

FCPA + Anti-Corruption Developments: 2012 End of Summer Round-Up

While the temperatures rose this summer, the number of Foreign Corrupt Practices Act (“FCPA”) enforcement actions seems to have cooled off for the first time in the last five years. However, the leveling-off in the number of cases is not an indication that US regulators are losing interest in FCPA enforcement. To the contrary, all indications are that the fight against corruption—in the United States and elsewhere—will continue to heat up in the months and years to come.

Here are some highlights:

Spotlight on Individuals

In February 2010, Assistant Attorney General Lanny A. Breuer announced that the prosecution of individuals would be a “cornerstone” of the regulators’ FCPA “enforcement policy.”¹ Mr. Breuer has been true to his word: there has been a spike in actions against individuals. But, the government’s cases against individuals have met with mixed success, with some record-breaking prison sentences, on the one hand, and stinging judicial rebukes, on the other hand.

A. Terra Telecommunications Executives Appeal Sentences in Haiti Teleco Case

This summer, Joel Esquenazi and Carlos Rodriguez, the former president and vice president of Terra Telecommunications Corp., appealed sentences resulting from their convictions in 2011 for seven counts of violating the FCPA and other crimes in connection with a scheme to pay bribes to officials at Haiti Telecom. Esquenazi was sentenced to 15 years in prison, the longest sentence ever imposed in the history of the FCPA. Rodriguez received a sentence of seven years.²

In their appeals filed earlier this year, Esquenazi and Rodriguez challenge the meaning of “foreign official[]”

1. See Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice, *Prepared Address to American Bar Association National Institute on White Collar Crime* (Feb. 25, 2010), available at <http://www.justice.gov/criminal/pr/speeches-testimony/2010/02-25-10aag-AmericanBarAssosiation.pdf>.

2. For further discussion, see Paul Friedman and Ruti Smithline, *Another Successful FCPA Prosecution Against Individuals—More Terra Telecom Execs Appear Headed for Prison for Haiti Bribes*, *Client Alert* (Aug. 9, 2011), available at <http://www.mofo.com/files/Uploads/Images/110809-FCPA-Prosecution-Individuals.pdf>. See also D. Anthony Rodriguez, *Telecom Executive Sentenced to 4 Years in Prison for Violations of the Foreign Corrupt Practices Act*, *Client Alert* (Sept. 13, 2011), available at <http://www.mofo.com/files/Uploads/Images/110913-Prison-for-FCPA-Violation.pdf>.

under the FCPA, and the district court’s jury instruction on the meaning of “instrumentality.” The defendants argue that the government never established that Haiti Teleco performed government functions that would qualify its employees as “foreign officials.” Rather, the DOJ relied on the ownership of Haiti Teleco’s stock by the National Bank of Haiti and the Haitian government’s right to appoint board members and directors.³

In support of their argument, defendants point to a declaration signed by Jean Max Bellerive, then Prime Minister of Haiti, in which he stated that Haiti Teleco is not and has never been a state enterprise. Despite being signed in July 2011, the declaration was not provided to defense counsel until August 10, 2011, six days after the defendants were convicted.⁴ A subsequent declaration prepared by Mr. Bellerive with the government’s assistance, asserts that Bellerive did not know that his first declaration was going to be used in a criminal trial in the United States, that it had been signed strictly for internal purposes, and that Haiti Teleco belonged to the National Bank of Haiti, an institution of the Haitian state. According to defendants, however, Bellerive’s second declaration still confirmed that no Haitian law ever established Haiti Teleco as a “publicly owned institution.”⁵

Both defendants also argue that the district court incorrectly instructed the jury regarding the scope of the term “instrumentality”—a term which the FCPA does not define. The defendants argue that the FCPA’s failure to define the term “instrumentality” is “significant” and warrants construing the term narrowly, rather than grafting into the definition “state-owned or state-controlled entities that are not political subdivisions that perform governmental functions. . . .”⁶

The government’s reply counters that defendants’ narrow construction of the term “instrumentality” is inconsistent with the terms of the FCPA and Congressional intent. The government also asserts that defendants cannot “complain that they were left guessing about the legality of their actions when they could have requested an

3. See Corrected Brief of Appellant, *United States v. Esquenazi*, No. 11-15331-C, at 18 (11th Cir. May 31, 2012).

4. *Id.* at 9-10.

5. *Id.* at 11.

6. *Id.* at 39.

opinion on that question from the Attorney General but did not do so.”⁷

Notably, the scope of the term “instrumentality” has been considered by a number of district courts recently, each of which has agreed with the government’s interpretation. But this will be the first appellate court to consider the issue.⁸ While it is difficult to predict how the appellate court will rule, it seems unlikely that the appellate court’s decision will be groundbreaking, given the consistency in the lower courts’ decisions.

B. After Africa Sting Case Goes Down in Flames, the Government’s Key Informant is Sentenced to 18 Months in Prison

In July 2012, Richard Bistrong, the government’s key informant in the Africa Sting case, was sentenced to 18 months in prison. Bistrong is the only individual to receive jail time in the Africa Sting case, which was at one time heralded by the DOJ as a turning point in the history of FCPA prosecution. In handing down this sentence, U.S. District Judge Richard Leon rejected the government’s request that Bistrong receive a sentence of probation.⁹

After being charged with conspiring to bribe officials to win contracts from several foreign countries for his former employer, Armor Holdings, Bistrong cooperated with the government in a large scale sting operation, the first FCPA investigation to use such investigative techniques. The investigation resulted in the indictment of 22 individuals under the FCPA. After two mistrials, the case fell apart with the government dropping all charges and Judge Leon throwing out guilty pleas previously obtained during the course of the case.¹⁰

Prosecutors sought probation for Bistrong, even as they acknowledged that the sting case ultimately failed.

7. Brief for the United States, *United States v. Esquenazi*, No. 11-15331-C, at 20 (11th Cir. Aug. 21, 2012).

8. The defendant in *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Feb. 21, 2011), pled guilty; the convictions in *United States v. Noriega* (the “Lindsey case”), No. 2:10-cr-01031 (C.D. Cal. 2010), were vacated as a result of prosecutorial misconduct; and *United States v. O’Shea*, No. 4:09-cr-00629 (S.D. Tex. 2012), was dismissed when the judge found insufficient evidence to support the government’s case. For further discussion, see Paul Friedman, Ruti Smithline, and Jarod Taylor, *FCPA Update: Another Challenge to DOJ’s Expansive “Foreign Official” Definition Fails, But Clarifies DOJ’s Burden* (June 2, 2011), available at <http://www.mofo.com/files/Uploads/Images/110602-FCPA-Update.pdf>; Paul Friedman, *Prosecutorial Misconduct Thwarts First-Ever FCPA Jury Conviction of Corporation, Securities Litigation Report*, Vol. 9, Issue 1, Dec. 2011/Jan. 2012, available at <http://www.mofo.com/files/Uploads/Images/120102-Securities-Litigation-Report-Friedman-McKellar.pdf>; Paul Friedman and Demme Doufekias, *Most Severe Setback To DOJ Thus Far In FCPA Prosecutions: Judge Dismisses All Charges In Africa Sting Case* (Feb. 2, 2012), at 2-3, available at <http://www.mofo.com/files/Uploads/Images/120227-Most-Severe-Setback-To-DOJ-Thus-Far-In-FCPA-Prosecutions.pdf>.

9. C. M. Matthews, *Cooperator Gets 18 Months in Complicated Bribery Case*, Wall Street Journal, July 31 2012, available at <http://blogs.wsj.com/corruption-currents/2012/07/31/cooperator-gets-18-months-in-complicated-bribery-case/>.

10. For further discussion, see Paul Friedman and Demme Doufekias, *Most Severe Setback To DOJ Thus Far In FCPA Prosecutions: Judge Dismisses All Charges In Africa Sting Case, Client Alert* (Feb. 2, 2012), available at <http://www.mofo.com/files/Uploads/Images/120227-Most-Severe-Setback-To-DOJ-Thus-Far-In-FCPA-Prosecutions.pdf>.

Although Judge Leon recognized the extent of Bistrong’s cooperation, he stated, “We certainly don’t want the moral of the story to be: Steal big. Violate the law big. Cooperate big. Probation.”¹¹

Increasing Enforcement Activity in Latin America: Focus on Mexico

Not surprisingly, as investment opportunities for multinational companies have increased in Latin America, so has the regulators’ scrutiny. As a result, in recent years, there has been a rise in FCPA enforcement actions involving Latin American countries. In 2011, for example, about a quarter of the DOJ’s cases included a Latin American component. For the first half of 2012, of the seven prosecutions DOJ has initiated, three of them involve allegations of improper payments to government officials in Latin America.

This summer, many of the headlines related to FCPA enforcement actions—both new and old—involved allegations of improper payments specifically in Mexico. There was Wal-Mart, but also in June, for example, FCPA news focused on the government’s decision to drop its Ninth Circuit appeal of the dismissal of the Lindsey Manufacturing Co. indictment involving alleged payments to officials at Mexico’s Comisión Federal de Electricidad (“CFE”).

While a great deal has been written about the *Lindsey* case,¹² the Wal-Mart disclosures and the *Lindsey* case’s connection to Mexico served to highlight the serious risks that foreign companies face when doing business in Mexico.

As the world’s 14th largest economy,¹³ Mexico has great potential for foreign investors. However, according to a recent study by the Business Coordinating Council’s Private Sector Economic Studies Center, the corrupt culture that pervades Mexico has hindered the government’s efforts to attract foreign investment.¹⁴ The study found that companies pay about 10% of their earnings to corrupt government officials.¹⁵

Known as “mordidas”—literally meaning bites—bribes

11. *Supra* note 9.

12. A more detailed discussion of the *Lindsey* case can be found in our earlier Client Alert on this topic, *False Affidavits and Lies Doom First-Ever FCPA Jury Conviction of Cooperation, Client Alert* (Dec. 2, 2011), available at <http://www.mofo.com/files/Uploads/Images/111202-FCPA-Corporation-Trial.pdf>.

13. *APEC Procurement Transparency Standards in Mexico*, Transparency International (2011), available at <http://www.transparency-usa.org/documents/MEXICOCIPETIReportFINAL-June2011.pdf>.

14. *Mexico’s Corruption Makes Foreign Investors Wary*, Washington Post, May 5, 2012.

15. *Id.*

have become a common cost of doing business in Mexico. For many doing business in Mexico, corruption is “an everyday occurrence.”¹⁶ According to Transparency International’s 2011 Corruption Perception Index (“TI Index”), Mexico scored 3 out of 10—with 0 being most corrupt, 10 being least corrupt. Of all the countries surveyed, Mexico ranked 100th place out of 182 countries. That’s about 25 spots lower than China, but 43 spots higher than Russia.

Given the economic opportunities in Mexico, multinational companies are unlikely to cease doing business in the region. Therefore, such companies need to be prepared to address the increased risk of FCPA enforcement by investing in tailored compliance programs.

The Anti-Corruption Fight Goes Global

From the adoption of new anti-corruption compliance laws in a number of countries, to tougher enforcement in countries such as India and France, this summer was a busy season in the global fight against corruption.

A. Transparency International’s Progress Report on OECD Convention Enforcement Shows Moderate Improvement

On September 6, 2012, Transparency International (“TI”) released its Eighth Annual report on the enforcement of the OECD Anti-Bribery Convention.¹⁷ The report concluded that “[t]he overall level of enforcement remains inadequate,” but noted that three countries (Austria, Australia, and Canada) had progressed into the “moderate” category of enforcement.¹⁸ This marked an improvement over the prior year when *no* country had progressed into a higher category.¹⁹

TI uses four categories to rate each country’s level of enforcement: active, moderate, little, and no enforcement.²⁰ Countries are evaluated by the number and significance of their bribery investigations and cases (defined to include criminal prosecutions, civil actions, and judicial investigations).²¹

16. *Id.*

17. Transparency International, *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012* (2012), available at http://issuu.com/transparencyminternational/docs/2012_exportingcorruption_oecdprogress_en?mode=window&printButtonEnabled=false&shareButtonEnabled=false&searchButtonEnabled=false&backgroundColor=%23222222.

18. *Id.* at 4.

19. *Id.*

20. *Id.* at 5.

21. *Id.*

The report acknowledged that anti-bribery efforts face particular challenges in a global recession but cautioned that “[g]overnment leaders must reject arguments that winning foreign orders during the recession justifies condoning foreign bribery.”²² Notably, the report classified seven countries as “active,” including the United States, which led the pack in total number of cases.²³

It will be interesting to see what progress, if any, many of the countries that have adopted stronger anti-corruption stances in recent months—including Russia, a new member of the OECD Anti-Bribery Convention—will make.

B. Will Mexico’s New Law Have Any Bite?

In response to the growing number of corruption-related scandals—many of them detected by US regulators investigating FCPA violations—Mexico increased its efforts to fight corruption this summer. Last year, President Felipe Calderón introduced a new law, the Federal Anti-Corruption Law on Public Procurement (Ley Federal Anticorrupción en Contrataciones Públicas, referred to as “LFACP”). The law is meant to address corruption in the federal procurement process. LFACP applies to both Mexican and foreign nationals participating in the government procurement process or in international business transactions. LFACP lingered in legislative limbo for over a year, but was eventually enacted and then signed by President Calderón on June 8, 2012 and then came into effect on June 12.

Under the new law, violators can face steep fines of up to as much as 30% to 35% of the value of the ill-gotten contract. Violators also face debarment or suspension from participation in government contracts for up to ten years. As with the FCPA, if the offense is committed by an intermediary, both the third party actor and the benefitting individual or company can be held liable. Taking a page from US enforcement of the FCPA, the LFACP credits self-disclosure and cooperation with mitigated penalties.

It is too early to tell what effect—if any—the new law will have in Mexico’s fight against corruption. We will continue to monitor and report on progress.

C. More Countries Join the Global Fight Against Corruption

This summer brought us enforcement actions from two countries that had previously been relatively inactive in enforcing global anti-corruption efforts: India and France.

22. *Id.* at 7.

23. *Id.* at 4, 9. The seven countries with “active” anti-corruption enforcement are: Denmark, Germany, Italy, Norway, Switzerland, the United Kingdom, and the United States.

1. Coalgate in India

In September, India's Central Bureau of Investigation ("CBI") filed its first charges arising out of the so-called "Coalgate" scandal, which rocked the country over the summer.²⁴ In August 2012, the national auditor reported that the government had quietly allocated coal fields to private firms without any competitive bidding from 2004 and 2009—at an estimated loss of as much as \$34 billion in potential revenue for the government.²⁵

The CBI filed charges against five companies and seventeen individuals, including company executives and government officials.²⁶ Investigations are ongoing.

2. Safran Fined in France

On September 5, a French court imposed a 500,000 euro fine on Safran, a securities and defense firm partially owned by the French government.²⁷ The investigating magistrate found that bribes paid to Nigerian officials between 2000 and 2003 had helped the firm secure a 170 million euro contract.²⁸ Earlier, the court had acquitted two executives of charges related to the bribery.²⁹

D. China's Ministry of Health Announces Code of Conduct for Medical Workers

On July 18, 2012, China's Ministry of Health ("MOH") issued a Notice of Code of Conduct for Medical Personnel (the "Code"), containing anti-corruption measures applicable to the country's nearly nine million medical practitioners.³⁰ According to the Deputy Director of the MOH's Department of Medical Administration, the measures are meant to "help to better regulate the practices of China's medical workers, improve medical care quality, and amend the doctor-patient relationship. . . ."³¹

Corruption in the medical sector has been a problem in

24. Ruling Party MP Named as India 'Coalgate' Scandal Widens, Reuters, Sept. 4, 2012, available at <http://www.reuters.com/article/2012/09/04/india-coal-raid-idUSL6E8K4E6520120904>.

25. *Corruption in India: Digging Deeper into the Pit*, The Economist, Aug. 22, 2012, available at <http://www.economist.com/blogs/banyan/2012/08/corruption-india>.

26. Melanie Lansakara, *First 'Coalgate' Defendants Charged*, The FCPA Blog, Sept. 7, 2012, available at <http://www.fcpablog.com/blog/2012/9/7/first-coalgate-defendants-charged.html>.

27. *French Court Fines Safran for Nigerian Bribes*, Reuters, Sept. 5, 2012, available at <http://www.reuters.com/article/2012/09/05/safran-fine-nigeria-idUSL6E8K5CGF20120905>.

28. *Id.*

29. *Id.*

30. *Notice on Issuance of Medical Institution Practitioners Code of Conduct*, Ministry of Health of the People's Republic of China (July 18, 2012), available at <http://www.moh.gov.cn/publicfiles/business/htmlfiles/mohjcg/s3577/201207/55445.htm>.

31. Shan Juan, *Document Regulating Medical Workers Issued*, China Daily, July 19, 2012, available at http://usa.chinadaily.com.cn/china/2012-07/19/content_15598389.htm.

recent years in China, and compliance has been a vexing problem for multinational companies. Doctors and other medical professionals receiving low wages have been accepting bribes from medical device and pharmaceutical companies. The anti-corruption provisions of the MOH's new Code are intended to address such conduct, imposing requirements that will impact healthcare and pharmaceutical companies operating in Mainland China.

The Code prohibits medical practitioners from soliciting or accepting kickbacks or commissions from healthcare companies.³² This includes accepting free medications, medical equipment, and participating in recreational activities organized or paid for by such companies. Practitioners are further prohibited from engaging in medicine and medical device advertisements, insurance fraud, and selling medical appointments. On the treatment side, physicians are discouraged from exaggerating the seriousness of illnesses and providing excessive treatment.

The Code is intended to apply to all medical practitioners including managers, physicians, nurses, technicians, rural doctors, and interns. Practitioners who violate the Code could be subject to sanctions including loss of accreditation or criminal liabilities. It remains to be seen the extent to which the new Code will impact what is seen as a prevalent corruption problem in the medical sector in China.

32. For specific elements of the code, see generally *Notice on Issuance of Medical Institution Practitioners Code of Conduct*, *supra* note 30.

E. The UK Bribery Act 2010—Year One

This summer, the UK Bribery Act 2010³³ (the “Act”) turned one.³⁴ And with the Act’s first birthday, has come much reflection on whether the Act has had the impact that was widely anticipated and speculation on how it will be enforced in the future.

1. A Recap of the Key Provisions of the Act

The Act repealed the existing common law and statutory offenses in the UK and created the following four offenses:

1. The offense of bribing (§ 1)
2. The offense of being bribed (§ 2)
3. The offense of bribing a foreign public official (§ 6)
4. The corporate offense of failing to prevent person acting on their behalf from engaging in bribery (§ 7)

The Act has extraterritorial effect and will apply to any organization that carries on part of its business in the UK even if that organization is incorporated elsewhere. Further, it is immaterial whether the relevant acts or omissions take place outside of the UK.

2. Prosecutions Under the Act

The Act created a more robust legislative framework under which domestic and international bribery and corruption offenses may be prosecuted in the UK. Since the Act came into force, however, there has been only one prosecution brought under the Act. In October 2011, Munir Yukab Patel, a clerk at Redbridge Magistrates’ Court became the first, and to date only, person to be convicted under the Act. Between February 2009 and August 2011, Mr. Patel had requested low-level bribes from members of the public as payment for failing to enter details of traffic offenses on a court database. Mr. Patel pled guilty to an offense under the Act and an offense of misconduct in a public office and was sentenced to three years for bribery and six years for misconduct in a public office (reduced to four years on appeal).³⁵

33. The full text of the UK Bribery Act 2010 is available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

34. A detailed analysis of the key provisions of the Act can be found in our earlier Client Alert on this topic, *Ministry of Justice Publishes Consultation Paper on the UK Bribery Act 2010* (Sept. 30, 2010), available at <http://www.mofo.com/files/Uploads/Images/100930-UK-Bribery-Act-2010.pdf>. An analysis of the March 30, 2011 Ministry of Justice guidance regarding the “adequate procedures” defense can be found in another Client Alert, *UK Bribery Act to Come Into Force on 1 July 2011* (Mar. 31, 2011), available at <http://www.mofo.com/files/Uploads/Images/110330-UK-Bribery-Act.pdf>.

35. *R v. Patel*, [2012] EWCA (Crim.) 1243.

To date, however, there have been no prosecutions of corporate entities or corporate executives under the Act. Critics of the Act have noted that the prosecution of a court clerk is hardly the international corporate corruption that the Act was enacted to tackle.

There are two main reasons for the dearth of high profile prosecutions of corporate entities and their executives under the Act to date.

The first is that the Act is not retroactive. The Act only applies to offenses committed from July 1, 2011 onwards; any acts committed prior to that date fall under the old regime. It is often the case that corrupt conduct goes undiscovered for some time and upon its discovery it may take the authorities a number of years to properly investigate the alleged corrupt conduct. Second, in order to mount a high profile, high value prosecution, a long and detailed investigation is required. The cost of mounting a successful prosecution is considerable and, in these times of austerity, the authorities will want to ensure that the investigations undertaken warrant this significant investment of resources.

By way of example, in 2012, the Serious Fraud Office (the “SFO”) successfully secured the convictions of a number of senior executives of a UK subsidiary of a US domiciled company related to corruption offenses involving senior government officials in Asia and the Middle East.³⁶ Although these convictions were secured in 2012, the offenses occurred between February 2002 and December 2008 (over ten years after the date of the first offense) and these convictions were under the previous legislation after a lengthy and costly investigation.

3. So What has Changed in the Last Year?

To date, the biggest impact of the Act has been to foster a corporate culture which promotes a zero-tolerance approach to bribery. Prior to the implementation of the Act, the former Secretary of State for Justice, Mr. Jack Straw, recognized that “[a] strong legal architecture is necessary in tackling corruption but of itself it is not sufficient. Ultimately our aim must be to bring about [behavioral] change within businesses themselves, creating corporate cultures in which no form of corruption is tolerated.”³⁷ By creating the corporate offense of failure to prevent bribery, the Act has brought

36. SFO Press Release, *Innospec Ltd.: Former CEO admits bribery to falsify product tests* (July 30, 2012), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-ceo-admits-bribery-to-falsify-product-tests.aspx>.

37. These statements were made by Jack Straw (Member of Parliament) in his address to the 5th European Forum on Anti-Corruption held on June 23, 2009.

anti-bribery and corruption policies to the forefront of the corporate agenda. Since the Act received Royal Assent we have seen a large number of corporate entities, domiciled in numerous jurisdictions and operating in diverse sectors, commit significant time and investment to reviewing and improving their anti-corruption policies. The aim of this prudent approach is to enable these entities to demonstrate that they have “adequate procedures” in place in the event of an allegation under section 7 of the Act.³⁸

It is inevitable that there will be high profile prosecutions under the Act in the future. In September 2012, David Green QC, the director of the SFO, stated that the SFO “ha[s] some Bribery Act investigations in the pipeline,” indicating that despite the lack of prosecutions to date there is no room for complacency.³⁹ This issue must therefore remain high on the corporate agenda. Commercial organizations affected by the Act should continue to review their anti-corruption policies and procedures to ensure that they are in line with the Act, and carefully monitor the implementation of these policies across all jurisdictions.

SEC’s Growing Sources of Information Could Mean an Increase in Enforcement Actions

A. SEC “Open for Business,” Pays Out \$50,000 in First Whistleblower Bounty under Dodd-Frank

On August 21, 2012, just over a year since the Dodd-Frank Wall Street Reform and Consumer Protection Act’s whistleblower program went into effect, the SEC announced its first whistleblower bounty.⁴⁰ The \$50,000 awarded represents 30% of the amount collected in the SEC enforcement action, the maximum payment allowed under the program.

The SEC’s announcement noted that the whistleblower, who wished to remain anonymous, provided the SEC with documents and “other significant information” that led to more than \$1 million in court-ordered sanctions, of which \$150,000 has been collected.⁴¹ The whistleblower’s award will increase as additional sanctions are collected. The SEC did not disclose the

38. The full text of the Ministry of Justice Guidance is available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

39. These remarks were made by David Green (Queen’s Counsel) to the Daily Mail newspaper. See Dan Atkinson, *SFO boss David Green Act to End Fears of Bribery Charges over Hospitality*, Daily Mail, Sept. 1, 2012, available at <http://www.dailymail.co.uk/money/news/article-2196824/SFOs-Green-acts-end-fears-bribery-charges-hospitality.html?ITO=1490>.

40. SEC Press Release, *SEC Issues First Whistleblower Program Award* (Aug. 21, 2012), available at <http://www.sec.gov/news/press/2012/2012-162.htm>.

41. *Id.*

name of the company that was fined, the nature of the fraud, or the whistleblower’s connection to the company. Notably, the SEC rejected the claim of a second individual seeking a bounty in the same matter because that individual’s information did not lead to or significantly contribute to the enforcement action. Nonetheless, the Chief of the SEC’s Whistleblower Office, Sean McKessy, proclaimed “we are open for business and ready to pay people who bring us good, timely information.”⁴²

With an estimated 8 tips a day rolling into the SEC’s Whistleblower Office—a rate that will likely increase with the substantial publicity surrounding this first award—additional bounty awards are likely to follow in the coming months. As more awards are handed out, it is also very likely that the number of tipsters will continue to grow as individuals seek to capitalize on the SEC’s promised bounties.

B. SEC Mines Information from Resource Extraction Issuers: FCPA Effects

On August 22, 2012, as mandated by the Dodd-Frank Act, the SEC adopted new rules requiring resource extraction issuers to annually disclose certain payments made to the US federal government or to foreign governments.⁴³ These rules will subject affected issuers to heightened scrutiny by the SEC, and could result in a short-term increase in the number of enforcement actions against resource extraction issuers. Affected companies, therefore, should use upcoming disclosure deadlines as an opportunity to bolster their FCPA compliance programs.

The SEC’s new rules apply to companies required to file annual reports with the SEC and that engage in the commercial development (i.e., the exploration, extraction, processing, and export or the acquisition of a license for any such activity) of oil, natural gas, or minerals.⁴⁴ Disclosable payments are ones made to further the commercial development of oil, natural gas, or minerals; are not *de minimis* (\$100,000 or more in either a single payment, or a series of related payments, whether made monetarily or in-kind); and fall into at least one of the specified categories, which include taxes, royalties, fees, production entitlements, bonuses, dividends, and payments for infrastructure improvements.⁴⁵ An issuer must disclose payments that it, a subsidiary, or any other entity under the

42. *Id.*

43. SEC Press Release, *SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers* (Aug. 22, 2012), available at <http://www.sec.gov/news/press/2012/2012-164.htm>.

44. *Id.*

45. *Id.*; see also SEC Final Rule Release, *Disclosure of Payments by Resource Extraction Issuers*, Release No. 34-67717, at 64-65, available at <http://www.sec.gov/rules/final/2012/34-67717.pdf>.

issuer's control, makes to the US federal government or to a national or subnational foreign government (defined broadly to include a department, agency, instrumentality, or company that is majority-owned by a foreign government).⁴⁶

The new rules require affected issuers to file with the Commission annually a new Form SD that specifically itemizes:

- Type and total amount of payments made for each "project" (left undefined by the SEC);
- Type and total amount of payments made to each government;
- Total amounts of payments by category;
- Currency used to make the payments;
- Financial period in which the payments were made;
- Business segment of the resource extraction issuer that made the payments;
- The government that received the payment, and the country in which that recipient is located; and
- Project of the resource extraction issuer to which the payments relate.⁴⁷

The filings thus provide the SEC with a detailed roadmap of a company's foreign operations. Any ambiguities in the disclosures could spur follow-up government inquiries, which could evolve into expansive FCPA enforcement investigations, and the SEC may actively scour Forms SD for information indicating potential violations. Although self-policing and self-reporting has previously played a driving role in the initiation of many FCPA enforcement actions, resource extraction issuers may experience an uptick in the number of government-initiated investigations as a result of the new Forms SD.

Resource extraction issuers should ensure the

46. In prior FCPA enforcement actions, the government labeled as "foreign officials" employees of foreign state-owned entities, even when the state owns less than half of the entity. See, e.g., several Bonny Island, Nigeria actions (DOJ Press Release, *Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty* (Jan. 17, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>) (noting that Nigeria LNG Ltd. was only 49% owned by a government agency) and *SEC v. Alcatel-Lucent*, No. 1:10-cv-24620 (complaint at <http://www.sec.gov/litigation/complaints/2010/comp21795.pdf>) (alleging that state owned 43% of Telekom Malaysia Berhad). The SEC's new rules define "foreign government" to include companies with majority state ownership, thus implying that employees of less than 50% state-owned enterprises would not be "foreign officials." The Department of Justice has rejected any connection between the FCPA and the SEC's new resource extraction disclosure rules on this point. See Brief for the United States, *U.S. v. Esquenazi*, No. 11-15331-C at 34 n.10 (11th Cir. Aug. 21, 2012).

47. SEC Press Release, *SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers* (Aug. 22, 2012), available at <http://www.sec.gov/news/press/2012/2012-164.htm>.

sufficiency of their FCPA compliance programs well in advance of the first Form SD filing deadline (within 150 days of the entity's fiscal year-end, starting after September 30, 2013).⁴⁸ Affected issuers may be able to leverage existing compliance programs to serve dual FCPA-Form SD purposes. In many respects, creating and enforcing controls designed to identify and track potentially disclosable payments on a Form SD will likewise result in tighter FCPA compliance, and the annual recurrence of filing a Form SD may help issuers efficiently impose increased regularity and rigor to their existing FCPA compliance programs. Indeed, for some resource extraction issuers, the looming Form SD initial filing deadline may provide an opportunity to create an appropriate FCPA compliance program. A resource extraction issuer will be better able to address SEC follow-up questions to the new Form SD if the issuer has an established, tailored compliance program in place.

Update on Anticipated DOJ and SEC Guidance

It has been nearly a year since DOJ's Assistant Attorney General Lanny A. Breuer said that, in 2012, the DOJ—jointly with the SEC—expected to "release detailed new guidance on the [FCPA's] criminal and civil enforcement provisions," in what Breuer hoped would be "a useful and transparent aid." Summer came and went without any guidance. And now, as it turns to fall, there was reason to believe that the release of such guidance was now imminent. Commentators predicted that the guidance would be issued before a meeting of the Organisation for Economic Co-operation and Development's anti-bribery working group, scheduled for October 10, 2012 in Paris. With that date likely passing without any guidance being released, it is more likely that the guidance will be issued, as said by a DOJ spokesperson, before the end of the year.

Prominent business groups and legal organizations have outlined their expectations (and hopes) for the DOJ guidance. The guidance is seen by many as an opportunity to bring much needed reform to FCPA enforcement.

Nevertheless, few official details have been released about what specific issues the guidance might address. In April 2012, just prior to attending a legal roundtable with the US Chamber of Commerce's Institute for Legal Reform about their wish list for the guidance,⁴⁹ Mr. Breuer stated in an interview that the commitment to enforcing the FCPA has

48. *Id.*

49. See D. Anthony Rodriguez, *Top Enforcement Officials Meet with U.S. Chamber of Commerce Regarding FCPA Guidance*, *Client Alert* (Apr. 13, 2012), available at <http://www.mofo.com/files/Uploads/Images/120413-FCPA-Guidance.pdf>.

never been greater, and that he sees this trend continuing. Mr. Breuer also discussed the guidance, stating that he is hopeful that observers will credit the DOJ and the SEC with having worked hard and having taken concerns into consideration. He did not discuss any specifics, and did not set a date for releasing the guidance.

Giving a glimmer of hope that the guidance was on its way, at a June 5, 2012 FCPA program sponsored by the American Bar Association's Criminal Justice Section, Deputy Assistant Attorney General John Buretta explained that the DOJ and the SEC were "well along" in crafting a document that he hoped would provide helpful advice. He added that the agencies had taken the comments they received from observers of the process very seriously, and that the guidance would discuss many aspects of the FCPA, including compliance programs and the foreign officials and foreign instrumentalities issues.⁵⁰ These issues were among those specifically raised by the Chamber, as were the extent of parent company liability over the activities of subsidiaries, standards for pre- and post-acquisition due diligence, a *de minimis* standard for gifts and hospitality expenses that will not ordinarily trigger enforcement action, corporate liability standards, and making information available about "declination decisions."⁵¹

With regard to guidance on due diligence for mergers and acquisitions and the issue of successor liability, DOJ has demonstrated its evolving theory in a handful of settlements over the past few months. Most notably, DOJ seems to be relaxing the timeline for conducting such diligence when compared to the strict requirements set forth in the Halliburton Opinion Procedure Release 08-02, which set forth aggressive deadlines for conducting a post-close review and reporting findings.⁵² For example, the *Data Systems* and *Bizjet* deferred prosecution agreements require that the companies conduct "appropriate risk-

based" anti-corruption due diligence for potential mergers and acquisitions, implement anti-corruption policies and procedures "as quickly as practicable," and conduct FCPA-specific audits of newly acquired or merged businesses "as quickly as practicable."⁵³ Similarly, *Pfizer's* deferred prosecution agreement requires that "when practicable and appropriate on the basis of an FCPA risk assessment," new entities should be acquired only after anti-corruption due diligence is conducted, and that when such pre-acquisition diligence is appropriate but not practicable, that it be conducted subsequent to the acquisition.⁵⁴ Like the *Bizjet* and *DS&S* settlements, *Pfizer* is required to implement policies "as quickly as practicable," but unlike *Bizjet* and *DS&S*, *Pfizer* has a deadline of "no more than one-year post-closing."⁵⁵ These and other similar settlements suggest that while DOJ will continue to insist on appropriate due diligence, audits, and policy implementation à la Halliburton, that DOJ is moving toward a more flexible approach with regard to the timing of such actions. It remains to be seen how these topics will be reflected in the upcoming guidance.

CONCLUSION

The Summer 2012 developments have reinforced that the government's aggressive enforcement of the FCPA remains a hot priority. While the promised DOJ guidance may give some additional contours to FCPA enforcement, with the increased heft and breadth of the global fight against corruption, companies are well advised to make anti-corruption compliance a top priority.

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50. Comments of John Buretta, Deputy Assistant Attorney General, Criminal Division, Department of Justice, *The New Era of FCPA Enforcement and the Collapse of the Africa Sting Cases: Time to Reevaluate?*, program sponsored by American Bar Association Criminal Justice Section and ABA Center for Continuing Legal Education in cooperation with Dorsey & Whitney LLP and Pepper Hamilton LLP (June 5, 2012).

51. See *supra* note 49.

52. DOJ Opinion Procedure Release 08-02 (June 13, 2008).

53. *United States v. BizJet Int'l Sales and Support Inc.*, No. 4:12-CR-00061, at C-6 (N.D. Okla. Mar. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf>; *United States v. Data Systems & Solutions LLC*, No. 1:12-CR-00262, at C-6 (E.D. Va. June 18, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-dpa.pdf>.

54. *United States v. Pfizer H.C.P Corp.*, No. 1:12-CR-00169, at C.2-6, C.2-7 (D.D.C. Aug. 7, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf>.

55. *Id.*

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