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FCPA Snapshot 2013

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FCPA Snapshot –2013

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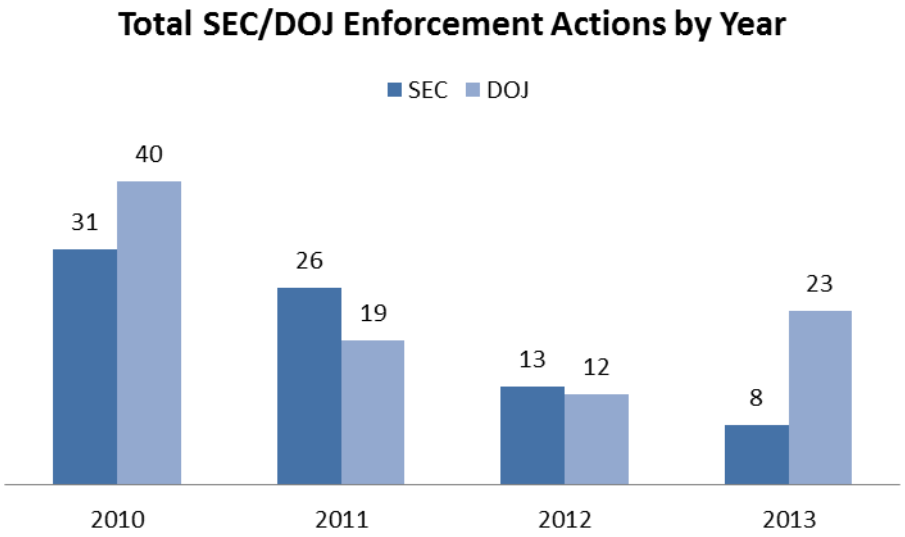
SUMMARY

Foreign Corrupt Practices Act (FCPA) enforcement activity in 2013 was robust, with DOJ and the SEC bringing 31 new FCPA enforcement actions, exceeding 2012's total of 25. Total penalties amounted to more than $720 million, the second highest year on record.



Many trends from earlier years continued in 2013. International cooperation among law enforcement authorities remained strong. For example, 2013 saw the first coordinated enforcement action between U.S. and French authorities in a major foreign bribery case (*U.S. v. Total S.A.*). DOJ also continued to make good on its promise to prosecute individuals, bringing or announcing 14 actions against individuals in 2013. And, DOJ and the SEC seemed to continue their willingness to reward companies for their swift voluntary disclosure and ongoing cooperation, although the extent of that reward has been the subject of much debate.

There have also been some new developments this year. For example, the SEC entered into its first non-prosecution agreement with a corporate defendant over alleged FCPA misconduct (*SEC v. Ralph Lauren Corporation*).

Meanwhile, the courts remained busy with FCPA matters. In *United States v. Esquenazi et al.*, the Eleventh Circuit heard oral argument in a challenge to the

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HONORS & AWARDS

Law360 named Venable a FCPA Powerhouse in 2013

FCPA and Anti-Corruption Group received *Main Justice's* 2013 Distinguished Service Award

U.S. News-Best Lawyers 2012-2013 *"Law Firm of the Year"* in Criminal Law: White-Collar Litigation

government's definition of "foreign official." In *SEC v. Sharef* and *SEC v. Straub*, the agency faced specific challenges to its expansive interpretation of FCPA jurisdiction, with differing results. Three FCPA-related shareholder derivative lawsuits that commenced in 2011 and 2012 were dismissed in 2013, but the shareholder lawsuit against Wal-Mart was allowed to proceed. And, the Republic of Iraq's lawsuit alleging, *inter alia*, that numerous multinational corporations violated the FCPA in connection with the U.N.'s Oil-for-Food program was also dismissed.

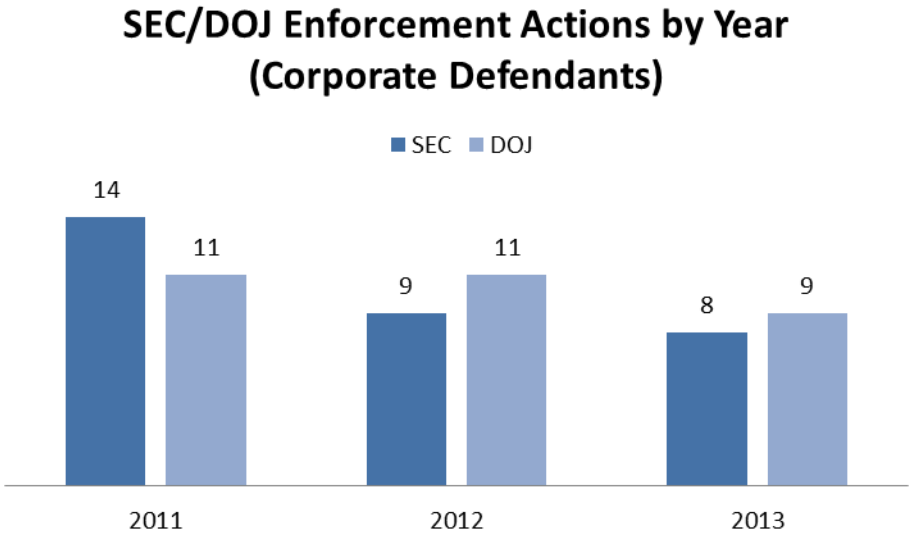
FCPA legislative reform efforts, on the other hand, seem to have stalled following the issuance of DOJ's and the SEC's FCPA Guidance in November 2012. Although industry groups continue to press DOJ and the SEC for clarity in "several areas of continuing concern for businesses seeking in good faith to comply with the FCPA," the SEC and DOJ have expressed no intention to revisit the Guidance in the near future. However, legislative efforts to strengthen anti-corruption deterrence continue – an amendment is before the House of Representatives that would provide for automatic debarment of companies that have been convicted or charged with a variety of criminal and civil offenses, including violating the FCPA.

Finally, countries other than the United States continue to increase their anti-corruption enforcement. In Russia and Canada, existing anti-corruption regimes were strengthened through legislative action. Brazil enacted the new Clean Companies Act, which is designed to bring it in line with OECD standards and to complement existing anti-corruption laws in the Brazilian Criminal Code by creating criminal liability for individuals, and civil and administrative liability for corporations found guilty of bribery. In China, authorities continue to crack down on bribery and corruption, most notably against pharmaceutical manufacturers.

STATISTICS

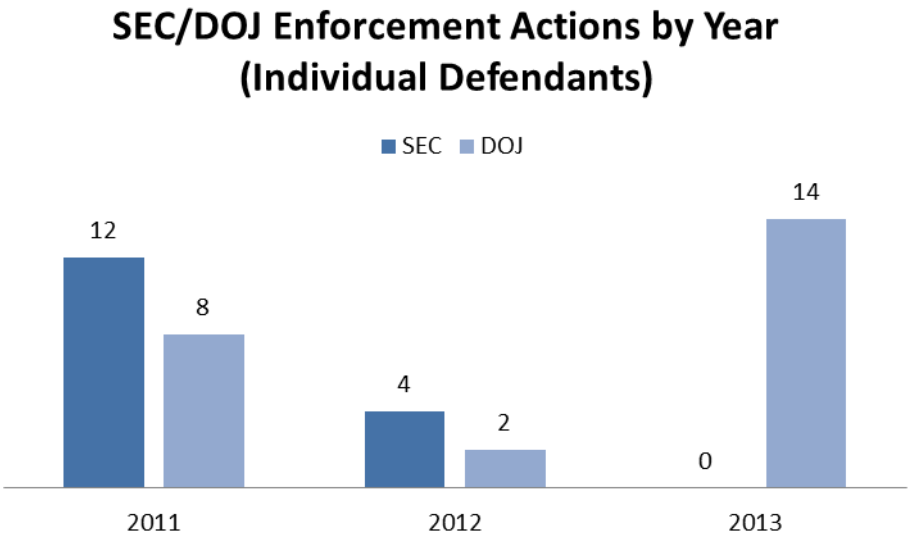
Corporate Defendants

- In 2013, DOJ brought nine enforcement actions against corporate defendants, compared with 11 each year during 2012 and 2011.
- Meanwhile, all eight of the SEC's enforcement actions in 2013 were against corporate defendants, compared with nine in 2012, and 14 in 2011.



Individual Defendants

- In 2013, DOJ brought 14 enforcement actions against individual defendants, compared to only two in 2012, and 12 in 2011. The 14 DOJ enforcement actions in 2013 stemmed from five corporate investigations. Four of the defendants were charged or pleaded guilty before 2013, but their cases were under seal until 2013.
- The SEC brought no new enforcement actions against individual defendants in 2013, compared to four in 2012, and 12 in 2011.



- Additionally, the fact that a corporation settles an enforcement action with DOJ or the SEC does not mean that the potential for the prosecution of individuals has passed. In fact, the trend seems to be that individuals are charged well after the corporation has settled. For example, DOJ's prosecution of Peter Dubois, Jald Jensen, Bernd Kowalewski, and Neal Uhl all stemmed from the Department's earlier enforcement action against BizJet International Sales and Support, Inc., the individuals' employer. Alain Riedo, a former Maxwell Technologies employee, was prosecuted two years after Maxwell entered into a deferred prosecution agreement. (*See also* Venable LLP's FCPA Snapshot 2011, where we reported that DOJ had indicted eight individual defendants in *U.S. v. Sharef et al.* in 2011, nearly three years to the day after the related *Siemens* settlement.)

Fines/Penalties

- In 2013, DOJ and the SEC combined imposed more than $720 million in penalties – more than double the value of penalties imposed overall in 2012. This figure includes the penalties imposed against French oil and gas company Total, S.A. (DOJ: $245.2 million; SEC: $152.8 million), and Weatherford International, Ltd. (DOJ: $86.8 million; SEC: $65.6 million) – the fourth and ninth largest FCPA enforcement actions ever. Weatherford and Total accounted for three-quarters of all SEC and DOJ penalties in 2013.
- In 2012, the total amount of penalties imposed in FCPA cases was approximately $263.8 million, while in 2011, the total amount of sanctions was slightly more than $500 million. All penalties are significantly down from the cumulative DOJ/SEC total of approximately $1.7 billion in FCPA-related cases in 2010. Enforcement trends both before and after 2010 suggest that year may have been an outlier.

Industry Targets

- In the past, we have reported on DOJ and the SEC's focus on the pharmaceutical and medical device industry. In 2013, there were only two such cases, perhaps indicating a maturation of anti-corruption compliance in that industry. However, the multiple investigations against pharmaceutical companies launched by the Chinese government (see page 9 *infra*) demonstrate that the anti-corruption enforcement risk for pharmaceutical companies remains high.
- The primary industries targeted in 2013 include:
  - Oil & Gas (seven actions);
  - Aviation (four actions);

- Energy (four actions); and
- Financial Services (four actions).

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

In 2013, approximately 14 defendants were U.S.-based entities or U.S. citizens, while approximately nine were non-U.S. based entities or non-U.S. citizens. The SEC and DOJ brought enforcement actions against non-U.S. based corporations, including Weatherford International and Bilfinger SE. Individual non-U.S. citizen defendants include French citizen Frederic Cilins, charged with obsturction of justice in connection with an ongoing probe into a mining company seeking mining rights in Ghana, and Swiss citizen Alain Riedo, a former Maxwell Technologies employee accused of conspiring to violate the FCPA by bribing government officials in China to secure sales to state-owned electric-utiltiy manufacturers. In addition, Venezuelan government official Maria de los Angeles Gonzalez de Hernandez (Gonzalez) was charged and pleaded guilty in connection with a bribery scheme to direct a state-owned economic development bank's security-trading business to a U.S. broker-dealer. While the other defendants in that matter were charged with violating the FCPA, Gonzalez was charged with Travel Act violations predicated upon New York's commercial bribery laws. The Travel Act makes it a federal offense to travel in interstate commerce or use interstate facilties to engage in "unlawful activity" as defined by state law, including bribery. The Travel Act allows DOJ to bring charges not otherwise within the ambit of the FCPA because the FCPA does not apply to the foreign official bribe recipient, and does not cover commercial bribery.

CORPORATE RESOLUTIONS

2013 saw some noteworthy resolutions against corporate entities, including French oil and gas giant Total S.A., Swiss oil services company Weatherford International, and American lifestyle and clothing retailer Ralph Lauren Corporation. Certain trends can be discerned.

- *United States v. Total S.A.* is currently the fourth largest FCPA settlement ever (a combined $398 million in sanctions imposed by DOJ and the SEC). According to the criminal information, Total S.A. paid at least $60 million in bribes in order to access Iranian oil and gas fields, where it allegedly made more than $150 million in profits. Purportedly, Total S.A. entered into allegedly sham consulting agreements with intermediaries for Iranian officials at state-owned oil and gas companies and characterized related payments as legitimate "business development expenses" in its books and records. Total S.A. was subject to enforcement actions by both agencies, and is also being prosecuted in France. Total S.A.'s deferred-prosecution agreements with DOJ requires them to appoint an independent compliance monitor for three years, while implementing an enhanced corporate compliance program and enhanced internal controls. The SEC's Cease and Desist Order also refers to the independent compliance monitor and requires them to review and periodically report to the SEC on the company's FCPA compliance. This is a break from the trend away from corporate monitors.
- The SEC and DOJ brought a total of three enforcement actions against Weatherford International, a Swiss oil services company, and its Bermudan subsidiary, Weatherford Services, Ltd. The actions focused on both FCPA violations and export control violations. Weatherford Services pleaded guilty to bribing foreign officials in African countries, including Angola. Another subsidiary was accused of committing fraud relating to the UN's Oil For Food program in Iraq. According to DOJ and the SEC, Weatherford International knowingly failed to have adequate internal accounting controls, permitting the conduct by its subsidiaries to take place. Weatherford Services employees allegedly established joint ventures with government officials in Africa in order to receive contracts and information about competitors' pricing. Another subsidiary paid almost $1.5 million in kickbacks to the Iraqi government to receive contracts under the Oil For Food program, and falsely recorded the payments as legitimate expenses. The transactions reportedly resulted in almost $54.5 million in profits for Weatherford International. The export control violations related to deals with Cuba, Iran, Sudan, and Syria. The total penalties for both sets of violations were more than $252 million, with the FCPA penalties accounting for approximately $152 million of the total. Weatherford International's deferred prosecution agreement with DOJ is for a term of three years. Weatherford also agreed to retain an independent corporate compliance monitor for 18 months, and to self-report to the SEC for 18 months. DOJ noted Weatherford's cooperation and remediation efforts; however, the SEC complaint notes that before the cooperation began, Weatherford and its employees allegedly compromised the investigation by failing to secure certain documents and allowing potentially complicit employees to participate in the document collection.
- Also in 2013, the SEC entered into its first FCPA-related non-prosecution agreement with American clothing retailer Ralph Lauren Corporation (RLC). According to the SEC, RLC's Argentine subsidiary paid bribes to Argentine government officials as part of a scheme to import RLC products into Argentina but avoid necessary

paperwork. Allegedly, these bribes occurred during a period when RLC lacked meaningful anti-corruption compliance and internal control mechanisms, and the payments in question went unnoticed by RLC until it began a world-wide process of implementing an enhanced compliance program.

In conjunction with the non-prosecution agreement, the SEC publicly praised RLC for its "significant remedial measures" and "ongoing cooperation," which included:

- Implementing a comprehensive new compliance program world-wide;
- Terminating employment and business relationships with all individuals involved in the wrongdoing;
- Strengthening internal controls and procedures for third-party due diligence;
- Reporting the preliminary findings of an internal investigation to the SEC within two weeks of discovering the illegal payments;
- Voluntarily and expeditiously producing relevant documents to the SEC;
- Providing English-language translations of important documents to the SEC;
- Summarizing witness interviews conducted overseas; and
- Making overseas witnesses available for SEC interviews, and bringing those witnesses to the U.S.

In a related action, DOJ also entered into a non-prosecution agreement with RLC. In all, RLC paid sanctions totaling $1.6 million. This amount is relatively modest compared to other enforcement actions in the past – likely due to RLC's "extensive, thorough, and timely cooperation." However, some critics have questioned whether a company that undertakes a compliance audit in an effort to bolster its anti-corruption controls, discovers, and voluntarily discloses FCPA issues should have been sanctioned at all, especially when the payments were not in connection with a specific business transaction.

SENTENCES

As demonstrated below, the sentences handed down in 2013 were a mixed bag, and (except for Frederic Bourke) all individuals cooperated with the government to some extent.

- Paul Novak was sentenced to 15 months in prison and was forced to pay a $1 million criminal fine for his involvement in the *Willbros* case. In sentencing Novak, the Court took Novak's cooperation into consideration.
- Hans Bodmer was sentenced to time served and forced to pay a $500,000 criminal fine in connection with the *Bourke/Kozeny* matter. Like Novak in the *Willbros* case, Bodmer cooperated with the prosecution in the *Bourke/Kozeny* matter.
- Thomas Farrell was sentenced to time served, with no period of supervised release, in connection with his involvement in the long-running *Bourke/Kozeny* matter. Farrell also agreed to cooperate with prosecutors.
- Clayton Lewis was also sentenced to time served in connection with the *Bourke/Kozeny* matter. (In 2003, after his arrest, Lewis served six days in prison. In 2004, Lewis agreed to cooperate with prosecutors.)
- Flavio Ricotti was sentenced to time served in connection with the *Carson/CCI* case. Ricotti, an Italian citizen, was detained in Germany and extradited to the United States. He was the third CCI employee to plead guilty to FCPA-related charges. In all, Ricotti spent approximately 11 months in prison. Like Mario Covino and Richard Morlock (below), Ricotti agreed to cooperate with prosecutors.
- Mario Covino received no prison time in connection with the *Carson/CCI* case, but was sentenced to three months' home detention and was forced to pay a $7,500 criminal fine. Covino agreed to cooperate with the prosecution in the *Carson/CCI* case.
- Richard Morlock also received three months' home detention for his involvement in the *Carson/CCI* case and was forced to pay a $5,000 criminal fine. Morlock agreed to cooperate with the prosecution in the *Carson/CCI* case.
- Frederic Bourke, co-founder of luxury goods purveyor Dooney & Bourke, finally exhausted all available appeals of his 2009 conviction and reported to a federal penitentiary to begin serving his sentence of a year and a day.
- Neil Uhl, the former vice president of finance at BizJet, and Peter Dubois, the former vice president of sales and marketing at BizJet were each sentenced to home detention for eight months and probation for five years.

Their sentences were reduced based on their cooperation with the government's investigation. Two other co-defendants, Bernd Kowalewski, the former president and CEO of BizJet, and Jald Jensen, the former BizJet sales manager, remain abroad. Uhl and Dubois pleaded guilty in January 2012, but their pleas were not unsealed until April 2013, when the charges against Kowaleski and Jensen were also unsealed.

LITIGATION

In 2013, the FCPA continued to appear regularly on court dockets, although there were no criminal trials in 2013. The SEC, however, faced two distinct challenges to its expansive interpretation of FCPA jurisdiction in the United States District Court for the Southern District of New York, with varied results.

- In *SEC v. Sharef*, before District Judge Shira Scheindlin, defendant Herbert Steffan, a German citizen and a former senior executive at Siemens A.G., successfully challenged the SEC's expansive interpretation of its extraterritorial jurisdiction in a case where the only connection between the United States and the defendant's role in the alleged foreign bribery scheme was a telephone call that originated in the United States. The SEC claimed that the underlying scheme involved payments made by Siemens's Argentine affiliate to Argentine government officials in exchange for a contract to produce national identity cards. Allegedly, Steffen's only role was to pressure the Argentine affiliate's CFO to authorize the bribes, and Steffan's only connection to the United States was his participation in a single telephone call initiated from the United States in connection with the alleged bribery scheme. Judge Scheindlin rejected this telephone call as a sufficient basis for asserting personal jurisdiction over Steffan, holding that Steffan lacked the necessary minimum contacts with the United States in order to make jurisdiction proper. In so doing, Scheindlin stated that "the exercise of jurisdiction over foreign defendants based on the effect of their conduct on SEC filings is in need of a limiting principle." She concluded that, absent any allegation of Steffan's role in the cover up of the bribery scheme, or his role in preparing the false financial statements at issue, the exercise of jurisdiction over Steffan would be unreasonable and exceed the limits of due process.
- By contrast, Judge Richard Sullivan held in *SEC v. Straub* that the *Straub* defendants, who are former executives of the Hungarian telecommunications company, Magyar Telekom, were subject to U.S. jurisdiction. The issue arose on defendants' motion to dismiss, *inter alia*, for lack of personal jurisdiction. In finding that there was personal jurisdiction over the defendants, Judge Sullivan found that defendants had "engaged in conduct designed to violate United States securities regulations," in that they attempted to cover up bribes, signed false or misleading financial reports (that were then passed on to American investors), and signed false management representation letters to Magyar's auditors. This was sufficient, for due process purposes, to make jurisdiction over the defendants reasonable.

On the criminal front, the Eleventh Circuit heard oral arguments in October 2013 in the appeals of Carlos Rodriguez and Joel Esquenazi, primarily challenging the definition of "foreign officials" and what constitutes an "instrumentality" of a foreign government.

- In *U.S. v. Joel Esquenazi & Carlos Rodriguez*, the defendants, former executives for Terra Communications, were found guilty in 2011 of violating the FCPA by bribing Haitian officials between 2001 and 2005. The government's case was dependent on the argument that Haiti's state-owned telecommunications company was a government instrumentality, and that its employees were therefore government officials. Esquenazi and Rodriguez claimed that the trial court erred in instructing the jury that employees of a state-owned telecommunications company could be considered foreign officials due to the fact that the company was an instrumentality of the Haitian government. Rodriguez argued that an "instrumentality" must be a direct part of a unit of the foreign government, and claimed that the government's definition used in the jury instructions deprived defendants of a "clear line." Esquenazi's attorney proposed that the definition of "instrumentality" must derive from a core government function. This appeal is of great interest, as many FCPA enforcement matters turn on the issue of who is a foreign official.

The Ninth Circuit upheld the restitution orders against Gerald and Patricia Green, who were found guilty of violating the FCPA in 2009, and sentenced to six months' imprisonment and joint restitution of $250,000. The Greens ran afoul of the FCPA in running a film festival in Thailand, where they secured contracts by paying bribes to Thai government officials. The Ninth Circuit upheld the restitution order even though the jury did not find an identifiable victim who suffered a pecuniary loss. The Supreme Court denied *certiorari*.

FCPA-related private litigation also continues to be active, even though there is no private right of action under the statute.

Shareholder Derivative Lawsuits

In the first half of 2013, shareholder derivative lawsuits filed in 2011 and 2012 suffered a series of setbacks. For example, in March 2013, the United States District Court for the Eastern District of Louisiana dismissed the shareholder derivative lawsuit pending against Tidewater Inc.'s directors, which alleged breach of fiduciary duty based on the company's purported payment of bribes to Nigerian and Azeri officials. The dismissal was predicated upon plaintiff shareholders' failure in 2012 to show that a demand on the board would have been futile. Similarly, the United States District Court for the District of Nevada dismissed the shareholder derivative lawsuit pending against Wynn Resorts Ltd for failure to adequately plead futility of demand on the board of directors. The Wynn shareholders had alleged in their complaint that a $135 million donation to the University of Macau was actually a bribe to Macau government officials in exchange for a land concession to build a second resort on the island. Additionally, the United States District Court for the Northern District of California dismissed a shareholder derivative lawsuit against computer giant Hewlett-Packard (HP) for the directors' alleged failure to prevent HP from bribing Russian government officials. The dismissal was based on the grounds that the shareholders' complaint failed to plead particularized facts showing a reasonable doubt as to: (1) the directors' independence; (2) their failure to investigate the claims; or (3) the informed manner in which the directors' dismissed the pre-suit demand.

The second half of 2013 saw more success for shareholder derivative lawsuits, as a shareholder lawsuit against Wal-Mart stemming from alleged bribes in Mexico was permitted to proceed. Shareholders had filed lawsuits in both Delaware state court and federal District Court in the Western District of Arkansas. The District Court case is very similar to the Delaware state court action, but also contains claims pursuant to the Securities Exchange Act of 1934. Wal-Mart had received a stay in District Court pending appeals in the Delaware state action. The plaintiffs in District Court appealed the stay, which a three-judge panel of the Eighth Circuit reversed. Thus, the Delaware and Arkansas suits are ongoing.

Other FCPA-Related Litigation

In July 2008, the Republic of Iraq sued a laundry list of multi-national corporations in federal court, making claims under the FCPA, RICO, and federal/state common law for allegedly conspiring with Saddam Hussein and his regime to frustrate the U.N.'s Oil-for-Food Program. In February 2013, the United States District Court for the Southern District of New York held that Iraq had standing to file suit for harms to its proprietary interests in the U.N. escrow account, and that Iraq's claims are not defeated by the act of state or political question doctrines. However, the court: (1) dismissed Iraq's FCPA claim, holding that there is no private right of action under the FCPA; (2) dismissed Iraq's RICO claim, holding that RICO does not apply extraterritorially; and (3) dismissed Iraq's remaining common law claims, for lack of supplemental federal jurisdiction. These three holdings resolved the action, and the Complaint was dismissed with prejudice.

INVESTIGATIONS

Recent reports indicate that over 100 companies are currently under investigation by DOJ and the SEC, including JPMorgan Chase, DreamWorks Animation SKG Inc., Kraft Foods Inc., Microsoft Corporation, and Wal-Mart. The investigation of JPMorgan Chase stems from its alleged practice of hiring the children of China's elite, including government officials, in order to win business with Chinese companies. The investigation of JPMorgan Chase has reportedly led to other investigations on hiring in the financial services industry, and at least six other banks have received requests for information from the government, including Citigroup, Goldman Sachs, and UBS.

Dealing with these investigations continues to be costly, with Wal-Mart reporting in mid-2013 that it had spent over $300 million on its internal investigation related to foreign bribery allegations, with $135 million spent in the nine months ending on October 31, 2013. Avon, another publicly-traded company under investigation, whose offer of settlement was rejected by the DOJ and SEC in 2013, has reportedly spent almost $350 million since 2009 on "professional and related fees" associated with a global FCPA investigation and compliance review.

LEGISLATIVE AND REGULATORY ACTION

Since the issuance of DOJ's and the SEC's FCPA Guidance in November 2012, FCPA legislative reform efforts have lost some steam. However, as described below, industry representatives continue to press DOJ and the SEC for

further clarification of key FCPA provisions, identifying "several areas of continuing concern for businesses seeking in good faith to comply with the FCPA."[1]

Specifically, in a letter dated February 19, 2013, the U.S. Chamber of Commerce stated that the Guidance fails to assure businesses that DOJ and the SEC are giving appropriate weight to strong corporate compliance programs. The Chamber's letter also points out that the Guidance fails to clearly define who is a "foreign official" under the FCPA, or to illustrate, through examples or hypotheticals, what third-party due diligence is expected in foreign markets. The Chamber's letter also asks DOJ and the SEC to make disclosure of declination decisions a regular practice so there is increased transparency into their decision-making process.

The SEC and DOJ have expressed little interest in revisiting the Guidance in the near future. However, the House recently adopted an amendment to a military appropriations bill that would make debarment automatic for companies that have been convicted, had a civil judgment entered against them, or been charged with a number of offenses, including fraud. In drafting the amendment so that it applies to companies that have only been charged, it would necessarily apply to companies under deferred prosecution agreements. Currently, companies must certify that they have not been convicted or been subject to a civil judgment, or been charged with certain offenses including fraud, embezzlement, and bribery; however, the government is permitted to award contracts to companies that cannot provide the certifications.

Additionally, in the last FCPA Snapshot, we reported that things were heating up on the Dodd-Frank front. This continued through 2013, with several important developments in pending Dodd-Frank whistleblower retaliation lawsuits.

- *Meng-Lin Liu v. Siemens A.G.* – In January, 2013 Meng-Lin Liu, a former employee of Siemens A.G.'s Chinese affiliate, sued Siemens under the Dodd-Frank whistleblower anti-retaliation provisions in the United States District Court for the Southern District of New York, alleging that Siemens unlawfully fired him after he alerted his supervisors that Siemens had continued to bribe foreign officials in China, in violation of both the FCPA and the FCPA-related settlement agreement Siemens reached with DOJ in 2008. The Court granted Siemens's motion to dismiss in October, holding that the Dodd-Frank whistleblower protections do not apply outside of the United States. Noting that it was a case involving a Taiwanese resident suing a German corporation for acts committed by its Chinese subsidiary in China and North Korea, the Court concluded that "[t]here is simply no indication that Congress intended the Anti-Retaliation Provision to apply extraterritorially."

- Disagreement is growing between courts as to whether a person must report alleged corruption to the SEC before the retaliation occurs in order to qualify as a whistleblower. In July, the Fifth Circuit upheld the District Court's dismissal of *Asadi v. G.E. Energy (USA), LLC*. The Fifth Circuit based its ruling on a finding that that Khaled Asadi was not entitled to whistleblower protections because he reported wrongdoing internally and was dismissed before any report was made to the SEC. Several district courts around the country have disagreed with the Fifth Circuit's interpretation and found that such employees are entitled to the Dodd-Frank protections. This is likely to be an area of ongoing litigation due to inconsistencies, tension, and ambiguity between the statute and the SEC regulations.

NON-U.S. ANTI-CORRUPTION ENFORCEMENT

Like previous years, 2013 has continued to be an active period for non-U.S. anti-corruption enforcement.

The United Kingdom

July 1, 2013, marked the second anniversary of the U.K. Bribery Act's taking effect. Unlike the FCPA, which prohibits bribery of foreign government officials only, the U.K. Bribery Act criminalizes all commercial bribery, as well as accepting a bribe. Additionally, unlike the FCPA, the U.K. Bribery Act does not contain a facilitation payment exception, and there is a strict liability offense for corporations that fail to prevent bribery.

- Early enforcement of the Bribery Act has been underwhelming, in part, because the Bribery Act's provisions are not retroactive. In 2012, the only prosecutions under the Bribery Act involved domestic bribes in small denominations. This appears to be changing, albeit slowly. The most notable 2013 use of the Bribery Act was

[1] "Business Community Responds to FCPA Enforcement Guidance by DOJ and SEC," UNITED STATES CHAMBER OF COMMERCE, Feb. 19, 2013, *available at* http://www.uschamber.com/press/releases/2013/february/business-community-responds-fcpa-enforcement-guidance-doj-and-sec.

charges against four employees of Sustainable AgroEnergy for an allegedly fraudulent scheme against investors involving biofuel investments in Cambodia. Additionally, demonstrating that the Serious Fraud Office (SFO) is ready to take on larger Bribery Act investigations, both it and Rolls-Royce confirmed in December 2013 that the SFO had opened a criminal investigation into possible bribery by Rolls-Royce in Indonesia and China. Furthermore, in 2013, both the SFO and the City of London Police department issued statements that they expect the number of Bribery Act cases to rise. David Green, the head of the SFO, gave a speech in October stating that the SFO was currently developing several cases, warning "those who are impatient for the first prosecution under the Bribery Act . . . watch this space."

- Moreover, U.K. authorities continue to prosecute actions under previous bribery statutes. In April, the U.K. Financial Services Authority[2] fined EFG Private Bank Ltd. more than $4 million because of lapses in its financial controls. The EFG Group's U.K. branch failed to fully implement its anti-money laundering regime, despite having more than 400 accounts held by high-net worth individuals from international jurisdictions who were found to present a high risk of money-laundering and bribery.

- The U.K. has also refined its criminal laws in ways that will influence the Bribery Act, for example, by (1) permitting deferred prosecution agreements (DPA); and (2) publishing guidelines for sentencing both individuals and corporations for fraud, bribery, and money laundering offenses. The SFO expects to begin using DPAs in early 2014.

China

In 2013, Chinese President Xi Jinping bolstered widespread efforts to root out Chinese corruption by placing a strong public focus on prosecutions of Chinese government officials for corruption. The Chinese government also ramped up investigations of private companies and individuals, especially pharmaceutical manufacturers, at least seven of which are reported to be under investigation by the Chinese government including: Baxter International, Inc.; Sanofi, S.A.; AstraZeneca; H.Lundbeck A/S; and GlaxoSmithKline (GSK). In June 2013, four GSK executives, all of whom are Chinese nationals, were detained in connection with bribery allegations. Additionally, a British GSK executive had been barred from leaving the country and returning home. Chinese authorities allege that GSK employees paid nearly $500 million in bribes to Chinese officials and doctors in order to promote sales. These allegations are particularly problematic for GSK given its recent completion of a four-month internal investigation of Chinese business in which it stated it had uncovered no evidence of corruption or bribery. Chinese authorities also detained a salesperson from AstraZeneca. Although the reasons for the detention are still unclear, AstraZeneca emphasized that it has rigorous anti-corruption protocols in place for its Chinese operations.

Russia

On January 1, 2013, a new Russian anti-corruption law took effect that requires corporations doing business in Russia to increase their anti-corruption compliance efforts. The new law also mandates expansive asset disclosures by Russian government officials and their families. The law comes on the heels of Russia becoming a signatory to the OECD Anti-Bribery Convention, which, among other things, establishes international standards for criminalizing bribery of public officials. Furthermore, in May 2013, Russia barred some classes of Russian government officials from using foreign bank accounts and/or owning foreign securities. Although some have criticized the "Law on Foreign Accounts" as merely an attempt to strengthen the Russian economy by pushing more assets in to Russian banks, the Russian government has argued that the measure will prevent corrupt government officials from hiding assets abroad.

India

The serious anti-corruption legislative reform efforts that began in India in 2012 seemed to have stalled somewhat in 2013, but the Indian Parliament gave final approval to an anti-corruption bill in December. The bill empowers an independent ombudsman to investigate corruption involving civil servants and politicians. In addition, Indian law enforcement officials have been actively policing corruption. For example, they recently launched an investigation into a European defense group over bribery allegations related to its procurement of a military hardware contract. An executive of Rheinmetall Defense AG, another European arms-maker, is also under investigation by Indian

[2] The U.K. Financial Services Authority has since been eliminated. It was replaced by the Prudential Regulation Authority and Financial Conduct Authority in April 2013.

authorities for allegedly making corrupt payments to Indian government officials in an effort to prevent the arms-maker from being placed on a government blacklist of corporations suspected of corruption.

Canada

Canadian lawmakers made significant amendments to their Corruption of Foreign Public Officials Act (CFPOA) in 2013. These amendments include: raising the maximum criminal penalties for bribing foreign officials; removing the facilitation payment exception; and adding "book-and-records" provisions. Furthermore, in January 2013, Canadian prosecutors charged Griffiths Energy International, an oil and gas exploration company, with violations of the CFPOA, stemming from allegations that the company made illegal payments to government officials in Africa in order to secure oil and gas leases. At the close of 2013, Canadian authorities had approximately 34 open cases involving potential CFPOA violations. Finally, Canadian authorities secured their first conviction of an individual under the CFPOA in August, a man accused of participating in a conspiracy to bribe Air India.

Brazil

Political protests in Brazil caused a languishing bill – the Brazilian Clean Companies Act – to become law, and will likely bring Brazil in line with OECD anti-corruption standards. The new law establishes strict liability for Brazilian legal entities, as well as foreign legal entities with a "registered office, branch, or representation in the Brazilian territory." It broadly prohibits bribery of public officials, "bid rigging," and other frauds in the procurement process, and efforts to interfere with public agencies' audits or investigations. Sanctions could range from 1% - 20% of an entity's gross revenue from the prior year (or from $3,000 to about $26 million, if revenue is too difficult to calculate). Entities found liable can also be dissolved, suspended, face forfeiture, debarment, loss of public contracts, or prohibitions on government incentives and public financing. Like the FCPA and the Bribery Act, the Clean Companies Act will encourage entities under investigation to cooperate with authorities and disclose suspected wrongdoing. Also like the Bribery Act, the Clean Companies Act gives credit to companies that have effective compliance programs in place. As the law has only recently been promulgated, it is not possible to determine how effective it will be in policing corruption. However, the law will certainly add to the growing tapestry of anti-corruption legislation throughout the world.

Germany

In 2013, German prosecutors aggressively pursued foreign bribery allegations, as highlighted by the criminal charges leveled against Former German President Christian Wulff for allegedly receiving bribes. Wulff was accused of lobbying to help market a movie, *John Rabe*, after the film's producer paid Wulff's expenses worth thousands of euros during a trip Wulff took with his family in 2008.

German lawmakers have also amended national anti-corruption laws to increase monetary penalties ten-fold for internal controls failures and negligent conduct. These amendments to the German Administrative Offenses Act, which became effective June 30, 2013, also gave courts accelerated power to freeze the assets of corporations, making it easier for German courts to pursue corruption cases against foreign entities.

INTERNATIONAL COOPERATION

Finally, in 2013, the trend of cooperation between international regulators continued. As Acting Assistant Attorney General Mythili Raman noted in a speech to the Global Anti-Corruption Conference in June 2013, there has been an "important shift in the anti-corruption realm – the development of stronger anti-bribery enforcement programs in foreign countries, the continuing and encouraging rise in cross-border cooperation, and the increasing efforts of our foreign law enforcement partners to hold individual perpetrators accountable." This shift has been readily apparent in the ongoing cooperation between United States and French authorities in the *Total S.A.* case in 2013. In addition to U.S. penalties described above, Total S.A. may be subject to French enforcement actions, too. In May 2013, French authorities recommended that criminal charges be brought in France against Total S.A., one of its senior officers, and two Iranian nationals.

DOJ and SEC officials also highlighted cross-border cooperation in other enforcement actions this year. In a press release heralding the criminal indictment of two former executives of a French power company for bribing Indonesian officials, DOJ noted that it had "worked closely with its law enforcement counterparts in Indonesia." In other press releases, DOJ noted the assistance of Mexican and Panamanian law enforcement authorities in its prosecution of four former executives of BizJet International Sales and Support, Inc. The SEC acknowledged the

cooperation of the U.K.'s Crown Prosecution Service and Metropolitan Police in its enforcement action against Parker Drilling Company. The DOJ expressed its appreciation for the assistance of German authorities who also assisted in the investigation of Archer Daniels Midland.

If you have any questions concerning the FCPA or how to protect your company against possible FCPA liability, please contact the authors or other attorneys in Venable's Foreign Corrupt Practices Act and Anti-Corruption Group.