.8, 1233 n.14 (11th Cir. 2005) (stating, albeit in dicta, that SEC "obey-the-law" injunctions were unenforceable).
28. 15 U.S.C. § 78u-3(a).
29. *See KPMG LLP v. SEC*, 289 F.3d 109, 124, 126 (D.C. Cir. 2002) (stating that there must be some likelihood of a future violation and ultimately accepting a negligence showing as sufficient with respect to scienter).
30. 17 C.F.R. § 201.410(a) (appeal of initial decisions by hearing officers to the Commission).
31. *Id.* § 201.460 (contents of the record).
32. *Id.* § 201.410(e) (petition to the Commission for review of initial decision is a prerequisite to seeking judicial review); see 15 U.S.C. § 78y(a)(1) (court of appeals may review final orders).
33. See 17 C.F.R. § 201, Subpart D – SEC Rules of Practice.
34. *See, Tull v. United States*, 481 U.S. 412, 418 (1987) (holding that there was a right to jury trial to determine liability for civil penalties under the Clean Water Act). *SEC v. Kopsky*, 537 F. Supp. 2d 1023, 1026 (E.D. Mo. 2008) (the SEC used the *Tull* decision to support its demand for a jury trial in this suit seeking a civil penalty for insider trading under Section 21A of the Exchange Act).

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the manner of a non-jury trial.[35] In addition, although both sides are able to present evidence and testimony and cross-examine witnesses in administrative proceedings, the defendant does not have the protection of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Discovery is limited in administrative proceedings and the actions tend to proceed more quickly, giving defendants less time to prepare.[36]

D. Consequences of a Later Violation

Violating an injunction can lead to a finding of contempt and can result in fines, imprisonment or other remedial orders.[37] If a defendant violates a cease-and-desist-order, the SEC can move a federal court to enter an injunction directing compliance with the order or seek a civil penalty for violation of such order.[38] If an injunction is obtained, contempt proceedings are available to secure compliance with the injunction.

E. Other Considerations

The posture of the adjudicator should also be considered. ALJs are full-time Commission employees, and, as a result, are perceived by some to be less independent than federal judges. Commentators have expressed concerns about ALJs' independence, particularly when the Commission is conducting a proceeding that, had it been brought in federal court, would have been protected by the right to a jury trial.[39]

Parties should also consider the risk that findings of fact in an administrative proceeding may be admissible as evidence in subsequent private litigation. Under the Federal Rules of Evidence, evidence relating to settlement of claims and the fact that a compromise was reached is not admissible.[40] While the plain language of this rule prevents most settlement-related information from being introduced, at least one court has found that the SEC's factual findings, opinions, and conclusions in settled orders are not governed by that rule. The court held that this information, contained in administrative orders, was admissible through an exception to the hearsay rule that allows into evidence records or statements of a public office of factual findings of a legally authorized investigation.[41] While other courts have disagreed[42] or chosen to allow admission of SEC orders in only very limited circumstances,[43] parties must be cognizant of the risk that administrative findings of fact could be admitted as evidence in private litigation.

IV. SEC Administrative Proceeding Trends in FCPA Cases

A. Use Prior to 2011

Prior to the passage of the Dodd-Frank Act in July 2010, the SEC filed administrative proceedings in FCPA cases

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35. The SEC has addressed whether it may enforce civil money penalties in an administrative action, notwithstanding the Seventh Amendment right to a jury trial. *In re Wise and Vindman*, SEC Admin. Proc. 3-11247, Order Denying Motion to Dismiss Claim for Civil Monetary Penalties, (Feb. 18, 2005), at 3, http://www.sec.gov/alj/aljorders/2003/3-11247-092403.pdf (applying the Supreme Court's analysis in *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1976), in stating that "Congress may create a new cause of action in the government for civil penalties enforceable by an administrative agency without violating the Seventh Amendment") *affirmed* by SEC Admin. Proc. 3-11247, Final Order (Apr. 14, 2006), at 20, http://www.sec.gov/litigation/opinions/2006/33-8679.pdf.

36. *See* SEC Rules of Practice, 17 C.F.R. §§ 201.230–34 (limiting document production and the ability to take depositions).

37. Andrew M. Smith, *SEC Cease-and-Desist Orders*, 51 Admin. L. Rev. 1197, 1218 (1999) (noting that injunctions compel that the person obey the law or be found in contempt of the issuing court, and hence "violation of an injunction subjects one immediately to contempt proceedings").

38. 15 U.S.C. § 78u(e) (granting courts the authority to issue injunctions commanding persons to comply with the securities laws); *id.* § 77t(d) (authority of the Commission to bring an action in civil court for a penalty for violation of a cease and desist order).

39. *See* American Bar Association Comment Letter on the "Full Committee Markup of H.R. 2179, the "Securities Fraud Deterrence and Investor Restitution Act of 2003" (May 10, 2004), at 2-3 http://apps.americanbar.org/poladv/letters/108th/securities051004.pdf ("[appeals] do[] not ensure the same protection as judicial review, especially since it is the SEC Commissioners themselves who voted to authorize the case in the first instance" and "SEC administrative hearings…do not guarantee these fundamental due process rights [including an impartial judge or jury to decide the case]" and "the proposal to grant the SEC new administrative powers to impose civil monetary penalties on non-regulated persons also raises important constitutional questions [under the Seventh Amendment right to a jury trial]").

40. Fed. R. Evid. 408 (a). While generally inadmissible, the court is able to admit such evidence for other purposes such as proving witness bias or negating a contention of undue delay. *Id.* 408(b).

41. Fed. R. Evid. 803(8)(A)(iii) (providing an exception to the hearsay rule for a "record or statement of a public office if it sets out…in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation"); *Option Resource Grp. v. Chambers Dev. Co.*, 967 F. Supp. 846, 850 (W.D. Pa. 1996) ("the findings and opinions/conclusions of the SEC, being rendered pursuant to the SEC's independent obligations to enforce the securities laws and not as part of the actual compromise negotiations, are not governed by Rule 408"). However, the same court found evidence from a parallel action in federal court was inadmissible pursuant to Rule 408, the "Consent and Final Judgment, and the actual settlements and Enforcement Releases are inadmissible." *Id.* at 849.

42. *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, Slip Copy, 1:00–CV–2838–WBH, 2008 WL 9358563, at *3 (N.D. Ga. Apr. 23, 2008) (expressly disagreeing with the *Option Resource* holding and denying admissibility of the administrative order as it "falls squarely into the class of evidence deemed inadmissible pursuant to Rule 408").

43. *SEC v. Pentagon Capital Mgmt. PLC*, 2010 WL 985205 (S.D.N.Y. Mar. 17, 2010) (allowing defendants to submit settled orders against other parties as a defense to the SEC's charges because they were "not trying to use the settlements to establish liability against the parties who settled but to offer evidence as a shield because the SEC's findings [in the prior orders]…tend to negate the Commission's allegation [in this case]…").

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in only limited circumstances. Because the SEC did not have the ability to assess civil monetary penalties in administrative actions, it frequently adopted a bifurcated approach in FCPA actions, typically filing an action in federal court solely for civil penalties, while pursuing a simultaneous administrative action for a cease-and-desist order along with disgorgement.[44] In other FCPA cases, the SEC initiated only an administrative action against a company for a cease-and-desist order, without filing an action in federal court. However, in these cases the SEC often pursued a related FCPA action against a top executive of the company in federal court for civil penalties.[45] In earlier years of FCPA enforcement, when enforcement activity was less robust than today, the Commission appears to have sought cease-and-desist orders instead of injunctions as a form of leniency granted in cases in which there had been genuine cooperation and remediation.[46] Even so, the use of an administrative order without concurrently seeking civil money penalties was employed only a few times.

B. 2011 through Present

The use of administrative proceedings increased after passage of the Dodd-Frank Act in 2010 empowered the SEC with the ability to assess civil monetary penalties in these proceedings. In 2011, four of the five FCPA cases that the SEC pursued alone (that is, without a parallel criminal case being filed by the DOJ) were resolved through administrative actions.[47]

Use of administrative enforcement actions declined, however, in 2012, when only one of the three enforcement actions pursued by the SEC in the absence of parallel criminal proceedings was resolved through an administrative order. Settlements through administrative action appear to have picked up again in 2013, with the SEC having pursued two of its four cases through administrative actions.[48]

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44. *See, e.g.*, *SEC v. NATCO Grp. Inc.*, No. 4:10-CV-00098 (S.D. Tex. Jan. 11, 2010) (settled civil action in which the company agreed to imposition of a civil penalty); *In re NATCO Grp. Inc.*, SEC Admin. Proc. 3-13742 (Jan. 11, 2010), at 1, http://www.sec.gov/litigation/admin/2010/34-61325.pdf (issuing a cease-and-desist order against the company); *SEC v. Avery Dennison Corp.*, No. 2:09-cv-5493 (C.D. Cal. July 29, 2009) (settled civil action in which the company agreed to a civil penalty); *In re Avery Dennison Corp.*, SEC Admin. Proc. 3-13564 (July 28, 2009), at 6, http://www.sec.gov/litigation/admin/2009/34-60393.pdf (issuing a cease-and-desist order with requirements that the company pay disgorgement and pre-judgment interest); *SEC v. Con-way, Inc.*, No. 08-1478 (D.D.C. Aug. 27, 2008) (settled civil action in which the company agreed to imposition of a civil penalty); *In re Con-way Inc.*, SEC Admin. Proc. 3-13148 (Aug. 27, 2008), at 4, http://www.sec.gov/litigation/admin/2008/34-58433.pdf (issuing a cease-and-desist order against the company).

45. *See, e.g.*, *In re United Indus. Corp.*, SEC Admin. Proc. 3-13495 (May 29, 2009), at 11, http://www.sec.gov/litigation/admin/2009/34-60005.pdf (issuing a cease-and-desist order, and requiring disgorgement from, and pre-judgment interest to be paid by the company); *SEC v. Wurzel*, No. 1:09-cv-1005, Final Judgment (D.D.C. 2009) (settled civil action against the company's President in which he agreed to an injunction and a civil penalty); *In re Immucor Inc. and Gioacchino De Chirico*, SEC Admin. Proc. 3-12846 (Sept. 27, 2007), at 4, http://www.sec.gov/litigation/admin/2007/34-56558.pdf (issuing a cease-and-desist order against the company and the President/COO); *SEC v. Gioacchino De Chirico*, No. 1:07-cv-2367, Complaint,(N.D. Ga. filed Sept. 28, 2007), at 10, http://www.sec.gov/litigation/complaints/2007/comp20316.pdf (separate settled civil action in which the company's President agreed to pay a related civil penalty); *In re Electronic Data Systems Corp.*, SEC Admin. Proc. 3-12825 (Sept. 25, 2007), at 9, http://www.sec.gov/litigation/admin/2007/34-56519.pdf (issuing a cease-and-desist order, requiring disgorgement from, and pre-judgment interest to be paid by the company); *SEC v. Chandramowli Srinivasan*, No. 1:07-CV-01699, Complaint (RBW) (D.D.C. Sept. 25, 2007), at 5 (settled civil action against the company's President in which he agreed to an injunction and a civil penalty).

46. *See In re Bristow Group Inc.*, SEC Admin. Proc. 3-12833 (Sept. 26, 2007), at 7. http://www.sec.gov/litigation/admin/2007/34-56533.pdf (issuing a cease-and-desist order against the company). The SEC press release noted that "Bristow Group cooperated with the Commission's investigation and took a number of remedial steps as reflected in the Commission's Order." SEC Press Rel. No. 2007-201 (Sept. 26, 2007), http://www.sec.gov/news/press/2007/2007-201.htm; *In re Oil States Int'l, Inc.*, SEC Admin. Proc. 3-12280 (Apr. 27, 2006), at 5, http://www.sec.gov/litigation/admin/2006/34-53732.pdf (issuing a cease-and-desist order against the company). The SEC News Digest noted that "[i]n determining to accept Oil States' settlement offer, the Commission considered remedial acts promptly undertaken by Oil States and cooperation afforded the Commission staff." SEC News Dig. 2006-81 (Apr. 27, 2006) http://www.sec.gov/news/digest/2006/dig042706.txt; *In re B.J. Services Co.*, SEC Admin. Proc. 3-11427 (Mar. 10, 2004), http://www.sec.gov/litigation/admin/34-49390.htm (issuing a cease-and-desist order against the company). The Administrative Order noted that "[i]n determining to accept the Offer, the Commission considered remedial actions promptly undertaken by the Respondent and cooperation afforded the Commission staff once the board of directors and senior management learned of the matters discussed herein." *Id.*; *see also*, *In re Baker Hughes Inc.*, SEC Admin. Proc. 3-10572 (Sept. 12, 2001), http://www.sec.gov/litigation/admin/34-44784.htm (issuing a cease-and-desist order against the company). The Administrative Order noted that "[i]n determining to accept the offer, the Commission considered remedial acts promptly undertaken by Respondent and cooperation afforded to the Commission staff." Id.

47. *See In re Watts Water Tech., Inc. and Leesen Chang*, SEC Admin. Proc. 3-14585 (Oct. 13, 2011), at 7–8, http://www.sec.gov/litigation/admin/2011/34-65555.pdf (issuing a cease-and-desist order against the company and the vice president of sales and agreeing to disgorgement, interest, and civil money penalties); *In re Diageo Plc*, SEC Admin. Proc. 3-14490 (July 27, 2011), at 9–10, http://www.sec.gov/litigation/admin/2011/34-64978.pdf (issuing a cease-and-desist order against the company and agreeing to disgorgement, interest, and civil money penalties); *In re Rockwell Automation, Inc.*, SEC Admin. Proc. 3-14364 (May 3, 2011), at 5, http://www.sec.gov/litigation/admin/2011/34-64380.pdf (issuing a cease-and-desist order against the company and agreeing to disgorgement, interest, and civil money penalties); *In re Ball Corp.*, SEC Admin. Proc. 3-14305 (Mar. 24, 2011), at 6, http://www.sec.gov/litigation/admin/2011/34-64123.pdf (issuing a cease-and-desist order against the company and agreeing to civil money penalties). *But see*, *SEC v. Int'l Bus. Machs. Corp.*, No. 11-00563 (D.D.C. Mar. 18, 2011) (settled civil action in which the company agreed to an injunction, disgorgement, interest, and a civil penalty).

48. *See* Total Order, note 1, *supra* (SEC administrative order accompanying DOJ criminal action); *In re Koninklijke Philips Elec. N.V.*, SEC Admin. Proc. 3-15265 (Apr. 5, 2013), http://www.sec.gov/litigation/admin/2013/34-69327.pdf (SEC administrative proceeding only). *But see SEC v. Ralph Lauren Corp.*, Non-Prosecution Agreement (Apr. 22, 2013), http://www.sec.gov/news/press/2013/2013-65-npa.pdf (SEC administrative non-prosecution agreement); *SEC v. Parker Drilling Co.*, No. 1:13CV461, Complaint (E.D. Va. filed Apr. 16, 2013), at 1, http://www.sec.gov/litigation/complaints/2013/comp22672.pdf (settled civil action with the SEC in which the company agreed to an injunction, disgorgement, and interest and also settled a DOJ criminal action assessing penalties).

Total S.A. Action ■ Continued from page 6

The Total agreement marks the first time since the passage of the Dodd-Frank Act that the SEC pursued an administrative proceeding at the same time that the DOJ pursued a related criminal action. In the other instances since 2011, the SEC has reserved the use of the administrative proceeding for FCPA violations that it pursued in the absence of parallel criminal proceedings.

V. Conclusion

Although the practical differences between settlement through court order versus an administrative action have become less distinct, a court-ordered injunction—the hallmark of a judicial resolution—still carries a certain stigma that a cease-and-desist order does not. As the members of the Commission have long made clear, "[we choose] the forum of a federal district court to bring cases involving more serious violations."[49]

Nonetheless, with the passage of Dodd-Frank, the SEC now has the ability to achieve, through an administrative proceeding, what it could once obtain only by filing an action in federal court—civil monetary penalties, disgorgement, interest, and an order prohibiting future violations of the securities laws.[50] This development has eased the burden on Commission staff in securing an end result that used to require greater time and effort.[51] It would not be surprising to see a distinct trend toward use of administrative proceedings as the resolution method of choice for the SEC in the future, particularly as long as Article III federal judges, notwithstanding the SEC's recent policy changes regarding "neither admit nor deny" settlements, may continue to express concerns about various features of SEC settlements that come before them, reducing the certainty of federal court settlement processes.

"[W]ith the passage of Dodd-Frank, the SEC now has the ability to achieve, through an administrative proceeding, what it could once obtain only by filing an action in federal court[.]"

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49. "New SEC Enforcement Remedies," Remarks of Commissioner Mary L. Schapiro, SEC at the Twentieth Annual Securities Regulation Institute (Jan. 20, 1993), at 9, http://www.sec.gov/news/speech/1993/012093schapiro.pdf.

50. It should be noted that, prior to Dodd-Frank, the SEC was able to seek civil monetary penalties in administrative proceedings, but only against regulated entities and their associated persons. Securities Enforcement Remedies and Penny Stock Reform Act, Pub. L. No. 101-429, 104 Stat. 931 §§ 202, 301, 401 (1990) (codified in various sections of Title 15, United States Code).

51. "One of its advantages is that to obtain [a cease-and-desist order], enforcement officials do not need to jump all the technical and procedural hurdles of bringing an action in federal court." Ira L. Brandriss & Thomas C. Newkirk, *Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws* (Sept. 19, 1998), http://www.sec.gov/news/speech/speecharchive/1998/spch222.htm.

Moving Up the Chain: As One Defendant Seeks to Cooperate, SDNY USAO and SEC Charge Managing Partner in Broker-Dealer/Venezuela FCPA Bribery Matter

On June 12, 2013, the U.S. District Court for the Southern District of New York, at the request of the U.S. Department of Justice ("DOJ"), unsealed a second round of criminal charges in the prosecution of employees, managers and others affiliated with New York broker-dealer Direct Access Partners LLC ("DAP") in connection with an alleged bribery scheme also implicating a Vice President for Finance of the Economic and Social Development Bank of Venezuela (Banco de Desarrollo Económico y Social de Venezuela ("BANDES")), an entity of the Venezuelan state.[1]

The new defendant is Ernesto Lujan, a Managing Partner of the Global Markets Group at DAP, who was charged with criminal violations of the FCPA, the Travel Act, and anti-money laundering statutes as well as conspiracy to violate these laws.[2]

Like his co-defendants, Lujan was arrested in the Southern District of Florida and has been remanded to the Southern District of New York for further criminal law proceedings.[3] Also like his co-defendants, on the same day that criminal charges were unsealed against him Lujan was named as a defendant by the New York Regional Office of the U.S. Securities and Exchange Commission ("SEC"), which charged Lujan with violating Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and related rules, aiding and abetting those violations, and related violations of the broker registration mandates.[4] As DAP is not an "issuer" under the 1934 Act, neither it nor its employees could be charged by the SEC with civil FCPA violations, though criminal and civil FCPA charges could be lodged by the DOJ against the company under the FCPA's provisions that relate to "domestic concerns."[5]

No charges against DAP have been brought, however, and the SEC has stated the investigation "is continuing."[6]

The criminal complaint against Lujan implicates him in the scheme outlined in the DOJ's March 12, 2013 complaint against DAP co-employees Tomas Alberto Clarke Bethancourt ("Clarke") and Jose Alejandro Hurtado ("Hurtado").[7] The SEC action, proceeding by way of an amended complaint in the original DAP matter, alleges Lujan actively participated in the matters outlined in the SEC's original May 7, 2013 complaint.[8] The original complaint named Clarke and Hurtado, as well as Hurtado's wife, Haydee Leticia Pabon ("Pabon"), and Iuri Rodolfo Bethancourt

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1. DOJ Press Rel. No. 13-670, Managing Partner of U.S. Broker-Dealer Charged in Manhattan Federal Court With Participation in Massive International Bribery Scheme (June 12, 2013), http://www.justice.gov/opa/pr/2013/June/13-crm-670.html. For a detailed discussion of the earlier-filed charges against other defendants, *see* Sean Hecker, Andrew M. Levine and Steven S. Michaels, "Broker-Dealer Employees and Venezuelan Bank Official Charged with FCPA Bribery and Related Offenses: The Potential Significance for the Financial Services Sector," *FCPA Update*, Vol. 4, No. 10, at 9-12 (May 2013), http://www.debevoise.com/files/Publication/c2384244-10bd-4356-9168-9812213ef43a/Presentation/PublicationAttachment/23c6b305-b0d3-4aa8-8e04-e4e9fee5b8b2/FCPA_Update_May2013.pdf.

2. *See* DOJ Press Rel. No. 13-670, note 1, *supra*.

3. *See United States v. Lujan*, Docket, No. 9:13-mj-08301-JMH (S.D. Fla. July 12, 2013).

4. SEC Press Rel. No. 203-109, SEC Announces More Charges in Massive Kickback Scheme to Secure Business of Venezuelan Bank (June 12, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171574826; First Amended Complaint, *SEC v. Clarke et al.*, No. 13 Civ. 3074 (S.D.N.Y. filed May 7, 2013; amended June 12, 2013) [hereafter "Amended Clarke SEC Civil Complaint"], at 3.

5. *See* 15 U.S.C. § 78dd-2.

6. SEC Press Rel. No. 203-109, note 4, *supra*.

7. *Compare* Complaint, *United States v. Lujan*, No. 13 Mag. 1501 (filed under seal June 10, 2013, unsealed S.D.N.Y. June 12, 2013) [hereinafter "Lujan Criminal Complaint"] (detailing Lujan's alleged involvement in a long thread of emails that culminated in instructions to initiate wire transfers) *with* Complaint, *United States v. Clarke et al.*, No. 13 Mag. 0683 (filed under seal Mar. 12, 2013, unsealed S.D.N.Y. May 6, 2013), at 2-3 (alleging how the non-Lujan defendants wired funds to different accounts world-wide controlled by other defendants).

8. *Compare* Amended Clarke SEC Civil Complaint, note 4, *supra*, at 7-8 (alleging Lujan oversaw the system for executing riskless trades for BANDES) *with* Complaint, *SEC v. Clarke et al.*, No. 13 Civ. 3074, (S.D.N.Y. filed May 7, 2013), at 7-8 (alleging a system of executing riskless trades supervised by the non-Lujan defendants and an unnamed "Executive-1").

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("Bethancourt"), an alleged resident of Panama and apparent relative of Clarke.[9] The brazen scheme alleged in the original and new filings involved the alleged payment of millions of dollars to Maria Gonzalez, a senior BANDES official, in exchange for her conniving with the charged DAP employees to create inflated bond trading profits with little or no economic risk to DAP, with millions more ending up in the pockets of Clarke, Hurtado, their family members and Lujan.[10]

Perhaps the most intriguing element of the new filings is the statement, in the *Lujan* criminal complaint, that one of the original defendants in the criminal matter, identified only as "CS-1," has decided to cooperate with the government "in the hope of entering into a cooperation agreement."[11] For managers such as Lujan, this case highlights the considerable difficulty faced by individual defendants given the benefits that can be obtained by alleged co-conspirators who decide to cooperate, as did Swiss attorney Hans Bodmer in the *Bourke* prosecution.[12]

Also worthy of note is the fact that Lujan (as well as his criminal co-defendants) have been charged not only as officers, employees, directors or agents of a "domestic concern," but also as "stock holders" acting on DAP's behalf, under a little-used sub-provision of the "domestic concern" provisions of the FCPA.[13] Given the detailed allegations against Lujan and the other alleged co-conspirators, including those arising from alleged emails indicating Lujan approved corrupt payments, the "stock holder" allegations would appear to have been unnecessary. They may reflect a new line of DOJ attack against active (and knowing) equity investors in both issuers and domestic concerns. The BANDES case, as it unfolds, could provide clarification of the circumstances in which so-called stockholder liability may attach under the FCPA.

"Perhaps the most intriguing element of the new filings is the statement…that one of the original defendants in the criminal matter, identified only as 'CS-1,' has decided to cooperate with the government[.]"

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9. *Id.*; *see also* SEC Press Rel. No. 2013-84, SEC Charges Traders in Massive Kickback Scheme Involving Venezuelan Official (May 7, 2013), http://www.sec.gov/news/press/2013/2013-84.htm.
10. *See* DOJ Press Rel. No. 13-670, note 1, *supra*; *see also* DOJ Press Rel. 13-515, Two U.S. Broker-dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-515.html.
11. Lujan Criminal Complaint, note 7, *supra*, at 12 n.5.
12. *See United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011) (upholding defendant Bourke's conviction), *cert denied sub nom. Bourke v. United States*, 133 S. Ct. 1794 (Apr. 15, 2013); David Glovin, "Swiss Lawyer Sentenced to Time Served in Bribery Case," *Bloomberg* (Mar. 7, 2013), http://www.bloomberg.com/news/2013-03-06/swiss-lawyer-sentenced-to-time-served-in-bribery-case.html.
13. Lujan Criminal Complaint, note 7, *supra* at 2; see 15 U.S.C. § 78dd-2(a) (prohibiting acts of bribery by "any stockholder thereof acting on behalf of such domestic concern"); *id.* § 78dd-1(a) (liability for any stockholder of an issuer acting on behalf of the issuer).

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