

FCPA Update

August 2010 ■ Vol. 2, No. 1

OECD Anti-Bribery Convention Enforcement and the Continued Risk of FCPA Exposure

In today's interconnected global environment, individuals and corporations may face liability for anti-bribery violations in any number of jurisdictions. Nonetheless, the United States continues to be the leader in anti-bribery law enforcement. Recently, the Organization for Economic Development ("OECD") and Transparency International ("TI"), a global civil society organization dedicated to raising awareness of the effects of corruption, have released reports analyzing the 38 signatories' enforcement of the OECD Anti-Bribery Convention. Although the data indicate that anti-bribery law enforcement is on the rise, the statistics also highlight widespread non-enforcement of anti-bribery laws and the U.S. government's continued role as the primary enforcer of anti-bribery laws around the world.

OECD Working Group on the Bribery 2010 Annual Report

The OECD Anti-Bribery Convention ("the Convention") requires signatories to criminalize bribery of foreign public officials in international business transactions. On June 15, 2010, OECD's Working Group on Bribery released a report detailing the enforcement efforts of each signatory to the Convention since its adoption in 1999.¹ Each of the 38 signatories was required to submit data concerning the number of "criminal, administrative, and civil cases of foreign bribery that have resulted in a final disposition, such as a criminal conviction or acquittal, or similar findings under an administrative or civil procedure."²

According to the data, as of May 2010, 148 individuals and 77 entities have been sanctioned in criminal proceedings for alleged foreign bribery since the Convention's adoption.³ However, of the 38 signatory countries, only 13 have pursued sanctions.⁴ The data also disclosed that of these 13 countries, seven have sanctioned both companies and individuals, five have sanctioned only individuals, and one country has sanctioned only one company.⁵

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¹ Organization for Economic Cooperation and Development, Working Group on Bribery, Annual Report 2009, (Jun. 15, 2010), http://www.oecd.org/document/46/0,3343,en_2649_34859_44271086_1_1_1_1,00.html.

² *Id.* at 26.

³ *Id.* at 27-30.

⁴ *Id.*

⁵ *Id.*

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Encompassed within these numbers, during this same ten-year span, the U.S. alone sanctioned 40 individuals and 20 companies, not including an additional 28 companies that agreed to deferred prosecution or non-prosecution agreements.⁶ Other leaders in bribery prosecutions include Italy, which sanctioned 21 individuals and 18 companies; Germany, which sanctioned 26 individuals and four companies; Hungary, which sanctioned 27 individuals; and South Korea, which sanctioned 13 individuals.⁷ The OECD Report also noted that there were approximately 280 ongoing investigations in 21 signatory countries as of May 2010.⁸

Transparency International 2010 Progress Report

On July 28, 2001, TI also released a Progress Report on Enforcement of the OECD Anti-Bribery Convention (“TI Report”).⁹ Similar to the OECD Report, the TI Report concluded that anti-bribery law enforcement has increased over the last six years, but that current levels of enforcement are too low to enable the Convention to succeed.¹⁰ The TI Report categorized seven nations as being engaged in “Active Enforcement.”¹¹ The seven countries included Germany, Norway, Switzerland, and the U.S., as well as three countries that are new to Active Enforcement – the U.K., Italy, and Denmark. These countries’ economies are responsible for 30 percent of world exports.¹²

The TI Report categorized nine countries as having engaged in “Moderate Enforcement”:¹³ Argentina, Belgium, Finland, France, Japan, Netherlands, South Korea, Spain, and Sweden. These countries’ economies are responsible for 21 percent of world exports.¹⁴ The nine countries marked a downward trend from 11 countries last year because three countries moved up to the Active Enforcement category. Argentina moved up into the Moderate Enforcement group from the lowest category.¹⁵

Last, and most tellingly, the TI Report categorized 20 countries as engaging in “Little or No Enforcement.”¹⁶ This category includes G8 member Canada, whose economy is responsible for 15 percent of world exports.¹⁷ The number of countries with little or no

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⁶ *Id.*

⁷ *See* OECD, note 1, *supra*.

⁸ *Id.*

⁹ Transparency International, Progress Report 2010: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (Jul. 28, 2010), <http://www.transparency.org>.

¹⁰ *Id.* at 8.

¹¹ “Active Enforcement” is defined as (1) countries with a share of world exports over two percent that cumulatively have at least ten major anti-bribery cases (of which three were initiated in the last three years and concluded with substantial sanctions) and (2) countries with a share of world exports under two percent that have brought at least three major anti-bribery cases (of which one was initiated in the last three years and concluded with substantial sanctions). *Id.* at 7, 8.

¹² *Id.* at 8.

¹³ “Moderate Enforcement” is defined as countries that do not qualify for active enforcement but have at least one major case as well as active investigations. *Id.* at 7.

¹⁴ *Id.* at 8.

¹⁵ *See* TI, note 9, *supra*.

¹⁶ “Little or No Enforcement” is defined as countries that do not qualify for the previous two categories, including countries that have only brought minor cases, have only investigated but not sanctioned, and have brought no cases or investigations. *Id.* at 7.

¹⁷ *Id.* at 8.

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OECD Anti-Bribery Convention Enforcement ■ Continued from page 2

enforcement has remained virtually unchanged over the past five years.¹⁸ In addition, approximately 33 percent of the world's exports come from countries that are not members of the OECD Convention, such as China, India, and Russia.¹⁹

The TI Report noted that the recently-enacted U.K. Bribery Bill, the number of high-profile settlements in the U.S., and the addition of three countries to the Active Enforcement category were positive developments overall. TI also concluded, however, that global anti-bribery law enforcement efforts were too minimal to prove effective.²⁰ The Report blamed the low levels of enforcement mainly on lack of political will.²¹ Many countries fail to provide adequate funding and staffing for enforcement, and others actively obstruct investigations and prosecutions.²² The Report warned that without increased enforcement efforts by signatory countries, the effectiveness of the OECD Convention could erode.²³

Additionally, TI made several specific recommendations, including a study of the effectiveness of negotiated settlements to resolve foreign bribery cases.²⁴ Although TI acknowledged the critical role of settlements, it recommended making

settlement terms public and subject to judicial approval to promote additional transparency and accountability.²⁵ Furthermore, TI recommended that settlement terms should be subject to a public hearing at which “representatives of the country where the bribes were paid, competitors, and other interested stakeholders . . . should be given an opportunity to present their views.”²⁶ Penalties should always exceed the amount of profit from the illicit activity, and a portion of the fine should go to the country where the damage from the bribery was inflicted.²⁷

The Future of Global Anti-Bribery Enforcement

The mixed news from OECD and TI's reports of global anti-bribery enforcement efforts strongly suggests that the U.S. will likely continue to aggressively assert jurisdiction over foreign companies and individuals. Until U.S. prosecutors become comfortable with a steady and reliable law enforcement regimen abroad, we can expect that the U.S. will continue to investigate and prosecute foreign private issuers and even foreign nationals.²⁸ In the first half of

2010, the U.S. Department of Justice and U.S. Securities and Exchange Commission continued to bring record numbers of FCPA cases and obtained significant relief, including fines, penalties, disgorgement, consent to corporate monitorships, and even imprisonment for individuals. The absence of vigorous anti-corruption enforcement in many countries means that U.S. enforcement efforts will likely continue at a ramped-up pace for the foreseeable future. ■

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¹⁸ *Id.*

¹⁹ Transparency International Press Rel., Efforts to Curb Foreign Bribery Remain Inadequate, New Report Shows the Need to Improve Enforcement, (Jul. 28, 2010), http://www.transparency.org/news_room/latest_news/press_releases/2010/2010_07_28_oecd_progress_report.

²⁰ *See* TI, note 9, *supra* at 8-9.

²¹ *Id.* at 8.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 9.

²⁵ *Id.*

²⁶ *See* TI, note 9, *supra*.

²⁷ *Id.* at 16.

²⁸ *See* Attorney General Eric Holder, Memorandum to All Federal Prosecutors, (May 19, 2010), <http://blogs.usdoj.gov/blog/archives/192> (“Charges should ordinarily be brought if there is probable cause to believe that a person has committed a federal offense and there is sufficient admissible evidence to obtain and sustain a conviction, unless ‘no substantial Federal interest’ would be served, the person is subject to ‘effective prosecution’ elsewhere, or there is ‘an adequate non-criminal alternative to prosecution.’”); Deputy Attorney General Mark Filip, Memorandum on Principles of Federal Prosecution of Business Organizations, (Aug. 28, 2008), www.justice.gov/dag/readingroom/dag-memo-08282008.pdf (the revised principles encourage prosecutors to consider factors such as “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and the adequacy of remedies such as civil or regulatory enforcement actions,” when determining whether to bring charges against a business organization); *see also* Deputy Attorney General Paul J. McNulty, Memorandum on Principles of Federal Prosecution of Business Organizations, (Dec. 12, 2006), www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; Deputy Attorney General Larry D. Thompson, Memorandum on Principles of Federal Prosecution of Business Organizations, (Jan. 20, 2003), http://www.justice.gov/dag/cftf/corporate_guidelines.htm.

Seven-Year Kazakh Bribery Case Draws to an End

Oil consultant Jim Giffen's seven-year battle against charges that he bribed Kazakh government officials ended on August 6, 2010, when he pleaded guilty to a tax-related misdemeanor in the United States District Court for the Southern District of New York. On the same day, the Mercator Corporation, the investment bank Giffen chaired, pleaded guilty to one count of making an unlawful payment to a senior government official of Kazakhstan, in violation of the FCPA. Giffen faces a maximum sentence of one year in prison and a maximum fine of \$25,000. Mercator will pay a fine of the greater of \$2 million or twice the gross pecuniary gain or loss derived from the offense. The Department of Justice ("DOJ") in Washington, D.C., and the United States Attorneys' Office for the Southern District of New York collaborated in the prosecution.¹

Giffen first became active in the former Soviet Union during the Cold War when he established himself as an authority on trade between the Soviet

Union and the United States.² Starting in 1994, Giffen worked as a middleman for U.S. oil companies and represented Kazakhstan in its negotiations with companies that included the Mobil Oil Corporation, Phillips Petroleum Company, Amoco Corporation, and Texaco Inc.³ He soon earned the moniker "Mr. Kazakhstan." As Ed Chow, who previously managed external affairs at Chevron Overseas Petroleum Ltd., once noted, "You couldn't go to a Kazakh minister, particularly if you were an American company, without going through Giffen."⁴

Among Giffen's most significant efforts was allegedly making payments to facilitate six oil deals, including a \$1.05 billion deal that enabled Mobil to purchase a stake in Tengiz, one of the world's largest oil fields.⁵ Giffen was the inspiration for a character in the 2005 geopolitical thriller *Syriana*, which earned George Clooney an Oscar.⁶

Giffen's FCPA prosecution was one of the most far-reaching and contentious ever. Investigations into Giffen's

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activities for alleged FCPA violations began in 2000. He was arrested in March 2003 as he was preparing to board a flight at a New York airport. He was reportedly carrying a Kazakh diplomatic passport.⁷ Giffen was accused of allegedly paying \$84 million in bribes to Kazakh President Nursultan Nazarbayev and other senior government officials.⁸ He was charged with violating

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¹ DOJ Press Rel. 10-909, New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account, (Aug. 6, 2010), <http://www.justice.gov/opa/pr/2010/August/10-crm-909.html>. See also FBI NY DOJ Press Rel. 08-243, New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account, (Aug. 6, 2010), <http://newyork.fbi.gov/dojpressrel/pressrel10/nyfo080610a.htm>.

² Clare Nuttall, "Tame Ending to 'Mr. Kazakhstan' Investigation," *Silk Road Intelligence*, (Aug. 13, 2010), <http://silkroadintelligence.com/2010/08/13/tame-ending-to-mr-kazakhstan-investigation/>.

³ "Kazakhstan: Mobil, CIA Secrets May Come Out," *Bloomberg*, (Aug. 25, 2005), <http://www.corpwatch.org/article.php?id=12586>.

⁴ *Id.*

⁵ David Glovin, "Seven-Year Kazakh Bribery Case Ends with 'Sputtering' Misdemeanor Plea," *Bloomberg News*, (Aug. 6, 2010), <http://www.bloomberg.com/news/2010-08-06/oil-consultant-giffen-to-plead-guilty-to-misdemeanor-after-bribery-charges.html>.

⁶ Robert Winnett, "George Clooney Film Inspiration 'Mr. Kazakhstan' Finally Brought to Justice," *The Daily Telegraph*, (Aug. 13, 2010), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7943201/George-Clooney-film-inspiration-Mr-Kazakhstan-finally-brought-to-justice.html>.

⁷ *Id.*

⁸ See Glovin, note 5, *supra*.

Seven-Year Kazakh Bribery Case ■ Continued from page 4

the FCPA on 13 counts, as well as a number of other charges that included money laundering and conspiracy.⁹ He was freed on \$250,000 bail, which had been reduced from an original \$10 million,¹⁰ and has lived in Mamaroneck, New York since his arrest.¹¹ Over the course of the seven years following his arrest, prosecutors and defense counsel fought over access to classified documents from the Central Intelligence Agency (“CIA”) and other government agencies. Giffen alleged that the CIA was aware of his activities and sanctioned the payments, but the CIA refused to release the relevant papers.¹² The Kazakh government also tried to limit the U.S. probe.¹³ Ultimately, after 20 court appearances,¹⁴ Giffen pleaded guilty to failing to report in his 1996 Individual Income Tax Return, Form 1040, that he had maintained an interest in and signature authority over a Swiss bank account in the name of Condor Capital Management, a British Virgin Islands corporation Giffen controlled.¹⁵

Prosecutors dropped the other charges, which could have led to decades in prison. Giffen will be sentenced in November.¹⁶

Mercator advised Kazakhstan on various sales of the nation’s oil and gas. The company pleaded guilty to violating the FCPA by giving two snowmobiles worth \$16,000 as New Year’s gifts to a senior government official in 1999.¹⁷ Three senior Kazakh government officials purportedly had substantial influence over Mercator’s success in Kazakhstan, and the company offered the snowmobiles to maintain the goodwill of the officials.¹⁸

In 2007, the United States brought a separate, related civil forfeiture action in the Southern District of New York against \$84 million on deposit in Switzerland. The funds allegedly were traceable to unlawful payments to senior Kazakh officials in connection with sales transactions Mercator had brokered for Kazakhstan. Under a 2007 agreement among the United States, Kazakhstan,

and Switzerland, the funds have been channeled into a non-profit organization in Kazakhstan that is independent of the government. The non-profit is using the money to benefit underprivileged Kazakh children.¹⁹

Mobil, now part of the Exxon Mobil Corporation, has not been accused of wrongdoing, nor have the other oil companies with which Giffen engaged in transactions.²⁰ The investigation, however, has led to consequences for another individual; in 2003, J. Bryan Williams, a Mobil executive who ran the company’s activities in Kazakhstan, pled guilty to evading taxes on \$7 million in unreported income, including a \$2 million kickback he received in connection with Mobil’s oil business in Kazakhstan. He was sentenced to three years and 10 months in prison on income tax evasion charges, fined \$25,000, and made to pay more than \$3.5 million in restitution to the Internal Revenue Service, as well as penalties and interest.²¹

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⁹ See Nuttall, note 2, *supra*.

¹⁰ *Id.*

¹¹ See Glovin, note 5, *supra*.

¹² See Winnett, note 6, *supra*.

¹³ See Glovin, note 5, *supra*.

¹⁴ See Winnett, note 6, *supra*.

¹⁵ See DOJ and FBI, note 1, *supra*.

¹⁶ See Winnett, note 6, *supra*.

¹⁷ See Nuttall, note 2, *supra*.

¹⁸ See DOJ and FBI, note 1, *supra*.

¹⁹ See Glovin, note 5, *supra*.

²⁰ *Id.*

²¹ U.S. Attorney’s Office, Southern District of New York, Former Mobil Executive Sentenced on Tax Evasion Charges in Connection with Kazakhstan Oil Transactions, (Sept. 18, 2003), www.justice.gov/usao/nys/.../September03/williamsjbryansentencingpr.pdf.

Upcoming Speaking Engagements

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September 27-28, 2010

Paul R. Berger

Fifth FCPA Boot Camp

"The FCPA Year in Review: What the Latest Settlements and Investigations Reveal

About FCPA Compliance Priorities"

"Panel: Controlling the Money with Effective Books and Records"

ACI

Santa Clara, CA

Conference Brochure:

<http://www.americanconference.com/FCPABootCamp.htm>

September 30, 2010

Andrew J. Ceresney

2010 Regional Fall Conference

"Enforcement Update: Spotlight on the FCPA"

Society of Corporate Secretaries and Governance Professionals, Inc.

New York

Conference Brochure:

http://www.governanceprofessionals.org/society/joint_Regional_Chapter_Fall_Conference_-_Northeast.asp?SnID=1795872803

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The fines and penalties in the case have drawn criticism from commentators as overly lenient, "peculiar," and "sputtering."²² Andy Spalding, a professor at the Chicago-Kent College of Law, has speculated that the DOJ had been subjected to political pressure. He has written that the foreign policy implications of the case, involving relations with resource-rich Kazakhstan, outweighed any public interest in a "fulsome prosecution."²³ Spalding suggested that the Giffen case may be America's equivalent of another case that settled this year involving BAE Systems plc ("BAE"), in which the United Kingdom's Serious Fraud Office ("SFO") fined BAE £30 million, a "relative pittance," according to Spalding.²⁴

Although Giffen and Mercator may have faced small penalties, the publicity surrounding the case as well as the costs of seven years of litigation have imposed substantial, additional professional and financial repercussions for the defendants. Whether other businesses and individuals, who may have made even more money in former Soviet satellite countries, will plead guilty or face trial as a result of the Giffen/Mercator litigation remains to be seen. The government's persistence in prosecuting the case over so many years speaks volumes about its continued commitment to pursuing alleged FCPA violations, particularly in the energy and mining fields. Companies and individuals in industries the government has identified as priorities, should remain particularly vigilant in their efforts to comply with the FCPA. ■

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²² See Glovin, note 5, *supra*. See also Andy Spalding, "Is the Giffen Case America's BAE?" *FCPA Blog*, (Aug. 12, 2010), <http://www.fcpablog.com/blog/2010/8/12/is-the-giffen-case-americas-bae.html>.

²³ Spalding, *Id.*

²⁴ *Id.* Notably, BAE's £30 million penalty was the largest the SFO had ever imposed. See also Rosalba O'Brien and Jeremy Pelofsky, "BAE Reaches \$450 Mln Settlement with US, Britain," *Reuters*, (Feb. 5, 2010), <http://www.reuters.com/article/idUSTRE6143UZ20100205>. For further background and analysis of BAE, see FCPA Update Vol. 1, No. 7, "BAE Settlement Highlights Enforcement Trends," (Feb. 2010), www.debevoise.com/files/...b41c.../FCPAUpdateFebruary2010.pdf, and FCPA Update Vol. 1, No. 8, "Update on BAE's Settlements with the DOJ and the SFO," (Mar. 2010), www.debevoise.com/files/Publication/.../FCPAUpdateMarch2010.pdf.

Two Global Tobacco Companies Charged with FCPA Violations

On August 6, 2010, global tobacco joined numerous other industries, including energy, pharmaceuticals, and telecommunications, that have been the focus of FCPA prosecutions when the Department of Justice (“DOJ”) and the Securities Exchange Commission (“SEC”) charged subsidiaries of Alliance One International Inc. (“Alliance One”) and the Universal Corporation (“Universal”) with violating various FCPA provisions. The DOJ and SEC prosecuted the tobacco companies for an alleged coordinated bribery scheme in Thailand. The SEC also alleged that both companies made improper payments to government officials in other countries and failed to accurately record the true nature of these payments.

Alliance One pleaded guilty to the DOJ’s charges in the United States District Court for the Western District of Virginia, Universal pleaded guilty to the DOJ’s charges in the United States District Court for the Eastern District of Virginia, and both settled with the SEC in the United States District Court for the District of Columbia. Alliance One is a tobacco leaf merchant headquartered in Morrisville, North Carolina and Universal

is a Richmond, Virginia-based tobacco company. The subsidiaries involved were Alliance One International AG (“AOIAG”), a Swiss corporation; Alliance One Tobacco Osh LLC (“AOI-Kyrgyzstan”), a Kyrgyz corporation; and Universal Leaf Tabacos Ltda. (“Universal Brazil”), a Brazilian entity. Alliance One was formed in 2005 when Dimon Inc. (“Dimon”) and the Standard Commercial Corporation (“Standard”) merged, and the court cases relate to the conduct of employees and agents of Dimon and Standard prior to the merger.¹

Thailand

From 2000 to 2004, Dimon, Standard, and Universal Brazil purportedly sold Brazilian-grown tobacco to the Thailand Tobacco Monopoly (“TTM”). The three companies each allegedly retained sales agents in Thailand to apportion sales to TTM, coordinate sales prices, and pay kickbacks to TTM officials. The government alleged that the companies falsely characterized the payments in their respective books and records as “commissions” paid to the sales agents. Dimon and Standard allegedly paid a

combined total of \$1.2 million in bribes to TTM officials in exchange for more than \$18.3 million in sales contracts. Universal purportedly paid \$697,000 in bribes for \$11.5 million in sales contracts for its Brazilian and European subsidiaries.²

Kyrgyzstan

AOI-Kyrgyzstan admitted that employees of Dimon International Kyrgyzstan (“DIK”), a wholly-owned subsidiary of Dimon, paid approximately \$3 million in bribes from 1996 to 2004 to Kyrgyz government officials in exchange for various benefits.³ More specifically, DIK purportedly bribed officials of the Kyrgyz Tamekisi, a government entity that controlled and regulated the local tobacco industry, paid \$254,262 to five local provincial government officials known as “Akims” to obtain permission to purchase tobacco from local growers, and paid roughly \$82,000 to officers of the Kyrgyz Tax Police in order to avoid penalties and lengthy tax investigations.⁴ Most of these payments were allegedly delivered to high-ranking government officials in the form of bags filled with \$100 bills.⁵

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¹ 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>. See also SEC Litig. Rel. 21618, SEC Charges Two Global Tobacco Companies with Bribery, (Aug. 6, 2010), <http://www.sec.gov/litigation/litrel/2010/lr21618.htm>.

² *Id.*

³ T. Gorman, “SEC Files Two More Settled FCPA Cases,” *SEC Actions*, (Aug. 9, 2010), <http://www.secactions.com/?p=2469>.

⁴ See SEC, note 1, *supra*.

⁵ *Id.*

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Greece, Indonesia, China, and Thailand

Alliance One also purportedly made improper payments to tax officials in Greece and Indonesia. In Greece, the payments were allegedly made so that tax officials would not investigate certain irregularities discovered during an audit. The payments in Indonesia were allegedly made in exchange for a tax refund.⁶ Standard allegedly made an improper payment to a political candidate and furnished gifts, paid for travel and entertainment expenses, and purportedly made improper payments to officials in Asia, including China and Thailand.⁷

Malawi and Mozambique

Universal allegedly paid more than \$165,000 between 2004 and 2007 through corporate subsidiaries in Belgium and Africa to government officials in Mozambique, primarily to secure an exclusive right to purchase tobacco from regional growers and to influence legislation that would benefit the company's business. In addition, from 2002 to 2003, Universal subsidiaries allegedly paid \$850,000 to high-ranking Malawian government officials without properly recording the payments.⁸

Alliance One Criminal and Civil Charges

AOIAG pleaded guilty to a three-count criminal information charging it with conspiring to violate the FCPA and violating both the anti-bribery provisions and the books and records provisions of the FCPA for its activities with TTM. AOI-Kyrgyzstan also entered a guilty plea to a separate three-count criminal information containing the same three charges – conspiracy and substantive violations of both the anti-bribery and books and records provisions of the FCPA – in connection with the bribes it paid to Kyrgyz government officials. Under the plea agreements, AOIAG agreed to pay a fine of \$5.25 million and AOI-Kyrgyzstan agreed to pay a \$4.2 million fine. Both subsidiaries face sentencing on October 21, 2010. In addition, the DOJ and Alliance One entered into a non-prosecution agreement pursuant to which the company agreed to cooperate with the on-going investigation, retain an independent compliance monitor for at least three years, and to report periodically to the DOJ.⁹ On the civil side, Alliance One agreed to pay \$10 million in disgorgement. Without admitting or denying the SEC's allegations, the company consented to the entry of a final

judgment permanently enjoining it from violating the anti-bribery, books and records, and internal control provisions of the Securities Exchange Act of 1934 ("34 Act"). The proposed settlement is subject to court approval.¹⁰

Universal Criminal and Civil Charges

The DOJ filed a two-count information charging Universal Brazil with conspiring to violate the anti-bribery and the books and records provisions of the FCPA, and with violating the anti-bribery provisions for its part in the TTM crime. Universal Brazil also signed a plea agreement whereby it admitted to the conduct described in the charging document. The Brazilian subsidiary agreed to pay \$4.4 million as part of the plea agreement and a non-prosecution agreement. Universal and Universal Brazil both agreed to retain an independent compliance monitor for a minimum of three years and to periodic reporting to the DOJ.¹¹ To settle with the SEC, Universal agreed to pay \$4.5 million in disgorgement. Without admitting or denying the SEC's allegations, Universal agreed to the entry of a final judgment permanently enjoining it from violating the anti-bribery, books and records, and

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⁶ See Gorman, note 3, *supra*.

⁷ See SEC, note 1, *supra*.

⁸ *Id.*

⁹ See DOJ, note 1, *supra*.

¹⁰ See SEC, note 1, *supra*.

¹¹ See DOJ, note 1, *supra*.

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internal control provisions of the '34 Act, a settlement that remains subject to court approval.¹²

FCPA Violations Charged Against Individuals

In April 2010, the SEC charged four former employees of Dimon with violating the anti-bribery provisions of the FCPA in the United States District Court for the District of Columbia. The former employees are Bobby Elkin Jr., the former country manager for Kyrgyzstan; Baxter Myers, the former Regional Finance Director; Thomas Reynolds, the former corporate controller; and Tommy Williams, a former Senior Vice President of Sales. Elkin allegedly authorized the \$3 million paid to various Kyrgyz officials, and Myers and Reynolds purportedly signed off on the bribes. Williams allegedly directed the sales of tobacco from Brazil to TTM and authorized the payment of bribes to TTM officials. Each defendant settled with the SEC by consenting to a permanent injunction for future violations of the anti-bribery and books, records, and internal control provisions of the '34 Act. Myers and Reynolds also agreed to pay civil penalties of \$40,000 each.¹³

On August 4, 2010, Elkin pleaded

guilty to a one-count criminal information charging him with conspiracy to violate the FCPA in the United States District Court for the Western District of Virginia. At sentencing, which has not yet been scheduled, Elkin faces a maximum of five years in prison and a \$250,000 fine.¹⁴

FCPA Prosecution and the Tobacco Industry

The prosecution of these two large tobacco companies demonstrates that the government is expanding its pursuit of FCPA violations into new industries. This is the first time the federal government has taken action against tobacco companies for overseas payoffs.¹⁵ Alliance One and Universal are both among the world's top leaf tobacco merchants and processors. Alliance One does business in more than 90 companies and Universal in more than 30.¹⁶ According to Dick Cassin, the author of the FCPA Blog, the prosecution of these companies demonstrates that "[t]he tobacco industry is going to have to take a look at itself and the way it's been doing business.... A lot of the law-on-the-ground practices are just going to have to stop."¹⁷ Industry "sweeps" are commonplace at the DOJ and SEC as a means through which the agencies use actions and fines as a show of force to

industries. The pharmaceutical industry is currently experiencing this type of FCPA scrutiny. This action on tobacco makes FCPA compliance a priority for companies in that field.¹⁸

The prosecutions are yet another reminder of the importance of state-of-the-art compliance programs and continued vigilant monitoring of relationships with foreign officials. This is especially the case in countries considered high-risk for corruption, where gift-giving and under-the-table dealings are a regular part of conducting business. Furthermore, individuals should also be aware that they, too, can be charged under the FCPA, and unlike corporations, individuals can serve prison time. ■

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¹² See SEC, note 1, *supra*.

¹³ *SEC v. Elkin*, No. 1:10-cv-0061, (D.D.C. 2010).

¹⁴ DOJ Press Rel. 10-894, North Carolina Businessman Pleads Guilty to Role in Foreign Bribery Scheme, (Aug. 4, 2010), <http://www.justice.gov/opa/pr/2010/August/10-crm-894.html>.

¹⁵ Traver Riggins and Ricardo Sandoval Palos, Tobacco Company Penalties May Signal U.S. Crackdown on Industry Practices Overseas, The Center for Public Integrity, (Aug. 11, 2010), <http://www.publicintegrity.org/articles/entry/2341/>.

¹⁶ Sue Reisinger, "Tobacco Companies Universal, Alliance One Settle Bribery Charges," *Corporate Counsel*, (Aug. 9, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202464356897&All_That_Money__emSMOKEDem_to_Settle_Bribery_Charges.

¹⁷ *Id.*

¹⁸ *Id.*