

SHEARMAN & STERLING^{LLP}

FCPA DIGEST

Recent Trends and Patterns in the Enforcement
of the Foreign Corrupt Practices Act

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SHEARMAN & STERLING_{LLP}

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Recent Trends and Patterns in FCPA Enforcement

It is still too early to tell whether 2009 will equal or exceed 2008's record setting levels of fines and penalties levied in FCPA enforcement actions. Whether or not the monumental outcomes of *Siemens* and *Halliburton/KBR* represent a trend toward large-scale high-penalty FCPA prosecutions, enforcement activity has remained steady as we have continued into 2009. By our count, at least 66 corporations have disclosed investigations (see *Digest*, section F), and the Department of Justice has stated that least 120 companies are under investigation, up from 100 at the end of last year. Significantly, 2009 has taken shape as the year of the individual with 16 individuals newly charged, four convicted after trial, seven pleading guilty or settling charges, and over eight awaiting trials scheduled to commence before year's end.

As we review the developments since our last report in March, and the overall enforcement patterns over the last few years, we have noted the following new and continuing trends and patterns:

- the SEC and, to a lesser extent, the DOJ continue to adopt aggressive and potentially controversial interpretations of the FCPA in their respective enforcement actions against individuals and corporations;
- the maturation of foreign transnational bribery statutes, resulting from the OECD Convention and other international treaties, has increased the risk of parallel investigations and enforcement proceedings against individuals and corporations;
- the DOJ and the SEC appear to be willing to take a more nuanced approach to imposing monitors on corporations and assessing monetary sanctions; and
- the DOJ and the SEC continue to emphasize the importance of due diligence in M&A transactions and on third parties as a critical internal control.

Over the past several years the amount of guidance on the meaning of the FCPA's provisions has steadily grown, largely as a result of enforcement actions against individuals, who, given the personal stakes involved, are more likely to contest the government's charges. Cases such as *Kay* and *Bourke* have given the courts an opportunity to weigh in on the scope of the statute in important ways. On the corporate side, although corporations rarely go to trial, they have sought the DOJ's views on specific transactions, resulting in several significant FCPA Opinions. Unfortunately, however, some of the government's more interesting theories have been announced in settled cases, providing no opportunity to test the validity of those theories in court.

In our last issue, we cited the *Siemens* matter as an example of how multinational corporations now have to respond to, defend, and possibly settle investigations and enforcement actions in multiple jurisdictions. We see this trend continuing in relation to the *Halliburton/KBR* matter, which first started in France and now appears to have spawned investigations in Nigeria, the U.K., Switzerland, and perhaps Italy. Moreover, the risk of follow-on enforcement proceedings are not limited to foreign authorities but also

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includes collateral sanctions imposed by public international organizations. For example, this year Siemens AG was forced to agree to varying periods of suspension by the World Bank and the United Nations.

U.S. FCPA enforcement appears to also be spurring foreign governments to pursue both the payors and recipients of improper payments subject to their jurisdiction. For example, in March 2009, one year after *Volvo* settled charges with the U.S. authorities related to Oil-for-Food kickbacks by two of its subsidiaries, Sweden criminally charged three Volvo executives for related conduct. Similarly, after the DOJ brought charges against *CCI* and its former executives, South Korean and Chinese authorities reportedly opened investigations into the conduct of officials allegedly involved in those bribery schemes. In other examples, the U.K. successfully prosecuted the Ministry of Defense official who received *PCIs* illegal payments, and Italian authorities won a guilty verdict in a Milan tribunal against the CEO of *Immucor* on charges related to those the same executive and *Immucor* settled with the SEC.

Although the financial sanctions imposed in settlements with the SEC and the DOJ continue to be significant, 2009 has shown a continued trend of the authorities falling back from the automatic imposition of independent monitors in every case. Instead, the government has adopted a more nuanced approach that weights the severity and pervasiveness of the violations against the company's existing compliance regime and remediation. Thus, in some cases, such as *Helmerich & Payne*, the DOJ required only that the company itself periodically report on its implementation of additional compliance measures.

I. A Record Year for FCPA Trials

2009 has seen, so far, a record of three trials, involving four individuals: Frederic Bourke, former U.S. Congressman William Jefferson, and Patricia and Gerald Green. These three trials equal in number the total number of FCPA trials that have occurred in the preceding seven years: *King* (2002); *Kay/Murphy* (2004); and *Thompson* (2005).

In July 2009, a federal jury in the Southern District of New York found Bourke guilty of conspiracy to violate the anti-bribery provisions of the FCPA and the Travel Act in connection with bribes his investment consortium paid in an attempt to take control of the Azerbaijan state-owned oil company and for making false statements to the FBI. Several commentators have made much of the court's jury instruction on willful blindness in *Bourke*, which stated that "knowledge may be established if a person is aware of a high probability of its existence and consciously and intentionally avoided confirming that fact." An instruction of this kind, however, is not uncommon in FCPA cases; it is often given even when the government's evidence includes both evidence of actual knowledge and possible willful blindness. It is not clear on which theory the jury returned its verdict against Bourke.

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In his post-trial motion filed August 28, 2009, Bourke seeks a judgment of acquittal or new trial based on 10 claimed trial errors. Among the several claimed errors involving faulty jury instructions, Bourke argues that the court erred in charging the jury on conscious avoidance because, according to Bourke, the government disclaimed reliance on this theory. In his brief he recounts that the prosecutor stated in closing argument that the defense had mischaracterized the prosecution as having a “back-up” theory of conscious avoidance. In response, the government argued it had one theory, that Bourke “knew about the conspiracy and he joined” it. Bourke also argues post-trial that the government’s evidence supports, at most, a finding of negligence, not conscious avoidance of knowledge of bribes paid to the Azerbaijani officials and that, moreover, there was insufficient evidence of actual knowledge to support a conviction.

In *Jefferson*, a jury in the Eastern District of Virginia returned a verdict convicting former Representative Jefferson of a number of crimes, including a single count of conspiracy to solicit bribes, commit wire fraud, and violate the FCPA. Strangely, however, it acquitted him of the substantive FCPA count. The press reported that the verdict reflected the jury's finding that although Jefferson had agreed to bribe a foreign official (and hence violated the conspiracy statute), he had, in fact, not committed the substantive crime because, according to the evidence introduced at trial, cash for the bribe payment remained in the freezer of his Washington, D.C. home where the FBI seized it. This may indeed represent the jury's reasoning, but it reflects more the difficulty of convincing a jury that a crime has been committed without some evidence that a bribe was actually paid, notwithstanding that the FCPA requires only an interstate act in furtherance, an element presumably satisfied by Jefferson receiving the money in Virginia and transporting it to said freezer in Washington. It also provides an example of how the conspiracy statute can be used by the government to overcome such unfortunate proof problems.

In another wrinkle to the FCPA aspects of this case, it is unknown whether the jury even convicted Jefferson for conspiracy to violate the FCPA. The jury was charged to find Jefferson guilty under the conspiracy count if it found he had conspired to commit two of three crimes: solicitation of bribes, wire fraud, or violation of the FCPA. The jury was not required to specify which two objects the government proved or whether it had concluded that Jefferson had conspired to commit all three. Post-trial briefs in support of and opposing Jefferson’s motion for a new trial, which may address this issue, were filed under seal.

In the third trial of 2009, the government won convictions of *Patricia and Gerald Green* in the Central District of California for bribery of a Thai tourism official in exchange for lucrative contracts. A jury found the Greens guilty of conspiracy to violate the FCPA and money laundering laws along with substantive violations of those laws. Patricia Green alone was also convicted of filing false tax returns. The jury could not reach a verdict on a separate obstruction of justice charge against Gerald Green that was premised on

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allegations that Gerald Green altered and falsified film production budgets to disguise bribe payments as *bona fide* expenses.

The way in which the government acquired and sought to present evidence supporting the obstruction of justice charge exemplifies the aggressive investigatory and prosecutorial strategies we have observed in past *Trends and Patterns*. In what the defense characterized as “overzealous efforts,” the government turned the Greens’ book keeper, Susan Shore, into a government informant and directed her to make surreptitious recordings of conversations with the Greens and others who worked with them. Over a period of 15 weeks, Shore allegedly attempted to elicit statements about the subject matter of the investigation, advice of lawyers, and the intention of her co-workers to cooperate with the government. The Greens sought to suppress Shore’s recordings based on the argument that the government was impermissibly communicating with represented individuals through Shore in violation of the California Rules of Professional Responsibility. It is not apparent from the docket whether the court ultimately agreed to preclude the recordings in whole or in part; regardless, the government’s evidence was ultimately insufficient to convince the jury of Gerald Green’s guilt of obstruction of justice.

Also in the *Greens* trial, the government attempted to admit evidence concerning statements made by Gerald Green during a joint defense meeting. The government claimed that the crime fraud exception allowed the court to pierce the attorney-client privilege protecting the joint defense meeting because Gerald Green allegedly used the joint defense meeting to begin assembling falsified documents and testimony to disguise bribe payments as legitimate payments related to non-existent services on film projects. The court granted defendants’ pre-trial motion for a protective order preventing the government from using evidence from the joint defense meeting, finding that the government made an insufficient showing to justify applying the crime fraud exception.

The *Carson et al.* trial, scheduled to begin on December 8, 2009 (also in the Central District of California), is already giving rise to legal challenges to prosecutorial strategies. The defendants have jointly moved to compel discovery seeking disclosure of, among other materials, an electronic database of documents CCI collected in its internal investigation, interview notes and analyses and summaries prepared by CCI’s counsel and accountants during their internal investigation, and eight documents CCI had identified as privileged but disclosed to the government. CCI and its parent company IMI have moved to intervene to oppose the discovery motion. Whether the government (and the companies) will succeed in shielding these materials from the defendants has important implications for the consequences of company cooperation with the government when the government subsequently seeks to prosecute individual employees. Moreover, defendants have moved to dismiss three counts (two for FCPA bribery and one for Travel Act bribery) as time barred under the theory that a foreign evidence request submitted by the government did not toll the statute of limitations charges unrelated to the evidence sought. The defendants are advancing an alternative limitations argument with respect to one of the three counts,

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similar to that successfully advanced in the *Kozeny et al.* case, that a request for foreign evidence does not toll the statute of limitations when the request is filed after the limitations period has already expired.

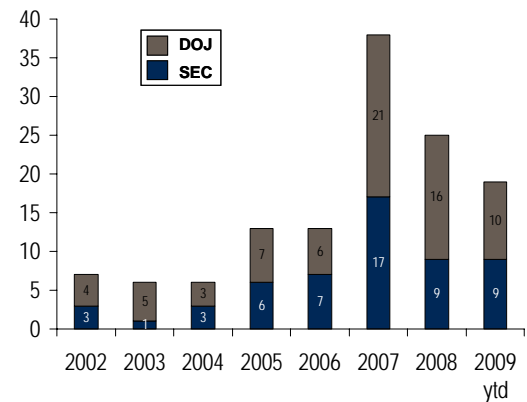
II. More Cases and Larger Penalties

Charges Against Corporations and Individuals

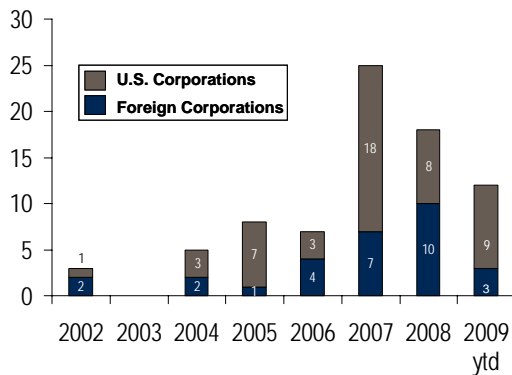
Over the past several years, the number of FCPA matters pursued by the Department of Justice (including deferred prosecutions and non-prosecution agreements) and the SEC has steadily increased. Although 2008 did not match the high-water mark of 2007, both years exceeded by far the previous years. 2009, as well, already exceeds 2006 and previous years and shows potential to perhaps equal 2008.

Foreign corporations appear to be less in the sights of U.S. authorities this year, although there may be several cases in the pipeline. While in 2008, the DOJ and SEC charged foreign corporations in 10 of the 18 matters involving corporations (or 20 out of 29 total corporations involved), 2009 has seen far fewer cases. So far this year, the agencies have pursued enforcement against foreign corporations in only three of the 12 actions against corporations (or three out of 13 corporations involved).

Total SEC/DOJ Matters Initiated: 2002-present



Total Corporate Matters Initiated: 2002-present



criminal and civil matters, already equaling the number of individuals charged in 2008. Although this

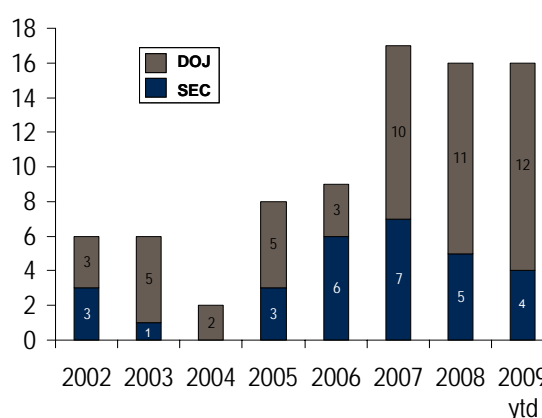
On the other hand, while in previous years many of the cases against individuals, particularly those brought by the SEC, appeared to be more in the nature of “cleaning up” loose ends from corporate cases, it is now clear that both agencies are targeting individuals. As one Justice official described it, the government has decided that it helps create incentives to comply if corporate executives realize they have “skin in the game.” In 2009, 16 individuals have, thus far, been charged in

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number is somewhat skewed by the prosecution of several employees from a single company, such as the eight former CCI executives charged in 2008 and 2009 and the four executives from Willbros charged in 2007 and 2008, the overall number of cases against individuals is clearly on the rise.

We noted in the last *Trends and Patterns* the pattern of the DOJ charging individual employees involved in alleged illicit conduct before related charges occur against an employer corporation. *CCI* is a prime example, where the corporation was only charged (and settled) this past July after eight former employees had already been indicted or pleaded to charges in the related actions *Covino*, *Morlok*, and *Carson, et al.* However, conversely in *Meza*, the SEC settled this August with a former Faro sales VP over one year after the *Faro* SEC and DOJ settlements.

Individuals Charged: 2002-Present



The government's approach of charging individuals or the corporations separately and in sequence is a common tool in non-FCPA cases but relatively new in the FCPA arena. It allows the government to build a case by exacting cooperation from one party against the other. Some of the recent increases in charges against individuals reflects the normal delay between negotiating a resolution with a cooperating corporation and preparing a case against an individual, who is both more likely to contest criminal, or even civil, charges and who bears the burden of conviction or civil liability, *i.e.*, imprisonment and fines, in a direct and personal way. Thus, for example, although the DOJ and SEC corporate cases against *Syncor* and its subsidiary, *Syncor Taiwan*, were settled in 2002, the SEC filed settled charges against *Monty Fu*, *Syncor's* former chairman, only in 2007. Likewise, the SEC did not bring charges against the four individuals in *Samson et al.* until 2006, two years after *ABB* had settled related charges with the DOJ and SEC in the first *Vetco Gray* cases. Similarly *Wooh* was not charged until a year after his employer *Schnitzer* settled. In each of these cases, the agreements with the corporations required them to provide assistance to the government in any subsequent investigation and prosecution of individuals and other entities. While it settled with the DOJ months after its employees were charged, *CCI* has similarly agreed to cooperate in the prosecution of its former employees.

More than the emergence of preferred, default sequencing of actions against employees and corporations what we are likely observing is a flexible *ad hoc* approach to the sequencing of related enforcement actions, based on the unique circumstances of each case. More recently, there is a strong trend of actions against individuals being brought separately or even in advance of charges against their employers and

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then, in all likelihood, following classic prosecutorial strategy of working up the chain of command, using the individuals to build the government's case against their superiors and eventually the company. In *Willbros*, the DOJ charged four employees over a two-year period with two pleading in previous years (*Steph* and *Brown*) and an indictment being returned against two others (*Tillery* and *Novak*) in February 2008. Finally, in May 2008, Willbros Group and Willbros International agreed to a deferred prosecution agreement. Similarly, the DOJ entered into a plea agreement with the former CEO of KBR, *Stanley*, in 2008, well in advance of settling the matter with *Halliburton/KBR* in early 2009.

Perhaps following the same strategy, in *Sapsizian*, the government has thus far charged only two employees of Alcatel but not the company itself. According to the government's press release, however, Alcatel "continues to be investigated." Likewise, the Department has charged a Bridgestone employee, *Hioki*, but has not yet charged Bridgestone, which is currently the subject of a related antitrust investigation.

There are, of course, other cases in which individuals but not their employers were charged, although they tend to be dependent upon unique circumstances. In *Self* and *Smith*, for example, Pacific Consolidated Industries ("PCI") voluntarily disclosed the conduct of its former executives, was under new management, and provided assistance in an investigation that resulted in *Self* and *Smith* pleading guilty to charges in the U.S. and a conviction in the U.K. (of the foreign official). As a result, it appears that the government does not intend to proceed against PCI directly.

Interestingly, there are two examples already this year of actions against agent/employee pairs of co-defendants – *Diaz/Perez* and *Tesler/Chodan* – similar to the *Novak/Tillery* indictment filed under seal in 2008. With respect to *Diaz/Perez*, the Miami-Dade County companies involved in bribing Haitian telecom officials are still unnamed and reportedly under investigation. In contrast, the *Tesler/Chodan* indictment came down a week after *KBR* settled related actions. This year in *Naaman*, an agent was indicted alone although the company he reportedly represented in Iraq, Innospec Inc. is still only under DOJ and SEC investigation. These cases, along with the action the DOJ brought against *Shu Quan-Sheng* last year, appear to reflect a trend of enforcement against intermediaries subject to U.S. jurisdiction who funnel illicit payments on behalf of U.S. and foreign corporations.

Financial Penalties

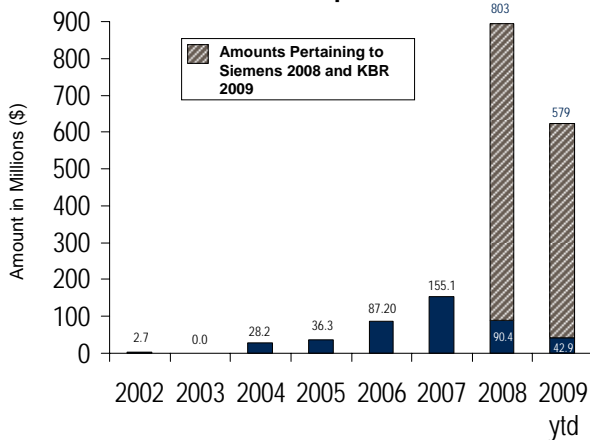
Without a doubt the penalties assessed against corporations have increased over the past several years, both in the aggregate value (including all fines, penalties, restitution, and disgorgement) and in individual cases. The latest large scale penalties (*Siemens*, *Halliburton/KBR*) dwarf the previous records reported in earlier *Trends and Patterns*. *Siemens*, however, involved pervasive corruption throughout one of the world's largest companies over a lengthy period, while *Halliburton/KBR* involved a series of extremely

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large contracts over a 10 year period. The aggregate DOJ and SEC penalties in these matters (\$800 million in *Siemens* and \$579 million in *Halliburton/KBR*) severely distort the calculations of average corporate fines because of the large amount of business obtained through corruption in those cases. Interestingly, if the *Siemens* and *Halliburton/KBR* fines are removed from the calculation of average fines, the overall average level of penalties is actually down in 2008 and 2009 year to date from the previous two years. See charts showing Average Fine Per Corporate Proceeding: 2004-2009, p. 9. It is highly unlikely, however, that this decrease should be viewed as a long-term trend, and, indeed, the government has signaled that there may be several large settlements in the pipeline.

To some degree, when compared to penalties in the earlier corporate cases, the overall increase in penalties over the past decade can be attributed to the promulgation of the Organizational Sentencing Guidelines in 1991. These Guidelines were intended to impose some rationality on corporate fines and, in doing so, increase them. Even though the Guidelines are now advisory rather than mandatory, the 2008 revision of the Principles of Federal Prosecutions of Business Organizations requires that “negotiated

**Total Criminal and Civil Fines Imposed on Corporations:
2002-present**



departures or recommended variances from the advisory Sentencing Guidelines,” given as concessions for cooperation and voluntary disclosure, be “justifiable under the Guidelines” and “disclosed to the sentencing court.” Of course, as a practical matter, one cannot forget that the Guidelines are driven by loss calculations and thereby provide some room for maneuvering as both sides argue over which transactions should or should not be included and what loss or benefit should be assigned to them. Indeed, in *Siemens*, although the SEC concluded that it had sufficient evidence to

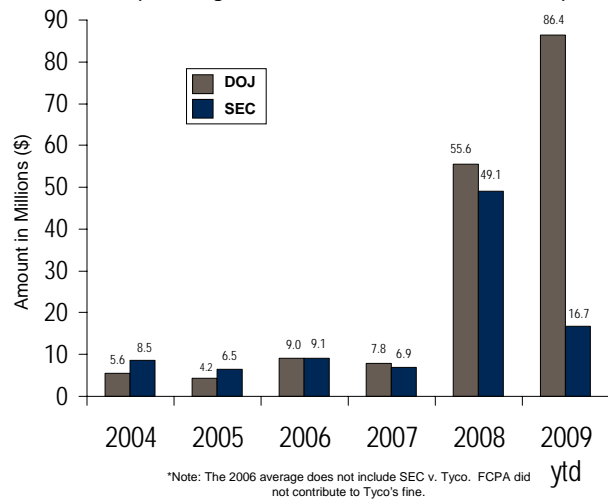
estimate the gain from corrupt payments, the DOJ agreed instead to calculate the fines based on the amount of the payments themselves, claiming that it would be unnecessarily burdensome to estimate the amount of gain.

For corporations that are issuers subject to civil enforcement actions under either or both the anti-bribery and books and records provisions, the SEC has the authority to collect both fines and disgorgement, together with pre-judgment interest. The SEC penalties may thus prove to be as large or even larger than those assessed in DOJ actions, depending, in some cases, on whether the business obtained through the

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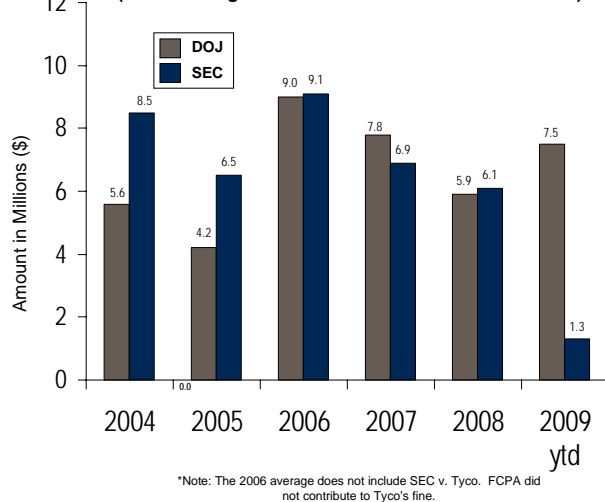
improper payments proved profitable. In notable instances, the SEC has appeared content to forgo a fine by practically giving the issuer credit for having paid the DOJ fine and collect only disgorgement as occurred in *Halliburton/KBR*, *Helmerich & Payne*, and *United Industrial Corp.* in 2009, *Siemens* and *Willbros* in 2008, *El Paso Corp.* in 2007, and *Statoil* in 2006. The SEC’s general practice, however, has been to extract both fines and disgorgement, even when the issuer was also paying a criminal fine or penalty. For example, in cases connected to the now defunct U.N. Oil-for-Food (OFF) program (e.g., *Novo Nordisk*, *Ingersoll-Rand*, *Westinghouse Air Brake Technologies (Wabtec)*, *Flowserve*, and *Fiat*), the SEC granted no credit for the DOJ penalties and required the defendants to pay both a civil fine and disgorgement.

Average Fine Per Corporate Proceeding: 2004-2009
(Including Siemens 2008 & Halliburton/KBR 2009)



In certain cases, the Department has begun to give credit for fines and other penalties paid overseas to foreign law enforcement authorities. In some cases, such as *Siemens* and *Statoil*, the fines were previously or simultaneously assessed and paid, and the DOJ may have sought to avoid a perception of unfairness even while asserting the United States’ policy interests in bringing enforcement actions and imposing penalties.

Average Fine Per Corporate Proceeding: 2004-2009
(not including Siemens 2008 & Halliburton/KBR 2009)



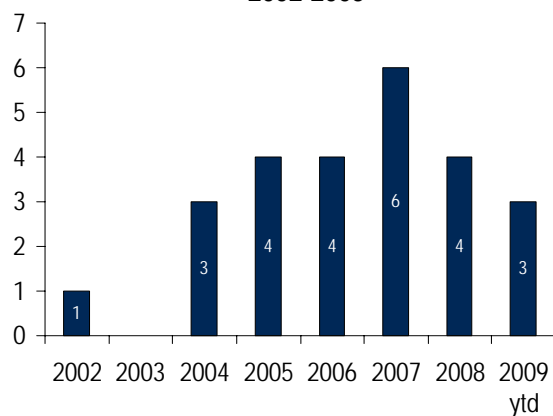
In other matters, such as OFF cases, the DOJ appears to specifically have sought to encourage foreign enforcement authorities to take action. Thus, for example, in *Akzo Nobel*, an OFF matter in which the company was charged with books and records violations, the DOJ gave a credit conditioned on the company settling with the Dutch authorities and paying a fine “no less than €381,602.”

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A final trend and pattern worth noting is the SEC's continued demand for disgorgement of ill-gotten profits in cases in which only books and records violations are charged, such as in the OFF cases as seen recently in *Novo Nordisk* and also in recent non-OFF cases such as *ITT*, *Helmerich & Payne*, and *Avery Dennison*. Prior to the *ABB* case in 2004, the SEC had never collected disgorgement in FCPA cases; since then it has sought it in virtually every case with only a few exceptions, such as *Nature's Sunshine*, *Dow Chemical*, *Delta & Pine Land*, *Lucent*, and *Conway*. In *Tyco*, the SEC collected \$1 in ill-gotten gains (along with \$50 million in penalties related to other violations). Whether or not a false entry in a company's books and records (or a failure to implement adequate internal controls) truly results in increased profits is open to question. To date, however, no FCPA defendant has publicly challenged the SEC on whether disgorgement is appropriate when the sole charge is false books and records.

Monitors

Total DOJ/SEC Settlements Requiring Monitorship:
2002-2009



Some of the cases brought by the U.S. authorities in the past year suggest that the pattern we have noted in past *Trends and Patterns* of increasingly requiring a monitor in all cases may be on the wane. While each of the past four years have seen the appointment of four or more monitors per year, only three cases have required the appointment of a monitor this year to date (one in *CCI* and one in each of the related DOJ and SEC actions against *Halliburton/KBR*). Further, the overall percentage of settlements

requiring a monitor has continued to drop steadily since 2004.

This trend likely reflects a larger effort to rationalize the use of monitorships, including the Department's 2008 policy providing an institutional framework for the selection and supervision of monitors. Thus, rather than routinely requiring a monitor, the government appears to be applying a more nuanced approach, examining facts and circumstances such as the likelihood of recurrence and the scope and nature of the conduct, in determining whether to impose a monitor.

In this year's cases, it appears that the government has reserved the imposition of monitors to cases of conduct of significant extent – such as *KBR*, involving \$180 million in bribe payments and *CCI*, a case involving millions of dollars in illicit payments to officials in four or more countries. Similarly, the DOJ

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and the SEC required *Siemens* to retain a monitor and, reflecting the scope and pervasiveness of the conduct, required that the monitor be in place for four years rather than the usual three. In an interesting departure, however, the agencies appointed a non-U.S. monitor – a former German minister – albeit one assisted by a U.S. law firm.

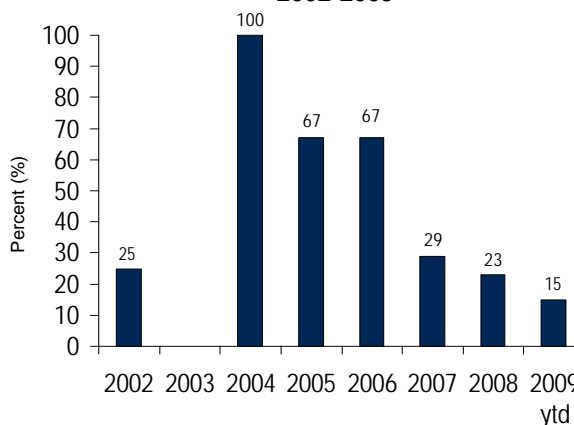
The OFF cases (*e.g.*, *Novo Nordisk*, *Inveco/Fiat*, *AB Volvo*, *Flowserve*, *El Paso*, *Akzo Nobel*, *Chevron*, *Textron*) have long represented a notable categorical exception to the once general practice of routinely imposing a monitor. The absence of monitors in the vast majority of OFF cases may be due to the unique and no longer present circumstances surrounding the now terminated OFF program. In those few OFF cases in which the authorities did require a monitor or required the company to engage a consultant, the company's conduct included not just the OFF kickbacks to the Iraqi government but also providing travel and entertainment to Iraqi officials directly (*Ingersoll-Rand*) or paying bribes to public officials in other countries (*York*).

In addition, in an increasing number of non-OFF cases, the government appears to be concluding similarly that the conduct at issue was sufficiently isolated in nature or extent to not require the imposition of a monitor. This year, the conduct at issue in *Hemerlich & Payne* involved payments of under \$200,000 to customs officials in two countries. Last

year in *Wabtec*, the incidents also involved under \$200,000 in payments to one customer in India. Significantly, in both cases the conduct appeared to have taken place in isolated subsidiaries without the involvement of the parent company. In a somewhat different example, the DOJ also refrained from imposing a monitor as a term in the *Latin Node* plea agreement. After acquiring Latin Node, eLandia discovered a \$2.25 million bribery scheme undertaken by Latin Node involving state telecommunications companies in Honduras and Yemen. Within a year of its acquisition, eLandia dissolved Latin Node, effectively leaving no organization to be monitored.

One outlier in this group of cases is the *Lucent* matter from 2007. In that matter, Lucent provided several million dollars in benefits to government officials, including trips and tuition payments to Chinese officials. Nevertheless, the DOJ imposed no monitorship under the DPA. We have never seen a particularly persuasive explanation of this decision, although the government may have taken into account the fact that the conduct preceded Lucent's merger with Alcatel. It could be, therefore, that the

Percentage of Settlements Requiring a Monitorship:
2002-2009



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government held off on a monitor in view of the substantial revamping of a compliance program that usually accompanies a merger. Moreover, as we surmised in the last edition of *Trends and Patterns*, the authorities may have held off requiring a monitorship for the new company, Alcatel-Lucent, because of the separate ongoing investigation of Alcatel which may still ultimately result in the imposition of a monitor.

Finally, in at least two cases, *Ingersoll-Rand* and *Paradigm*, the government essentially agreed to allow a “monitor-lite.” In *Ingersoll-Rand*, an OFF case with a limited additional conduct involving travel and entertainment of Iraqi officials, the DOJ and the SEC essentially ratified the company’s selection of external counsel to act as a “consultant” for a period of six months, during which time he was to evaluate the company’s compliance programs and make recommendations to the company (with copies to the government). Notably, although the consultant is charged with certifying that the company’s program was “adequately designed and implemented,” the agreement does not include the standard detailed requirements and description of the monitor’s work plan (e.g., “onsite observations,” interviews, and testing), nor is the company required, as was done in some other agreements (see, e.g., *Baker Hughes*), to accept the consultant’s recommendations in all respects.

Paradigm provides an even more instructive example. In that case, the company, in preparation for an Initial Public Offering, scrubbed its internal controls and discovered improper payments spread across several countries. Nevertheless, instead of imposing a monitor, the government merely noted that the company had agreed to retain its existing external counsel (who conducted the internal investigation) for 18 months as “external compliance counsel” to review the “implementation and effectiveness” of the company’s programs and make recommendations concerning enhancements as well as whether additional internal investigations and voluntary disclosures to the government were appropriate. Significantly, although the external counsel was required to report periodically to the Department “as directed,” the agreement does not contain the provision found in all other monitor agreements that his work in this respect would not be protected by the attorney-client privilege as to the Department.

The DOJ has allowed an even more abbreviated version of monitorship in some cases. For example, the DOJ allowed *Helmerich & Payne* to self-monitor the implementation of a compliance program required under its non-prosecution agreement, carry out its own in-house initial review and report to the government along with two follow-ups, and self-report any questionably corrupt payments it might discover. In another variation, the SEC did not require a monitorship *per se* in *Wabtec*. Instead, *Wabtec* agreed to retain an independent compliance consultant for a 60-day review of its compliance program.

Although the government has appeared to be applying a more selective approach to monitorships, the practice of monitors continues to be scrutinized. In a recent review of the appointment of monitors undertaken by the Government Accountability Office, the GAO noted that the Department’s policy does

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not require written documentation of the process used and the specific reasons for selecting a particular monitor. The GAO recommended that the DOJ clearly document the process and make such documentation available for examination to avoid the appearance of favoritism and assure the public that monitors are chosen based on their merits and through a collaborative process. See GAO Testimony before the Subcommittee on Commercial and Administrative Law, Committee of the Judiciary, House of Representatives: *Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* (June 25, 2009).

III. Aggressive Prosecution Theories

Corrupt Intent and Culpable Knowledge

The Supreme Court's denial of *certiorari* in *Kay* put an end, for now at least, to the question of whether the government must prove that a defendant knowingly and specifically sought to violate the FCPA, as opposed to simply do something wrong. Both the district court and the Fifth Circuit in *Kay* had held that the statute required only that the defendant acted intentionally to create an unlawful result or act by unlawful means. These holdings were consistent with that of the Second Circuit in *Stichting*, that the FCPA is not in the "narrow category" of "complex statutes" requiring a showing of specific intent to avoid "implicat[ing] innocent individuals." Nevertheless, in *Bourke's* post-trial motions, he contends that the trial court erred in failing to properly instruct the jury that it must find he acted both "willfully" and "corruptly" to find a substantive FCPA violation or a violation based on conspiracy.

In two cases this year, the government, particularly the SEC, have pushed the envelope even further by essentially charging imputed intent. In *Nature's Sunshine*, the SEC charged the company *inter alia* with various books and records and internal control violations resulting from payments by a subsidiary to customs brokers. These charges are unsurprising and consistent with the SEC's long-standing practice of holding parent issuers strictly liable for their subsidiaries' books and records and internal controls. Significantly, however, the SEC charged two of Nature's Sunshine's senior executives with books and records and internal control violations based on their positions as "control persons" within the meaning of Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78t(a)). On its face, the FCPA appears to require some degree of *scienter* or culpable knowledge even for books and records or internal controls violations. In the majority of the circuits, however, the government is not required – and did not do so in this case – to plead culpable knowledge of the control person, although the executive may raise it as an affirmative defense. Thus, in this case, the SEC held two of the company's most senior executives liable based on the alleged knowledge of certain subordinates under their "control" even though it did not allege that they had personal knowledge of the payments. Since the two executives settled, they did not assert

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(in public at any rate) the issue of their good faith. Control person liability has never been asserted before in the FCPA context, and it potentially greatly expands the risk to corporate executives.

The SEC has not treated companies any more leniently. In May of this year, the SEC held *UIC* liable for payments made by one of its subsidiaries, charging it not only with books and records and internal controls but also with violations of the FCPA's anti-bribery provisions – provisions that require proof, even for corporations, of corrupt knowledge and intent. In this case, however, the SEC's pleadings are entirely devoid of any suggestion that UIC itself had any involvement in the foreign payments, which were allegedly made by its wholly owned subsidiary, ACL, to Egyptian Air Force officials through an agent. Instead, although this theory is not spelled out in the pleadings, the SEC seems to have concluded that the involvement of ACL's senior executive, *Thomas Wurzel* (also charged) and assorted internal control failures that allowed the payments to go forward without significant review by the parent company was sufficient to establish constructive knowledge by the parent company. Again, as the company settled with the SEC (without admitting or denying the allegations), the SEC's apparent theory has not been tested in court.

Jurisdiction over Foreign Persons

The FCPA prohibitions extend to foreign companies and foreign individuals who make use of the “mails or other instrumentalities of interstate commerce” or do “any acts within the territory of the United States” in furtherance of an offer, promise, or payment of an unlawful payment to a non-U.S. official. The key issue for foreign persons has always been what qualifies as an act “within the territory of the United States.” In the *Siemens* and *Halliburton/KBR* cases, the government at last alleged in pleadings what it had long argued – that U.S. dollar-denominated transactions that typically clear through correspondent accounts in U.S. intermediary banks establish U.S. jurisdiction over the foreign parties to the transaction.

Significantly, in *Siemens* and *Halliburton/KBR*, neither the SEC nor the DOJ went so far as to base jurisdiction solely on the correspondent accounts and each carefully pled the use of traditional territorial acts such as transfers from U.S. bank accounts. Accordingly, no court has yet been asked to determine whether the unintended (and possibly unknown) use of a correspondent account, standing alone and without any traditional territorial act, is sufficient to confer U.S. jurisdiction over foreign individuals or entities. Notably, however, the DOJ identified certain foreign joint venture partners in the *KBR* pleading as unindicted co-conspirators, and it may have alleged correspondent account jurisdiction to send a strong signal to those companies, as well as the government of the countries in which those companies were located, as to the reach of the U.S. law. As of today, however, the implied threat of prosecution of the foreign partners has not yet materialized.

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Again this year, in the *Halliburton/KBR*-related case, *Tesler/Chodan*, the government has alleged, as a jurisdictional basis, that the defendants and their named and unnamed coconspirators made bribe payments through correspondent bank accounts, both as overt acts in furtherance of conspiracy and as substantive FCPA violations. Tesler has been apprehended abroad and is awaiting extradition; Chodan remains at large. It is yet unclear whether either defendant will go to trial providing an occasion for the government's assertion of correspondent account jurisdiction to be tested.

The Department, in a spin-off from the *Siemens* matter, also filed a civil forfeiture complaint against the bank accounts of certain former Siemens consultants and foreign government officials in which it claims *in rem* jurisdiction over funds transferred by Siemens from accounts in Cyprus and Austria to accounts in Singapore because "each of the transfers . . . would have moved through banks located within the United States on their way to the beneficiary bank in Singapore." The assertion of jurisdiction over these funds appears to be based solely on their passage through correspondent accounts. The issue could, therefore, be squarely presented to a court if the owners of these foreign bank accounts challenge the forfeiture.

Forfeiture of Proceeds of Bribery

In settled cases, the government often effectively forces the defendant to forfeit the ill-gotten gains from the bribery through a combination of criminal and civil fines and disgorgement. Over the past several years, the government has increasingly sought in contested cases to deprive the defendant, often individuals, of the use of the proceeds of alleged bribery, sometimes even before trial. The earliest instance of this approach was its request to the Swiss authorities in 2000 to seize funds in Swiss accounts purportedly held for the benefit of *James Giffen* and several officials of Kazakhstan. When Giffen was subsequently indicted in 2003, the government included forfeiture allegations claiming \$84.33 million in frozen funds, the contents of several identified accounts in Swiss and New York bank accounts, and \$51.7 million deposited in a Swiss account held in the name of the treasury of the Republic of Kazakhstan.

Similarly, in October 2008, the government filed a superseding indictment against *Gerald and Patricia Green* including criminal forfeiture allegations laying claim on the defendants' home, car, and pension fund if convicted on charges of bribing Thai tourism officials. In the following month, the government successfully moved to freeze the defendants' pension plan with an estimated value of approximately \$458,748. In its motion papers, the government announced that a restraining order preserving the availability of the car or residence was unnecessary because the government had already seized the car pursuant to a seizure warrant and intended to record a *lis pendens* notice against the real property sufficient to prevent its lease or transfer.

In another attempt to preserve the availability of an individual defendant's assets to satisfy eventual FCPA penalties, the Department obtained a court order freezing the proceeds of *Victor Kozeny's* sale of his

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Aspen home, estimated at \$23 million following a charge of forfeiture allegations. While it has thus far not taken any known steps to preserve the availability of assets, the government included forfeiture allegations for \$132 million in proceeds traceable to the alleged violations in the 2009 indictment against *Tesler/Chodan*.

Thus, although the FCPA itself provides only for prosecution of the bribe-payers, including agents and intermediaries, the DOJ has used the criminal forfeiture statutes, as well as civil forfeiture complaints (*Siemens*), to reach both the bribes and the proceeds of the bribery on all sides of a bribe transaction, including the alleged bribe-payers (*Giffen, Green, Kozeny*), intermediaries (*Siemens*), and the foreign officials themselves (*Giffen, Siemens*). In some circumstances, this has put the government in a difficult position requiring creative solutions. For example, in *Giffen*, some portion of the alleged bribes were transferred, just ahead of the Swiss government's freeze order, from an account held in the name of a foreign official into an account held in the name of the Treasury of the Kazakh government. Although the Swiss government subsequently froze the latter account and it was included in the criminal forfeiture count in *Giffen*, the U.S. government subsequently entered into a complicated settlement with the Kazakh government pursuant to which the parties agreed to the release of the forfeited funds to a World Bank trust fund, from which they will be used for projects in Kazakhstan to assist poor children, improve public financial management, and increase transparency in the extractive industries.

Expanded Use of Other Statutes

Traditionally, the government paired FCPA charges with other applicable statutes, including the Travel Act, 18 U.S.C. § 1952 (incorporating state bribery laws) or "honest services" mail or wire fraud charges, 18 U.S.C. §§ 1341, 1343, 1346. Often, the purpose of these charges was to provide an alternative basis for foreign legal assistance in the days when there was no dual criminality between the U.S. and the rest of the world in FCPA cases. Today, however, the government has increasingly charged other crimes to capture the full scope of the alleged criminal conduct, particularly including money laundering, tax violations, and bribery of employees of private companies.

In the past, many mechanisms for international assistance such as letters rogatory and early MLATs required dual criminality. Most modern MLATs, however, do not require dual criminality and many multilateral anti-corruption treaties, including the OECD Convention, explicitly place an obligation on parties to render such assistance. In light of this development, the government appears to have moved away from routinely adding fraud or Travel Act charges to FCPA charges unless justified by specific facts in a particular matter. For example, in *Schnitzer*, a corporate settlement, the Department charged the company with both FCPA *and* federal wire fraud violations in connection with the bribes and kickbacks it paid to customers in China and South Korea. This choice to charge conspiracy to commit wire fraud may

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have been in recognition of the difficulty of determining who exactly is (or is not) a government official in China and thus whether the bribes in question constituted FCPA violations or commercial bribery.

In recent cases, the Department has expanded its palette of charges to more fully capture the full range of conduct uncovered by its investigations. This has come up in two contexts: (i) when more than one criminal scheme is detected during an investigation or (ii) when the alleged corruption scheme traverses multiple criminal statutes.

In the first context, a number of cases have arisen over the past years where the FCPA offenses were discovered during an investigation targeting entirely different conduct. For example, the *Saybolt* case from 1998 began during an investigation of environmental crimes, and *Cantor* from 2003 arose during a securities fraud investigation. More recently, in 2008, the *Shu Quan-Sheng* case arose in connection with an illegal arms export investigation and, in *Hioki*, the FCPA allegations were raised in the course of an antitrust cartel investigation.

In the second instance, the government has steadily increased the range of charges it brings against FCPA defendants. This year, the DOJ has continued to charge other criminal violations in FCPA cases: wire fraud (e.g., *Novo Nordisk, Naaman*); money laundering (e.g., *Diaz/Perez, Greens*); and obstruction of internal revenue laws (e.g., *Winston Smith*). In 2009, the government expanded its charges against the *Greens* to also include tax charges against Patricia Green and an obstruction of justice count against Gerald Green. In a particularly colorful example, the government charged Rose Carson, a defendant in *Carson et al.* with obstruction of justice for allegedly destroying documents after learning that CCI was carrying out an internal investigation by tearing them up and flushing them down a ladies' room toilet even though a representative from CCI's human resources department instructed her not to do so. In the CCI group of cases (*CCI, Carson et al., Morlok, and Covino*) the government has charged Travel Act counts incorporating under California's commercial bribery laws to cover approximately \$2 million in additional bribes allegedly paid to employees of private companies, conduct not covered by the FCPA.

The Business Nexus Test

The history of the *Kay* case is well known, with two trips to the Court of Appeals and a final denial of certiorari by the Supreme Court only last year. Of the several significant holdings in this matter, perhaps the most significant is the Fifth Circuit's expansive interpretation of the "business nexus" element of the statute. In its decision, the court held that corrupt payments designed to obtain a tax benefit may satisfy the business nexus element of the FCPA provided the government established a link between the reduced taxes and obtaining or retaining business from *someone*, not necessarily the government. The limits of the court's holding were soon manifest when the SEC withdrew its appeal in its action against *Mattson*

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and *Harris*, two Baker Hughes executives accused of authorizing bribes to Indonesian tax authorities, impliedly finding that it could not link the tax reductions to “assisting in obtaining or retaining business.”

Nevertheless, the *Kay* holding has set a powerful precedent that has allowed the government to bring a number of cases against companies that paid bribes to customs officials to reduce or eliminate duties and taxes in ways that facilitated the companies’ ability to do business with private parties in a foreign country. See *Helmerich & Payne*, *Aibel*, *Nature’s Sunshine*, *Con-way*, *Baker Hughes*, *Dow Chemical*, and *BJ Services*.

IV. Increased Resources and Tools

Increased Resources

As we have noted in previous *Trends & Patterns*, the government has steadily increased the resources dedicated to FCPA investigations, including assigning a number of FBI agents to work exclusively on FCPA investigations. The existence of an “FCPA squad” may account for the increased use of traditional law enforcement tools. We do not, of course, know what else the government is doing in cases it has not yet filed. However, in earlier cases, and recently in its investigation of the *Greens* discussed above, the DOJ has used informants and undercover agents to surreptitiously record conversations among potential FCPA conspirators, e.g., *Tannenbaum* and *King*. Such evidence – the defendants’ own words – is, of course, very powerful in front of a jury, and it is reasonable to expect that the government continues to seek opportunities to utilize these tools.

As for the SEC, in a speech on his first 100 days as the agency’s new Enforcement Director, Robert Khuzami announced an overhaul of his division to enhance the strategic and efficient use of enforcement resources. Under the new structure, SEC FCPA enforcement will be undertaken by a specialized FCPA unit which “will focus on new and proactive approaches to identifying violations.” Mr. Khuzami noted “more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.” In the same speech, Khuzami announced that the SEC will create and issue a policy statement setting forth “standards to evaluate cooperation by individuals in enforcement actions,” “a ‘Seaboard’ for individuals.”

Detention and Arrest of Individuals

The government has increasingly applied traditional coercive law enforcement tools to FCPA investigations and in a number of cases has apparently put individuals on border watches and detained them when they entered or transited through the United States. For example, in one well-publicized

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instance in May 2008, in connection with its investigation into BAE Systems' arms deals with Saudi Arabia, the government separately detained BAE CEO Mike Turner and BAE Director Sir Nigel Rudd as they traveled through the Houston and Newark airports, served them with subpoenas, and searched their electronic equipment. Of even more consequence to the individual involved, in 2008, the government terminated the U.S. passport of *Paul Novak*, a U.S. citizen who was a former consultant to Willbros, while he was living in South Africa (and presumably not cooperating with the Department), causing him to be deported to the United States where he was immediately arrested upon arrival at the Houston Airport.

It is in most cases difficult (and deliberately so) to determine what stage the government has reached in an investigation and thus to judge the risk for potential defendants to travel into or through the United States. The BAE executives were merely briefly detained for questioning, while Novak had already been charged in an indictment that was kept under seal until his airport arrest. In 2006, it was well known that the U.S. had opened an investigation into alleged bribery by Alcatel of Costa Rican officials. Unfortunately for *Christian Sapsizian*, a Paris-based Alcatel executive, the government apparently was further along than expected, and he was arrested upon a complaint (and subsequently indicted) while transiting through the Miami airport in late 2006.

Along with an increasing number of prosecutions of foreign individuals, prosecutors are expected to start making frequent use of extradition requests. Following the German authorities' arrest of *Naaman*, the U.S. is expected to seek his extradition. While *Chodan* has thus far escaped apprehension, U.K. authorities arrested his co-defendant, *Tesler*, and the U.S. will seek his extradition. In addition, two of the *CCI* executives are foreign nationals — Flavio Ricotti a former executive in Italy and Han Yon Kim, a former executive, turned consultant, in South Korea. It is likely that the U.S. will seek their arrest and extradition.

Foreign Evidence

Absent cooperation by the subjects of an investigation, *e.g.*, a cooperating corporation, the government's ability to obtain evidence located overseas depends on the cooperation of foreign governments, and over the years many investigations appear to have stalled for lack of such cooperation. In the recent past, however, prosecutors have repeatedly cited an improved climate of cooperation and pointed to various cases in which they successfully obtained evidence, such as Swiss bank records, not previously available. In 2008, we saw a substantial advance in cooperation among U.S. and foreign law enforcement authorities. In the *Siemens* matter, in which the investigation was initiated by the Munich prosecutor, the cooperation between the German and U.S. authorities was apparent. More surprisingly, however, the government's forfeiture complaint reveals that FBI agents traveled to Bangladesh and participated in interviews with the local corruption investigators. In several other cases, the Department and the SEC have publicly acknowledged the assistance of foreign investigatory authorities — *e.g.*, *Diaz & Perez* (Haiti),

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Winston Smith (U.K.), *Naaman* (U.K.), *Baker Hughes* (Isle of Man, U.K., Switzerland), *Hioki* (“multiple foreign jurisdictions”), *Halliburton/KBR/Stanley* (France, Italy, Switzerland, U.K.), *Sapsizian* (Costa Rica and France), *Smith* (U.K.), and *Willbros* (Nigeria). As for pending investigations, Magyar Telekom in Hungary reported that beginning in May 2008 Hungarian and Macedonian authorities began investigating Magyar for suspected corruption, joining the U.S. investigation that began in 2007.

Further, the Department and the SEC have increasingly availed themselves of more formal cooperation tools by making formal government-to-government requests for evidence under existing bi-lateral Mutual Legal Assistance Treaties (MLATs) and memoranda of understanding. Indeed, with the advent of a number of multi-lateral anti-corruption treaties, the pace of these requests appears to have increased, with a DOJ official stating at a recent conference that the Department issued no less than 45 such requests in 2008. Despite these advances, however, obtaining foreign evidence is still viewed by prosecutors as a lengthy and cumbersome process. In a recent study undertaken by the Government Accountability Office, it was found that, in FCPA cases in particular, a company’s cooperation in disclosing evidence is an important factor in the Department’s decision to offer a deferred or non-prosecution agreement precisely because that cooperation relieves investigators from issuing formal requests for foreign evidence. See GAO Testimony before the Subcommittee on Commercial and Administrative Law, Committee of the Judiciary, House of Representatives: *Preliminary Observations on DOJ’s Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements* (June 25, 2009) (also discussing the impact of a prosecution on innocent parties and remedial actions taken by the company as important factors).

V. Legal Interpretations

Over the past years, through litigation, settlements, and DOJ opinions, several questions involving the interpretation and application of the FCPA have been clarified, although in some cases the government’s views remain controversial and subject to further definition in future cases and testing in court.

Extortion

Most demands from officials for bribes can be characterized as extortion. Whether and to what extent extortion is a defense in FCPA matters has been addressed in two recent proceedings, *Kay* and *Kozeny*, with somewhat differing conclusions. See Philip Urofsky, *Extortionate Demands Under the Foreign Corrupt Practices Act*, BNA White Collar Crime Report (Dec. 19, 2008).

The FCPA legislative history shows that Congress intended that true extortionate demands – made under threat of harm to person or property – should not be construed as an FCPA violation. It remains unclear whether a company that would have only suffered a loss of business as a result of refusing a bribe would

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be able to successfully avail itself of a common law extortion defense. In 2004 in *Kay*, the trial court instructed the jury that threat of “serious economic loss” could be considered in assessing whether a defendant had the requisite corrupt intent. In contrast, in a 2008 opinion, the district court in *Bourke* stated that it would instruct the jury at trial only as to “true extortion,” citing legislative history as authority for this view. Bourke now raises the court’s denial of his defense that the alleged payments were extortion under Azeri law and therefore legal as a trial error entitling him to a new trial.

Intriguingly, however, the forfeiture complaint in *Siemens* cites “extortion” under Bangladesh law as a predicate, in addition to FCPA and federal money laundering law violations, and explicitly notes that Bangladesh law defines extortion to include demands made under threat of non-physical injury, including fiscal injury and damage to reputation.

Facilitation Payments

Under the 1988 amendments, Congress explicitly excepted “facilitation payments” from the category of bribery prosecuted under the FCPA. With this exception, the statute distinguishes between corrupt payments made to speed up normally performed government actions requiring no discretion (like a routine permit or license issue) and corrupt payments to obtain or retain business. The proceedings against *Wabtec*, settled in February 2008, shed some light on how, in practice, the government is drawing (or not drawing) the line between mere facilitation payments and prosecutable offenses.

As recited in the deferred prosecution agreement, Wabtec’s subsidiary in India, Pioneer Friction Limited, made payments to government officials associated with the Indian Railway Board and the Ministry of Rails for several different purposes: (1) to secure approval of Pioneer’s tender bids and allow Pioneer to sell other parts outside of the tender process; (2) to schedule inspections to perform required pre-delivery inspections; (3) to secure issue of delivery receipts certifying products conformed to tender; and (4) to put a stop to excessive excise tax audits. The latter three of these payment types may have arguably been payments to obtain routine governmental action, outside the scope of enforcement envisioned by the FCPA. Nevertheless, Wabtec’s efforts to disguise the payments gave rise to books and records and internal control violations. It remains a question whether the prosecutors would have brought an action based solely on such facilitation payments had they not been disguised nor part of a broader course of conduct involving corrupt payments more clearly prohibited by the FCPA.

Promotional and Charitable Programs

The FCPA Opinion Procedure continues to be relatively rarely used. In 2009, however, the Department has issued one opinion with implications for social giving and promotional programs. In Release 09-01 (Aug. 3, 2009), the DOJ agreed it would not prosecute a medical device manufacturer for supplying a

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foreign government official with a donation of 100 units for the dual purpose of distribution to patients in need and evaluation of the product for a future supply contract with the foreign government. In rendering its opinion, the DOJ cited the facts that the ultimate recipients of the medical device donation were intended to be needy patients, as opposed to a single official, and that the plans for distributing the donated units were subject to “specific guidelines.” This release may help administrators of corporate responsibility and product evaluation programs avoid steering their charitable and marketing activities afoul of the FCPA. However, the guidance is silent as to the duties companies have to monitor such programs to ensure that they are in fact administered in compliance with the terms agreed upon by the company.

Acquisitions and Appropriate Due Diligence

Over the past years, the Department has issued a number of FCPA Opinions that provide guidance as to its current approach to successor liability in the mergers and acquisitions context. As early as 2001, the Department began issuing instructive opinions on this subject, essentially stating that an acquirer (or joint venture partner) that did reasonable due diligence, investigated any problematic transactions, disclosed its concerns to the DOJ and what remedial steps it had or would take, and promised to implement a rigorous compliance program would not be charged for accurately and completely disclosed pre-acquisition conduct. In 2004, in an opinion issued to the new owners of the Vetco Gray companies, the Department provided assurance that it would not prosecute the Vetco Gray companies for disclosed pre-acquisition conduct in light of an extensive pre-acquisition global compliance review, the guilty pleas of two of the Vetco Gray subsidiaries, and the new owners’ undertaking to report additional pre-acquisition conduct, if discovered, and to institute a rigorous compliance program, the scope and elements of which were described in detail in the Opinion. Unfortunately, however, the Vetco Gray companies failed to honor their commitments, and, in early 2007, the companies were prosecuted for post-acquisition conduct and fined \$26 million, at the time, the largest FCPA criminal fine ever imposed. In announcing the Vetco Gray plea agreement, the Department made special note of the company’s failure to “institute and implement a compliance system, internal controls, training, and other procedures sufficient to have deterred and detected violations of the FCPA” as was required under the Opinion. The company’s failure to abide by its commitment under the Opinion was further taken into account in the sentencing calculations.

The consequence of not doing reasonable pre-acquisition due diligence was demonstrated in this year’s prosecution of *Latin Node*, which was for a brief period a subsidiary of eLandia. According to the pleadings, it appears that eLandia relied on the seller’s representations and warranties that there were no FCPA issues and did little or no due diligence of its own. Only after the acquisition closed did eLandia discover that Latin Node had paid bribe payments to state-owned telecommunications officials in Yemen and Honduras. eLandia then investigated the payments, terminated the agreements obtained through

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corruption, made voluntary disclosures to the DOJ and SEC, and sued the seller and one of its executives, claiming fraud in the failure to disclose the illicit payments. By the time the dust had settled, eLandia had incurred substantial costs and written off its investment in Latin Node, eventually placing Latin Node into liquidation. Nevertheless, the government was not willing to give eLandia a pass for Latin Node's pre-acquisition conduct. However, in recognition of eLandia's post-closing remedial efforts and, in the words of the DOJ, "thorough, timely, and exemplary" cooperation, the government agreed to charge the shell that remained of Latin Node rather than eLandia, and it limited the charges to a single violation, effectively capping the penalty at \$2 million. All the same, the enforcement is a loud warning that the failure of an acquiring company to perform what the government considers adequate due diligence *pre*-acquisition and immediate and complete remedial steps post-acquisition may have dire consequences.

What happens, however, when an acquirer *does* conduct adequate due diligence but misses something? Or, worse, not only misses pre-acquisition conduct but the conduct continues for some time post-acquisition? These are the circumstances in which companies often seek a "grace period" during which they can implement their own supposedly superior controls without fear of prosecution for spillover conduct. In FCPA Opinion 08-02, Halliburton sought an opinion providing it with protection against liability for pre-acquisition conduct and a "grace period" for post-acquisition conduct in the context of an auction sale where it had no opportunity to conduct any pre-acquisition due diligence beyond the limited data the seller, widely reported to be Expro International Group PLC, was willing to post in a data room. The government agreed to grant such protection, but at a high price. In exchange for the safe harbor provided by the FCPA Opinion, Halliburton agreed, assuming it won the auction (which it did not), to disclose upon closing all pre-acquisition corruption or internal controls issues learned of in due diligence, provide the Department with a detailed post-acquisition due diligence work plan within 10 days of the closing, retain external counsel and forensic accountants to undertake a comprehensive compliance review of high, medium, and low-risk areas of the new business, report on its findings at set periods, and institute a rigorous compliance program. In exchange, the Department agreed not to bring an enforcement action against the company for disclosed post-acquisition conduct that took place within the first six months after the closing.

Halliburton, on the eve of settling the KBR FCPA action, was clearly eager to ensure it was protected from having to endure yet another investigation. It is questionable whether the standard set by Opinion 08-02 reflects what is necessary in all cases to invoke a grace period or what was necessary in those particular circumstances to obtain the DOJ's agreement in advance. In most cases, it seems likely that a company that is able to and does conduct reasonable risk-based due diligence in advance of the acquisition (something Halliburton was not able to do), ensures that reasonably rigorous compliance procedures and controls are in place soon after the acquisition, and takes appropriate remedial action immediately upon learning of any issue is likely to be afforded lenient treatment regardless of whether it adopts all of the measures set out in 08-02.

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One cautionary note is appropriate, however. These transactions involved an acquisition either in whole or in part of another company in which, as a result of the transaction, the company that had engaged in the improper conduct was now owned by new “clean” owners. In such a circumstance, the government may well be persuaded that it is not fair to the new owners to hold them responsible for acts over which they have no control *even when they will reap the benefit in the form of ongoing contracts with continuing profits* (although, of course, in *Latin Node*, eLandia had already effectively disavowed any such profits by terminating the corrupt contracts). Nevertheless, the issue of continuing benefits explains why the government will sometimes use its leverage in the pre-closing period to force the parties to reach some form of settlement with it that will often require effective disgorgement of such ill-gotten profits. In a *merger*, on the other hand, the old company may be viewed as part-owner of the new company, and the argument of “clean hands” may not prevail.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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