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FCPA Snapshot - 2012

VENABLE LLP

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FCPA TEAM MEMBERS

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

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

Jan Handzlik, Co-Chair - Author
jlhandzlik@Venable.com
310.229.0378

Victoria Danta - Author
vrdanta@Venable.com
212.370.6248

Robert L. Meyerhoff – Author
rlmeyerhoff@Venable.com
212.305.0555

Ashley Craig
awcraig@Venable.com
202.344.4351

Geoffrey Garinther
grgarinther@Venable.com
202.344.4919

Nancy Grunberg
nrgrunberg@Venable.com
202.344.4730

W. Warren Hamel
wwhamel@Venable.com
410.244.7563

Treazure Johnson
trjohnson@Venable.com
202.344.4418

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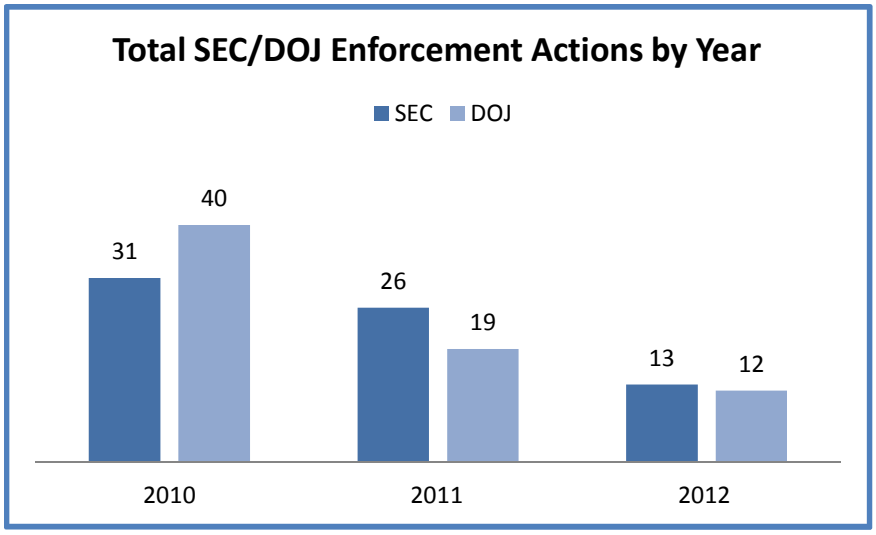
SUMMARY

In 2012, DOJ and the SEC brought 25 new Foreign Corrupt Practices Act ("FCPA") enforcement actions, a significant decrease from the number of FCPA enforcement actions brought in 2011 (45) and the prolific 2010 (71). However, there is no reason to suspect that DOJ and the SEC are losing their zeal for enforcement. Rather, it is likely that DOJ and the SEC are juggling the approximately 150 open investigations and were distracted by the drafting of their comprehensive FCPA Resource Guide, which was released in November 2012, as well as several trials.



Many trends from 2011 continued into 2012, including DOJ's and the SEC's willingness to reward companies for their swift voluntary disclosure and ongoing cooperation. In at least one significant case (*U.S. v. Peterson*), DOJ and the SEC declined to bring an enforcement action against the individual defendant's corporate employer, financial services giant Morgan Stanley, noting Morgan Stanley's rigorous FCPA compliance program, voluntary disclosure, and cooperation. In addition, the trend away from using independent compliance monitors/"consultants," in favor of self-monitoring and periodic self-reporting, continued. DOJ's and the SEC's targeting of the health care and life sciences industries continued to bear fruit. Indeed, more than half of DOJ's FCPA enforcement actions this year were brought against medical device manufacturers and/or pharmaceutical companies.

Thomas Kelly, Jr.
tjkelly@Venable.com
202.344.4889

George Kostolampros
gkostolampros@Venable.com
202.344.8071

Doreen Martin
dsmartin@Venable.com
212.983.1179

Karl Racine
karacine@Venable.com
202.344.8322

Seth Rosenthal
sarosenthal@Venable.com
202.344.4741

Michael Schatzow
mschatzow@Venable.com
410.244.7592

Michael Sherman
mdsherman@Venable.com
202.344.4558

Raymond Shepherd, III
rvshepherd@Venable.com
202.344.4745

Winifred Weitsen
wmweitsen@Venable.com
202.344.8224

D. Edward Wilson
dewilson@Venable.com
202.344.4819

On the trial front, the government continued to experience significant setbacks. In early 2012, the government dismissed the charges against the remaining *SHOT Show* defendants, with the judge noting that the dismissal closed a "long and sad chapter of white collar criminal enforcement." In May, the government dropped its appeal in *Lindsey Manufacturing*, in which Venable LLP's Jan Handzlik was counsel to Lindsey Manufacturing and Dr. Keith Lindsey. The District Court had previously dismissed the convictions for prosecutorial misconduct.

FCPA legislative reform efforts seemed to fade away in 2012, with the issuance of DOJ's and the SEC's highly-anticipated "FCPA Guidance" in November. The Guidance, while not providing much that is new, nevertheless sheds light on DOJ's and the SEC's enforcement priorities and is a comprehensive and helpful reference manual for the FCPA. Meanwhile, the implementation of the Dodd-Frank Whistleblower Provisions, which monetarily reward those who provide information that results in a successful enforcement action, are poised to impact the enforcement landscape. Approximately 4% of the 3,001 tips received through the Dodd-Frank Whistleblower Program during its first year were FCPA-related.

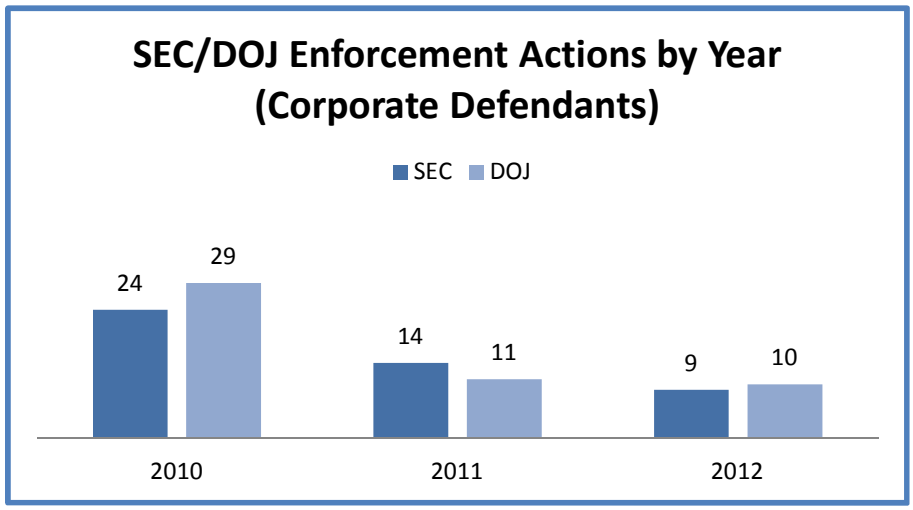
In 2012, countries other than the United States continued to be active in policing global corruption. July 2012 marked the one-year anniversary of the U.K. Bribery Act taking effect. Countries like China and India have passed (or are considering) new measures to strengthen their anti-bribery prohibitions. And some European nations, including France and Germany, have ramped up their prosecutions of individuals and corporations for foreign bribery. All this adds an additional layer of complexity to anti-corruption compliance for multi-national corporations.

At the same time, some trends from 2011 ebbed in 2012—most notably, the trend of bringing FCPA enforcement actions against individuals. In 2012, only five people were criminally or civilly charged with FCPA violations, compared to 20 people in 2011, and 18 in 2010. It will be interesting to see whether this is a permanent decline, given the difficulties at least DOJ has encountered in its prosecution of individuals.

STATISTICS

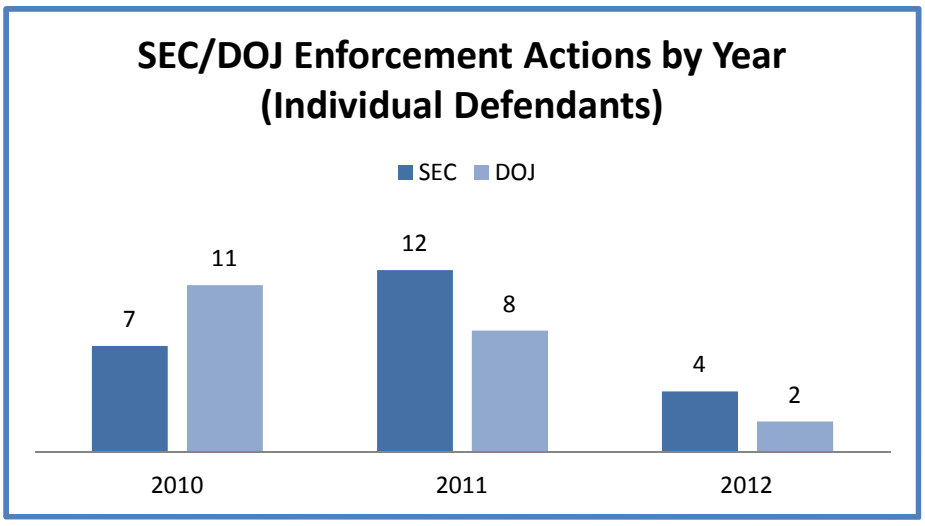
Corporate Defendants

- In 2012, DOJ brought ten enforcement actions against corporate defendants, compared with 11 in 2011, and 29 in 2010.
- The SEC brought nine enforcement actions against corporate defendants in 2012, compared with 14 in 2011, and 24 in 2010.



Individual Defendants

- In 2012, DOJ brought only two enforcement actions against individual defendants, compared with 8 in 2011, and 11 in 2010.
- Meanwhile, the SEC brought four actions against individual defendants in 2012, compared to 12 in 2011, and 7 in 2010.



- Despite the downtick in the number of new enforcement actions against individuals, numerous individuals pleaded guilty, were convicted, or sentenced in 2012.

Fines/Penalties

- In 2012, DOJ and the SEC combined imposed approximately $263.8 million in sanctions. 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 in 2011 and 2012 that many sanctions were substantially reduced due to the defendants' early self-reporting and continued cooperation. In addition, in *In re NORDHAM Group Inc.*, DOJ imposed a fine below the standard range under the U.S. Sentencing Guidelines because the defendant demonstrated, to DOJ's satisfaction, pursuant to Section 8C3.3 of the U.S. Sentencing Guidelines, that a fine at or above the standard range would substantially jeopardize the defendant's continued viability.

Industry Targets

- As in 2011, a large portion of DOJ's and the SEC's enforcement actions in 2012 involved corporate and/or individual defendants in the health care and life sciences industries, namely, pharmaceutical and/or medical device manufacturers (6 enforcement actions). This should come as no surprise to FCPA historians, who will recall Assistant Attorney General Lanny Breuer's warning in 2009 that "big pharma" would be a high-priority target for FCPA enforcement.
- Other industries affected in 2012 include:
    - Logistics and manufacturing (3 enforcement actions);
    - Energy (2 enforcement actions);
    - Aviation (2 enforcement actions); and
    - Technology and telecommunications (1 enforcement actions).

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

In 2012, half of all enforcement actions against corporations were brought against non-U.S.-based companies, and no enforcement actions were brought against non-U.S.-based individuals.

RESOLUTIONS

- We have previously noted a trend away from the use of independent monitors/"consultants" as part of deferred- and non-prosecution agreements to resolve FCPA violations. In 2012, that trend continued, with provisions requiring companies to retain monitors/"consultants" appearing in only four agreements (*Marubeni*, *Smith & Nephew,*[1] *Biomet,* and *Eli Lilly*). At the same time, half of the deferred- and non-prosecution agreements in 2012 included provisions for continued self-monitoring and periodic self-reporting.
- Moreover, of the 9 companies that received non-prosecution or deferred prosecution agreements from DOJ in 2012, all reportedly had their fines/penalties reduced due to early self-reporting and ongoing cooperation. In certain settlements, DOJ highlighted the ingredients of "extraordinary cooperation," including, among other things, extensive internal investigations, making both

[1] In *Smith & Nephew* and *Biomet*, DOJ adopted a "hybrid" approach to monitoring, whereby the defendants were required to retain outside compliance monitors for the first 18 months of their three-year deferred prosecution agreements, and then to self-report to DOJ for the remaining 18 months.

U.S. - and non-U.S.-based employees available for interviews, as well as collecting, analyzing, and organizing voluminous evidence and information for DOJ.

  - Three of these non-prosecution and deferred prosecution agreements included provisions related to the companies' M&A activities, namely, specific requirements to conduct pre-transactional FCPA due diligence and to report any negative findings to DOJ, as well as to ensure that newly acquired/created entities are subject to the same rigorous anti-corruption compliance policies and training as the acquiring company. These provisions were foreshadowed to some extent by the increasing number of enforcement actions posing successor liability issues and, of course, DOJ's Opinion Procedure Release 08-02, which set forth due diligence measures that Halliburton would be required to follow in order to avoid FCPA liability for the activities of an acquisition target.[2]
  - The non-prosecution agreement between DOJ and Tyco International, Ltd. included some other noteworthy provisions, namely, the requirements: (1) to terminate employees responsible for the improper payments and the falsification of company books and records; (2) to sever the contracts with the responsible third-party agents; and (3) to close subsidiaries that were found guilty of compliance failures (*In re Tyco International, Ltd.*).
    - The non-prosecution agreement between DOJ and Tyco was also noteworthy for a separate reason—it is the second settlement between DOJ and Tyco in a decade, stemming from the same investigation. In 2006, Tyco paid a $50 million penalty to the SEC to resolve allegations that its Brazillian and South Korean subsidiaries made improper payments to foreign government officials. The settlement with the SEC also included a requirement to conduct an extensive FCPA audit of Tyco's world-wide operations, which, in turn, uncovered additional suspected illicit payments in a number of countries. Although Tyco's 2012 settlement was limited to post-2006 violations, its settlement with DOJ included references to allegations of misconduct reaching back to 1999.

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

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

  - Clear internal guidelines prohibiting bribery and other corrupt payments in the form of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment;

[2] These measures included a comprehensive, risk-based FCPA and anti-corruption due diligence work plan, which would address, among other things, the use of agents and other third parties; commercial dealings with state-owned customers; any joint venture, teaming, or consortium arrangements; customs and immigration matters; tax matters; and the need for any government licenses or permits. *See also* DOJ Opinion Procedure Releases 2003-01, 2004-02, 2008-01, and 2008-02, all of which relate to pre-transactional FCPA-related due diligence.

- Regular updating of internal policies to reflect recent regulatory developments and specific risks;
- Frequent training of employees and agents on internal policies, the FCPA, and other anti-corruption laws. According to a DOJ press release, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. Peterson, himself, was trained seven times and reminded of his obligations to comply with the FCPA at least 35 times;
- Close and regular monitoring of transactions posing corruption risks;
- Random audits of employees, transactions, and entire business units;
- Frequent testing to identify illicit payments;
- Extensive pre-transactional due diligence on all new business partners; and
- Even more stringent controls on any payments made to business partners.

Whereas Morgan Stanley was commended by DOJ for its compliance measures, which DOJ acknowledged were specifically calculated to eliminate bribery and corruption within the company, Peterson was sentenced to 9 months in prison.

- Lufthansa/BizJet: In March 2012, DOJ announced a settlement with BizJet International Sales & Support ("BizJet"), an Oklahoma-based aircraft maintenance, overhaul, and repair outfit accused of bribing officials of the Mexican federal police, two Mexican state governments, and a Mexican aviation authority, as well as officials of the Panamanian aviation authority, in exchange for aircraft services contracts. Under its deferred prosecution agreement, BizJet became obligated to pay approximately $11.8 million in criminal penalties and to implement significant FCPA compliance measures. Lufthansa, A.G., BizJet's indirect parent, also entered into a non-prosecution agreement with DOJ, despite having no direct involvement in the underlying FCPA violations. Lufthansa admitted, accepted, and acknowledged responsibility for BizJet's conduct and committed to ongoing cooperation with DOJ and its own set of rigorous FCPA compliance measures. According to some commentators, the *Lufthansa/BizJet* case presents a new twist to FCPA vicarious liability: a parent company being held accountable for the conduct of its subsidiary without any apparent discussion in the charging documents/press releases of the parent company's role in the underlying FCPA violation.

    - The *Lufthansa/BizJet* case was not the only resolution in 2012 to present parent-subsidiary issues. Nearly all of the SEC's settlements with corporate defendants in the second half of 2012 stemmed from improper payments by the defendants' non-U.S. subsidiaries. In those cases, including *Pfizer/Wyeth*, *Oracle*, and *Orthofix International,* the defendants' conduct appears to have been limited to: (1) the failure to identify improper payments in their subsidiaries' books and records, and (2) the incorporation of information from their subsidiaries' books and records into their own books and records, which they necessarily incorporated into filings with the SEC. There were no allegations of improper payments or willful blindness at the parent-level. However, in *Eli Lily and Co.*, the SEC alleged that the parent company was aware of the possible FCPA violations by its Russian subsidiary but did not stop the suspect "marketing program" for five years. The company was required to disgorge $13,955,196 in profits, plus $6,743,538 in prejudgment interest, and to pay $8.7 million dollars in civil penalties. In *Allianz SE*, the company received a complaint in 2005, and an audit was conducted, but the violations continued. It was only a second complaint in 2009 that

launched an internal investigation, which led to a resolution. The corporation was required to disgorge $5,315,649 in profits, pay a civil penalty in the same amount, and to pay $1,765,125 in prejudgment interest.

INVESTIGATIONS

By the end of the second quarter in 2012, approximately 90 public companies had announced they were under investigation by DOJ and the SEC, including Hewlett-Packard, Avon, Las Vegas Sands, Deere & Co, and 3M. Approximately 150 companies, public and private, all are said to be under investigation. Perhaps the most public investigation of 2012, however, concerned mega-retailer Wal-Mart and its Mexican subsidiary, Wal-Mart de Mexico. On April 25, 2012, the New York Times ran an article alleging that, in the early 2000s, Wal-Mart de Mexico made a string of improper payments in conjunction with obtaining construction permits to build retail stores throughout Mexico. Wal-Mart has taken steps to strengthen its FCPA compliance and launched a comprehensive internal investigation. So far, no formal enforcement action has been taken against Wal-Mart or its Mexican subsidiary by either DOJ or the SEC. Recent reports indicate that Wal-Mart has expanded its initial FCPA audit/investigation beyond Mexico to include Brazil, China, South Africa, and India. These efforts reportedly cost the company $157 million in 2012, and the company expects to spend at least $40 million dollars in the first quarter of 2013.

TRIALS AND OTHER LITIGATION

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

- The "*SHOT Show*" Defendants: In 2010, DOJ unsealed the indictments of 22 executives and employees of military and law enforcement suppliers who allegedly attempted to bribe a fictitious defense minister of Gabon 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 represented the first successful challenge to the government's expansive interpretation of the FCPA's jurisdictional provisions. In light of these setbacks, the government "dismissed" the "*SHOT Show*" indictments in 2012, closing what District Court Judge Richard Leon termed a "long and sad chapter of white-collar criminal enforcement."
- *O'Shea/ABB*: Individual defendant John O'Shea, a former general manager and vice president of a unit of ABB Ltd., also went to trial in 2011. O'Shea 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.

- *Lindsey Manufacturing*: In 2011, the District 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.

  Although initially the government sought to appeal the ruling, in May 2012, the government filed a motion to voluntarily dismiss the case and drop its appeal.

- *Magyar Telecom*: In late 2011, the SEC sued three former Magyar Telecom employees for violations of the FCPA. In 2012, the defendants moved to dismiss the complaint, partly on jurisdictional grounds. They argued that the SEC's sole basis for territorial jurisdiction was legally insufficient, i.e., that it was not enough that one defendant located outside the U.S. sent/received e-mail messages in furtherance of the alleged bribery scheme to another defendant outside the U.S., which, unbeknownst to the defendants, were routed through a U.S. server. The SEC replied that it was "beyond dispute" that the use of the internet is an instrumentality of interstate commerce, and FCPA defendants do not need to know their e-mail traffic is being routed through the U.S. in order to bring their conduct within the statute. In February 2013, the district court denied the defendants' motion to dismiss, finding that there is no *mens rea* requirement attached to the use of instrumentalities of interstate commerce under the statute. Thus, defendants' intent–or lack thereof–to use an instrumentality of interstate commerce was irrelevant. In addition, the court rejected the defendants' challenge to the extraterritorial reach of the FCPA, finding that the company's securities were listed on the NYSE/registered with the SEC, and that the defendants' conduct was specifically intended to violate U.S. securities laws.

- Noble Corporation Executives: In February 2012, the SEC charged two former Noble Corporation employees with alleged FCPA violations stemming from Noble's alleged payment of money to Nigerian customs officials, in order to extend temporary oil rig importation permits.[3] Defendants moved to dismiss the complaint, arguing, among other things, that it failed to plead that the payments in question were not "facilitating payments" and therefore outside the scope of the FCPA. The court granted this portion of the defendants' motion and held that it was the SEC's burden to plead facts showing that the "facilitation payment" exception did not apply. The court granted the SEC leave to amend its complaint and replead these allegations.

SENTENCES

As set forth below, the sentences handed down in 2012 have generally involved substantial prison time:

- Jean Rene Duperval was sentenced to 9 years in prison for his involvement in the *Haiti Telecom* case. Duperval, the first foreign official to stand trial in an FCPA case, appealed his conviction to the 11th Circuit, arguing that the FCPA does not apply to payments made to state-owned enterprises that are not performing government functions.

[3] On February 24, 2012, a third Noble employee settled charges with the SEC, agreeing to pay a $35,000 civil penalty.

- Juan Vasquez received 36 months' probation for his involvement in the *Latin Node* case.
- Albert Jack Stanley was sentenced to 30 months in prison. Stanley's preliminary sentence was 84 months, but it was reduced for cooperation.
- Manuel Caceres was sentenced to 23 months in prison for his involvement in the *Latin Node* case.
- Fernando Basurto was sentenced to time served after spending 22 months in prison for his involvement in the *ABB* case.
- Jeffrey Tesler was sentenced to 21 months in prison.
- Robert Antoine was sentenced to 18 months in prison for his involvement in the *Haiti Telecom* case. Antoine was originally sentenced to four years, but received a reduced sentence after prosecutors filed a motion to reduce his prison term for his cooperation with law enforcement.
- Richard Bistrong, DOJ's key cooperating informant in the "SHOT Show" prosecutions, was sentenced to 18 months in prison. Bistrong was the only one of the "SHOT Show" defendants to be sentenced in 2012.
- Paul Cosgrove was sentenced to 13 months home confinement for his involvement in the *CCI* case.
- Patrick Joseph was sentenced to one year and one day in prison for his involvement in the *Haiti Telecom* case.
- Manuel Salvoch was sentenced to 10 months in prison for his involvement in the *Latin Node* case.
- Wojciech Chodan received a year of probation.
- Garth Peterson was sentenced to nine months in prison for attempting to bribe an official at a Chinese state-owned enterprise, as part of a scheme to buy real estate in Shanghai at a discounted price.
- Stuart Carson was sentenced to four months in prison for his involvement in the *CCI* case. His wife, Hong Carson, was sentenced to six months home confinement, also for her involvement in the *CCI* case.
- David Edmonds was sentenced to four months in prison for his involvement in the *CCI* case.

FCPA GUIDANCE

Easily the most talked-about FCPA event of 2012 occurred in early November, when DOJ and the SEC released their much-anticipated "FCPA Guidance." Styled "A Resource Guide to the U.S. Foreign Corrupt Practices Act," this 120-page document represents DOJ's and the SEC's effort to answer critics of the Act (e.g., the U.S. Chamber of Commerce) and to clarify their interpretation of key provisions of the FCPA and the principles guiding their enforcement efforts. (Click **here** to access a PDF copy of the Guidance, and click **here** to access a Venable Client Alert discussing the Guidance). Some of the key takeaways from the Guidance include: (1) the broad sweep of DOJ's and the SEC's interpretation of U.S. jurisdiction, (2) an expansive definition of who qualifies as a foreign official, (3) an emphasis on the FCPA-related problems posed by charitable giving; (4) a highlighting of the anti-corruption dangers in the employment of third-party agents; and (5) an emphasis on pre-transactional due diligence. However, the Guidance took a slightly more lenient stance on gifts and entertainment than many would have expected.

Despite its length, the Guidance offers little that is new. Not surprisingly, the Guidance repeats DOJ's and the SEC's long-held interpretation of key FCPA provisions. The Guidance does, however, serve as an excellent resource as to how DOJ and the SEC are likely to enforce the Act, providing useful checklists and hypotheticals that help shore up the boundaries of what does or does not violate the FCPA, at least in the agencies' opinions.

In February 2013, the U.S. Chamber of Commerce issued a letter to the heads of enforcement at both DOJ and the SEC commending the FCPA Guidance. At the same time, however, the letter points out that some areas addressed in the Guidance remain unclear and require additional clarification or reform, for example:

- Compliance programs and voluntary disclosures: As the Chamber's letter points out, even if a company has a robust compliance program in place, the company "remains exposed to liability if the program is circumvented by even one employee." According to the Chamber, an affirmative defense should be added to the FCPA that would "permit a company, if charged with an anti-bribery violation, to rebut the imposition of criminal liability if the individuals responsible for the violation circumvented compliance measures that were otherwise . . . designed to identify and prevent such violations . . . ."
- Definitions of "Foreign Official" and "Instrumentality": Additionally, according to the Chamber, if an entity does not perform a government function, it should not be considered an "instrumentality" for purposes of the FCPA. This position is contrary to the FCPA Guidance and many federal court opinions, which hold that whether an entity performs government functions is merely one factor, among many others, to consider when determining if an entity is an "instrumentality" of a foreign government.

OTHER LEGISLATIVE AND REGULATORY ACTION

- While the Guidance was in many ways an attempt to mollify critics, both inside and outside the halls of Congress, some members of Congress continued to criticize federal prosecutors for "overreaching" and have 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."
- In 2011, the SEC adopted regulations implementing Dodd-Frank, which, in relevant part, provided 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. In 2012, almost 4% of all tips received by the SEC under the Dodd-Frank Whistleblower Program related to potential FCPA violations.

  2012 also saw the resolution of the first FCPA-related whistleblower retaliation claims under Dodd-Frank.

  - *Nollner v. Southern Baptist Convention*: In April 2012, the U.S. District Court for the Middle District of Tennessee dismissed an employee's wrongful termination lawsuit against his employer, Southern Baptist Convention, Inc. ("SBC"), which alleged that one of the plaintiffs was fired after complaining of suspect payments made by SBC to Indian government officials. The court never reached the merits of plaintiffs' claims, holding that SBC was not an "issuer" subject to the SEC's jurisdiction, and that Dodd-Frank's whistleblower retaliation provisions applied only to "issuers."

- *Asadi v. G.E. Energy (USA) LLC*: Later, in June 2012, the U.S. District Court for the Southern District of Texas dismissed the wrongful discharge claim of a plaintiff who was allegedly terminated for complaints he made over his employer's hiring of a third-party agent "closely associated" with an Iraqi government official. Here again, the court failed to reach the merits of the plaintiff's claims, holding that Dodd-Frank did not apply extraterritorially to protect the plaintiff, a dual Iraqi/U.S. citizen.
- *Kramer v. Trans-Lux Corp.*: Finally, in September 2012, the U.S. District Court for the District of Connecticut broadly interpreted the term "whistleblower" under the statute to include individuals who make disclosures to entities other than the S.E.C. In *Kramer*, the Vice President of Human Resources was found to be a whistleblower, where he first revealed his concerns to the corporation's CFO and then to its audit committee. Kramer claimed that after expressing his concerns, most of his job responsibilities were taken away, and he was eventually fired by the company. In response, he filed suit under the Dodd-Frank anti-retaliation provision. In September 2012, the district court denied the corporation's motion to dismiss.

NON-U.S. ANTI-CORRUPTION ENFORCEMENT

2012 has been an active period for non-U.S. anti-corruption enforcement as well:

- The U.K. Bribery Act:
  - July 1, 2012, was the first anniversary of the U.K. Bribery Act going into 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. In addition, unlike the FCPA, the U.K. Bribery Act does not contain a facilitation payment exception.
    - The first two prosecutions under the Bribery Act were somewhat underwhelming. In the first case, 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). In the second case, a taxi driver was convicted of attempting to pay at least £200 to a government official in exchange for a passing score on a taxi license test. The driver received a two-month suspended sentence.
    - 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.
      - In 2012, the U.K.'s Serious Fraud Office ("SFO") obtained six convictions involving allegations of foreign corruption, including the convictions of two former Innospec executives who previously settled FCPA charges with the SEC. At least eight individuals are currently awaiting trial for offenses related to foreign corruption.
      - Oxford Publishing Limited, a wholly owned subsidiary of Oxford University Press, agreed to pay nearly £1.9 million under a settlement with the SFO, following allegations of

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

- And, Abbot Group Limited, an oil and gas services company based in Aberdeen, Scotland, agreed to pay $5.6 million to settle allegations brought by the Scottish Crown Office that it made corrupt payments in obtaining a foreign contract in violation of the Proceeds of Crime Act. Neither the government nor the company, which operates around the world, disclosed much detail about the improprieties, which were self-reported after the company changed ownership. The SCO did indicate that Abbot had benefitted from a contract entered into by one its foreign subsidiaries with a foreign energy company, however.

- 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. In 2012, Chinese police arrested an executive at Alibaba Group Holding Ltd., an e-commerce outfit, based on allegations of bribery and facilitating piracy and counterfeiting.
- Russia: In the spring of 2012, Russia became a party to OECD Anti-Bribery Convention. In August, Russia also joined the World Trade Organization. Both developments bode well for increased Russian cooperation on anti-corruption matters.
- India: In India, 2012 was marked by widespread popular protests, particularly among the middle class, against corruption. In December, India's lower house of Parliament passed a bill designed to create a new agency, known as Lokpal, to pursue corruption allegations against government officials. However, the bill has yet to be approved by the upper house of Parliament.
- Canada: Responding to a 2011 OECD report criticizing its lax enforcement of anti-corruption laws, Canadian officials have stepped up efforts to combat foreign bribery. In January 2013, Canadian prosecutors charged Griffiths Energy International, an oil and gas exploration company, for violations of its Corruption of Foreign Public Officials Act (CFPOA) related to two consulting contracts in Chad. Currently, Canadian authorities have 23 open cases involving potential CFPOA violations.
- France: In September 2012, a French court fined the Safran Group, a French defense and aeronautics company, €500,000 for bribing Nigerian government officials in order to secure a €170 million identity-card contract. A French court had previously found two Safran executives not guilty of bribery-related charges. In addition, French prosecutors continued to pursue individuals involved in the Nigeria "Bonny Island" scandal, for which there have been many U.S. prosecutions and civil enforcement actions. Total S.A., a French oil company, is scheduled to stand trial in a French court in 2013 in connection with allegations of bribery stemming from the U.N. Oil-for-Food program. However, Total seems unlikely to face trial in a U.S. court, as the company stated in its 2012 Form 6-K (Report of Foreign Private Issuer) that it had set aside $398 million to settle with

DOJ and the SEC.

- Germany: In late 2012, Anton Weinmann received a ten-month suspended sentence and a € 100,000 fine from a German court after being found guilty of aiding and abetting bribery as part of a scheme in Slovenia to sell commercial vehicles. Mr. Weinmann was formerly in charge of MAN SE's commercial vehicles department and a board member of the corporation.

INTERNATIONAL COOPERATION

Finally, in 2012, the trend of cooperation between international regulators continued. DOJ acknowledged significant assistance from authorities in France, Italy, Switzerland, the U.K., Greece, Mexico, and Panama, among others, in the *Marubeni*, *Smith & Nephew*, and *Lufthansa Technik/BizJet International* investigations.

Venable office locations

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

WILMINGTON, DE
1201 NORTH MARKET STREET
SUITE 1400
WILMINGTON, DE 19801
t 302.298.3535
f 302.298.3550

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

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

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

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

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

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