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FCPA Snapshot
Mid-Year 2012

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FCPA & ANTI-CORRUPTION PRACTICE GROUP

William Devaney, Co-Chair
whdevaney@Venable.com
212.307.5500

Lindsay Meyer, Co-Chair
lbmeyer@Venable.com
202.344.4829

Jan Lawrence Handzlik, Co-Chair
jhandzlik@Venable.com
310.229.0378

Ashley Craig
awcraig@Venable.com
202.344.4351

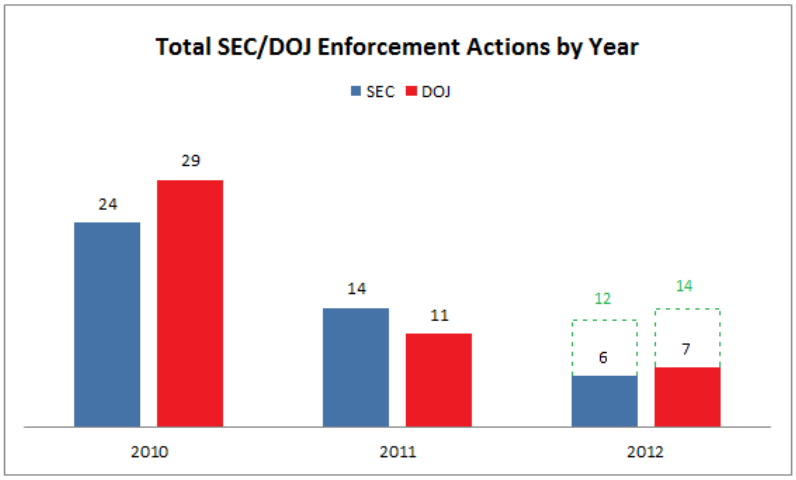
Victoria Danta
vrdanta@Venable.com
212.370.6248

Geoffrey Garinther
grgarinther@Venable.com
202.344.4919

Nancy Grunberg
nrgrunberg@Venable.com
202.344.4730

SUMMARY

The number of Foreign Corrupt Practices Act ("FCPA") enforcement actions brought in the first half of 2012 is roughly on par with the number brought in the first half of 2011. Nonetheless, enforcement activity for both periods is down from a prolific 2010. If the numbers continue to trend as they did in 2011, 2012 should end with approximately 12 SEC and 14 DOJ enforcement actions.



Several trends from 2011 seem to be continuing through the first half of 2012, including the discounting of financial penalties by both DOJ and the SEC for companies that made swift, voluntary disclosures and continued to cooperate with the government. In at least one significant case *(U.S. v. Peterson),* DOJ and the SEC declined to bring an enforcement action against the individual defendant's corporate employer, financial services giant Morgan Stanley, noting Morgan Stanley's rigorous FCPA compliance program, voluntary disclosure, and ongoing cooperation.

After having declined to impose outside compliance monitors/consultants under recent deferred prosecution agreements, this trend has apparently been reversed somewhat. Already in 2012, DOJ and the SEC have required outside compliance consultants in at least four cases.

W. Warren Hamel
wwhamel@Venable.com
410.244.7563

Glenn Ivey
gfivey@Venable.com
202.344.4411

Treazure Johnson
trjohnson@Venable.com
202.344.4418

Thomas Kelly, Jr.
tjkelly@Venable.com
202.344.4889

George Kostolampros
gkostolampros@Venable.com
202.344.8071

Doreen Martin
dsmartin@Venable.com
212.983.1179

Karl Racine
karacine@Venable.com
202.344.8322

Seth Rosenthal
sarosenthal@Venable.com
202.344.4741

Michael Schatzow
mschatzow@Venable.com
410.244.7592

Michael Sherman
mdsherman@Venable.com
202.344.4558

On the trial front, the setbacks that began for the government in 2011 continued into the first half of 2012. In the "SHOT Show" cases in Washington, D.C., the government dismissed the charges against the remaining defendants and dropped cases in which others had already been convicted. The judge noted that the dismissals closed a "long and sad chapter of white collar criminal enforcement." In *O'Shea/ABB,* at the close of the government's case-in-chief, the District Court in Houston granted the defendant's motion for a judgment of acquittal on the FCPA counts. Subsequently, the government moved to dismiss the remaining counts of the indictment. And in May, the government dropped its Ninth Circuit appeal in the *Lindsey Manufacturing Company* FCPA case, in which Venable LLP's Jan Handzlik was counsel to Lindsey Manufacturing and its CEO, Dr. Keith Lindsey. Thus, the District Court's order overturning the convictions and dismissing the indictment with prejudice on grounds of prosecutorial misconduct was allowed to stand.

FCPA legislative reform efforts continued to gather steam in the first half of 2012. In February, the U.S. Chamber of Commerce and several members of Congress issued letters demanding "clear and concrete" guidance from DOJ on its enforcement positions, including the definition of "foreign official," requirements for adequate compliance programs, and the methodology for calculating fines and disgorgement, among other things. At the same time, other members of Congress continued to seek automatic debarment of government contractors convicted of FCPA violations and to make it easier for companies and individuals to bring private causes of action for FCPA violations. The implementation of Dodd-Frank, which monetarily rewards whistleblowers who provide information resulting in a successful SEC enforcement action, has also started to change the enforcement landscape.

Finally, in the first half of 2012, countries other than the United States continued to be active in policing global corruption. July 2012 marks the one-year anniversary of the U.K. Bribery Act's taking effect. China, India, Canada, Russia, and Greece revamped their anti-corruption efforts in 2011 and early 2012. This added another layer of complexity to anti-corruption compliance for multinational corporations.

STATISTICS

Corporate Defendants

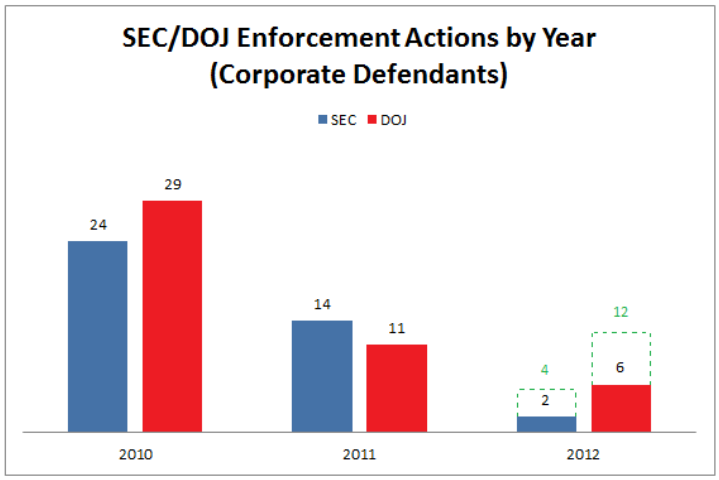
In the first half of 2012:

- DOJ brought six enforcement actions against corporate defendants, the same number it brought in the first half of 2011.
- However, the SEC brought only two enforcement actions against corporate defendants, compared to nine for the same period in 2011 and eight in 2010.

Raymond Shepherd, III
rvshepherd@Venable.com
202.344.4745

Winifred Weitsen
wmweitsen@Venable.com
202.344.8224

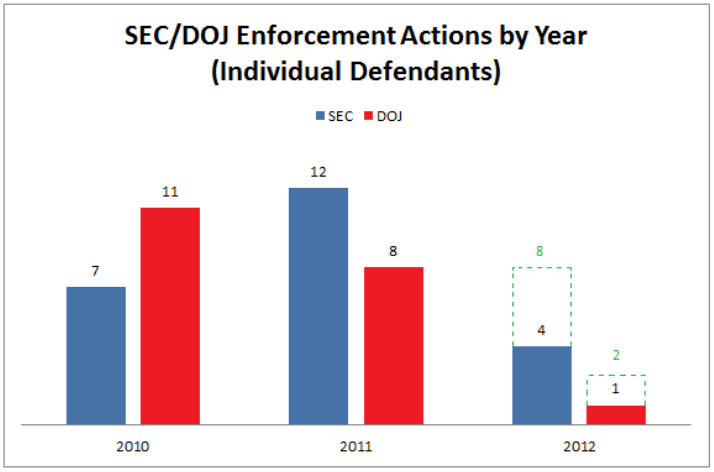
D. Edward Wilson
dewilson@Venable.com
202.344.4819



Individual Defendants

In the first half of 2012:

- DOJ brought one new enforcement action against an individual defendant, compared with none during the same period in 2011 and two in 2010.
- At least four individuals pleaded guilty to FCPA violations and are currently awaiting sentencing.
- Meanwhile, the SEC brought four enforcement actions against individual defendants, compared to only one in the first half of 2011. By this time in 2010, the SEC had also initiated four enforcement actions against individuals.



Fines/Penalties

- In the first half of 2012, DOJ and the SEC together imposed approximately $124 million in sanctions, including disgorgement, in FCPA cases. In 2011, the total amount of these sanctions imposed was slightly more than $500 million. Penalties for these periods are significantly down from the cumulative DOJ/SEC total of approximately $1.7 billion in 2010.

- In probable reaction to long-running complaints, DOJ issued a series of press releases in 2011 and early 2012 asserting that it was difficult to quantify the value of voluntary disclosures and cooperation and stating that many sanctions had been substantially reduced because of the target's early self-reporting and continued cooperation.

Industry Targets

- As in 2011, most DOJ enforcement actions in 2012 involved corporate and/or individual defendants in the following industries:
    - Government Contracting, especially against contractors providing logistics, engineering and construction services; and
    - Health Care and Life Sciences, especially medical device manufacturers.
- These same industries were targeted in 2010, with additional focus by DOJ on the energy, technology, telecommunications, logistics, manufacturing, and tobacco industries.

U.S.-Based Versus Non-U.S.-Based Defendants

As in 2011 and 2010, in the first half of 2012, roughly half of the enforcement actions were against non-U.S.-based companies and individuals, suggesting that DOJ and the SEC are continuing their publicized efforts to "level the playing field" with respect to non-U.S.-based entities.

RESOLUTIONS

- So far in 2012, DOJ has entered into more than 20 non-prosecution or deferred prosecution agreements with corporations in various criminal enforcement areas. Of these, more than one-quarter (six) were in the FCPA arena.
    - Of the six companies that have entered into non-prosecution or deferred prosecution agreements with DOJ so far in 2012, all reportedly had their fines/penalties reduced because of early self-reporting and ongoing cooperation. In some settlements, DOJ highlighted the companies' "extraordinary cooperation," including, among other things, an extensive internal investigation, following which the company made both U.S.- and non-U.S.-based employees available for interviews, and collected, analyzed, and organized voluminous evidence and information for DOJ.
    - In what may be indicative of a trend, roughly half of the FCPA non-prosecution and deferred prosecution agreements in the first half of 2012 included provisions related to the companies' M&A activities, namely, specific requirements to conduct pre-transactional FCPA due diligence and to report

any negative findings to DOJ, and to ensure that newly acquired/created entities are subject to the same rigorous anti-corruption compliance policies and training as the acquiring company. These provisions were foreshadowed by the increasing number of enforcement actions raising successor liability issues in previous years, such as *Watts Water Technologies, Alliance One,* and *General Electric*.

- Three of the six companies receiving deferred prosecution agreements in the first half of 2012 required the defendants to retain outside compliance consultants, compared with 2011, when only one deferred prosecution agreement required an outside compliance consultant (JGC Corporation). In *Smith & Nephew* and *Biomet, Inc.,* DOJ adopted a "hybrid" approach to monitoring, whereby the defendants were required to retain outside compliance consultants for the first 18 months of their three-year deferred prosecution agreements and then to self-report to DOJ for the remaining 18 months.

- *U.S. v. Peterson* (Morgan Stanley): In perhaps the most noteworthy resolution so far in 2012, individual defendant Garth Peterson, an American citizen and the former managing director of Morgan Stanley's real estate business in China, pleaded guilty to one count of conspiracy to circumvent internal controls. Mr. Peterson was alleged to have evaded Morgan Stanley's internal controls, by transferring a multi-million-dollar real estate ownership interest to himself and a Chinese government official, with whom Mr. Peterson had a personal friendship. Morgan Stanley discovered evidence of Mr. Peterson's illicit conduct through its system of internal accounting and anti-corruption controls. It self-reported, conducted an internal investigation, and cooperated with DOJ and the SEC.

  Ultimately, DOJ and the SEC declined to bring any enforcement action against Morgan Stanley, publicly citing Morgan Stanley's:

  - Clear internal guidelines prohibiting bribery and other corrupt payments in the form of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment;
  - Regular updating of internal policies to reflect recent regulatory developments and specific risks;
  - Frequent training of employees and agents on internal policies, the FCPA, and other anti-corruption laws. For instance, according to the DOJ press release, Morgan Stanley trained various groups of Asia-based personnel, including Mr. Peterson, on anti-corruption policies 54 times. Mr. Peterson himself had been trained seven times and reminded of his obligation to comply with the FCPA on at least 35 occasions;

- Close and regular monitoring of transactions posing corruption risks;
- Random audits of employees, transactions, and entire business units;
- Frequent testing to identify illicit payments;
- Extensive pre-transactional due diligence on all new business partners; and
- Even more stringent controls on any payments made to business partners.

Morgan Stanley was commended by DOJ for these business practices, which DOJ acknowledged were specifically calculated to eliminate bribery and corruption within the company. Mr. Peterson, who faces a maximum penalty of five years in prison, was deemed to be a "rogue" employee.

- Lufthansa/BizJet: In March 2012, DOJ announced a settlement with BizJet International Sales & Support ("BizJet"), an Oklahoma-based aircraft maintenance, overhaul, and repair outfit accused of bribing Mexican and Panamanian government officials in exchange for aircraft services contracts. Under its deferred prosecution agreement, BizJet is obligated to pay approximately $11.8 million in criminal penalties and to implement significant FCPA compliance measures. Lufthansa, A.G., BizJet's parent company, also entered into a non-prosecution agreement with DOJ, despite having no direct involvement in the underlying FCPA violations. Although no monetary penalty was imposed on Lufthansa, it admitted to and acknowledged responsibility for BizJet's conduct and committed to ongoing cooperation with DOJ while implementing its own set of rigorous FCPA compliance measures. According to some, the *Lufthansa/BizJet* case presents a new twist to FCPA successor liability: a parent company held to some measure of accountability for the conduct of its subsidiary, without any apparent discussion in the charging documents of the parent's role, if any, in the underlying FCPA violations.

INVESTIGATIONS

By the end of the second quarter in 2012, almost 90 companies were under scrutiny by DOJ and the SEC, including giants Hewlett-Packard, Avon, Deere & Co, and 3M. Perhaps the most discussed investigation to date in 2012 was the one involving mega-retailer Wal-Mart and its Mexican subsidiary, Wal-Mart de Mexico. According to press reports, the investigation concerns payments allegedly made to Mexican government officials to speed up the issuance of permits in conjunction with the rapid expansion of Wal-Mart's operations in Mexico. Recent reports indicate that Wal-Mart has expanded its internal investigation beyond Mexico to include its activities in Brazil, China, South Africa, and India.

TRIALS

2011 was truly the year of the FCPA trial. Although DOJ was largely successful in fending off legal challenges to its interpretation of the Act, FCPA defendants were highly successful in their own right. This trend has continued into the first half of 2012.

- The "*SHOT Show*" Defendants: In 2010, DOJ unsealed the indictments of 22 executives and employees of military and law enforcement suppliers who allegedly attempted to bribe the fictitious defense minister of a small African nation (Gabon). In reality, the case was based on an FBI undercover sting operation. The *"SHOT Show"* trials began in 2011, after the defendants had been divided into four groups to make the trials more manageable. At the end of the first trial, the jury was unable to reach a verdict and the court declared a mistrial. In the second trial, the judge threw out the conspiracy counts, citing a lack of evidence. The judge also granted a judgment of acquittal for one *"SHOT Show"* defendant for lack of jurisdiction. The court concluded that the mailing of a purchase agreement from the United Kingdom to the United States, without more, was not a corrupt act within the "territory" of the United States. This ruling represented the first successful challenge to the government's expansive interpretation of the FCPA's jurisdictional provisions and is likely to result in similar jurisdictional challenges in the future. In light of these setbacks, in March 2012, the government sought dismissal of the *"SHOT Show"* indictments. This brought to a close what U.S. District Judge Richard Leon called a "long and sad chapter of white-collar criminal enforcement."

- *O'Shea/ABB*: Individual defendant John O'Shea, a former general manager and vice president of a unit of ABB Ltd., also went to trial in 2011. O'Shea had been indicted for his purported role in an alleged scheme to pay officers of a Mexican government-owned utility company over $1.9 million in kickbacks to secure contracts. Although the indictment alleged that payments had been made through a Mexican intermediary, the government failed to call the intermediary at trial. Instead, the government's key witness was the intermediary's son, who they contended was also involved in the scheme. In January 2012, at the close of the government's case, the court granted Mr. O'Shea's Rule 29 acquittal motion and dismissed the FCPA counts. The court based its decision on the lack of "foundation" and "specifics" in the testimony of the intermediary's son, who the court said had no direct knowledge of the purported scheme. The court also cited the inadequacy of documentary evidence purportedly linking O'Shea to the improper payments. While the court accepted that kickbacks might have been made, it determined that the government failed to carry its burden of showing that O'Shea had bribed a public official.

- *Lindsey Manufacturing*: In December 2011, in an FCPA case handled by Venable partner and practice group co-chair Jan Handzlik, the District Court granted the defendants' motion to set aside the guilty verdicts and dismiss the indictment, with

prejudice, based on prosecutorial misconduct (including the presentation of false and misleading testimony to the grand jury, making false statements in search warrant applications, improperly arguing a "willful blindness" theory to the trial jury, and failing to disclose exculpatory evidence). In dismissing the charges, the court pointed not only to prosecutorial misconduct, but also to the weaknesses of the government's evidence against the defendants.

The government initially sought to appeal the ruling to the Ninth Circuit. However, in late May 2012, DOJ filed a motion to voluntarily dismiss the case and drop its appeal, which was granted by the appellate court.

Notwithstanding the above, the trial landscape was not all bleak for DOJ in 2011 and 2012. It obtained convictions in *Haiti Telecom, Innospec,* and *Latin Node*. And, its interpretation of the FPCA, when challenged, was largely upheld. For instance, the District Courts in *Lindsey Manufacturing, Control Components,* and *Haiti Telecom* rejected the defendants' arguments that the state-owned entities in their cases were not "instrumentalities" of foreign governments under the FCPA. However, these courts also held that a fact-specific assessment, based on a multi-factor test, was necessary to determine the issue, which must be proven beyond a reasonable doubt at trial, thereby giving defense counsel a helpful standard for future FCPA trials.

SENTENCES

The sentences given to FCPA defendants in the first half of 2012 have been a mixed bag:

- Albert Jack Stanley was sentenced to 30 months in prison for his involvement in the *KBR/TSKJ* case. Stanley's sentence was significantly reduced, as a result of his cooperation with the government.
- Manuel Caceres was sentenced to 23 months in prison for his involvement in the *Latin Node* case.
- Jeffrey Tesler was sentenced to 21 months in prison for his involvement in the *KBR/TSKJ* case.
- Robert Antoine was sentenced to 18 months in prison for his involvement in the *Haiti Telecom* case.
- Manuel Salvoch was sentenced to 10 months in prison, also for his involvement in the *Latin Node* case.
- Juan Vasquez received 36 months' probation for his involvement in the *Latin Node* case.
- Wojciech Chodan received a year of probation for his involvement in the *KBR/TSKJ* case.

LEGISLATIVE AND REGULATORY ACTION

Some members of Congress and industry groups have been seeking to narrow or clarify the FCPA. At the same time, others are attempting to add new dimensions to anti-corruption enforcement, particularly with regard to the ability of convicted government contractors to bid on U.S. government contracts and the creation of a private right of action under the FCPA.

- In 2010, the U.S. Chamber of Commerce issued a report detailing what it saw as shortcomings in the FCPA. This report guided debate over FCPA reform well into 2011. Later, in February 2012, the Chamber sent a letter to DOJ and the SEC identifying specific suggestions for forthcoming guidance on corporate FCPA compliance, such as:
    - clarification of when and to what extent a parent company can be held liable for the FCPA violations of a foreign subsidiary;
    - clarification of what is sufficient due diligence to avoid FCPA successor liability;
    - an affirmative defense for companies with strong, pre-existing anti-corruption compliance programs, and clarification about what consideration — if any — DOJ and the SEC will give to such programs;
    - uniform definitions of key FCPA terms, *e.g.,* "foreign official" and "instrumentality," so companies can conform their conduct; and
    - clarification of the intent requirements under the Act.[1]
- Following the Chamber's lead, some members of Congress criticized federal prosecutors for "overreaching" and called for amendments to the FCPA to include a compliance defense or a corporate leniency program.
- Other members of Congress sought even stronger FCPA and anti-corruption enforcement. For instance, the proposed "Overseas Contractor Reform Act" would debar contractors convicted of violating the FCPA from contracting with the U.S. government. And yet another bill to create additional remedies for private parties seeking to bring civil lawsuits based on FCPA violations, titled the "Foreign Bribery Prohibition Act," is before Congress.
- In 2011, the SEC adopted regulations implementing Dodd-Frank, which, in relevant part, provide financial rewards to individuals who report violations of federal securities laws, including FCPA books and records violations. Under Dodd-Frank, whistleblowers whose information leads to a successful SEC enforcement action stand to receive between 10% and 30% of any monetary sanctions. The program took effect in mid-August 2011, and, within the

[1] In March 2012, Secretary of State Hillary Clinton stated that the Obama administration was "unequivocally opposed" to any legislation that would weaken the FCPA.

first 50 days, the SEC received approximately 334 tips, about 4% of which were related to potential FCPA violations.

The first half of 2012 saw the resolution of the first FCPA-related whistleblower retaliation claims under Dodd-Frank:

- *Nollner v. Southern Baptist Convention*: In April 2012, the U.S. District Court for the Middle District of Tennessee dismissed an employee's wrongful termination lawsuit against his employer, Southern Baptist Convention, Inc. ("SBC"). The lawsuit alleged that one of the plaintiffs[2] was fired after complaining of suspect payments made by SBC to Indian government officials. The court never reached the merits of plaintiffs' claims, however, holding that SBC was not an "issuer" subject to the SEC's jurisdiction and that Dodd-Frank's whistleblower retaliation provisions applied only to "issuers."
- *Asadi v. G.E. Energy (USA) LLC*: In June 2012, the U.S. District Court for the Southern District of Texas dismissed the wrongful discharge claim of a plaintiff who was allegedly terminated for complaints he made over his employer's hiring of a third-party agent "closely associated" with an Iraqi government official. Here again, the court failed to reach the merits of the plaintiff's claims, holding that Dodd-Frank did not apply extraterritorially to protect the plaintiff, a dual Iraqi/U.S. citizen.

OTHER CIVIL ACTIONS

Even though the FCPA does not contain a private right of action, the ever-increasing stream of FCPA-related civil litigation continues. In the first half of 2012, Watts Water Technologies brought a legal malpractice claim against its outside counsel, Sidley Austin LLP. The complaint alleged that, during pre-acquisition due diligence, Sidley had uncovered but failed to bring to Watts' attention a document suggesting that improper payments had been made by a potential Chinese subsidiary. Other noteworthy, FCPA-inspired civil actions include a high-profile dispute between Wynn Resorts, Ltd., a developer and operator of casinos and luxury hotels, and Kazuo Okada, one of Wynn's directors and largest shareholders, who is alleged to have paid over $100,000 in bribes to gaming regulators in the Philippines. In a derivative lawsuit filed against cosmetics manufacturer Avon Products, Inc., it is alleged that employees made improper payments to Chinese government officials and that the company had insufficient anti-corruption compliance controls.[3] In addition, in February 2012, a court-

[2] Plaintiffs in this lawsuit were a husband and wife residing in India while the husband, an SBC employee, oversaw construction of an SBC office building.

[3] In February 2012, the *Avon* plaintiffs voluntarily discontinued their complaint without prejudice to enable Avon to complete an internal investigation and resolve potential enforcement actions related to the underlying conduct by DOJ and the SEC.

appointed receiver responsible for unwinding a group of hedge funds sued Juan S. Montes, a former pension fund manager for the Venezuelan state-owned oil company Petroleos de Venezuela ("PDVSA"). The receiver alleged that Montes was bribed by a hedge fund manager to engage in bond-swap transactions between the hedge funds and PDVSA pension funds. Allegedly, the bond-swaps provided enough temporary liquidity that the hedge fund manager was able to carry on a $500 million Ponzi scheme. The civil lawsuit seeks "the return of bribes totaling $35,744,651."

NON-U.S. ANTI-CORRUPTION ENFORCEMENT

Both 2011 and the first half of 2012 have been active periods for non-U.S. anti-corruption enforcement as well:

- The U.K. Bribery Act:
  - July 1, 2012, was the first anniversary of the U.K. Bribery Act's going into effect. Unlike the FCPA, which only prohibits bribery of foreign government officials, the U.K. Bribery Act criminalizes all official and commercial bribery and criminalizes the conduct of bribe-receivers as well as bribe payers. Also, unlike the FCPA, the U.K. Bribery Act does not contain a facilitation payment exception.
    - The first prosecution under the Bribery Act was somewhat underwhelming. A court clerk who received bribes "intending to improperly perform his functions" with regard to traffic tickets was sentenced to three years' imprisonment under the Bribery Act (and six years for misconduct in public office). However, the provisions of the Bribery Act are not retroactive, so it is likely that any major prosecution will take a year or two to develop.
    - Nevertheless, the U.K. demonstrated it was serious about anti-corruption enforcement by increasing prosecutions under previous bribery statutes.
      - So far in 2012, the U.K.'s Serious Fraud Office ("SFO") has obtained nearly 15 convictions of individuals under previous bribery statutes. The SFO reported it has 11 active cases pending and 18 cases under consideration.
      - Also in 2012, former Innospec Ltd. CFO Paul Jennings pleaded guilty in the U.K. for his role in allegedly making corrupt payments in Indonesia and Iraq. In 2011, Jennings settled civil FCPA charges with the SEC stemming from the same underlying conduct.
      - And, Oxford Publishing Limited, a wholly-owned subsidiary of Oxford University Press, agreed to pay nearly £1.9 million under a settlement with the SFO following

allegations of bribery and corruption in connection with its East African operations. Oxford University Press will also make a voluntary payment of $2 million to not-for-profit teacher training and other educational organizations in sub-Saharan Africa.

- China: On May 1, 2011, the Eighth Amendment to the Criminal Law of the People's Republic of China came into force. Among other things, it criminalizes payments to non-Chinese government officials and officials of international organizations for any commercial benefit. The Amendment applies to all persons physically present in the People's Republic of China and to companies, enterprises, and institutions organized under Chinese laws. Prior to this amendment, China's bribery laws covered only domestic bribery. In July 2012, Chinese police arrested an executive at Alibaba Group Holding Ltd., an e-commerce outfit, alleging bribery, facilitating piracy, and counterfeiting.
- Russia: Russia also amended its anti-corruption laws in early 2011, expanding their scope to include bribery of foreign government officials and a new criminal offense of acting as an intermediary for bribery. In addition, the amendments dramatically increase penalties for corrupt activities.
- India: In late 2011, India introduced new anti-corruption legislation in response to a series of ongoing demonstrations and well-publicized protests from Indian citizens over perceived corruption in the Indian government. The bill, which is largely viewed as a mixed success, would grant an independent ombudsman authority to prosecute corrupt politicians and civil servants.
- Canada: In late 2011, Canada proposed new anti-corruption legislation that would, among other things, substantially increase the fines that can be imposed on government contractors for illegal activity. It would also debar government contractors found guilty of illegal activities. Finally, the legislation would establish a new Canadian anti-corruption office. Unlike the U.K. Bribery Act, this legislation would be retroactive, reaching corrupt conduct over the last five years. Many experts believe there will be robust enforcement, given Canada's commitment to establishing a dedicated, anti-corruption office and the large number of international extraction industry corporations headquartered in Canada.

INTERNATIONAL COOPERATION

Finally, just as in 2011, cooperation between international regulators continued to increase in early 2012. By way of example, in 2011, U.S. and European anti-corruption enforcement authorities collaborated on, among other matters, the *Innospec* and *Alcatel-Lucent* investigations, and the ongoing *Hewlett-Packard* investigation. In 2012, DOJ acknowledged significant assistance from authorities in France, Italy, Switzerland, the U.K., Greece, Mexico and Panama, among others, in connection with the

Marubeni, *Smith & Nephew*, and *Lufthansa Technik/BizJet International* investigations.

Venable offices are located in the following cities.

BALTIMORE, MD
750 E. PRATT STREET
SUITE 900
BALTIMORE, MD 21202
t 410.244.7400
f 410.244.7742

LOS ANGELES, CA
2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
t 310.229.9900
f 310.229.9901

NEW YORK, NY
ROCKEFELLER CENTER
1270 AVENUE OF THE
AMERICAS
25TH FLOOR
NEW YORK, NY 10020
t 212.307.5500
f 212.307.5598

ROCKVILLE, MD
ONE CHURCH STREET
FIFTH FLOOR
ROCKVILLE, MD 20850
t 301.217.5600
f 301.217.5617

TOWSON, MD
210 W. PENNSYLVANIA AVE.
SUITE 500
TOWSON, MD 21204
t 410.494.6200
f 410.821.0147

TYSONS CORNER, VA
8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
t 703.760.1600
f 703.821.8949

WASHINGTON, DC
575 7TH STREET NW
WASHINGTON, DC 20004
t 202.344.4000
f 202.344.8300