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MARCH 2012

FCPA Snapshot 2011

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FCPA Snapshot 2011

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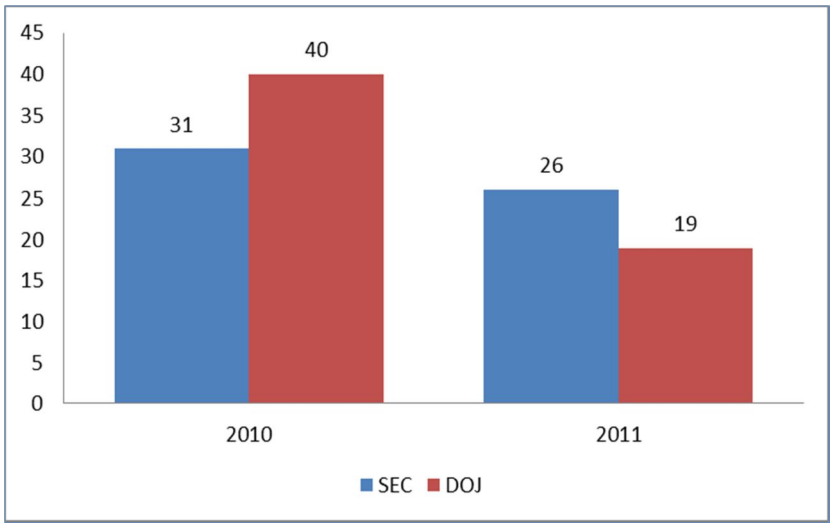
SUMMARY

2011 was the second most active year in the history of anti-corruption enforcement, outpaced only by the prolific 2010. While the number of new Foreign Corrupt Practices Act (FCPA) enforcement actions brought by DOJ and the SEC was lower in 2011, there is no reason to suspect that these agencies have lost their zeal. Rather, it is likely they are pursuing the investigations begun and actions initiated in 2010, and were occupied with the record-high number of FCPA trials in 2011.

Despite the overall decrease in the number of new enforcement actions, 2011 witnessed DOJ's and the SEC's continued focus on non-U.S.-based entities and individuals—perhaps part of an attempt to "level the playing field" between U.S.-based and non-U.S.-based companies. In addition, 2011 saw increased enforcement against individuals, and it also demonstrated attempts by DOJ and the SEC to highlight the benefits of voluntary disclosure. The welcome trend away from outside monitors continued.



SEC/DOJ Enforcement Actions by Year

The number of criminal trials in FCPA cases in 2011 was the largest in the Act's history. This led to several significant setbacks for

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DOJ, including Venable's successful defense of both Lindsey Manufacturing Company and its officers. There have been additional adverse results for the government in the first part of 2012, primarily in cases involving the prosecution of individuals, as well as companies. However, DOJ's and the SEC's long-held interpretations of key FCPA provisions—*e.g.*, "foreign official" and "instrumentality" of a foreign government—were largely adopted by trial courts.

Also in 2011, the U.S. Chamber of Commerce, other industry groups, and some members of Congress began to push back against the FCPA. At the same time, other members of Congress sought to strengthen the United States' anti-corruption efforts by, among other things, seeking debarment of convicted government contractors and making 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 that results in a successful enforcement action, will almost certainly continue to change the enforcement landscape.

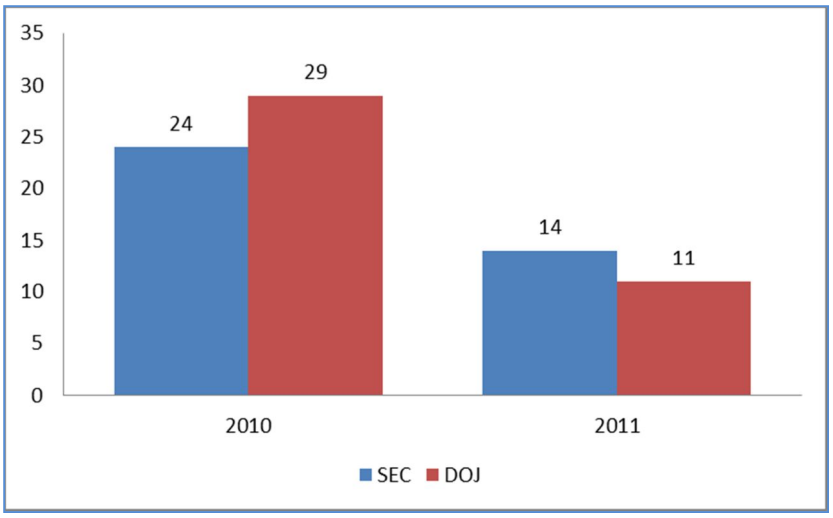
Finally, in 2011, countries other than the United States stepped-up their anti-corruption enforcement efforts. Most notably, on July 1, 2011, the much anticipated U.K. Bribery Act took effect, adding an additional area of concern to anti-corruption compliance for many multinational corporations. China, India, Canada, and Russia, among others, also introduced new anti-corruption legislation.

This year we will likely see a continuation of many of these trends—particularly DOJ's and the SEC's focus on non-U.S.-based entities and individuals and a further increase in other countries' involvement in global anti-corruption enforcement. In addition, DOJ can be expected to continue its efforts to hold individuals accountable, and individuals most likely will continue to challenge DOJ and its interpretation of the Act at trial. Already, 2012 has witnessed DOJ's "dismissal" of charges in the "*SHOT Show*" sting case after a series of mistrials and acquittals, as well as the dismissal of the FCPA counts in the *O'Shea/ABB* trial.

STATISTICS

Corporate Defendants

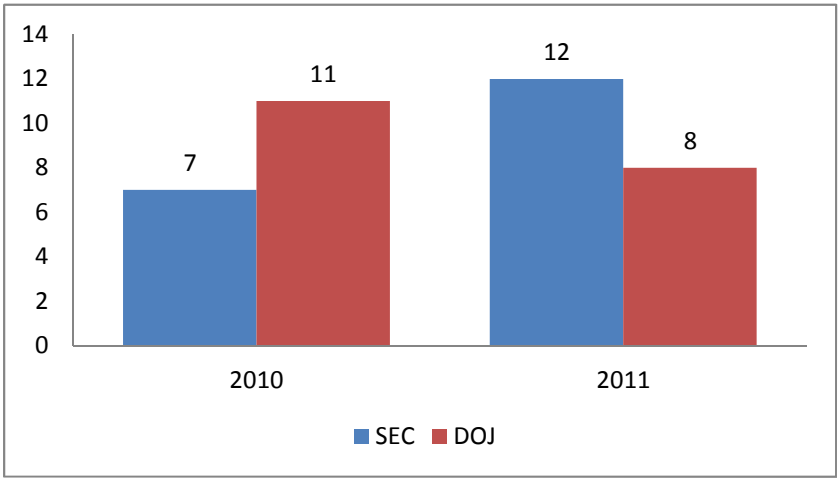
- In 2011, DOJ brought approximately 11 enforcement actions against corporate defendants, compared with 29 in 2010.
- Also in 2011, the SEC brought approximately 14 enforcement actions against corporate defendants, compared with 24 in 2010.



SEC/DOJ Enforcement Actions (Corporate Defendants) by Year

Individual Defendants

- In 2011, DOJ brought approximately eight enforcement actions against individual defendants, compared with eleven in 2010.
- Also in 2011, the SEC brought approximately twelve enforcement actions against individual defendants, compared with seven in 2010.
- In 2011, nine SEC actions (75 percent) were filed against non-U.S.-based individual defendants. All of the new criminal actions were against non-U.S.-based individual defendants.



SEC/DOJ Enforcement Actions (Individual Defendants) by Year

Fines/Penalties

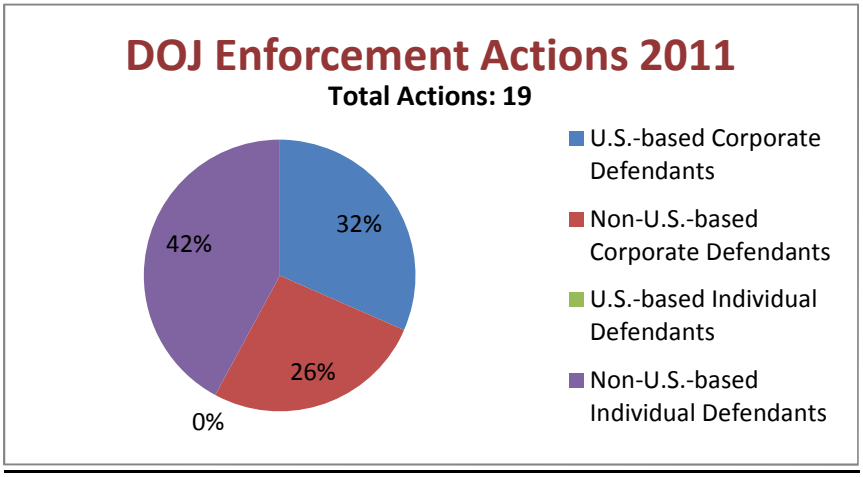
- In 2011, the total amount of sanctions imposed in FCPA cases was slightly more than $500 million.
- These penalties are significantly down from the cumulative DOJ/SEC total of approximately $1.7 billion in 2010.
- DOJ explained in a series of press releases that many fines were substantially reduced, because of the defendants' swift response to alleged FCPA violations and continued, real-time cooperation.

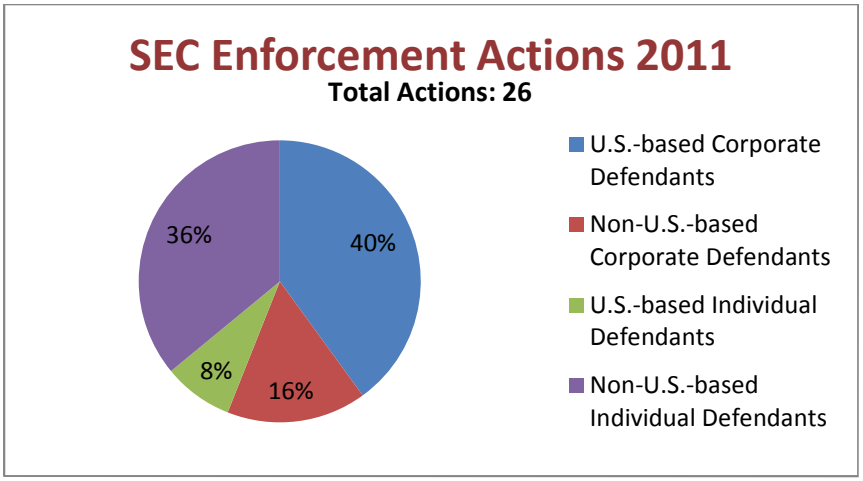
Industry Targets

- In 2011, most DOJ enforcement actions involved corporate and/or individual defendants in the following industries:
  - Engineering and Construction
  - Technology/Telecommunications
  - Health Care and Life Sciences
- The same industries were targeted in 2010, with additional focus by DOJ on the energy sector, logistics, manufacturers and the tobacco industry.

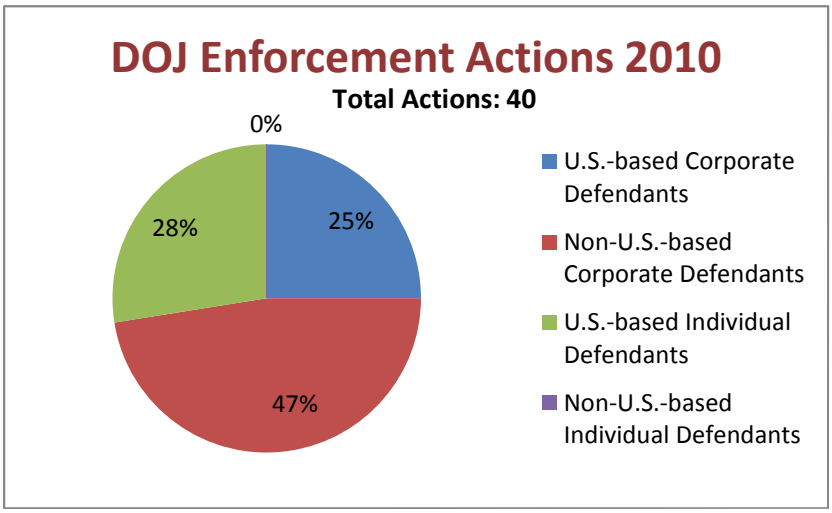
U.S.-based Versus Non-U.S.-based Defendants

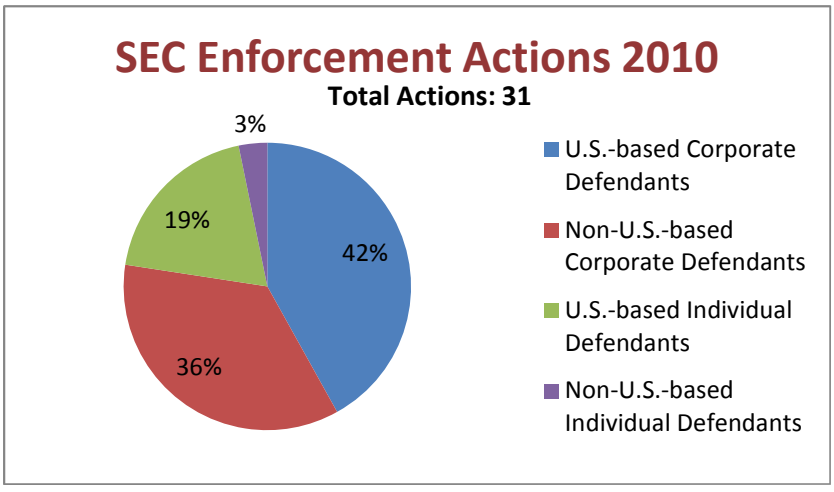
As demonstrated below, 2011 also saw a continued focus by DOJ and the SEC on non-U.S.-based individuals and entities:





Although only 22 percent of the fines/penalties collected by the SEC were from non-U.S. companies, approximately 71 percent of criminal penalties collected by DOJ were from non-U.S. companies. In 2010, approximately 64 percent of monetary sanctions were levied against non-U.S. companies.





As suggested, the large number of enforcement actions against non-U.S. companies and individuals most likely shows an effort by DOJ and the SEC to "level the playing field," perhaps as a result of

widespread criticism that U.S. entities were being subject to an unfair commercial disadvantage. By vigorously enforcing the Act against non-U.S. companies and their employees who fall into the broad net of U.S. FCPA jurisdiction, the government hopes to dampen this criticism, especially in the face of the efforts to curtail the FCPA, discussed below.

RESOLUTIONS

- Among the 10 corporations that received non-prosecution agreements or deferred prosecution agreements from DOJ in 2011, almost all of them, according to DOJ, had their fines/penalties reduced because of early reporting and ongoing cooperation.
- At least one of the settling corporations, JCG Corporation, was required to retain an independent compliance consultant. At least two, including Johnson & Johnson/DePuy Inc. ("J&J"), were required to self-monitor and report bi-annually to DOJ.

A Few Noteworthy Settlements

- *Johnson & Johnson/DePuy*: In what was perhaps the most discussed settlement of 2011, J&J agreed to pay a $21.4 million criminal penalty as part of a deferred prosecution agreement with DOJ. The deferred prosecution agreement resolved charges of improper payments by J&J subsidiaries to foreign government officials in Greece, Poland and Romania. The agreement also resolved allegations of kickbacks paid to the former government of Iraq under the U.N.'s Oil-for-Food Program. Specifically, the agreement:
  - acknowledged J&J's responsibility for the actions of its non-U.S.-based subsidiaries;
  - recognized J&J's voluntary disclosure, which came as a result of a thorough and wide-reaching internal investigation; and
  - rewarded J&J for its extensive remedial efforts and compliance improvements undertaken after the improper payments and kickbacks were uncovered.

  In an associated SEC action, J&J agreed to a permanent injunction and paid approximately $48.6 million in disgorgement and prejudgment interest.
- *Tenaris SA*: In 2011, the SEC issued its first-ever civil version of a deferred prosecution agreement with defendant Tenaris S.A., a Luxembourg-based entity accused of bribing Uzbek government officials during a bidding process to supply pipelines for transporting oil and natural gas. Although the SEC noted that Tenaris's alleged foreign bribery scheme was "unacceptable and unlawful" and forced Tenaris to pay $5.4 million in disgorgement and prejudgment interest, it praised Tenaris's swift response, high level of corporate accountability, and voluntary self-reporting and cooperation. Pursuant to the agreement, Tenaris committed to the following:
  - Enhancing its policies, procedures and controls to

strengthen compliance with the FCPA and anti-corruption best practices;

- Implementation of due diligence protocols related to the retention and payment of agents;
- Providing detailed training on the FCPA and other anti-corruption laws;
- Requiring certification of compliance with anti-corruption policies; and
- Notifying the SEC of any complaints, charges or convictions against Tenaris or its employees for violations of any anti-bribery or securities laws.

Tenaris also entered into a non-prosecution agreement with DOJ, pursuant to which Tenaris paid $3.5 million in penalties. DOJ, too, noted that Tenaris's penalties were significantly reduced because of voluntary cooperation.

- *Magyar Telecom*: Magyar Telecom agreed to pay approximately $63.9 million in criminal penalties to DOJ and approximately $95 million in civil penalties to the SEC. In *Magyar*, the government's sole claim to jurisdiction under the FCPA was a foreign government official's U.S.-based email address, which he allegedly used in furtherance of the bribery scheme. Neither DOJ nor the SEC alleged any other territorial act in connection with the alleged bribery scheme. Although this seems to be a weak jurisdictional basis, it is a continuation of a long-standing trend in FCPA enforcement by DOJ and the SEC in which they take an extremely broad view of U.S. FCPA jurisdiction. Indeed, DOJ and the SEC will often take the position that any contact with the United States in furtherance of the corrupt scheme—no matter how fleeting—gives rise to jurisdiction under the FCPA. Most notably, this position has been applied to so-called correspondent bank accounts, whereby a dollar-denominated transaction clears through a U.S. account.

INDIVIDUAL PROSECUTIONS

Another key lesson from 2011: the fact that a corporation settles an enforcement action with DOJ or the SEC does not mean that individuals will not be prosecuted. Notably, when DOJ indicted eight individual defendants in *U.S. v. Sharef et al.*, stemming from the *Siemens* case, in late 2011, it was nearly three years to the day after the original *Siemens* settlement in 2008. Since all of these defendants were high-level Siemens executives/employees, it is clear that DOJ and the SEC are seeking to hold gatekeepers/control persons liable for foreign bribery schemes, even years after the company settles.

TRIALS

Additionally, 2011 witnessed several noteworthy FCPA trials. Although DOJ was largely successful in defending legal challenges to its interpretation of the Act, FCPA defendants were highly successful in their own right.

- *Lindsey Manufacturing*[1]: Although the court largely adopted the government's interpretation of foreign official under the FCPA, the court granted the defendants' motion to set aside the guilty verdicts and dismiss the indictment based on prosecutorial misconduct (including the introduction of false 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 case against the defendants.

- The "*SHOT Show*" Defendants: In 2010, DOJ unsealed the indictments of 22 executives and employees of military and law enforcement suppliers who attempted to bribe a fictitious defense minister of a small African nation in what was, in reality, an FBI undercover sting operation. The *"SHOT Show"* trials began in 2011, with the defendants divided into four trial 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 the Rule 29 motion of one *"SHOT Show"* defendant for lack of jurisdiction on the grounds 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 represents 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, the government "dismissed" the "*SHOT Show*" indictments in 2012.

- *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 was indicted for his alleged role in a scheme to pay Mexican-owned utility company employees over $1.9 million in kickbacks, through an independent agent, to secure contracts. At trial, the independent agent was the government's key witness. In early 2012, at the close of the government's case, the court granted O'Shea's Rule 29 acquittal motion and dismissed the FCPA counts. The court based its decision on the lack of "foundation" or "specifics" in the independent agent's testimony, as well as its dissatisfaction with the documentary evidence linking O'Shea to the improper payments. While the court accepted that kickbacks had been made, it determined that the government failed to carry its burden of showing that O'Shea had bribed a public official.

Notwithstanding the above, the trial landscape was not all bleak for DOJ. It obtained convictions in *Haiti Telecom*, *Innospec*, and *Latin Node*. And, as noted, its interpretation of the statute, when challenged, was largely upheld. For instance, the courts in *Lindsey Manufacturing, Control Component,* and *Haiti Telecom* each rejected the defendants' arguments that the allegedly state-owned entities in their cases were not "instrumentalities" of foreign governments

[1] Venable partner Jan Handzlik represents Lindsey Manufacturing Co. in this case.

under the FCPA. These courts 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.

SENTENCES

As set forth below, the lengths of sentences handed down in 2011 were generally significant:

- Joel Esquenazi: sentenced to 15 years for his involvement in the *Haiti Telecom* case;
- Carlos Rodriguez: sentenced to 84 months, also for his involvement in the *Haiti Telecom* case;
- Antonio L. Perez: sentenced to 10 months, also for his involvement in the *Haiti Telecom* case;
- Jorge Granados: sentenced to 46 months for his involvement in the *Latin Node* case; and
- Ousama Namaan: sentenced to 30 months for his involvement in the *Innospec* case.

LEGISLATIVE AND REGULATORY ACTION

While some members of Congress and industry groups are seeking to narrow or clarify the FCPA, others are attempting to strengthen anti-corruption enforcement, particularly with regard to the ability of convicted government contractors to bid on U.S. government contracts and private rights of action.

- 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 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 in order 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 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 requirement under the Act.[2]
- Following the Chamber's lead, some members of Congress have

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

criticized federal prosecutors for "overreaching" and called for amendments to the FCPA setting forth a compliance defense or providing for a corporate leniency program.

- Other members of Congress desired 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 is before Congress that would make it easier for individuals to bring private lawsuits for FCPA violations, titled the "Foreign Bribery Prohibition Act of 2011."
- Perhaps the most significant development, however, came in the form of SEC regulations implementing Dodd-Frank, which, in relevant part, provide financial rewards to individuals who report violations of federal securities laws, including the FCPA's books and records provisions. Under Dodd-Frank, whistleblowers whose information leads to a successful SEC enforcement action stand to receive between 10 percent and 30 percent of any monetary sanctions.

NON-U.S. ANTI-CORRUPTION ENFORCEMENT

2011 was an active year for non-U.S. anti-corruption enforcement:

- The U.K. Bribery Act:
  - The much anticipated U.K. Bribery Act came into effect on July 1, 2011, four months after the U.K. Ministry of Justice published its official guidance for corporations seeking to implement "adequate procedures" to prevent illegal bribery.
  - Unlike the FCPA, which prohibits bribery of foreign government officials only, the U.K. Bribery Act criminalizes all commercial bribery, as well as the offense of being bribed.
  - In addition, 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, because the provisions of the Bribery Act are not retroactive, it is unlikely that any major prosecution under that statute will be filed in the first year or two of its existence.
  - Nevertheless, the U.K. demonstrated it was serious about anti-corruption enforcement by increasing prosecutions under previous bribery statutes. For example, the U.K. Financial Services Authority (FSA) fined insurance broker Willis Limited £7 million for breaches of the FSA's Principles for Business and the FSA Handbook—the largest fine imposed by the FSA to date in this area. Also in 2011, the High Court issued an order against Macmillan Publishers Ltd. for approximately £11.2 million. The order

followed an agreement between Macmillan and the U.K.'s Serious Fraud Office (SFO), whereby the SFO recovered money Macmillan had received from illegal bribes to secure business in Africa.

- China: On May 1, 2011, the Eighth Amendment to the Criminal Law of the People's Republic of China came into force, which, among other things, criminalizes payments to non-Chinese government officials and to officials of international organizations for any illegitimate commercial benefit. The Amendment applies to all Chinese citizens, all persons physically present in the People's Republic of China, and companies, enterprises and institutions organized under Chinese laws. Prior to this amendment, China's bribery laws dealt only with domestic bribery.
- Russia: Russia also amended its anti-corruption laws in early 2011, expanding the laws' scope to include bribery of foreign government officials and creating a new criminal offense for acting as an intermediary for bribery. In addition, the amendments dramatically increase penalties for corrupt activity.
- India: In late 2011, India introduced brand-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: Also 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 from bidding for public contracts. 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 engaged in over the last five years.

INTERNATIONAL COOPERATION

Finally, in 2011, the trend of cooperation between international regulators continued. For instance, 2011 witnessed the collaboration of U.S. and European anti-corruption enforcement authorities on, among others, the *Innospec*, *Johnson & Johnson/DePuy*, and *Alcatel-Lucent* investigations and the ongoing *Hewlett-Packard* investigation.

LOOKING FORWARD TO 2012

In 2012, expect:

- more trials and legal challenges to DOJ's and the SEC's interpretation of the FCPA;
- more transparent and obvious benefits to those who voluntarily disclose;
- a continued focus on non-U.S.-based entities and on individuals;
- an increase in enforcement actions spurred by information provided by whistleblowers; and
- an increase in the number of anti-corruption enforcement actions brought by other countries and continued cooperation between the U.S. and other jurisdictions.

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