DEBEVOISE & PLIMPTON LLP

FCPA Update

January 2014 ■ Vol. 5, No. 6

Anti-Corruption Compliance in 2013: Post-Guidance Trends and Signals for the Future

I. Introduction

The publication in November 2012 of the *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("Guidance"), jointly released by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC"),[1] was followed by a mixed, but by no means insignificant year in terms of the number of resolutions and size of recoveries, as well as new cases against individuals.

Although FCPA enforcement in 2013 was overshadowed in various ways by other types of enforcement actions against companies and individuals in an array of sectors,[2] this hardly signifies a decline in anti-corruption challenges. Those challenges will likely continue long after enforcement arising out of specific historical events, such as the Deepwater Horizon oil spill and the financial crisis, abates. The embedded risks of corruption in a broad swath of the world's markets unfortunately are likely to guarantee this and may even lead to new enforcement records.

Despite the value of the Guidance in outlining general principles, anti-corruption compliance challenges are likely to continue as U.S. enforcement against companies continues to result in negotiated settlements or infrequently disclosed declinations that provide only limited insights into what the U.S. enforcement agencies find significant. Anti-corruption compliance will also continue to present increasingly complex problems as cross-border M&A activity recovers from the financial crisis and as other nations' enforcement – as illustrated by China's crackdown on corruption and passage of new laws in Brazil and Russia – becomes more active. It is entirely possible that frustration by business interests, the public, Congress, and the federal judiciary with the existing system of "regulation by settlement" could result in FCPA enforcement being swept up in a larger legislative reform effort,[3] or in targeted amendments to the FCPA.

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1. *See* Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2012), www.justice.gov/criminal/fraud/fcpa/guide.pdf.
2. *See, e.g.*, DOJ Press Rel. 14-020, Justice Department Collects More Than $8 Billion in Civil and Criminal Cases in Fiscal Year 2013 (Jan. 9, 2014), http://www.justice.gov/opa/pr/2014/January/14-ag-020.html.
3. *See, e.g.*, S. 1898, Truth in Settlements Act of 2014 (Jan. 8, 2014), https://www.govtrack.us/congress/bills/113/s1898/text; Truth in Settlements Act, Statement by Elizabeth Warren, Cong. Record – Senate at S 115 (Jan. 8, 2014); *see also* Cheyenne Hopkins, "Senate's Warren Seeks Disclosure Over Firms' Wrongdoing," *Bloomberg* (Jan. 8, 2014), http://www.bloomberg.com/news/2014-01-08/senate-s-warren-seeks-fuller-disclosure-over-firms-wrongdoing.html.

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The sections below canvass FCPA enforcement data and the most significant developments in 2013, noting several important trends, including the increase in administrative SEC resolutions pursuant to the Dodd-Frank Act, the return of corporate monitors in a significant number of corporate resolutions, and the growth in cross-border cooperation in anti-corruption matters. This issue also addresses the continued applicability of the Guidance's advice in light of the 2013 developments, as well as significant anti-corruption enforcement and legislative developments in the United Kingdom, China, Russia, Germany, and Brazil.

II. Overview of Corporate and Individual Enforcement Actions in 2013

A. Corporate Enforcement

The number of FCPA enforcement actions against corporate entities in 2013 fell relative to 2012, but the cumulative dollar value of the settlement amounts soared to almost three times the 2012 value and almost twice that in 2011. The DOJ and the SEC resolved nine enforcement actions against companies and their subsidiaries in 2013 (down from 12 in 2012 and 15 in 2011). In those nine settlements, the U.S. government collected roughly $721 million in fines, penalties, disgorgement, and prejudgment interest, significantly more than the approximately $259 million collected in 2012 and $508.6 million collected in 2011.[4]

Six of the nine enforcement actions of 2013 were resolved through simultaneous criminal and civil settlements with the DOJ and the SEC; two were actions in which the SEC acted alone; and one was an action in which the DOJ acted, but the SEC did not.[5]

With the number of enforcement actions down but the overall settlement amounts sharply up from 2012, there are statistics to which commentators can point to make opposing arguments about the overall state of FCPA enforcement. Too much should not be read into these numbers, however. With the average time from the initiation of an investigation to its resolution taking many years, last year's enforcement actions may say more about the government's enforcement priorities several years ago than about those priorities today. Given the number of high-profile cases in the pipeline and the recent statements of DOJ and SEC officials regarding the workload of their FCPA units,[6] the recent dip in the number of settled corporate enforcement actions should not be overstated. The marked increase in the overall settlement amounts should not be overemphasized, either, given that $551 million of all funds recovered in 2013 came from just two large settlements – those of Weatherford International and Total S.A.

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4. *See* Chart of 2013 FCPA Corporate Enforcement Actions at the end of this article.

5. For comparison, in 2011, seven of the 15 enforcement actions resulted in parallel DOJ/SEC resolutions. *See* 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/fcpa-update-01-20-2012. In 2012, five of the 12 enforcement actions were resolved in parallel by the DOJ and the SEC. *See* Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett, Samantha J. Rowe & Amanda M. Bartlett, "The FCPA in 2012: Release of the Government's Guidance Caps a Year of Disparate Developments," *FCPA Update*, Vol. 4, No. 6 (Jan. 2013), http://www.debevoise.com/fcpaupdate20130131 [hereinafter, "FCPA Update 2012 Year in Review"].

6. *See* Sean Hecker, Andrew M. Levine, Bruce E. Yannett & Steven S. Michaels, "DOJ and SEC Officials' Recent Conference Remarks," *FCPA Update*, Vol. 5, No. 4 (Nov. 2013), http://www.debevoise.com/fcpa-update-11-26-2013.

FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

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B. Individual Enforcement

Although the number of corporate resolutions dipped, there was a marked uptick in 2013 in enforcement actions against individuals compared to 2012. The number of individuals against whom criminal or civil charges were initiated, or against whom indictments were unsealed, rose to 14 in 2013, from five in 2012.[7] The higher number is largely due to enforcement actions involving multiple employees of the same companies, including four executives of Alstom S.A., four employees of Lufthansa's subsidiary BizJet, and three employees of New York-based Direct Access Partners LLC (as well as the Venezuelan government official to whom they allegedly made improper payments, for Travel Act and money laundering offenses).

The remaining two individual defendants were the sole individuals charged at their companies. Frederic Cilins was charged with attempted obstruction of an FCPA-related grand jury investigation into BSG Resources' activities in the Republic of Guinea. Alain Riedo, former general manager of the Swiss subsidiary of Maxwell Technologies, was indicted for bribing officials at state-owned companies in China.

In significant developments in cases in their post-conviction phases, the United States Court of Appeals for the Eleventh Circuit heard arguments in the *Esquenazi* appeal concerning the definitions of "foreign official" and "government instrumentality" under the FCPA, and the Supreme Court of the United States denied Frederic Bourke's petition for review, resulting in Bourke entering federal prison.

III. Key Observations Relating to 2013 Enforcement Actions

A. Closeout of Longstanding Investigations and Industry Sweeps

The year 2013 was a clean-up year of sorts for the government. In a number of cases, the DOJ and the SEC appear to have come very close to resolving if not closing the last of their longstanding investigations of certain industries, projects, or intermediaries. In the second largest FCPA settlement of the year, Weatherford International settled charges relating to, among other things, improper payments made in connection with the U.N. Oil-for-Food Program in Iraq. The Weatherford settlement may be one of the last related to the now infamous program, which previously has been the source of 14 enforcement actions and $267 million in settlements between 2007 and 2011.[8] Likewise, the DOJ/SEC settlement with Parker Drilling Company represented what appears to be one of the closing chapters in the investigation of a Swiss freight forwarder, Panalpina World Transport (Nigeria) Limited, and oil and gas companies that utilized its services.[9] The Panalpina investigation previously resulted in eight enforcement actions and $262 million in settlements between 2007 and 2011.[10]

The recent Bilfinger SE settlement marked the latest in a series of criminal actions by the DOJ relating to the Eastern Gas Gathering System ("EGGS") project in Nigeria, which was the subject of at least one set of criminal charges filed each year between 2006 and 2009.[11] Finally, Stryker Corporation was the latest medical device company to settle an FCPA case since the U.S. government began an industry sweep that has netted over $220 million in monetary recoveries since 2011.[12]

B. Continued Prevalence of DPAs and NPAs

As in 2012, all criminal enforcement actions against corporate parents in 2013 were resolved through deferred prosecution

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7. *See* Richard L. Cassin, "2013 Enforcement Index," FCPA Blog (Jan. 2, 2014), http://www.fcpablog.com/blog/2014/1/2/2013-fcpa-enforcement-index.html (2013 numbers); *FCPA Update* 2012 Year in Review, note 5, *supra* (2012 numbers).

8. *See* "Keeping FCPA Enforcement Statistics in Perspective," *FCPA Professor* (Jan. 23, 2013), http://www.fcpaprofessor.com/keeping-fcpa-enforcement-statistics-in-perspective. Weatherford was the only Oil-for-Food-related enforcement action since the April 2011 action against Johnson & Johnson. *See* DOJ Press Rel. 11-446, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-446.html.

9. DOJ Press Rel. 13-431, Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty (Apr. 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-431.html.

10. *See* "Keeping FCPA Enforcement Statistics in Perspective," note 8, *supra*.

11. DOJ Press Rel. 13-1297, German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay $32 Million Criminal Penalty (Dec. 11, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html.

12. *See* Andrew Finkelstein, "Navigating the FCPA Within the Medical Device Industry," *Compliance Week* (Sept. 11, 2012) (discussing Johnson & Johnson, Smith & Nephew, Biomet, and Orthofix settlements), http://www.complianceweek.com/navigating-the-fcpa-within-the-medical-device-industry/article/258099; 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 (announcing the Pfizer settlement); SEC Press Rel. 2012-273, SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116 (announcing the Eli Lilly settlement).

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agreements ("DPAs") or non-prosecution agreements ("NPAs").[13] Given the relative popularity of DPAs and NPAs with corporate defendants and the DOJ (instead of litigation),[14] it is likely resolutions of FCPA enforcement actions will continue to involve these means of settlement.

"Given the relative popularity of DPAs and NPAs with corporate defendants and the DOJ (instead of litigation), it is likely resolutions of FCPA enforcement actions will continue to involve these means of settlement."

Furthermore, there were indications in 2013 that the SEC would more fully implement its "Enforcement Cooperation Initiative" by resolving more cases through DPAs and NPAs. The Ralph Lauren settlement in April 2013 was the first FCPA case that the SEC resolved with an NPA and the first FCPA case resolved with dual DOJ/SEC NPAs.[15] Lauding Ralph Lauren's prompt reporting and cooperation, the SEC commented that "[t]he NPA in this matter makes clear that we will confer substantial and tangible benefits on companies that respond appropriately to violations and cooperate fully with the SEC."[16] Although the SEC did not resolve any other FCPA matters in 2013 via NPAs or DPAs, in November the SEC announced its first DPA with an individual, a hedge fund administrator, Scott Herckis, who assisted the SEC with the prosecution of a hedge fund manager.[17] As in the case of Ralph Lauren, the SEC emphasized its commitment to rewarding proactive cooperation through DPAs,[18] suggesting that we very well may see more such resolutions in the future, both in FCPA and other cases.

C. Rise of the SEC Administrative Orders

In 2013, the SEC also increasingly employed administrative orders to resolve FCPA cases. SEC actions that did not involve parallel proceedings with the DOJ, as well as the Total S.A. enforcement action that did, were settled by administrative proceedings before the SEC seeking civil penalties and cease-and-desist orders.[19]

As illustrated by the Total settlement, the SEC's use of administrative proceedings increased after passage of the Dodd-Frank Act in 2010, which granted the SEC the ability to assess civil monetary penalties in these proceedings.[20] After a decline in the use of administrative enforcement actions in 2012, the prevalence of such actions picked up last year, with the Total settlement representing the first time since the passage of the Dodd-Frank Act that an administrative action in an FCPA case was pursued in parallel to a related criminal proceeding.[21] In fact, the SEC's FCPA Unit Chief recently stressed the importance of Dodd-Frank in this context, noting that the

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13. The only guilty pleas came from the Bermuda subsidiary of Weatherford International and the Ukrainian subsidiary of Archer Daniels Midland Company. The parent companies entered into a DPA and an NPA, respectively. *See* DOJ Press Rel. 13-1260, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html; DOJ Press Rel. 13-1356, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1356.html.

14. *See, e.g.*, "McInerney Defends Deferred and Non Prosecution Agreements," *Corporate Crime Reporter* (May 7, 2013), http://www.corporatecrimereporter.com/news/200/mcinerneydefendsdpas05072013; "Who Is Too Big to Fail: Are Large Financial Institutions Immune from Federal Prosecution?," Hearing before the Subcommittee on Oversight and Investigations, Committee on Financial Services, U.S. House of Representatives (May 22, 2013) (statement of Mythili Raman) ("Oftentimes, our assessment . . . is that one of the middle-ground resolutions is most appropriate, a deferred prosecution or a non prosecution agreement.").

15. SEC Press Rel. 2013-65, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780. In 2011, a Luxembourg-based pipe maker Tenaris S.A. became the first company to enter into a DPA with the SEC. It also entered into an NPA with the DOJ. *See* SEC Press Rel. 2011-112, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), http://www.sec.gov/news/press/2011/2011-112.htm.

16. SEC Press Rel. 2013-65, note 15, *supra*.

17. SEC Press Rel. 2013-241, SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540345373.

18. *Id.*

19. *In re Stryker Corp.*, Admin. Pro. 3-15587 (Oct. 24, 2013), http://www.sec.gov/litigation/admin/2013/34-70751.pdf; *In re Total, S.A.*, Admin. Pro. 3-15338 (May 29, 2013), http://www.sec.gov/litigation/admin/2013/34-69654.pdf; *In re Koninklijke Philips Elecs. N.V.*, Admin. Pro. 3-15265 (Apr. 5, 2013), http://www.sec.gov/litigation/admin/2013/34-69327.pdf.

20. *See* Paul R. Berger, Sean Hecker, Erin W. Sheehy & Natalie E. Gray, "The Total S.A. Action: Are Administrative Orders the SEC's FCPA Resolution of Choice for the Future?," *FCPA Update*, Vol. 4, No. 12 (July 2013), http://www.debevoise.com/fcpa-update-07-29-2013.

21. *See id.*

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legislation has encouraged the resolution of a greater number of matters through administrative proceedings.[22] As Total's $398 million settlement indicates, the SEC currently does not reserve administrative proceedings for less serious violations, and it is likely that the trend towards administrative enforcement actions will continue in 2014.

D. Cross-Border Cooperation

In 2013, there was also increased cross-border cooperation between U.S. authorities and their foreign counterparts, as well as growing concerns raised about this trend and its impact on multinational companies.

In two of the seven DOJ corporate enforcement actions brought in 2013, the DOJ expressly recognized the cooperation and assistance of foreign law enforcement authorities – those in Germany in the case of Archer Daniels Midland Company ("ADM") and France in the case of Total S.A.[23] In both cases, foreign authorities not only cooperated with the DOJ, but conducted their own investigations, resulting in a resolution with an ADM subsidiary in Germany and the continuation of a criminal case in France against Total S.A. and its officers.[24] The latter proceeding indicates that Total's $398 million settlement with U.S. authorities will not end other government investigations. It also illustrates the evergrowing likelihood that multinational companies may be subject to parallel enforcement proceedings arising from the same set of facts, in multiple jurisdictions, and highlights the challenges of coordinating the defense of such enforcement proceedings.

Neither this phenomenon nor commentators' concerns about it are new,[25] but the proliferation of national anti-corruption regimes throughout the world is likely to exacerbate the risk of parallel government investigations. Although the DOJ's Deputy Fraud Section Chief recently stated that the DOJ generally offsets penalties paid overseas for the same conduct when determining the appropriate U.S. penalty,[26] such an approach is not required by U.S. law, which does not recognize the concept of double jeopardy, except in respect of multiple prosecutions brought by the U.S. federal government itself.[27] Ensuring just outcomes across multiple jurisdictions is likely to be a growing challenge and may well affect companies' self-reporting calculus as they consider the risks of parallel proceedings when disclosing potential violations in any one jurisdiction.

E. Greater Flexibility in Compliance Monitorships

Three of the four corporate enforcement actions this year that mandated an independent compliance monitor – Weatherford, Diebold, and Bilfinger – involved the imposition of a so-called "hybrid" monitorship.[28] Instead of requiring a monitor for the entire term of the DPAs (usually three years), "hybrid" monitorships are imposed for a shorter term – a minimum of 18 months in the cases of Weatherford, Diebold, and Bilfinger – to be followed by self-reporting by the company if the independent monitor certifies the lack of need for further independent monitoring. The Deputy Chief of the DOJ's FCPA Unit recently highlighted the greater flexibility that "hybrid" monitorships offer to the DOJ in its enforcement efforts,[29] suggesting that this trend is likely to continue.

F. Effects of the SEC's Whistleblower Program Remain to Be Seen

In fiscal year 2013, the second full year of the SEC's Dodd-Frank Whistleblower Program, the number of tips – 3,238 (of which 149 related to purported FCPA violations) – increased modestly from the figures in fiscal year 2012 (3,001 total tips, including 115 related to purported

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22. *See* Hecker, *et al.*, note 6, *supra*.

23. DOJ Press Rel. 13-1356, note 13, *supra* (ADM); DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-613.html (Total).

24. *See* Hecker, *et al.*, note 6, *supra*.

25. *See, e.g.*, Gwendolyn L. Hassan, "The Increasing Risk of Multijurisdictional Bribery Prosecution: Why Having an FCPA Compliance Program Is No Longer Enough," *ABA International Law News*, Vol. 42, No. 1 (Winter 2013); Richard L. Cassin, "'Carbon Copy Prosecutions' Change the Rules of the Game," *FCPA Blog* (Nov. 9, 2012), http://www.fcpablog.com/blog/2012/11/9/carbon-copy-prosecutions-change-the-rules-of-the-game.html.

26. *See* Hecker, *et al.*, note 6, *supra*.

27. Notably, Canada's Corruption of Foreign Public Officials Act, amended in June 2013, expressly endorses the international double jeopardy concept as it applies to corruption crimes and in some circumstances bars criminal proceedings in Canada if the underlying conduct led to a conviction in a foreign jurisdiction. *See, e.g.*, Mark Morrison et al., "Canada Strengthens International Anti-Corruption Legislation," *Blakes* (June 20, 2013), http://www.blakes.com/mobile/bulletins/pages/details.aspx?bulletinid=1760.

28. DOJ Press Rel. 13-1260, note 13, *supra* (Weatherford); DOJ Press Rel. 13-1297, note 11, *supra* (Bilfinger); DOJ Press Rel. 13-1118, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html (Diebold). Total S.A. settlement was the only 2013 enforcement action that involved an imposition of a three-year compliance monitor. DOJ Press Rel. 13-613, note 23, *supra*.

29. *See* Hecker, *et al.*, note 6, *supra*.

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FCPA violations). [30] Tips came from individuals in all 50 of the United States and 55 foreign countries, with the largest number of the 404 foreign tips coming from whistleblowers in the United Kingdom (66), Canada (62), China (52), and Russia (20).[31] The SEC made four financial awards to whistleblowers in 2013, including the largest award to date, of $14 million, announced in October 2013.[32]

The SEC's Co-Director of Enforcement recently stressed the importance of self-reporting by companies given that "the risk of not coming forward grows by the day as [the] whistleblower program continues to pick up steam."[33] The program has not had any publicly discernible effect on FCPA enforcement to date, however, and none of the 2013 financial awards to whistleblowers was in an FCPA case. Of course, it is not known whether any of the FCPA cases currently being investigated by the U.S. authorities are a result of information obtained via the Dodd-Frank Whistleblower Program. It is likely there will be at least some impact in the not-too-distant future, especially in light of the overall increase in whistleblower tips and those coming from abroad, including from countries such as China and Russia that present especially high corruption risks. If nothing else, the existence of the whistleblower program deserves consideration when deciding whether to make a voluntary disclosure to U.S. authorities.

IV. Major Corporate Resolutions of 2013

A. Total S.A. (DOJ/SEC, $398 million)

In May 2013, a nearly ten-year investigation concluded when the SEC and the DOJ entered a $398 million settlement with Total S.A., a French oil and gas company.[34] The settlement consisted of $153 million in disgorgement, as agreed in a settled SEC order,[35] and a $245.2 million penalty, as agreed in a DPA with the DOJ.[36] Total also agreed to retain an independent corporate compliance monitor for a period of three years.[37] With the combined settlement figure reaching nearly $400 million, Total's is the largest FCPA settlement in years, representing the fourth largest FCPA settlement on record and the fourth largest FCPA-related disgorgement to date.[38]

As described in the SEC's administrative order, Total entered into agreements with the National Iranian Oil Company ("NIOC") in 1995 and 1997 to develop several oil fields in Iran.[39] Prior to signing the contracts, Total entered into sham consulting agreements with intermediaries designated by an Iranian official in order to induce that official to use his influence with NIOC to help Total secure the development contracts.[40] According to the

> "The SEC's Co-Director of Enforcement recently stressed the importance of self-reporting given that 'the risk of not coming forward grows by the day as [the] whistleblower program continues to pick up steam.'"

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30. SEC, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program at 8, 20 (Nov. 2013), http://www.sec.gov/about/offices/owb/annual-report-2013.pdf [hereinafter, "SEC 2013 Whistleblower Report"]; SEC, Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2012 at 4, App. A (Nov. 2012), http://www.sec.gov/about/offices/owb/annual-report-2012.pdf [hereinafter, "SEC 2012 Whistleblower Report"].
31. SEC 2013 Whistleblower Report, note 30, *supra* at 9-10, 22. In 2012, 324 tips came from individuals in foreign countries, including 74 in the United Kingdom, 46 in Canada, 33 in India, and 27 in China. SEC 2012 Whistleblower Report, note 30, *supra* at App. C.
32. SEC 2013 Whistleblower Report, note 30, *supra* at 14-15, 22. An additional award was made on October 30, 2013, qualifying it as the first award of fiscal year 2014. *Id.* at 15.
33. *See* Hecker, *et al.*, note 6, *supra*.
34. DOJ Press Rel. 13-613, note 23, *supra*; SEC Press Rel. 2013-94, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006.
35. *In re Total, S.A.*, note 19, *supra*.
36. *United States v. Total, S.A.*, 1:13-CR-239, Deferred Prosecution Agreement (E.D. Va. May 29, 2013), http://www.justice.gov/iso/opa/resources/939201352910374699852 4.pdf.
37. DOJ Press Rel. 13-613, note 23, *supra*.
38. *See* Richard L. Cassin, "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; Richard L. Cassin, "Alcoa Disgorgement Is Third Biggest in FCPA History," *FCPA Blog* (Jan. 10, 2014), http://www.fcpablog.com/blog/2014/1/10/alcoa-disgorgement-is-third-biggest-in-fcpa-history.html. Alcoa World Alumina LLC's 2014 settlement with the DOJ and the SEC moved Total's disgorgement down to the fourth place. *See id.*
39. *In re Total, S.A.*, note 19, *supra* at ¶¶ 8, 15.
40. *Id.* at ¶¶ 6, 12.

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SEC order, Total paid the intermediaries roughly $60 million between 1995 and 2004, mischaracterizing those payments as "business development expenses."[41] The development interests with NIOC netted Total approximately $150 million in profits.[42]

On the same day Total settled with the DOJ and the SEC, the DOJ announced that the French enforcement authorities had requested that Total and its Chairman and Chief Executive Officer, as well as two other individuals, be referred to the Criminal Court for violations of French law, including France's foreign bribery law.[43]

Although the DOJ expressed appreciation for the cooperation of the French authorities and touted the Total case as the "first coordinated action by French and U.S. law enforcement in a major foreign bribery case,"[44] France has yet to show a strong track record of prosecuting overseas bribery. The October 2013 Transparency International report provided a negative assessment of France's anti-bribery enforcement efforts, noting that only one corporation has been convicted of bribery offenses in the more than 13 years since France adopted OECD-compliant anti-corruption laws, which conviction is currently being reviewed on appeal. The report observed that the corporation at issue paid only a roughly $643,000 fine, even though the value of the profit it allegedly earned as a result of improper conduct exceeded $218 million.[45] The report also noted that French authorities have so far dedicated insufficient resources to foreign bribery investigations and have not made use of all available penalties in going after potential violators.[46] Similarly, in its 2013 Annual Report, the OECD Working Group on Bribery in International Business Transactions expressed "serious[] concern[]" that only one corporate conviction for a bribery offense has been handed down in France since 2000, noting specifically the "lackluster response of the French authorities in relation to companies sanctioned by other Parties to the [OECD] Convention."[47]

It is likely that Total entered into a DPA with the DOJ while continuing to fight potential charges in France, which appear to relate to the same or overlapping facts, because French criminal procedure and its legal tradition permits neither negotiated guilty pleas by corporations that are investigated for corruption nor alternative dispositions, such as a DPA or an NPA. Whether the French investigation of Total will lead to criminal charges against the company remains to be seen. Even if it does, there would be years of litigation before such charges could be proven in court, at which point most of the relevant facts, as reported in the DOJ and the SEC filings, would be well over 10 or even 15 years old. Given that Total and its CEO were recently acquitted by a French court of unrelated corruption charges involving the U.N. Oil-for-Food Program,[48] it may take a significant ramp-up in enforcement to convince French companies that they indeed need to be concerned about enforcement of French foreign bribery laws.

B. Weatherford International (DOJ/SEC, $153 million)

On November 26, 2013, the DOJ and the SEC announced settlements with Swiss oil equipment and services corporation Weatherford International Limited ("Weatherford") and its subsidiary, Weatherford Services Limited ("WSL"), involving a wide variety of FCPA violations in Africa, the Middle East, and Europe occurring from 2000 to 2011.[49] The settlements – involving a financial resolution of $152.8 million for FCPA violations and the imposition of a monitor for 18 months with an additional 18-month self-reporting obligation – were part of a

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41. *Id.* at ¶¶ 1, 17.
42. *Id.* at ¶ 19.
43. DOJ Press Rel. 13-613, note 23, *supra*.
44. *Id.* In December 2010, the DOJ credited "the French Ministry of Justice, the Tribunal de Grande Instance de Paris, and Service General de Prévention de la Corruption" for having provided "[s]ignificant assistance" to the investigation that led to a similar settlement between the DOJ and French industrial giant, Alcatel S.A. DOJ Press Rel. 10-1481, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.
45. *See* Transparency International, "Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery" at 40 (Oct. 7, 2013).
46. *Id.*
47. OECD Working Group on Bribery in International Business Transactions, Annual Report 2013 at 49 (June 10, 2013) [hereinafter, "OECD Working Group on Bribery"].
48. *See* "Total and CEO Acquitted in Iraq Oil-for-Food Scandal," *Reuters* (July 8, 2013), http://www.reuters.com/article/2013/07/08/us-france-total-idUSBRE9670QK20130708.
49. DOJ Press Rel. 13-1260, note 13, *supra*; SEC Press Rel. 2013-252, SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694.

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$252 million global settlement between Weatherford and several of its subsidiaries and the U.S. government for violations of both the FCPA and U.S. sanctions laws prohibiting certain transactions with Cuba, Iran, Syria, and Sudan.[50]

As part of the resolution, Weatherford entered into a three-year DPA with the U.S. government,[51] supported by an information detailing criminal violations of the FCPA's internal controls requirements.[52] According to the DOJ, Weatherford knowingly failed to implement internal accounting controls designed to prevent corruption, resulting in a "permissive and uncontrolled environment" in which employees of Weatherford subsidiaries were given an opportunity to commit corrupt acts.[53] WSL pleaded guilty to violating the FCPA's anti-bribery provisions, as detailed in a criminal information.[54] Weatherford also settled a civil complaint brought by the SEC.[55]

The bulk of the improper payments alleged in both the SEC and DOJ actions arose out of transactions in Angola, in an unnamed "Middle Eastern Country," and as part of the U.N. Oil-for-Food Program. In Angola, WSL bribed an official at Sonangol, the Angolan National Oil Company, to induce his approval of the renewal of a contract.[56] Also in Angola, WSL formed a joint venture with two companies selected by Sonangol and owned by relatives of Angolan officials.[57] Sonangol officials told WSL that entering into the joint venture would secure for WSL the entire Angolan well screens market.[58] Owners of WSL's JV partners received more than $800,000 in dividends, paid in 2008.[59]

> "According to the DOJ, Weatherford knowingly failed to implement internal accounting controls designed to prevent corruption, resulting in a 'permissive and uncontrolled environment.'"

The settlement documents also alleged that, between 2005 and 2011, Weatherford's subsidiary in the Middle East provided improper "volume discounts," totaling over $11 million, to a distributor in an unnamed Middle Eastern country. The distributor was recommended to Weatherford's subsidiary in 2001 by the country's national oil company, and employees of the subsidiary believed that the volume discounts were used as a slush fund to make payments to officials at the national oil company.[60] The same subsidiary also made payments of just under $1.5 million to Iraqi officials involved in the U.N. Oil-for-Food Program in 2002.[61]

C. ADM (DOJ/SEC, $54 million)

The DOJ and the SEC closed out the year by bringing charges against ADM, an agribusiness company based in Illinois; the DOJ also brought criminal charges against the company's Ukrainian subsidiary.[62] ADM's subsidiary, Alfred C. Toepfer International (Ukraine) Ltd. ("ACTI Ukraine") pleaded guilty to one count of conspiracy to violate the anti-bribery provisions of the FCPA in connection with

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50. DOJ Press Rel. No. 13-1260, note 13, *supra*.

51. *United States v. Weatherford Int'l Ltd.*, 13-CR-733, Deferred Prosecution Agreement (S.D. Tex. Nov. 26, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-DPA.pdf.

52. *United States v. Weatherford Int'l Ltd.*, 13-CR-733, Information (S.D. Tex. Nov. 26, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-Information.pdf [hereinafter, "Weatherford Information"].

53. DOJ Press Rel. 13-1260, note 13, *supra*.

54. DOJ Press Rel. 13-1260, note 13, *supra*; *United States v. Weatherford Servs. Ltd.*, 13-CR-734, Information (S.D. Tex. 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-services-ltd/Weatherford-Services-Information.pdf [hereinafter, "WSL Information"].

55. SEC Press Rel. 2013-252, note 49, *supra*.

56. WSL Information, note 54, *supra* at ¶¶ 41-46; *SEC v. Weatherford Int'l Ltd.*, 13-CV-3500, Complaint at ¶¶ 11-16 (S.D. Tex. Nov. 26, 2013), http://www.sec.gov/litigation/complaints/2013/comp-pr2013-252.pdf [hereinafter, "Weatherford SEC Complaint"].

57. WSL Information, note 54, *supra* at ¶¶ 14-36; Weatherford SEC Complaint, note 56, *supra* at ¶¶ 17 24.

58. WSL Information, note 54, *supra* at ¶¶ 36-40; Weatherford SEC Complaint, note 56, *supra* at ¶ 17.

59. WSL Information, note 54, *supra* at ¶ 34; Weatherford SEC Complaint, note 56, *supra* at ¶ 24.

60. Weatherford Information, note 52, *supra* at ¶¶ 26-30; Weatherford SEC Complaint, note 56, *supra* at ¶¶ 28-35.

61. Weatherford Information, note 52, *supra* at ¶¶ 31-34; Weatherford SEC Complaint, note 56, *supra* at ¶¶ 43-45.

62. DOJ Press Rel. 13-1356, note 13, *supra*; SEC Press Rel. 2013-271, SEC Charges Archer-Daniels-Midland Company with FCPA Violations (Dec. 20, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139.

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improper payments made to Ukrainian government officials to obtain value-added tax ("VAT") refunds.[63] ACTI Ukraine agreed to pay $17.8 million in criminal fines to settle the case.[64]

The DOJ also entered into an NPA with ADM in connection with the company's failure to implement an adequate system of internal accounting controls to address the making of improper payments both in Ukraine and by an ADM joint venture in Venezuela.[65] ADM entered into a settlement with the SEC, agreeing to pay roughly $36.5 million in disgorgement and prejudgment interest, bringing the total amount of the financial resolution with ADM and ACTI Ukraine to more than $54 million.[66]

According to the SEC complaint, Ukraine imposed a 20% VAT on all goods purchased in the country, but exporters could apply for a refund of the VAT paid if the goods were subsequently exported.[67] At times, the Ukrainian government delayed payment of VAT refunds or did not make such payments at all.[68] According to the charges, in order to obtain the VAT refunds, ACTI Ukraine, together with a Germany-based ADM subsidiary, devised several schemes to make improper payments to Ukrainian officials, including payments of a total of $22 million to two third-party vendors between 2002 and 2008.[69] Nearly that entire amount was allegedly passed to Ukrainian officials to obtain over $100 million in VAT refunds, resulting in an alleged benefit to the subsidiaries of approximately $33 million.[70]

According to the SEC complaint, certain ADM executives expressed concern about the so-called "donations" made by the Ukrainian and German subsidiaries to recover the VAT refunds, but ADM's "insufficient anti-bribery compliance policies and procedures … did not prevent or detect improper payments."[71]

The DOJ and the SEC acknowledged ADM's self-disclosure and cooperation, and the DOJ also noted the assistance and cooperation of German law enforcement authorities, which separately reached a resolution with ADM's German subsidiary.[72]

D. Diebold Inc. (DOJ/SEC, $48 million)

Diebold, Inc., an Ohio-based manufacturer of ATM machines and security systems, agreed to settle criminal and civil charges relating to improper conduct in China, Indonesia, and Russia.[73] Diebold entered into a DPA with the DOJ and agreed to pay a $25.2 million criminal penalty to resolve charges that it conspired to violate the FCPA's anti-bribery and books and records provisions and violated the latter.[74] Diebold also settled with the SEC, agreeing to pay $22.9 million in disgorgement and prejudgment interest.[75] As part of the settlements, Diebold consented to an appointment of an independent compliance monitor for at least 18 months, followed by self-reporting for the remainder of the three-year DPA period.[76]

The charges against Diebold focused on two areas. First, Diebold allegedly provided payments and gifts, as well as non-business travel, to employees of Chinese and Indonesian state-owned and state-controlled banks in order to secure and retain business

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63. *United States v. Alfred C. Toepfer Int'l (Ukraine) Ltd.*, 13-CR-20062, Plea Agreement (C.D. Ill. Dec. 20, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/alfred-c-toepfer-international/acti-plea-agreement.pdf.

64. *Id.* at ¶ 16.

65. *In re Archer Daniels Midland Co.*, Non-Prosecution Agreement (Dec. 20, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/archer-daniels-midland/adm-npa.pdf [hereinafter, "ADM NPA"].

66. SEC Press Rel. 2013-271, note 62, *supra*.

67. *SEC v. Archer-Daniels-Midland Co.*, 13-CV-2279, Complaint at ¶ 12 (C.D. Ill. Dec. 20, 2013), http://www.sec.gov/litigation/complaints/2013/comp-pr2013-271.pdf [hereinafter, "ADM SEC Complaint"].

68. *Id.*

69. *Id.* at ¶ 38; ADM NPA, note 65, *supra* at A-3.

70. ADM SEC Complaint, note 67, *supra* at ¶ 38; ADM NPA, note 65, *supra* at A-3.

71. ADM SEC Complaint, note 67, *supra* at ¶¶ 14-20.

72. DOJ Press Rel. 13-1356, note 13, *supra*; SEC Press Rel. 2013-271, note 62, *supra*.

73. DOJ Press Rel. 13-1118, note 28, *supra*; SEC Press Rel. 2013-225, SEC Charges Diebold with FCPA Violations (Oct. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273.

74. DOJ Press Rel. 13-1118, note 28, *supra*.

75. SEC Press Rel. 2013-225, note 73, *supra*.

76. *United States v. Diebold, Inc.*, 13-CR-464, Deferred Prosecution Agreement at ¶¶ 12-13 (N.D. Ohio Oct. 22, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf; SEC Press Rel. 2013-225, note 73, *supra*.

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with those banks.[77] The value of the payments and other benefits totaled $1.75 million between 2005 and 2010, with the vast majority of that amount disbursed in connection with the business in China.[78] The DOJ and the SEC alleged that Diebold executives in charge of the company's Asian operations knew about these payments, which were falsely recorded in Diebold's books and records as training and other legitimate expenses.[79]

Second, the U.S. authorities alleged that Diebold made payments to employees of its privately owned bank customers in Russia to obtain or retain ATM-related contracts.[80] Although there is no allegation that these employees were government officials under the FCPA, the DOJ and the SEC charged Diebold with FCPA books-and-records violations because the payments at issue were made via a third-party distributor pursuant to sham contracts for non-existent services.[81] According to the SEC complaint, such payments totaled approximately $1.2 million between 2005 and 2008, which means that over 40% of the total improper payments in the Diebold action involved commercial bribery.[82]

E. Bilfinger SE (DOJ, $32 million)

On December 11, 2013, the DOJ brought criminal charges against Bilfinger SE, a German engineering and services company.[83] Bilfinger agreed to pay a $32 million penalty to resolve charges that it violated the FCPA by bribing officials in Nigeria.[84]

The DOJ filed a three-count criminal information in the United States District Court for the Southern District of Texas, charging Bilfinger with violating and conspiring to violate the FCPA's anti-bribery provisions.[85] Bilfinger entered into a three-year DPA with the DOJ to resolve the charges, agreeing, in addition to the monetary penalty, to implement internal controls, fully cooperate with the DOJ, and retain a corporate compliance monitor for at least 18 months.[86] The payments by Bilfinger, totaling over $6 million from 2003 through 2005, were intended to obtain and retain contracts related to the EGGS project in Nigeria.[87] The enforcement action is the latest in a series of criminal charges that the DOJ has filed in connection with the EGGS project, which included criminal charges against three companies and four individuals.[88]

V. Declinations

Although neither the DOJ nor the SEC departed from the general practice of not publishing the names of companies that were investigated but not prosecuted, 11 companies announced that prosecutions against them had been declined in 2013,[89] up from ten in 2012.[90] Several of the 2013 declinations can be viewed as part of the "closeout" of longstanding investigations and industry sweeps, a trend also evident in corporate resolutions in 2013. The closure of the investigations against Medtronic Inc. and Zimmer Holdings Inc., along with the Stryker settlement noted above,[91] represents what may be at least the beginning of the end of the sweep of medical device industry companies that began in 2007.[92] Likewise, the DOJ's decision to close its investigation of Nabors Industries Ltd., like its settlement

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77. *United States v. Diebold, Inc.*, 13-CR-464, Information at ¶ 15 (N.D. Ohio Oct. 22, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/information.pdf [hereinafter, "Diebold Information"]; *SEC v. Diebold, Inc.*, 13-CV-1609, Complaint at ¶ 2 (D.D.C. Oct. 22, 2013), http://www.sec.gov/litigation/complaints/2013/comp-pr2013-225.pdf [hereinafter, "Diebold SEC Complaint"].

78. Diebold Information, note 77, *supra* at ¶ 15; Diebold SEC Complaint, note 77, *supra* at ¶ 2.

79. Diebold Information, note 77, *supra* at ¶ 16; Diebold SEC Complaint, note 77, *supra* at ¶ 2.

80. Diebold Information, note 77, supra at ¶ 18; Diebold SEC Complaint, note 77, *supra* at ¶ 3.

81. Diebold Information, note 77, *supra* at ¶¶ 18-22, 45-46; Diebold SEC Complaint, note 77, *supra* at ¶¶ 3-4.

82. Diebold SEC Complaint, note 77, *supra* at ¶ 3.

83. DOJ Press Rel. 13-1297, note 11, *supra*.

84. *Id.*

85. *United States v. Bilfinger SE*, 13-CR-745, Information (S.D. Tex. Dec. 9, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/bilfinger/bilfinger-information.pdf [hereinafter, "Bilfinger Information"].

86. *United States v. Bilfinger SE*, 13-CR-745, Deferred Prosecution Agreement at ¶¶ 8-13 (S.D. Tex. Dec. 9, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/bilfinger/bilfinger-dpa.pdf.

87. Bilfinger Information, note 85, *supra* at ¶ 22.

88. DOJ Press Rel. 13-1297, note 11, *supra*.

89. The companies announcing declinations in 2013 were Allied Defense Group, Inc., DynCorp International Inc., Deere & Company, IDT Corporation, Medtronic Inc., Nabors Industries Ltd., Owens-Illinois Group Inc., Raytheon Company, 3M Company, Wynn Resorts, and Zimmer Holdings Inc. *See* Cassin, note 7, *supra*.

90. *See* Richard L. Cassin, "2012: The Year in Declinations," *FCPA Blog* (Dec. 27, 2012), http://www.fcpablog.com/blog/2012/12/27/2012-the-year-in-declinations.html.

91. *See* Section III.A, *supra*.

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with Parker Drilling Company,[93] relates to the longstanding investigation of the customers of a Swiss freight forwarder, Panalpina.[94] Finally, the conclusion of the investigation of Allied Defense Group, a munitions maker implicated in the Africa sting prosecutions, closes out that inglorious chapter for the DOJ[95] and will allow the liquidation of the company to proceed.[96]

> "The difficulty of drawing any meaningful conclusions from declinations is in large part due to the fact that neither the DOJ nor the SEC has released information regarding the reasoning behind each declination."

Overall, no clear pattern emerges from the disclosed 2013 declination decisions that would provide guidance to corporate counsel on how to address a potential FCPA violation. Only four of the 11 companies that received declinations voluntarily disclosed the potential FCPA violation to an enforcement agency, making it difficult to conclude (at least based on this statistic) that a decision to self-disclose – frequently touted by DOJ and SEC officials as a way to secure a more favorable resolution for the company[97] – is a prerequisite to receiving a declination.

The difficulty of drawing any meaningful conclusions from declinations is in large part due to the fact that neither the DOJ nor the SEC has released information regarding the reasoning behind each declination, despite ongoing pressure from business leaders to do so.[98] This is particularly problematic given that these authorities may decline to prosecute a company for many reasons, including lack of evidence, lack of jurisdiction, expiration of the statute of limitations, or other prosecutorial or administrative concerns unrelated to voluntary disclosure or cooperation by the company.[99] In some situations, a "declination" is more akin to the government's admission that it does not have a case, rather than an exercise of discretion rewarding a self-disclosing or cooperating target.

VI. Individual Resolutions of 2013

A. Key Jurisdictional Decisions in Prosecutions of Foreign Nationals

In February 2013, two judges in the United States District Court for the Southern District of New York reached different conclusions regarding personal jurisdiction in connection with SEC enforcement actions against individuals for alleged FCPA violations. Both cases involved non-U.S. persons who were employees of foreign companies publicly traded in the United States.

In *SEC v. Straub*,[100] the three defendants were former executives of Magyar Telekom, PLC, a subsidiary of Deutsche Telekom (both of which resolved FCPA enforcement actions in 2011).[101] The SEC alleged that the defendants bribed Macedonian officials in return for favorable treatment.[102] In an effort to carry out the scheme, defendants allegedly falsified certifications in connection with the companies' financial statements, which were filed with the SEC.[103] Defendants filed a motion to dismiss the complaint, arguing in part that the United States lacked personal jurisdiction over them.[104] In an

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92. *See* Medtronic, Inc., SEC Form 10-K at 114 (June 24, 2013); Zimmer Holdings, Inc., SEC Form 10 K at 64 (Feb. 27, 2013).
93. *See* Section III.A, *supra*.
94. *See* Nabors Industries Ltd., SEC Form 8-K at 1 (Feb. 20, 2013).
95. *See* FCPA Update 2012 Year in Review, note 5, *supra*.
96. Allied Defense Group, Shareholder Letter No. 13 (Aug. 15, 2013), http://www.allieddefensegroup.com/download.asp?fid=34; *see also* Richard L. Cassin, "DOJ Declination for Allied Defense, Green Light for Liquidation," *FCPA Blog* (Aug. 16, 2013), http://www.fcpablog.com/blog/2013/8/16/doj-declination-for-allied-defense-green-light-for-liquidati.html.
97. *See* Hecker, *et al.*, note 6, *supra*.
98. *See, e.g.*, U.S. Chamber of Commerce et al., Letter to the DOJ and the SEC Regarding the FCPA Resource Guide at 6 (Feb. 19, 2013).
99. *See, e.g.*, Marc Alain Bohn, "Revisiting the Definition of 'Declinations,'" *FCPA Blog* (Jan. 22, 2013), http://www.fcpablog.com/blog/2013/1/22/revisiting-the-definition-of-declinations.html. In fact, the IDT Corporation stated in its SEC filing that its internal investigation found no evidence that the company made any improper payments, suggesting that the decision by the DOJ and the SEC to close their investigations may have had to do with the lack of evidence. *See* IDT Corp., SEC Form 10-Q at 15 (June 10, 2013).
100. 921 F. Supp. 2d 244 (S.D.N.Y. Feb. 8, 2013).
101. *Id.* at 248-49.
102. *Id.* at 248-51.
103. *Id.* at 250, 256.
104. *Id.* at 248.

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opinion issued on February 8, 2013, Judge Richard Sullivan rejected this argument, holding that the defendants had sufficient "minimum contacts" with the United States.[105] Judge Sullivan highlighted the allegation that the defendants signed letters to Magyar Telekom's auditors and that defendants "knew or had reason to know" that the financial reports based on those letters "would be given to prospective American purchasers of [Magyar Telekom's] securities."[106] The defendants' request for leave to appeal to the United States Court of Appeals for the Second Circuit was denied.[107]

Shortly after the *Straub* decision, Judge Shira Scheindlin granted a motion to dismiss for lack of personal jurisdiction the case against one of the defendants in *SEC v. Sharef*,[108] expressly distinguishing the facts from those in *Straub*. The case is part of the SEC's and DOJ's ongoing efforts to prosecute former Siemens executives in connection with alleged improper payments to Argentine officials.[109] The former CEO of Siemens S.A. Argentina, Herbert Steffen, challenged allegations on jurisdictional grounds and the court agreed, holding that "Steffen's actions are far too attenuated from the resulting harm to establish minimum contacts."[110] Judge Scheindlin expressly distinguished the allegations against Steffen from those in *Straub* by noting that, in the latter, "executive[s] of a foreign securities issuer, wherever located, participate[d] in a fraud *directed* to deceiving United States shareholders."[111] This was not the case for Steffen, who did not "'follow[] a course of conduct directed at … the jurisdiction,'"[112] with the result that the exercise of jurisdiction violated due process.[113]

Judge Scheindlin also noted that several other factors, including Steffen's "lack of geographic ties to the United States, his age, his poor proficiency in English, and the forum's diminished interest in adjudicating the matter" (as a result of the prior U.S. enforcement action against Siemens and German authorities' action against Steffen), all weighed against a finding of personal jurisdiction.[114] With the action against other *Sharef* defendants still pending before Judge Scheindlin, the possibility remains that the SEC may take an appeal from her order of dismissal in Steffen's case.

B. Individual Prosecutions of 2013

1. Alstom Executives

Last year brought indictments and guilty pleas by the current and former executives of Alstom S.A. and its subsidiaries.[115] David Rothschild, former vice president of regional sales at Alstom's Connecticut-based subsidiary, was the first to plead guilty – to one count of conspiring to violate the FCPA – in November 2012. Rothschild's plea was unsealed in April 2013, at the time of the arrest of another Alstom executive, Frederic Pierucci, when Pierucci stepped off a plane at JFK Airport.[116] Pierucci pleaded guilty on July 29, 2013 to one count of conspiring to violate the FCPA and one count of violating the FCPA.[117]

Two other Alstom executives, Lawrence Hoskins (former senior vice president for the Asia region) and William Pomponi (former executive of Alstom's Connecticut-based subsidiary) were charged in July 2013 with conspiring to violate the FCPA and to launder money, as well as with substantive FCPA and money laundering offenses.[118] Pomponi's trial has been scheduled for

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105. *Id.* at 258.

106. *Id.* at 255.

107. *SEC v. Straub*, 11-CV-9645 (RJS), 2013 WL 4399042, at *7 (S.D.N.Y. Aug. 5, 2013).

108. 924 F. Supp. 2d 539 (S.D.N.Y. Feb. 19, 2013).

109. *See* Section VI.D, *infra*, regarding the settlement of SEC charges against another former Siemens executive.

110. *Sharef*, 924 F. Supp. 2d at 546.

111. *Id.* at 547 (internal quotation marks omitted) (emphasis in the original).

112. *Id.* at 548 (alterations in the original).

113. *Id.*

114. *Id.* at 548-49.

115. DOJ Press Rel. 13-862, Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013), http://www.justice.gov/opa/pr/2013/July/13-crm-862.html; DOJ Press Rel. 13-434, Foreign Bribery Charges Unsealed Against Current and Former Executives of French Power Company (Apr. 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-434.html; *see also* Nathalie Tadena, "DOJ Charges Another Ex-Alstom Executive for Foreign Bribery Scheme," *Wall Street Journal* (July 31, 2013), http://online.wsj.com/news/articles/SB10001424127887324635904578639971587558166.

116. DOJ Press Rel. 13-434, note 115, *supra*.

117. DOJ Press Rel. 13-862, note 115, *supra*.

118. *Id.* This was a second superseding indictment for Pomponi, who was previously charged on April 30, 2013.

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June 16, 2014,[119] while the status of Hoskins' case is unknown.

According to the charges, the defendants, along with others, bribed a member of the Indonesian Parliament and officials at an Indonesian state-owned electricity company.[120] The defendants allegedly paid the bribes via two consultants for the purpose of securing a $118 million Tarahan project in Indonesia. The DOJ described in detail emails containing explicit discussions of improper payments made via the consultants, and alleged that some of the funds passed through one of the consultants' Maryland bank account.[121] Alstom S.A., which has not been charged for the conduct of its executives, has been under investigation in the United Kingdom and Switzerland for overseas bribery.[122]

2. BizJet Executives

In April 2013, the DOJ unsealed charges against four former executives of BizJet International Sales and Support, Inc., the U.S.-based subsidiary of Lufthansa Technik AG. Four former BizJet executives – Bernd Kowalewski, Jald Jensen, Peter DuBois, and Neal Uhl – allegedly schemed to bribe officials of state agencies in Latin America.[123]

Kowalewski and Jensen were charged with conspiring to violate the FCPA and to launder money, as well as with substantive charges of violating the FCPA and money laundering, on January 5, 2012; they are believed to remain abroad.[124] DuBois and Uhl, in turn, pleaded guilty to one count of conspiracy to violate the FCPA and, in the case of DuBois, one count of violating the FCPA. Both DuBois and Uhl were sentenced on April 5, 2013 to probation and eight months' home detention, lighter sentences than the sentencing guidelines range, based on their cooperation with the investigation.[125]

The charges alleged that the defendants paid bribes to officials in Mexico, Brazil, and Panama to secure aircraft maintenance, repair, and overhaul services for BizJet. Improper payments allegedly were made both directly to the foreign officials and indirectly through a shell company that operated under the pretense of providing aircraft maintenance brokerage services and was owned and operated by Jensen.[126] The charges were unsealed one year after BizJet and its owner, Lufthansa, settled an FCPA case with the DOJ for an $11.8 million criminal fine and a three-year DPA.[127]

3. Employees of Direct Access Partners LLC

In August 2013, three employees of New York-based Direct Access Partners LLC ("DAP") pleaded guilty to bribing employees of two state-owned economic development banks in Venezuela in exchange for bond-trading work. Ernesto Lujan, Tomas Alberto Clarke Bethancourt, and Jose Alejandro Hurtado pleaded guilty to six counts of conspiring to violate the FCPA and the Travel Act and to commit money laundering, as well as to substantive counts of the offenses.[128] The defendants admitted to paying at least $5 million in bribes to Maria de los Angeles Gonzalez de Hernandez, a vice president of Banco de Desarrollo Economico y Social de Venezuela ("BANDES"), which was majority-owned by the Venezuelan government. In return, from 2009 through 2012, Gonzalez directed the trading business she controlled at BANDES to DAP, generating over $60 million in mark-ups and mark-downs from trades for the latter.[129]

In November 2013, Gonzalez herself pleaded guilty to conspiracy to violate the Travel Act and to commit money laundering, as well as to substantive counts

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119. *United States v. Pomponi*, 12-CR-238, Endorsement Order at 2 (D. Conn. Nov. 21, 2013).

120. *Id.*

121. *Id.*

122. *See, e.g.*, James Boxell & Caroline Binham, "Alstom to Pay €1M Fine After Bribery Probe," *Financial Times* (Nov. 22, 2011), http://www.ft.com/intl/cms/s/0/1cd17286-1508-11e1-b9b8-00144feabdc0.html#axzz2pfebtcJT; Richard L. Cassin, "Second Alstom Exec Pleads Guilty, and Another Is Indicted," *FCPA Blog* (July 30, 2013), http://www.fcpablog.com/blog/2013/7/30/second-alstom-exec-pleads-guilty-and-another-is-indicted.html.

123. DOJ Press Rel. 13-388, Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery (Apr. 5, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-388.html.

124. *Id.*

125. *Id.*

126. *Id.*

127. DOJ Press Rel. 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.

128. DOJ Press Rel. 13-980, Three Former Broker-Dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), http://www.justice.gov/opa/pr/2013/August/13-crm-980.html.

129. *Id.*

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of those offenses.[130] Gonzalez admitted to taking millions of dollars in kickbacks from employees and agents of DAP. The defendants are yet to be sentenced.[131]

The case arose out of the SEC's broker-dealer examination of DAP that began in November 2010.[132] The defendants, concerned about the SEC's examination and questions regarding DAP's relationship with BANDES, allegedly conspired to conceal the true nature of that relationship, deleting emails and, in the case of Bethancourt, lying to the SEC.[133] Following the arrests, DAP's parent company, Direct Access Group LLC, filed for Chapter 11 bankruptcy protection.[134]

4. Frederic Cilins

On April 15, 2013, the DOJ announced the arrest of a French national, Frederic Cilins, who was charged with attempting to obstruct an FCPA-related grand jury investigation pending in the United States District Court for the Southern District of New York into whether a mining company paid bribes to win mining rights in the Republic of Guinea.[135] Cilins allegedly agreed to pay large sums of money to "induce a witness to the bribery scheme to turn over documents to Cilins for destruction, which Cilins knew had been requested by the FBI and needed to be produced before a federal grand jury."[136] The documents allegedly included original copies of agreements between the mining company and its affiliates and "the former wife of a now-deceased Guinean government official," and related to a scheme to pay the wife of the official and other government officials to secure mining rights.[137]

> "In the last individual prosecution of 2013, Alain Riedo, former general manager of the Swiss subsidiary of California-based Maxwell Technologies Inc., was indicted in October for bribing officials at state-owned companies in China."

Court filings and press reports, including an in-depth article in The New Yorker, have identified the company behind the alleged scheme as BSG Resources, the mining arm of the conglomerate belonging to an Israeli billionaire, Beny Steinmetz.[138] The "former wife of a now-deceased Guinean government official," in turn, has been identified as Mamadie Touré, the fourth and youngest wife of General Lansana Conté, former ruler of Guinea.[139]

Cilins has pleaded not guilty to all charges, and on December 6, 2013, Judge William H. Pauley III ordered jury selection in the trial to begin on March 31, 2014. BSG Resources, which was not named in the indictment, is said to be the subject of an ongoing FCPA probe as well as investigations in several other countries in connection with its Guinean business.[140]

5. Alain Riedo

In the last individual prosecution of 2013, Alain Riedo, former general manager of the Swiss subsidiary of California-based Maxwell Technologies Inc., was indicted in October for bribing officials at state-owned companies in China. Riedo, a Swiss national, was charged with nine counts of violating

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130. DOJ Press Rel. 13-1229, High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme (Nov. 18, 2013), http://www.justice.gov/opa/pr/2013/November/13-crm-1229.html.

131. *See id.*; DOJ Press Rel. 13-980, note 128, *supra*.

132. *See* DOJ Press Rel. 13-980, note 128, *supra*.

133. *Id.*

134. *See* Nate Raymond, "Two U.S. Traders Plead Guilty in Venezuelan Bank Bribery Case," *Reuters* (Aug. 29, 2013), http://www.reuters.com/article/2013/08/29/us-bribery-arrest-directaccess-idUSBRE97S18X20130829.

135. DOJ Press Rel. 13-429, Obstruction Charges Filed in Ongoing FCPA Investigation into Alleged Guinean Mining Rights Bribe Scheme (Apr. 15, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-429.html.

136. *Id.*

137. *Id.*

138. *See, e.g.*, Patrick Radden Keefe, "Buried Secrets: How an Israeli Billionaire Wrested Control of One of Africa's Biggest Prizes," *The New Yorker* (July 8, 2013), http://www.newyorker.com/reporting/2013/07/08/130708fa_fact_keefe?currentPage=all; Samuel Rubenfeld, "Trial Date Set in FCPA Obstruction Case," *Wall Street Journal Risk & Compliance Blog* (Dec. 6, 2013), http://blogs.wsj.com/riskandcompliance/2013/12/06/trial-date-set-in-fcpa-obstruction-case.

139. *Id.*

140. *See* Rubenfeld, note 138, *supra*.

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the FCPA, conspiracy, falsifying records, and evading Maxwell's internal controls.[141]

The Swiss subsidiary of Maxwell headed by Riedo is claimed to have made corrupt payments to Chinese government officials between 2002 and 2009, and to have falsely recorded those payments.[142] Riedo is alleged to have approved sales contracts with Chinese state-owned entities that he knew were inflated, and to have forwarded extra funds to bank accounts of an agent who passed them on to individuals at the Chinese entities.[143]

Maxwell settled the DOJ and SEC enforcement actions arising out of the same conduct in February 2011, agreeing to pay $8 million in criminal penalties and $6.3 million in disgorgement and prejudgment interest to resolve civil charges.[144] Riedo remains at large.[145]

C. Frederic Bourke Reports to Prison

The trials and tribulations of Frederic Bourke, co-founder of the luxury handbag designer Dooney & Bourke, who was sentenced in 2009 to one year and one day for payments he made in connection with a planned acquisition of a previously state-owned oil company in Azerbaijan, came to a head in 2013.[146] Having lost appeals challenging his conviction,[147] in October 2012, Bourke petitioned the Supreme Court of the United States to review the Second Circuit rulings concerning, among other matters, the court's jury instruction on "willful blindness."[148]

On April 15, 2013, the Supreme Court denied Bourke's petition for certiorari.[149] One month later, the Second Circuit denied Bourke's petition for rehearing en banc in a separate challenge, in which Bourke alleged government misconduct.[150] On May 10, 2013, Bourke reported to the Englewood Camp, a minimum security facility near Denver, Colorado, to begin serving his one-year sentence.[151]

D. Uriel Sharef Settles with the SEC

In April 2013, Uriel Sharef, a former officer and board member of Siemens AG, settled the SEC's civil action relating to his role in the Siemens bribery matter. Sharef, along with other Siemens executives, was accused of paying bribes to government officials in Argentina in connection with a government contract to provide national identity cards.[152] Sharef was the most senior Siemens executive charged in connection with the alleged scheme. Sharef agreed to pay a $275,000 civil penalty to settle the SEC enforcement action, the second highest penalty assessed against an individual in an FCPA case.[153] Sharef neither admitted nor denied the allegations in the SEC complaint.[154]

Sharef's troubles are not over, however. In addition to having been charged in the United States with conspiracy to violate the FCPA, he is among 17 current and former Siemens executives charged with bribery in Argentina in connection with the same national identity card project.[155] In an indictment by the Argentine Federal Judge Ariel Lijo, Sharef and others are accused of

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141. *United States v. Riedo*, 13-CR-3789, Indictment (S.D. Cal. Oct. 15, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/reidoa/Riedo_Indictment.pdf.

142. *Id.* at ¶¶ 15, 22.

143. *Id.* at ¶ 17.

144. DOJ Press Rel. 11-129, Maxwell Technologies Inc. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $8 Million Criminal Penalty (Jan. 31, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-129.html.

145. *See* Richard L. Cassin, "Former Maxwell Exec Indicted for China Bribes," *FCPA Blog* (Oct. 16, 2013), http://www.fcpablog.com/blog/2013/10/16/former-maxwell-exec-indicted-for-china-bribes.html.

146. *See* FCPA Update 2012 Year in Review, note 5, *supra*; DOJ Press Rel. 09-1217, Connecticut Investor Frederic Bourke Sentenced to Prison for Scheme to Bribe Government Officials in Azerbaijan (Nov. 11, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1217.html.

147. *United States v. Kozeny*, 667 F.3d 122, 127-134 (2d Cir. 2011).

148. *Bourke v. United States*, 12-531, Petition for Writ of Certiorari (Oct. 25, 2012).

149. *Bourke v. United States*, 12-531, Cert. Denied (Apr. 15, 2013).

150. *United States v. Bourke*, 11-5390, Order (2d Cir. May 7, 2013) (denying Bourke's petition for panel rehearing or, in the alternative, for rehearing en banc); *see also United States v. Bourke*, 11-5390, Petition for Rehearing and Rehearing En Banc (2d Cir. Dec. 6, 2012).

151. Richard L. Cassin, "Bourke Enters Englewood," *FCPA Blog* (May 17, 2013), http://www.fcpablog.com/blog/2013/5/17/bourke-enters-englewood.html.

152. SEC Lit. Rel. 22676, Former Siemens Executive Uriel Sharef Settles Bribery Charges (Apr. 16, 2013), http://www.sec.gov/litigation/litreleases/2013/lr22676.htm.

153. The highest FCPA penalty against an individual was $438,038, assessed against a former Innospec, Inc. executive, Ousama M. Naaman, in 2010. SEC Press Rel. 2010-141, SEC Charges Two Individuals for Roles in Innospec FCPA Scheme (Aug. 5, 2010), http://www.sec.gov/news/press/2010/2010-141.htm.

154. SEC Lit. Rel. 22676, note 152, *supra*.

155. DOJ Press Rel. 11-1626, "Eight Former Senior Executives and Agents of Siemens Changed in Alleged $100 Million Foreign Bribe Scheme" (Dec. 13, 2011), http://www.justice.gov/opa/pr/2011/December/11-crm-1626.html; "Siemens' Ex-Managers Charged with Bribes," *Buenos Aires Herald* (Dec. 28, 2013), http://www.buenosairesherald.com/article/148403/siemens%E2%80%99-exmanagers-charged-with-bribes. Steffen was not among the individuals charged. *Id.*

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paying more than $106 million to middlemen representing the administration of a former Argentinean president.[156] Sharef also faces criminal proceedings in Germany.[157]

VII. The FCPA Guidance: Lessons from the First Year

Developments in 2013 also highlighted both strengths and weaknesses in the DOJ/SEC Guidance. As previously noted,[158] although the 120-page Guidance did not break considerable new ground, it provided practical advice on certain FCPA issues. Among other things, the Guidance: (1) provided helpful 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; (2) addressed questions regarding the acceptable gifts and hospitality levels under the FCPA; and (3) reiterated the government's position on the definitions of a "foreign official" and "government instrumentality."[159] The sections below evaluate those statements and their continued applicability in light of the subsequent enforcement actions and judicial developments.

A. Successor Liability

The SEC's and DOJ's advice to companies on how to proceed in the M&A context continues to serve as a source of comfort to companies involved in M&A transactions that carry potential FCPA risks. Although the Guidance did not provide new advice on how companies can avoid the risk of successor liability entirely, it did suggest concrete steps to minimize such risk. In particular, the agencies were clear in "encourag[ing] companies to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition,"[160] and voluntarily to report any discovered violations.[161]

Even before the Guidance, many companies recognized the need for risk-based pre-acquisition due diligence. This was in part because of enforcement actions holding acquiring companies liable for the FCPA violations of their targets,[162] as well as DOJ Opinion Release 2008-02 (commonly referred to as the "Halliburton Opinion"), in which the DOJ laid out its high expectations regarding M&A due diligence.[163]

Studies suggest that companies are now dedicating even more resources to FCPA due diligence in the M&A and joint venture formation contexts, and are more willing to self-report any discovered violations. A recent survey of 392 in-house counsel found that 18% of U.S. companies engaged in FCPA due diligence for cross-border deals in 2012, up from 11% in 2011.[164] The number of large U.S. companies engaged in such due diligence almost doubled, from 17% in 2011 to 30% in 2012.[165] Further, in a 2013 survey of general counsel, senior corporate lawyers, and compliance heads at 316 multinational companies, 68% of those surveyed said that, compared to three years ago, they were more likely to self-report

"The SEC's and DOJ's advice to companies on how to proceed in the M&A context continues to serve as a source of comfort to companies involved in M&A transactions that carry potential FCPA risks."

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156. *Id.*

157. *See* Cornelia Knust, "Siemens-Prozess: Zähe Kleinarbeit," *Manager Magazin Online* (Dec. 3, 2013), http://www.manager-magazin.de/unternehmen/industrie/siemens-prozess-urteil-im-fall-sharef-wird-erst-2014-ergehen-a-936977.html (German).

158. *See* FCPA Update 2012 Year in Review, note 5, *supra*; Debevoise & Plimpton Client Update, "U.S. Enforcement Agencies Issue Extensive New FCPA Guidance" (Nov. 15, 2012), http://www.debevoise.com/clientupdate20121115a.

159. *Id.*

160. Guidance at 28.

161. *Id.* at 54 ("[B]oth DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.").

162. *See, e.g.*, DOJ Press Rel. 10-903, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), http://www.justice.gov/opa/pr/2010/August/10-crm-903.html; SEC Press Rel. 2010-133, SEC Charges General Electric and Two Subsidiaries with FCPA Violations (July 27, 2010), http://www.sec.gov/news/press/2010/2010-133.htm.

163. DOJ Op. Rel. 08-02 (June 13, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf. Though the Guidance noted that the Halliburton Opinion "likely contain[s] more stringent requirements than may be necessary in all circumstances," it reaffirmed the DOJ's and SEC's support for this type of thorough due diligence for acquisitions. Guidance at 29.

164. *See* Fulbright & Jaworski LLP, "Fulbright's 9th Annual Litigation Trends Survey Report" at 35 (Feb. 26, 2013), http://www.litigationtrends.com.

165. *Id.* The 2013 survey has not yet been released.

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to regulators if they identified a suspected bribery case.[166]

Companies are increasingly recognizing the value of pre- and post-acquisition due diligence in part because, as the Guidance points out, the M&A due diligence recommendations are aligned with companies' business objectives as they "help[] an acquiring company to accurately value the target company."[167] If, through preacquisition due diligence, a company finds that the target is at higher risk for FCPA violations than previously believed or learns of actual violations, the company can attempt to renegotiate the purchase price, seek contractual protections, or even walk away from the transaction.[168] Due diligence also can assist an acquirer in making a more informed decision regarding the value of a target if it discovers that the target's profitability may decrease substantially in the absence of illegal or otherwise problematic activity.

Nevertheless, one of the Guidance's recommendations regarding successor liability – that acquiring companies seek targeted feedback under the DOJ's FCPA opinion procedure[169] – is less likely to be followed with any real frequency. Requesting and obtaining such an opinion is usually a time-consuming process, putting it at odds with the usual M&A transaction schedule, which is often highly time-sensitive. In fact, the only 2013 DOJ FCPA opinion, released on December 19, 2013, responded to a request issued more than two months earlier, even though the request ostensibly related to a rather urgent matter: provision of medical services to a daughter of a foreign government official for treatment of a "severe medical condition."[170] Given the infrequent use of the opinion procedure process – two opinions were issued in 2012 and only one in 2013 – there is a fair amount of uncertainty surrounding the procedure, likely making it a largely ineffective tool in the transactional context.[171]

B. Gifts and Business Hospitality

Another area where the Guidance provided detailed advice related to gifts to and entertainment of government officials and the treatment of such expenditures under the FCPA. The Guidance stated that ordinary and legitimate promotion of a business is unlikely to run afoul of the FCPA because such action lacks corrupt intent.[172] It also emphasized that the payment of travel and entertainment expenses for foreign officials has resulted in enforcement action only in cases in which such hospitality was extravagant or "occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent."[173] Further, the Guidance appears to have endorsed a rule of proportionality, authorizing companies to take into account the income and stature of the government official at issue, permitting somewhat higher gift, travel, and hospitality expenditures for those on whom such spending is less likely to have an influence.[174]

When announced, these statements were interpreted as DOJ's and SEC's implicit permission "not to sweat the small stuff"[175] and to focus on other compliance risks – *i.e.*, what U.S. government officials sometimes refer to as "the big bribe." The 2013 enforcement actions, most prominently that against Diebold, suggest that, although that advice is valid, it should not be overstated. Specifically, Diebold and other enforcement actions indicate that the DOJ and the SEC will not shy away from prosecuting

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166. *See* Control Risks, "International Business Attitudes to Corruption" at 17 (2013), http://www.controlrisks.com/Oversized%20assets/International_business_attitudes_to_corruption.pdf.

167. Guidance at 28.

168. For example, Lockheed Martin terminated a planned merger with the Titan Corporation in 2004 because Titan "had not obtained written confirmation from the Department of Justice that the investigation of alleged Foreign Corrupt Practices Act (FCPA) violations was resolved." *See* "Lockheed Martin Terminates Merger Agreement with the Titan Corporation," *PR Newswire* (June 26, 2004), http://www.prnewswire.com/news-releases/lockheed-martin-terminates-merger-agreement-with-the-titan-corporation-75166087.html.

169. Guidance at 29.

170. DOJ Op. Rel. 13-01 (Dec. 19, 2013). The two DOJ FCPA Opinions in 2012 were issued 7 months and 2 months after the respective requests were made. DOJ Op. Rel. 12-01 (Sept. 18, 2012); DOJ Op. Rel. 12-02 (Oct. 18, 2012).

171. The DOJ has issued only eight opinion releases in the last five years and only 37 opinions since 1993. *See* DOJ, Opinion Procedure Releases, http://www.justice.gov/criminal/fraud/fcpa/opinion.

172. Guidance at 15.

173. *Id.*

174. *Id.* at 17-18; *see also* FCPA Update 2012 Year in Review, note 5, *supra*.

175. *See, e.g.*, Mark Friedman, "DOJ to Industry: Don't Sweat the Small Stuff," *FCPA Blog* (Nov. 19, 2012), http://www.fcpablog.com/blog/2012/11/19/doj-to-industry-dont-sweat-the-small-stuff.html (stating that the takeaway from the Guidance and contemporaneous comments by DOJ officials is that "DOJ is not concerned with small potatoes"); Alexandra Theodore, "'Don't Sweat the Small Stuff' in FCPA Investigations, Says Deloitte," *Ethikos* (Nov. 20, 2012), http://www.ethikospublication.com/html/newsarchive.html.

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companies for travel and entertainment expenditures when they consider them to violate the FCPA, even when the amounts at issue are relatively small.[176]

As discussed above, the DOJ and the SEC alleged that, between 2005 and 2010, Diebold distributed an equivalent of $1.6 million in gifts, entertainment, and nonbusiness travel to multiple employees of two Chinese state-owned banks and trips valued at approximately $175,000 to employees of Indonesian banks.[177] The dollar equivalents of some of the allegedly improper payments detailed in the SEC complaint ranged "from less than $100 to over $600 . . . given to dozens of officials annually."[178]

The SEC complaints in two other 2013 enforcement actions also specifically called out improper travel and entertainment provided to foreign officials. The SEC complaint in the Weatherford action, which detailed large-scale bribes paid to obtain or retain business,[179] contained a recitation of improper travel and entertainment provided to officials at the Algerian national oil company, totaling $35,260 between 2005 and 2008.[180] Similarly, the SEC complaint in the Stryker action noted the company's payment for the travel and entertainment expenses of a Polish hospital official. Although the business purpose of the trip was a "single-day tour" of Stryker's facility in New Jersey, Stryker paid for the official and his wife's "six-night stay at a hotel in New York City, attendance at two Broadway shows, and a five-day trip to Aruba," at a cost of $7,000 to the company.[181]

> "[T]he comparatively harsh penalty paid by Diebold and the SEC's continued focus on gifts, travel, and entertainment expenses, including some items such as gifts as low as $100 in value, raise continuing concerns."

The facts relating to the travel and entertainment expenditures in Diebold, Weatherford, and Stryker actions indicate that those expenditures went beyond "ordinary and legitimate promotion of business" endorsed by the Guidance or constituted part of systemic improper conduct. Nevertheless, the comparatively harsh penalty paid by Diebold and the SEC's continued focus on gifts, travel, and entertainment expenses, including some items such as gifts as low as $100 in value, raise continuing concerns and indicate that compliance counsel will, for better or worse, need to continue to devote potentially significant time and resources to addressing travel and entertainment issues and ensuring that there are well-established policies and procedures governing such expenditures.

C. "Government Instrumentality" and "Foreign Official" Definitions and the *Esquenazi* Matter

The meaning of the terms "foreign official" and "government instrumentality" has been a key issue for FCPA enforcement. The Guidance repeated the position, successfully advanced by the DOJ in a number of lower federal courts, that whether a state-owned enterprise is an instrumentality of a foreign state (and its employees thus are foreign officials) is a fact-specific analysis involving issues of ownership, control, status, and function of the enterprise.[182] The Guidance encouraged companies to consider the listed factors "when evaluating the risk of FCPA violations and designing compliance programs."[183]

The Guidance's view on this matter was set out in the shadow of the *Esquenazi* appeal to the United States Court of

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176. *See also* Paul R. Berger, Sean Hecker, Andrew M. Levine, Bruce E. Yannett & Philip Rohlik, "The Government's $48 Million ATM Withdrawal: Is It Time to Start Sweating Again?," *FCPA Update*, Vol. 5, No. 3 (Oct. 2013), http://www.debevoise.com/fcpa-update-10-30-2013.

177. *See* Section IV.D, *supra*; *see also* Diebold Information, note 77, *supra* at ¶ 15; Diebold SEC Complaint, note 77, *supra* at ¶ 2.

178. Diebold SEC Complaint, note 77, *supra* at ¶ 25. The DOJ Information also quotes from internal emails detailing cash gifts given to Chinese bank employees. Diebold Information, note 77, *supra* at ¶¶ 31-40.

179. *See* Section IV.B, *supra*.

180. Weatherford SEC Complaint, note 56, *supra* at ¶¶ 36-38; *see also* Sean Hecker, Andrew M. Levine & Philip Rohlik, "Weatherford International Enters the FCPA Top Ten List with $152.5 Million in Fines and Penalties," *FCPA Update*, Vol. 5, No. 5 (Dec. 2013), http://www.debevoise.com/fcpa-update-12-18-2013.

181. *See In re Stryker Corp.*, note 19, *supra* at ¶¶ 15-16.

182. Guidance at 20.

183. *Id.*

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Appeals for the Eleventh Circuit, which will likely be the first appellate court to rule on the matter.[184] Joel Esquenazi and Carlos Rodriguez were convicted in 2011 of FCPA and money laundering offenses in connection with payments to officials at Telecommunications D'Haiti S.A.M. ("Haiti Teleco"), a stateowned telecommunications company.[185] They appealed their convictions, arguing that Haiti Teleco is not an instrumentality of the Haitian government, and therefore the recipients were not "foreign officials" as a matter of law. On appeal, Esquenazi and Rodriguez have argued that the term "instrumentality" includes only state-owned enterprises that perform "governmental functions," which do not include telecommunications services provided by Haiti Teleco.[186] The Government, on the other hand, endorsed the district court's (and Guidance's) multi-factored approach to determining whether a state-owned enterprise is an "instrumentality."[187]

The Eleventh Circuit heard oral arguments on October 11, 2013.[188] The judges' questions conveyed their interest in ensuring that the definition of "government instrumentality" they adopt proves workable and clear. As Judge Adalberto Jordan noted, "we are writing an opinion one way or another that is going to control later cases, so we do not have the luxury of saying we do not have to worry about a definition."[189]

Attorney for co-defendant Rodriguez argued that, in determining if an entity is a government instrumentality, the court should focus on whether the entity is a "unit" of the government or merely its "asset."[190] Using the example of U.S. National Parks, counsel stated that they are "units" of the U.S. government because they are created by statute and "anybody looking at it would know it is a part of the United States government."[191] Judge Jordan noted that "in other countries, that distinction may be very blurry because a state-owned enterprise may be a commercial engine for the government in what is more likely a centralized economy."[192] When pressed to distinguish "units" from "assets," counsel responded: "You kind of just know it, if it is part of the government."[193] Not surprisingly, the judges were unsatisfied with this answer.[194]

The judges also did not appear to be persuaded by the government's argument for a multi-factor test for "instrumentality" and noted their concern that the term may be so vague as to raise a constitutional issue when used in a criminal statute like the FCPA.[195] The government attorney emphasized the facts of the *Esquenazi* case and declined to look beyond the facts at hand to the broader implications of the government's position.[196] Defendants' counsel picked up on this theme, arguing that the approach advocated by the government lacks clarity, which is necessary in a criminal case.[197]

It remains to be seen how the Eleventh Circuit will rule, but the facts regarding Haiti Teleco – its 97% state ownership, the appointment of its board members by government officials, and its exemption from corporate taxes[198] – make the appeal an uphill battle for the defendants. Nevertheless, the judges did not appear to be completely at ease with the test advocated

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

185. *See* FCPA Update 2012 Year in Review, note 5, *supra*.

186. *Esquenazi* Appellant Brief, note 184, *supra* at 39-40 ("State-owned or state-controlled entities that are not political subdivisions that perform governmental functions should not be granted the status of 'instrumentality.'").

187. *Esquenazi* U.S. Brief, note 184, *supra* at 28.

188. *See, e.g.*, Samuel Rubenfeld, "Appeals Judges Probe for Definition of 'Instrumentality' in Key FCPA Case," *Wall Street Journal Risk & Compliance Blog* (Oct. 15, 2013), http://blogs.wsj.com/riskandcompliance/2013/10/15/appeals-judges-probe-for-definition-of-instrumentality-in-key-fcpa-case.

189. *United States v. Esquenazi*, Recording of Oral Argument at 31:21-31:29 (Oct. 11, 2013), www.perkinscoie.com/files/upload/IWCD_13_10_FunkArgument_10.15.2013.mp3.

190. *Id.* at 11:46-12:30.

191. *Id.* at 12:13-13:13.

192. *Id.* at 13:23-37.

193. *Id.* at 13:59-14:02.

194. *Id.* at 14:01-04, 15:14-22.

195. *Id.* at 28:14-29:23.

196. *Id.* at 28:35-59 ("Here, the defendants were engaging in bribery, so already that is illegal conduct and not only that, they were bribing officials who they knew worked for this nationalized phone company.").

197. *Id.* at 14:55-15:05.

198. *Esquenazi* U.S. Brief, note 184, *supra* at 7, 19-20.

by the government and indicated that they were looking for an approach that would work in other cases. Although an affirmance would vindicate the Guidance's position on the "foreign official" and "instrumentality" definitions, the opposite result, or an affirmance that articulates a narrower definition of "instrumentality," would call into serious question this aspect of the Guidance and significantly alter FCPA enforcement. Depending on how the decision is framed, it could increase the possibility of congressional action to clarify the law given that the decision will be binding only in the Eleventh Circuit.

VIII. Developments Outside the United States

A. United Kingdom

1. SFO's First Prosecution Under the Bribery Act 2010 and Collapse of a High-Profile Corruption Case

In August 2013, the Serious Fraud Office ("SFO") announced its first prosecution under the U.K. Bribery Act 2010 ("Bribery Act"), bringing charges against three individuals, each of whom was previously employed by Sustainable AgroEnergy plc ("SAE"), a biofuel investment company.[199] SAE and its group companies developed jatropha tree plantations in Southeast Asia and were funded by investors from, among other places, the United Kingdom.[200] The SFO apparently alleges that land used for the plantations had been purchased through senior military officials in Cambodia, and charged the former employees of SAE with the Bribery Act offenses of both making and receiving bribes. SAE itself previously had its bank accounts frozen and had been placed into receivership as part of a fraud investigation. The case is scheduled for trial on September 22, 2014, and the defendants have been released on bail.[201]

This prosecution heralds a first for anti-bribery enforcement in the United Kingdom, as previous prosecutions under the Bribery Act have been brought by the Crown Prosecution Service ("CPS") in connection with small-scale, entirely domestic bribery. The prosecution of the SAE employees, by contrast, involves extraterritorial elements and cooperation between the SFO and overseas agencies. Because only individuals are being prosecuted, the Bribery Act's much-vaunted "corporate offense," with its "adequate procedures defense," remains untested. This may change in the next year as the SFO previously announced that it has an additional eight Bribery Act cases on its books.[202]

As has been the case since the Bribery Act went into effect in July 2011, bribery prosecutions against corporate entities continued to be brought by the SFO under the preBribery Act regime. In October, the SFO announced that it had commenced proceedings against Smith & Ouzman Limited, a company specializing in security documents, and four individuals connected with the company.[203] The SFO alleged that the company had corruptly agreed to make payments totaling nearly £500,000 in order to influence the award of contracts in Mauritania, Ghana, Somaliland, and Kenya, contrary to the Prevention of Corruption Act 1906 ("PCA"). In bringing this prosecution, the SFO emphasized that "corruption in the public sector hampers the efficiency of public services, undermines confidence in public institutions and increases the cost of public transactions."[204] The trial is scheduled for November 10, 2014, and the individuals charged have been released on unconditional bail.

The SFO also suffered a setback in 2013 with the collapse of its PCA case against British-Canadian businessman Victor Dahdaleh. Dahdaleh was alleged to have made corrupt payments to Bahraini royalty while acting as an agent for U.S. aluminum company, Alcoa Inc., in order to win supply contracts with Aluminium Bahrain B.S.C. ("AlBa"), a Bahraini aluminum smelter.[205] During the course of the trial, one of the

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199. SFO Press Rel., Four Charged in 'Bio Fuel' Investigation (Aug. 14, 2013), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/four-charged-in-%27bio-fuel%27-investigation.aspx.

200. *See* Cahal Milmo, "How an Eco-Pioneer from Torquay Launched a Miracle Crop, Risked a Fortune, and Ended Up in a Cambodian Prison," *Independent* (Apr. 5, 2013), http://www.independent.co.uk/news/world/asia/how-an-ecopioneer-from-torquay-launched-a-miracle-crop-risked-a-fortune-and-ended-up-in-a-cambodian-prison-8562441.html.

201. *See* SFO Case Progress for Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd, http://www.sfo.gov.uk/our-work/our-cases/case-progress/sustainable-agroenergy-plc-and-sustainable-wealth-investments-uk-ltd.aspx

202. *See* David Green QC, Speech to Cambridge Symposium, Jesus College (Sept. 2, 2013), http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2013/cambridge-symposium-2013.aspx.

203. SFO Press Rel., Printing Company Corruption Charges (Oct. 23, 2013), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/printing-company-corruption-charges.aspx.

204. *Id.*

205. SFO Press Rel., Victor Dahdaleh Charged with Bribery (Oct. 24, 2011), http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/victor-dahdaleh-charged-with-bribery.aspx.

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prosecution witnesses provided unexpected information that boosted Dahdaleh's defense, and two lawyers from the U.S. law firm Akin Gump Strauss Hauer & Feld LLP, which had conducted an investigation of AlBa as part of a separate U.S. civil matter, refused to give evidence on aspects of the investigation (despite personal intervention of the Director of the SFO, David Green QC). As a result, the SFO offered no evidence, prompting Dahdaleh's directed acquittal.[206]

> "Overall, anti-corruption enforcement in the United Kingdom continues to underline the need for businesses to be compliant with the Bribery Act and have adequate internal controls to identify potential issues relating to corruption as early as possible."

2. Other Anti-Bribery Enforcement Developments

There was some other Bribery Act-related activity in 2013. The Director of the SFO, David Green, gave several speeches providing helpful guidance on his approach to enforcement of the Bribery Act and other laws.[207] Regarding self-reporting, Green stated that companies should report suspected criminality the moment it is discovered and that only a "genuine self report," one which "told [the SFO] something [it] did not already know and did so in an open-handed, unspun way," would constitute a factor in the SFO's determination whether a prosecution of a company would be in the public interest.[208] Green also stated that he would like the government to extend the principle behind the Bribery Act's corporate offense – that failure by a company to prevent a crime can itself be criminal – to dishonesty and fraud offenses, subject to an "adequate procedures" defense.[209] In his view, this would help overcome the greater difficulty of prosecuting companies in the United Kingdom. Together, these statements underline the Director's continued emphasis on the SFO's prosecutorial role.

In other developments, press reports raised questions as to whether the U.K. government would carve out facilitation payments from the scope of the Bribery Act.[210] This appears to have stemmed, in part, from a hearing by the House of Lords Committee on Small and Medium Enterprises in which witnesses suggested that this element of the statute was holding back exports.[211] The government rejected such proposals and stated that the statute was not under review. It announced that it plans to ensure that small and medium-sized enterprises fully understand how the Bribery Act and its guidance relate to them.[212]

Overall, anti-corruption enforcement in the United Kingdom continues to underline the need for businesses to be compliant with the Bribery Act and have adequate internal controls to identify potential issues relating to corruption as early as possible.

3. DPAs Near Implementation

The Government has taken further steps towards the implementation of DPAs in the United Kingdom. Parliament enacted the Crime and Courts Act 2013 ("CCA"), and the Director of the SFO and the Director of

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206. SFO Press Rel., Statement: R v. Dahdaleh (Dec. 10, 2013), http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/statement-r-v--dahdaleh.aspx. By contrast, Alcoa World Alumina LLC recently pleaded guilty to one count of violating the anti-bribery provisions of the FCPA in connection with the payment of "millions of dollars in bribes through an international middleman in London to officials of the Kingdom of Bahrain." DOJ Press Rel. 14-019, Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014), http://www.justice.gov/opa/pr/2014/January/14-crm-019.html. The DOJ expressed its "appreciation for the cooperation and assistance of" the SFO and other overseas law enforcement authorities. *Id.*

207. *See* Director's Speeches, SFO (2013), http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches.aspx.

208. David Green QC, Speech at the Pinsent Masons and Legal Week Regulatory Reform and Enforcement Conference (Oct. 24, 2013), http://www.sfo.gov.uk/about-us/ourviews/director%27s-speeches/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx; *see also* Karolos Seeger & Robin Lööf, "SFO Director Addresses Corporate Self-Reporting," *FCPA Update*, Vol. 5, No. 4 (Nov. 2013), http://www.debevoise.com/fcpa-update-11-26-2013.

209. *Id.*

210. *See* Karolos Seeger, "Opinion: Bribery Law Rethink Is a Distraction," *Lawyer* (June 10, 2013), http://www.thelawyer.com/analysis/opinion/opinion-bribery-law-rethink-is-a-distraction/3005705.article.

211. *See* House of Lords, Small and Medium Sized Enterprises Select Committee: Oral and Written Evidence at 17 (Mar. 18, 2013), http://www.parliament.uk/documents/lords-committees/SME-Exports/SMEEX_Written_OnlySV_version2.pdf

212. *See* Damian Green's Written Answer to Pauline Latham (Sept. 2, 2013), http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130902/text/130902w0006.htm#1309041000102; Damian Green's Written Answer to Emily Thornberry (Oct. 8, 2013), http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131008/text/131008w0003.htm.

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Public Prosecutions published a draft joint code of practice on its use.[213]

The CCA, enacted in April 2013, enables prosecutors in the United Kingdom to enter into DPAs with business organizations (not individuals) in respect of certain economic and financial crimes, including those defined by the Bribery Act. The terms of a DPA will include a statement of the facts (which can include admissions by the defendant), an expiration date, and various requirements applied to the defendant, such as payment of a financial penalty, payment of compensation to victims, disgorgement of profits, implementation of enhanced internal compliance programs, cooperation in future investigations, and payment of prosecution costs.

In contrast to the U.S. process, entry into a DPA will be subject to substantial court supervision. After the parties begin negotiations, but before the terms of the DPA are agreed, a declaration will need to be sought from the Crown Court, approving the DPA process in principle. After the final terms are agreed by the defendant and the prosecutor, further Crown Court approval will be necessary. Once this second approval is obtained, the terms of the DPA will usually need to be published and the prosecutor will require the court's consent to prefer a voluntary bill of indictment charging the defendant. After this bill of indictment is signed, proceedings will be formally instituted but automatically suspended. The suspension may be lifted, and criminal proceedings initiated, if there is non-compliance with the terms of the DPA.[214]

The prosecutors' draft code of conduct sets out the factors prosecutors need to consider in determining whether a DPA will be in the public interest, such as the defendant's engagement with the authorities, whether it has taken a genuinely proactive approach to reporting and remediation, or, arguing against a DPA, whether the actions constituting the offense are a part of the defendant's established practice. The draft code requires the contents of the DPA to be "fair, reasonable, and proportionate," and states that it should include full particulars of the alleged offenses, including the details of losses and gains. Consultation on the draft code closed in September 2013, and the prosecutors plan to publish the final version in early 2014. [215]

Although the framework for DPAs is almost entirely in place, the extent to which they will be used remains to be seen. Nonetheless, the additional flexibility granted by their very existence is likely to increase the effectiveness of white collar crime enforcement in the United Kingdom. DPAs are expected to come into force in February 2014 and will be available for offenses which occurred prior to that date.[216]

4. Sentencing Council's Draft Sentencing Guidelines for Bribery, Money Laundering, and Fraud Offenses

After years of deliberation, the Sentencing Council (the "Council") in 2013 published a draft of the United Kingdom's first ever sentencing guidelines for bribery and money laundering, along with updated guidelines for fraud.[217] The Council proposed that courts engage in a three-stage process in sentencing: (1) assess culpability; (2) assess harm; and (3) multiply the results to determine a punishment level, adjusted for other relevant factors.

There are three proposed levels of culpability. The highest level would apply to a corporate offender if, for example, the actor played a leading role in organized unlawful activity, or government or law enforcement officials were corrupted. Various factors can reduce the level of culpability, including the existence of bribery-prevention measures.[218]

Determination of harm would require calculating the gross amount obtained (or loss avoided) or intended to be obtained (or avoided) as a result of the offense. For example, the likely harm for bribery is gross profit obtained, retained, or sought as a result of the bribe. In cases in which it is not possible to identify the specific harm, the Council proposed that the "amount that was likely to be achieved in all the

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213. *See* John B. Missing, Karolos Seeger, Matthew H. Getz & Robin Lööf, "The United Kingdom Adopts Deferred Prosecution Agreements," *FCPA Update*, Vol. 4 No. 10 (May 2013), http://www.debevoise.com/fcpa-update-05-29-2013; Debevoise & Plimpton Client Update, "Deferred Prosecution Agreements in the UK: Draft Code of Practice Published" (July 3, 2013), http://www.debevoise.com/clientupdate20130703b/.

214. *Id.*

215. *See* SFO, Deferred Prosecution Agreements: Consultation on Draft Code of Practice, http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements--consultation-on-draft-code-of-practice.aspx.

216. *Id.*

217. *See* Debevoise & Plimpton Client Update, "Proposed UK Sentencing Guidelines for Corporate Offences" (July 1, 2013), http://www.debevoise.com/clientupdate20130701a. The guidelines would apply both to individuals and companies.

218. *Id.*

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circumstances" should be used.[219] Failing this, the harm should be set at 10% of the relevant revenue derived by the company.

The court should multiply these two factors, and then step back and make a conscious assessment of the fine to ensure that it meets the objectives of "punishment, deterrence, and removal of gain in a fair way." It may also consider other relevant factors, such as the size and financial position of the offending organization; cooperation can also lead to reductions. The ultimate fine level "must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law."[220]

In its November 2013 response to the draft guidelines, the House of Commons Justice Select Committee, with which the Council is required to consult, expressed some "[f]undamental concerns," especially regarding the calculation of harm based on the amount gained or loss avoided.[221] It considered that determining the specific amount gained or loss avoided would often be very difficult, such as in the recent cases of Libor rate rigging. As a result, it recommended that the starting point for harm calculation be a percentage of the defendant's turnover.[222] This radical suggestion from an important constituent places the draft guidelines in flux, and it is not clear when or in what form they will come into force.

B. People's Republic of China ("PRC")

The year 2013 was eventful for anti-corruption enforcement in China, with the continuation of a vigorous domestic anti-corruption drive focusing on the behavior of Communist Party of China ("CPC") officials and the highly publicized investigation of pharmaceutical company GlaxoSmithKline ("GSK") for alleged commercial bribery of doctors. Although China figured less prominently in FCPA resolutions than in recent years, the Diebold DPA[223] and the highly publicized investigation of hiring practices at JPMorgan Chase[224] and other investment banks[225] raise questions regarding the U.S. enforcement agencies' focus and highlight ongoing compliance challenges to doing business in the PRC.

1. PRC Domestic Anti-Corruption Developments

President Xi Jinping has made anti-corruption a central policy goal since taking power in late 2012. On December 4, 2012, the CPC Politburo adopted the "Eight-Point Regulation" (colloquially known as "Xi's Eight Rules"),[226] which set forth specific requirements for how Politburo members (and, by way of example, others in CPC leadership positions) should improve their "working style" in eight aspects, "focusing on rejecting extravagance and reducing bureaucratic visits, meetings and empty talk."[227]

> "The year 2013 was eventful for anti-corruption enforcement in China, with the continuation of a vigorous domestic anti-corruption drive focusing on the behavior of Communist Party of China ('CPC') officials."

In June 2013, Xi launched a one-year "mass line" campaign to strengthen party-people ties and crack down on luxurious living among elite party members.[228] The

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219. *See* Sentencing Council, "Fraud, Bribery and Money Laundering Offences Guideline Consultation" at 125 (June 2013), https://consult.justice.gov.uk/sentencing-council/fraud-bribery-money-laundering-offences-guideline/supporting_documents/Fraud%20Consultation.pdf.

220. *Id.* at 128.

221. House of Commons Justice Committee, "Fraud, Bribery and Money Laundering Offences Guideline: Consultation: (Nov. 5, 2013), http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/804/804.pdf.

222. *Id.*

223. *See* Section IV.D, *supra*.

224. *See* Paul R. Berger, Bruce E. Yannett, Sean Hecker, Philip Rohlik & Steven S. Michaels, "Hiring Relatives of Foreign Officials: The DOJ's Guidance, Some Key Issues, and Potential Internal Controls Solutions to a Recurring Issue Under the FCPA," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/fcpa-update-08-27-2013.

225. *See* Ben Protess & Jessica Silver-Greenberg, "On Defensive, JPMorgan Hired China's Elite," *Dealbook, New York Times* (Dec. 29, 2013), http://dealbook.nytimes.com/2013/12/29/on-defensive-jpmorgan-hired-chinas-elite/?hpw&rref=business&_r=0.

226. *See* Shi Jiangtao, "Xi Jinping's Guidelines to Cut Back Extravagance Go into Effect," *South China Morning Post* (Jan. 4, 2013), http://www.scmp.com/news/china/article/1119384/xi-jinpings-guidelines-cut-back-extravagance-go-effect.

227. Xinhua News, "Eight-Point Regulation," *CPC Encyclopedia*, www.cpcchina.org/2012-12/05/content_15992256.htm.

228. "Mass line" is an old Maoist doctrine and, according to the official CPC interpretation, one of the pillars of Maoism. It means that the CPC should learn from and remain close to the people, or as Mao Zedong himself put it, "from the masses, to the masses." *See* Raymond Li, "Xi Jinping Turns to Mao Zedong's Thoughts in His Efforts to Counter Corruption," *South China Morning Post* (July 15, 2013), http://www.scmp.com/news/china/article/1282772/xi-jinping-turns-mao-zedongs-thoughts-his-efforts-counter-corruption.

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campaign is aimed at restoring party discipline and purity by fighting "formalism, bureaucracy, hedonism, and extravagance" (collectively referred as the "four ills"), and Xi called on party members to "look in the mirror, straighten their attire, take a bath, and seek remedies."[229] Both the "Eight Rules" and "mass line" campaigns can be seen as a campaign against conspicuous consumption among party cadres, and there is evidence that it is working, with the mainland China luxury market experiencing a "lackluster year," according to a Bain & Company study.[230]

Another catchphrase in the anti-corruption campaign was the determination to crack down on both "tigers" and "flies" – powerful leaders and lowly bureaucrats.[231] In 2013, almost 37,000 officials at all levels were investigated or disciplined for graft,[232] including at least 16 provincial (ministerial) level officials and 83 prefectural (departmental) level officials.[233]

Corruption and extravagance among lower-level cadres often had been exposed through social media, for example by the posting of pictures focusing on luxury watches worn by officials.[234] In 2013, however, the PRC instituted a crackdown on "rumor-mongering," resulting in arrests of several prominent "netizens" and the chilling of civic anti-corruption campaigns.[235] Perhaps in an effort to replace bottom-up anti-corruption activity with top-down investigations, the CPC's internal anti-corruption organ, the Central Commission for Discipline Inspection ("CCDI") has dispatched an increasing number of "inspection teams" to provinces and state-owned enterprises.[236]

The formalization and centralization of anti-corruption initiatives is further demonstrated by the "anti-corruption five-year plan" adopted by the CPC Politburo. Officially titled "Establishing and Improving the System for the Punishment and Prevention of Corruption, 2013-2017 Work Plan,"[237] the plan provides for: (1) strengthening the CPC's "inspection tour system"; (2) improving its system of collecting and handling online information on corruption and the protection of whistleblowers (also in 2013, the CCDI created its own whistleblower website[238]); (3) scaling down the *shuanggui* system, in which officials undergo secret interrogations and detentions before being handed over to the police and prosecutors;[239] and (4) improving the system of reviewing officials and creating a warning system to oust and replace those who repeatedly violate internal rules. Party officials will also be required to log their personal details through an improved system over the next five years.[240]

The campaign against conspicuous consumption and the increased scrutiny of lower-level officials (the "flies") has numerous implications for corporate compliance

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229. President Xi Jinping's Speech, Communist Party Mass Line Education & Practice Working Conference (June 18, 2013), http://qzlx.people.com.cn/n/2013/0726/c365007-22344078.html (Chinese). In the speech, Xi also warned that "winning or losing public support is an issue that concerns the CPC's survival or extinction." *Id.*

230. Bain & Company, "Mainland China Entering New Era of Luxury Cooldown, Finds Bain & Company's 2013 'China Luxury Goods Market Study'" (Dec. 16, 2013), http://www.bain.com/about/press/press-releases/mainland-china-entering-new-era-of-luxury-cooldown.aspx. Significantly, the price for a bottle of Feitian Moutai, long a favorite tipple for the PRC military and Party cadres, has decreased from as high as RMB2,300 per bottle ($378) in 2012 to RMB1,100 ($181) in 2013. *See* Dexter Roberts, "Xi Jinping Is No Fun," *Bloomberg BusinessWeek*, (Oct. 3, 2013), http://www.businessweek.com/articles/2013-10-03/china-president-xi-jinping-revives-self-criticism-sessions-in-maoism-lite.

231. President Xi Jinping's Speech, Second Plenary Session of the Eighteenth Central Commission for Discipline Inspection (Jan. 22, 2013), http://news.xinhuanet.com/politics/2013-01/22/c_114461056.htm (Chinese).

232. "China Probes 36,907 Officials for Suspected Corruption," *China Daily* (Jan. 5, 2014), http://www.chinadaily.com.cn/china/2014-01/05/content_17216383.htm. For Chinese original, *see*, http://news.china.com.cn/2014-01/05/content_31094229.htm.

233. For pictures and short introductions of the 16 provincial level officials, *see* http://news.ifeng.com/photo/hdnews/detail_2013_12/21/32353429_0.shtml#p=1 (Chinese); for information on the 83 prefectural officials, *see* http://news.ifeng.com/shendu/nfzm/detail_2013_11/14/31244127_0.shtml (Chinese).

234. *See, e.g.*, "Chinese Watch Buff Becomes Corrupt Officials' Pet Peeve by Practicing Hobby: Watch-Spotting," *Ministry of Tofu* (Sept. 20, 2011), http://www.ministryoftofu.com/2011/09/chinese-watch-buff-becomes-corrupt-officials-pet-peeve-by-practicing-hobby-watch-spotting.

235. Didi Tang, "China Claims Victory in Scrubbing the Internet," *South China Morning Post* (Nov. 30, 2013), http://www.scmp.com/news/hong-kong/article/1369537/china-claims-victory-scrubbing-internet.

236. Teddy Ng, "Inspection Teams Fan Out to Enforce Curbs on Graft," *South China Morning Post* (June 1, 2013), http://www.scmp.com/news/china/article/1250918/inspection-teams-fan-out-enforce-curbs-graft.

237. For the full text (in Chinese) of the five-year plan, *see* http://news.xinhuanet.com/politics/2013-12/25/c_118708522.htm. The five-year plan was adopted by the CPC Politburo on August 27, 2013, and was not released to the public until December 25, 2013.

238. *See* http://www.12388.gov.cn (Chinese). The website is jointly run by CCDI and the PRC Ministry of Supervision.

239. For a description of the *shuanggui* system and abuses associated with it, *see* Bruce E. Yannett, Sean Hecker, Paul R. Berger, Philip Rohlik & Fengian Ao, "Spotlight on the Asia-Pacific Region (Part II): Anti-Corruption Authorities in China," *FCPA Update*, Vol. 4, No. 2 (Sept. 2012), http://www.debevoise.com/fcpa-update-09-14-2012.

240. *See* Jing Li, "China's Communist Party Issues Five-Year Plan on Corruption Fighting," *South China Morning Post* (Nov. 28, 2013), http://www.scmp.com/news/china/article/1367724/chinas-communist-party-issues-five-year-plan-corruption-fighting.

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programs. With lavish meals and luxury gifts in disfavor among government officials in China, some compliance resources devoted to meals, gifts, and entertainment might be better deployed to strengthening internal controls around the management of cash and third parties, and especially to detecting off-shore payments to PRC officials or close relatives of such officials. Moreover, this crackdown has created such an atmosphere of anxiety among many cadres that otherwise viable compliance tools, such as transparency letters, may become less practical because of fear of how even legitimate benefits might be viewed.

With regard to "tigers," the high-profile cases that attracted most public attention in 2013 involved the trials and convictions of former Chongqing Party Chief, Bo Xilai[241] and former railways minister Liu Zhijun.[242] Both trials involved allegations of graft that differed from the usual FCPA case. Rather than receiving kickbacks or up-front payments, both officials were accused of cultivating long-term relationships with prominent Chinese businesspeople. Instead of making payments for being awarded certain business, these businesspeople, once they became successful, essentially served as piggy-banks for their patrons, providing all-expense paid trips to the son of Bo Xilai[243] and investing in television production companies to provide benefits to Liu Zhijun.[244]

Several other relatively senior officials were put under investigation or removed from their posts in 2013, including Jiang Jiemen, former director of the State-Owned Assets Supervision and Administration Commission ("SASAC"), and several officials from Sichuan Province. Jiang and several other officials under investigation are viewed as close allies of Zhou Yongkang, a former member of the Politburo Standing Committee responsible for internal security who is also reportedly under investigation.[245] Should a prosecution go forward, Zhou would be the highest level official prosecuted since the founding of the PRC. To date, Western companies have not been publicly identified in connection with investigations of "tigers," but the fact of such high-level bribery and the investigations that it has generated continue to attract attention by compliance professionals.

"Although it is unusual for a Chinese investigation into a multinational company of GSK's profile to be publicized, commercial bribery is a deep-rooted and chronic problem in China, especially in healthcare."

2. GSK Investigation

Although no multinational companies have been implicated in the headline public bribery cases brought against high-level officials, multinationals were not immune from the anti-corruption probes in China. In July 2013, Chinese authorities accused GSK of funneling up to RMB3 billion ($492 million) to travel agencies to facilitate bribes to boost its drug sales.[246] These corruption accusations are among the most serious against a multinational in China in years, if not ever. In the wake of the investigation, GSK's sales in China dropped 61% in the third calendar quarter after hospital staff shunned visits by its sales teams.[247]

Although it is unusual for a Chinese investigation into a multinational company of GSK's profile to be publicized, commercial bribery is a deep-rooted and chronic problem in China, especially in healthcare. A typical physician's official

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241. *See* Keith Zhai, "Bo Xilai Protests Innocence as Life Sentence for Corruption Is Upheld," *South China Morning Post* (Oct. 25, 2013), http://www.scmp.com/news/china/article/1339516/court-rejects-bo-xilais-appeal-and-upholds-life-sentence.

242. *See* Zhuang Pinghui, "Disgraced Rail Boss Liu Zhijun to Stand Trial for 'Very Serious' Graft," *South China Morning Post* (June 8, 2013), http://www.scmp.com/news/china/article/1256040/disgraced-rail-boss-liu-zhijun-stand-trial-very-serious-graft.

243. *See* Adrian Wan, "Legal Experts Say Bo Xilai's Wife and Son Should Stand Trial for Economic Crimes Too," *South China Morning Post* (Aug. 25, 2013), http://www.scmp.com/news/china/article/1299256/legal-experts-say-bo-xilais-wife-and-son-should-stand-trial-economic.

244. *See* Zhuang Pinghui, note 242, *supra*.

245. *See* SCMP Staff Reporters, "Xi Jinping Sets Up Special Unit to Probe Zhou Yongkang Corruption Case," *South China Morning Post* (Oct. 21, 2013), http://www.scmp.com/news/china/article/1336219/xi-sets-special-unit-probe-zhou-yongkang-corruption-case.

246. Xinhua News, "Police Ask to Meet with Senior Representatives of GSK," (July 21, 2013), http://news.xinhuanet.com/2013-07/21/c_125041612.htm (Chinese); Alice Yan & Toh Han Shih, "GlaxoSmithKline Staff Held in Three Chinese Cities as Graft Investigation Widens," *South China Morning Post* (July 1, 2013), http://www.scmp.com/news/china/article/1272725/glaxosmithkline-staff-held-three-cities-graft-investigation-widens; Alice Yan & Toh Han Shih, "GlaxoSmithKline China Executives Face Bribery Probe," *South China Morning Post* (July 11, 2013), http://www.scmp.com/news/china/article/1280270/chinese-police-say-glaxosmithkline-employees-bribed-doctors.

247. Makiko Kitamura, "Glaxo's China Sales Plunge 61% After Corruption Probe," *Bloomberg*, (Oct. 23, 2013), http://www.bloomberg.com/news/2013-10-23/glaxo-s-china-sales-plunge-61-after-corruption-probe.html.

salary in the PRC is often below middle-class level, and a 2011 survey found 96% of Chinese doctors believed they were underpaid.[248] Healthcare-related bribery has been a focus of Chinese anti-corruption drives since at least 2006. In 2007, the former head of the Chinese food and drug safety agency was executed following a corruption trial,[249] and numerous cases of "commercial bribery," which is defined somewhat differently in China than in other jurisdictions,[250] in the hospital sector have been reported over the years.[251]

Commercial bribery, normally in the form of relatively small kickbacks, has a long history in China and is prohibited by China's Anti-Unfair Competition Law as well as the Criminal Code. Prior to the GSK investigation, commercial bribery bans were enforced without significant fanfare through administrative proceedings at the State Administration for Industry and Commerce ("SAIC," referred to in conjunction with provincial level counterparts as the "AIC").[252] Given the Chinese authorities' apparent willingness in the case of GSK to publicize their efforts, companies are advised to pay attention to AIC investigations, which, as in the Diebold enforcement action,[253] could indicate commercial bribery under Chinese law. Given the expansive and unique definition of "foreign official" adopted by U.S. enforcement agencies, such cases will almost certainly be viewed as involving a "foreign official" for FCPA purposes.

3. China-Related FCPA Investigations

In 2013, an investigation into the hiring practices at JP Morgan Chase relating to the employment of children of Chinese officials was publicly announced, and reportedly included other banks.[254] Given common hiring practices in the United States and elsewhere and the speculative nature of the "anything of value" allegedly provided to foreign officials (as opposed to salary provided to their sons or daughters) in such cases, it is unclear what will result.[255] It also has been reported that children of Chinese elites are considering shunning jobs at U.S. companies to avoid the potential negative publicity, preferring employment at foreign offices of Chinese state-owned companies.[256] The lack of training and exposure to international business practices for China's future elite at multinational companies will, if it occurs, likely impede, rather than facilitate, the introduction of international standards of corporate governance in the PRC. Nonetheless, companies are advised to review their procedures for such hires.

C. Russia

In 2013, anti-corruption compliance in Russia transitioned from largely voluntary efforts to measures compelled by Russian law. On January 1, 2013, pursuant to the newly enacted Article 13.3 of the Russian Anti-Corruption Law, Russian companies became obligated to develop and implement anti-corruption measures.[257] Article 13.3 did not provide an exhaustive list of measures, but stated they might include the identification of departments or employees responsible for counteracting corruption, cooperation with law enforcement, prevention of conflicts of interest, and adoption of codes of ethics.[258]

The required measures were further clarified in the Recommendations on the Development and Adoption by Organizations of Measures Aimed at Counteracting Corruption, issued by the

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248. *Id.*; *see also* "Many Doctors Not Content with Pay," *China Daily* (Aug. 10, 2011), http://www.china.org.cn/china/2011-08/10/content_23178097.htm.

249. *See* "Former SFDA Chief Executed for Corruption," *China Daily* (July 10, 2007), http://www.chinadaily.com.cn/china/2007-07/10/content_5424937.htm.

250. Chinese law distinguishes between types of corruption based on public function. Paragraph 4 of the Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Certain Issues Concerning the Application of the Law in Handling Criminal Cases of Commercial Bribery (Fa Fa [2008] No. 33 (Nov. 20, 2008), differentiates between the two in the healthcare context. Roughly speaking, a doctor at a state hospital accepting a kickback for hospital procurement would be committing the crime of accepting a bribe while being a public official. A doctor at a state hospital accepting a kickback for prescribing medicine to a patient would be guilty of commercial bribery.

251. Numerous Chinese language press reports have focused on these issues. *See, e.g.*, "Gao Qiang Condemns the Harm of Commercial Bribery in the Pharmaceutical Procurement Sector," *China News Service* (Mar. 28, 2006), http://news.sina.com.cn/c/2006-03-28/12479463769.shtml (Chinese).

252. *See* Daniel Chow, "The Interplay Between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act," 73 OHIO ST. L. REV. 1015, 1028-33 (2013).

253. *See* Diebold SEC Complaint, note 77, *supra* at ¶ 28.

254. *See* Berger, *et al.*, note 224, *supra*; Protess & Silver-Greenberg, note 225, *supra*.

255. *See* Berger, *et al.*, note 224, *supra*.

256. *See* George Chen, "Chinese Firms in Hong Kong May Be New Paradises for 'Princelings,'" *South China Morning Post* (Sept. 16, 2013), http://www.scmp.com/business/companies/article/1310489/chinese-firms-hong-kong-may-be-new-paradises-princelings.

257. Federal Law No. 231-FZ on Amendment of Certain Legal Acts of the Russian Federation in Connection with the Adoption of the Law on Oversight of Conformity Between Expenditures and Income, December 3, 2012 ("Law No. 231-FZ"); *see also* Paul R. Berger, Dmitri V. Nikiforov, Bruce E. Yannett, Jane Shvets & Anna V. Maximenko, "Anticorruption Compliance Programs Under Russian Law: Article 13.3 and the FCPA/UKBA Experience," *FCPA Update*, Vol. 4, No. 9 (Apr. 2013).

258. Article 13.3 of Federal Law No. 273-FZ on Counteracting Corruption (Dec. 25, 2008).

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Ministry of Labor and Social Protection on November 8, 2013.[259] Like the anti-corruption measures listed in Article 13.3, the Recommendations are not legally binding. Nevertheless, given that companies seeking to defend against administrative liability must prove they undertook "all possible measures" to ensure compliance,[260] many companies subject to Russian anti-corruption law have been reviewing the Law and Recommendations and following them to the extent practicable.

In 2013, Russia continued its fight against corruption in the public sector. Federal Law No. 79-FZ, adopted on May 7, 2013, prohibits state officials, officers of state-founded companies appointed by the President or by the Government, and their spouses and minor children from maintaining accounts or depositing cash or valuables in banks located outside the Russian Federation, and from owning or using foreign financial instruments.[261] There was also a proposal to prohibit these persons from owning real property abroad. Although this latter proposal did not pass in the legislature in 2013, there are reports that the Russian Duma will consider this initiative again in 2014.[262]

On July 9, 2013, the Russian Supreme Court adopted Resolution No. 24 on Court Practice in Bribery Cases and Other Corruption Crimes,[263] which replaced the earlier resolution dating from 2000. Resolution No. 24 clarified a number of key definitions, including what qualifies as a bribe, inducement of bribery, improper third-party conduct, and who qualifies as a foreign official. It also expanded the extortion defense under Russian law.[264]

Russia's enforcement of anti-corruption laws in 2013 resulted in a number of new cases, including:

- The "Kirovles Case," in which the opposition leader Alexey Navalny was accused of embezzlement in connection with fraudulent sales of products of state enterprise Kirovles through an intermediary. In July 2013, the court sentenced Navalny to five years' imprisonment, but this sentence was recently successfully appealed and commuted to a conditional sentence.[265]
- Cases against several senior Russian officials (including Yaroslavl mayor Yevgeny Urlashov, Astrakhan mayor Mikhail Stolyarov, and former Head of North Caucasus Resorts Magomed Bilalov) who are accused of bribery and abuse of power. Investigations are continuing.[266]
- The "Rosbank Case," in which the former Chairman of Joint Stock Commercial Bank Rosbank, Vladimir Golubkov, was accused of commercial bribery. He was formally charged in December 2013.[267]

In December 2013, an official convicted in a bribery case was ordered to pay RUB950 million (approximately $30 million) – the largest fine in the history of Russian anti-corruption enforcement.[268]

Looking ahead to 2014, there are several initiatives that may move forward, including: (1) introduction of definitions of corruption violations and crimes and a unified list of corruption crimes; (2) introduction of criminal liability for theft of publicly budgeted money; (3) additional controls over income and expenses of officials suspected or accused of corruption; (4) limitations on employment of, and contractual relationships with, relatives of officials in organizations where those officials work; and (5) prohibition of "illicit

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259. *See* Dmitri Nikiforov, Bruce E. Yannett, Anna V. Maximenko & Jane Shvets, "Russia Issues Detailed Recommendations on Compliance with Russian Anti-Corruption Law," *FCPA Update*, Vol. 5, No. 5 (Dec. 2013.

260. Article 2.1, Code of Administrative Offenses of the Russian Federation (adopted Dec. 20, 2001), http://www.russian-offences-code.com/SectionI/Chapter2.html.

261. *See* Paul R. Berger, Alyona N. Kucher & Anna Maximenko, "Russian State Officials' Assets Abroad: Proposed Ban on Foreign Accounts, Deposits and Securities," *FCPA Update*, Vol. 4, No. 7 (Feb. 2013).

262. *See* Roman Markelov, "Chinovnikam Mogut Zapretit' Imet' Nedvizhimost' za Rubezhom," *Rossiyskaya Gazeta* (Dec. 18, 2013), http://www.rg.ru/2013/12/18/chinovniki-site-anons.html (Russian).

263. Adopted pursuant to Article 126 of the Constitution of the Russian Federation and Article 14 of Federal Constitutional Law No. 1-FKZ on Courts of General Jurisdiction of the Russian Federation (Feb. 7, 2011); *see also* Dmitri V. Nikiforov, Bruce E. Yannett, Jane Shvets & Anna Maximenko, "Russia's Answer to the DOJ/SEC FCPA Guidance: The Russian Supreme Court's Resolution on Court Practice in Bribery Cases and Other Corruption Crimes," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013).

264. *See* Nikiforov, note 263, *supra*.

265. *See* Elena Borodina, "Navalnogo Prigovorili k Pyati Godam Kolonii," *Rossiyskaya Gazeta* (July 18, 2013), http://www.rg.ru/2013/07/18/reg-pfo/navalny-anons.html (Russian); "Na Smyagchenie Prigovora Navalnomu Ponadobilos' Men'she Trekh Chasov," *Vesti* (Oct. 16, 2013), http://www.vesti.ru/doc.html?id=1142728&tid=98894 (Russian).

266. *See, e.g.*, Kirill Braynin, "Shpionskie i Politicheskie Skandaly Ukhodyashego 2013 Goda," *Pervyi Kanal* (Dec. 29, 2013), http://www.1tv.ru/news/polit/249376 (Russian).

267. "Glavu 'Rosbanka' Obvinili v Kommercheskom Podkupe," *Vesti* (Dec. 17, 2013), http://www.vesti.ru/doc.html?id=1168260 (Russian).

268. Arshak Karapetyan, "Byvshiy Podmoskovniy Chinovnik Zaplatit Rekordny Shtraf v 950 Mln Rublei," *Vechernyaya Moskva* (Dec. 17, 2013), http://vmdaily.ru/news/2013/12/17/bivshij-podmoskovnij-chinovnik-zaplatit-rekordnij-shtraf-v-950-mln-rublej-227561.html.

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enrichment," which Russia is required to enact to ratify Article 20 of the United Nations Convention Against Corruption.

> "Under current German law, companies (as legal persons) cannot be charged as criminal defendants and face liability only for administrative offenses."

D. Germany

As a consequence of criticism by the OECD Working Group on Bribery,[269] the German Federal Government has substantially increased the scope of liability of companies for certain compliance violations typically committed by the company's employees, such as bribery, or the failure of management to prevent such violations through adequate supervision. Under current German law, companies (as legal persons) cannot be charged as criminal defendants and face liability only for administrative offenses. As a first step, the German Act on Regulatory Offenses was amended, effective June 30, 2013, to provide for a tenfold increase in fines for companies for such compliance violations.[270] This also applies to foreign companies who conduct business in Germany through German legal entities, and German branches that have committed offenses in Germany.

Despite increased corporate fines, there is still criticism that they are not a sufficient deterrent to corporate malfeasance and do not provide enough incentives for companies to establish adequate compliance management systems. In light of these criticisms, there has been discussion regarding adoption of legislation permitting criminal prosecution of companies and other legal entities.[271]

A draft of such a Corporate Criminal Code was put forward for discussion by the government of the German state of North Rhine-Westphalia. It provides, in addition to fines, for a number of corporate criminal penalties, including loss of subsidies, debarment from public tenders, and, in cases of repeated non-compliance, dissolution. Under the proposed legislation, a waiver of criminal sanctions is possible only under certain conditions, for example, if the company at issue establishes an adequate compliance management system to prevent future violations. The draft of the Corporate Criminal Code has received the support of the Conference of Ministers of Justice of the German states in November 2013.[272]

The new German Federal Government appears receptive to the state initiative and, in December 2013, committed to further increase corporate liability for criminal offenses and evaluate the possibility of adopting a Federal Corporate Criminal Code.[273]

E. Brazil

In a major 2013 anti-corruption development, Brazil enacted the Clean Company Law, which will take effect later in January 2014, with related regulation anticipated in the near future.[274] Although the Clean Company Law does not create corporate criminal liability for corruption violations, it imposes strict civil and administrative liability on companies for acts of its employees and agents.[275] It also imposes significant penalties on violators, including fines of up to 20% of the annual gross revenues, suspension or partial bans on company activities, and bans on receiving various benefits from the government, including government financing.[276]

Notably, the Clean Company Law rewards effective compliance programs and cooperation with the government in a way that brings Brazil in line with the U.K. and U.S. law and practice. Among the factors to be considered in determining the size of the sanction are the existence of a generally effective compliance program and the extent to which the company cooperates with the

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269. OECD Working Group on Bribery, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Germany at 71 (Mar. 2011).

270. *See* Debevoise & Plimpton Client Update, "Germany Increases Administrative Fines for Companies Tenfold" (July 3, 2013), http://www.debevoise.com/clientupdate20130702a.

271. *See* Ministerin für Bundesangelegenheiten, Europa und Medien des Landes Nordrhein-Westfalen, 14.05.2013 NRW: Position (May 14, 2013), http://www.mbem.nrw.de/pressemitteilungen/galerien/14-05-2013-nrwposition-unternehmensstrafrecht-652/14-05-2013-nrw-position-27528.html (German).

272. *See* 84. Konferenz der Justizministerinnen und Justizminister 2013, Beschluss, TOP II.5: Unternehmensstrafrecht (Nov. 14, 2013), http://www.saarland.de/dokumente/res_justiz/TOP_II.5-Unternehmensstrafrecht.pdf (German).

273. *See* Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD, 18. Legislaturperiode at 145, http://www.bundestag.de/dokumente/textarchiv/2013/48077057_kw48_koalitionsvertrag/koalitionsvertrag.pdf (German).

274. Federal Law No. 12.846/2013 (Aug. 1, 2013), *see also* Andrew M. Levine, Bruce E. Yannett, Renata Muzzi Gomes de Almeida, Steven S. Michaels & Ana L. Frischtak, "Brazil Enacts Long-Pending Anti-Corruption Legislation," *FCPA Update*, Vol. 5, No. 1 (Aug. 2013), http://www.debevoise.com/fcpa-update-08-27-2013.

275. Federal Law No. 12.846/2013 (Aug. 1, 2013), Art. 2.

276. *Id.* Art. 6, Art. 19.

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government.[277] Further, the statute enables authorities to enter into leniency agreements with offending entities, which would reduce the amount of the applicable fine by up to two-thirds and exempt the offender from certain other administrative and judicial sanctions.[278]

As with the recent anti-corruption developments in Russia and elsewhere, the impact of Brazil's new law remains to be seen. We will be monitoring the new anticorruption initiatives and enforcement it will bring, domestically and abroad.

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The authors would like to give special thanks to Dr. Thomas Schürrle, Karolos Seeger, Frederick T. Davis, Matthew H. Getz, Dr. Peter Wand, Konstantin Bureiko, Irene J. Hahn, Martinis Jackson, Robin Lööf, Anna V. Maximenko, Neal S. Shechter, and Jil Simon for their contributions to this article. Dr. Thomas Schürrle is a partner and Dr. Peter Wand is an international counsel in the firm's Frankfurt office. Karolos Seeger is a partner, Matthew H. Getz is an international counsel, and Konstantin Bureiko and Robin Lööf are associates in the firm's London office. Frederick T. Davis is of counsel in the firm's Paris office. Irene J. Hahn, Martinis Jackson, Neal S. Shechter, and Jil Simon are associates in the firm's New York office. Anna V. Maximenko is an associate in the firm's Moscow office. Full contact details are available at www.debevoise.com.

277. *Id.* Art. 7.

278. *Id.* Art. 16. A leniency agreement would exempt the offender from all administrative sanctions other than the (reduced) fine, but would not affect judicial sanctions, except exempting the offender from the prohibition against receiving government financing. *Id.*

FCPA Corporate Enforcement Actions

Company	Settlement Amount	Citations
ADM Co.	DOJ: $17.8 M (penalty)	*In re Archer Daniels Midland Co.*, Non-Prosecution Agreement (Dec. 20, 2013), *United States v. Alfred C. Toepfer Int'l (Ukraine) Ltd.*, 13-CR-20062 (C.D. Ill. Dec. 20, 2013) DOJ Press Rel. 13-1356, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1356.html
	SEC: $36.5 M (disgorgement and prejudgment interest)	*SEC v. Archer-Daniels-Midland Co.*, 13-CV-2279 (C.D. Ill. Dec. 20, 2013) SEC Press Rel. 2013-271, SEC Charges Archer-Daniels-Midland Company with FCPA Violations (Dec. 20, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540535139
Bilfinger SE	DOJ: $32 M (penalty)	*United States v. Bilfinger SE*, 13-CR-745 (S.D. Tex. Dec. 9, 2013) DOJ Press Rel. 13-1297, German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay $32 Million Criminal Penalty (Dec. 11, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html
Weatherford Int'l Ltd.	DOJ: $87.2 M (penalty)	*United States v. Weatherford Int'l Ltd.*, 13-CR-733 (S.D. Tex. Nov. 26, 2013), U*nited States v. Weatherford Servs., Ltd.*, 13-CR-734 (S.D. Tex. Nov. 26, 2013) DOJ Press Rel. 13-1260, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html
	SEC: $65.6 M (disgorgement, prejudgment interest, and penalties)	*SEC v. Weatherford Int'l Ltd.*, 4:13-CV-03500 (S.D. Tex. Nov. 26, 2013) SEC Press Rel. 2013-252, SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694
Stryker Corp.	SEC: $13.3 M (disgorgement, prejudgment interest, and penalty)	*In re Stryker Corp.*, SEC Admin. Pro. 3-15587 (Oct. 24, 2013) SEC Press Rel. 2013-229, SEC Charges Stryker Corporation with FCPA Violations (Oct. 24, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262
Diebold, Inc.	DOJ: $25.2 M (penalty)	*United States v. Diebold, Inc.*, 13-CR-000464-SO (N.D. Ohio Oct. 22, 2013) DOJ Press Rel. 13-1118, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html
	SEC: $22.9 M (disgorgement and prejudgment interest)	*SEC v. Diebold, Inc.*, 1:13-CV-01609 (D.D.C. Oct. 22, 2013) SEC Press Rel. 2013-225, SEC Charges Diebold with FCPA Violations (Oct. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273

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FCPA Corporate Enforcement Actions ■ Continued from page 30

Company	Settlement Amount	Citations
Total S.A.	DOJ: $245.2 M (penalty)	*United States v. Total, S.A.*, 1:13-CR-239 (E.D. Va. May 29, 2013) DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-613.html
	SEC: $153 M (disgorgement)	*In re Total, S.A.*, SEC Admin. Pro. 3-15338 (May 29, 2013) SEC Press Rel. 2013-94, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006
Ralph Lauren Corp.	DOJ: $245.2 M (penalty)	*United States v. Total, S.A.*, 1:13-CR-239 (E.D. Va. May 29, 2013) DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-613.html
	SEC: $153 M (disgorgement)	*In re Total, S.A.*, SEC Admin. Pro. 3-15338 (May 29, 2013) SEC Press Rel. 2013-94, SEC Charges Total S.A. for Illegal Payments to Iranian Official (May 29, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006
Parker Drilling Co.	DOJ: $11.76 M (penalty)	*United States v. Parker Drilling Co.*, 13-CR-176 (E.D. Va. Apr. 16, 2013) DOJ Press Rel. 13-431, Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty (Apr. 16, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-431.html
	SEC: $4.09 M (disgorgement and prejudgment interest)	*SEC v. Parker Drilling Co.*, 1:13-CV-461 (E.D. Va. Apr. 16, 2013) SEC Lit. Rel. 22672, SEC Charges Parker Drilling Company with Violating the Foreign Corrupt Practices Act (Apr. 16, 2013), http://www.sec.gov/litigation/litreleases/2013/lr22672.htm
Koninklijke Philips Electronics N.V.	SEC: $4.5 M (disgorgement and prejudgment interest)	I*n re Koninklijke Philips Elecs. N.V.*, SEC Admin. Pro. 3-15265 (Apr. 5, 2013), http://www.sec.gov/litigation/admin/2013/34-69327.pdf