

## FCPA Autumn Review 2008

International Alert  
10.13.2008

Featured in This Edition

- Actions Against Corporations
- Actions Against Individuals
- DOJ Opinions
- Other FCPA News
- International Developments
- Publications, Speaking Engagements, Recognition, and Awards

### Introduction

Since the publication of the [Spring 2008 Review](#) on June 6, 2008, the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) have only settled three enforcement actions under the Foreign Corrupt Practices Act (“FCPA”). During this time, the DOJ has also issued a number of FCPA-related indictments. This leaves enforcement for the year still at a historically brisk pace, but one that continues to be below the record level of cases brought in 2007.

Con-Way Inc., which settled charges with the SEC over allegedly making illicit payments in the Philippines, is the only corporation to have been the subject of an FCPA enforcement action in recent months, as the SEC and DOJ have focused increasingly on the prosecution of individuals. Most prominent among these is Albert “Jack” Stanley, the former CEO and Chairman of the Halliburton subsidiary KBR, who entered into separate settlement agreements with the DOJ and SEC for his participation in a decade-long bribery scheme involving Nigerian officials. In addition to this, the DOJ made several arrests, including four Nexus Technologies Inc. employees who allegedly bribed Vietnamese officials to secure contracts to sell equipment and technology, and a Virginia physicist who allegedly offered bribes to Chinese officials in an attempt to secure a contract to supply a hydrogen liquefier.

There were also developments in several previously reported enforcement actions. Christian Sapsizian, a French citizen and former Alcatel CIT vice-president, was sentenced to prison and heavily fined for bribing Costa Rican officials to win telecommunications contracts. Richard John Novak was sentenced for bribing Liberian officials as part of his role in a fake diploma mill. The Los Angeles film executive, Gerald Green, and his wife, Patricia, were issued a superseding indictment that includes additional FCPA charges for allegedly bribing a Thai official to secure management contracts. Several alleged participants in a prominent Azeri oil scandal managed to avoid prosecution on several FCPA charges pending against them. Prosecutors also dropped all charges against David Pinkerton, and the U.S. Court of Appeals for the Second Circuit recently affirmed the dismissal of most charges against Frederic Bourke Jr.

In other developments, the DOJ evidenced its willingness and ability to issue speedy answers to FCPA questions of companies operating under tight deadlines. Specifically, the DOJ issued opinions as to the permissibility of future transactions under the FCPA to Halliburton (in connection with a pending acquisition) and TRACE International Inc. (in connection with attendance fees to Chinese reporters), within just days of receiving the requests for the opinions.

To start its fall term, the U.S. Supreme Court refused to consider a narrow interpretation of the FCPA’s scope when it denied the petition for certiorari review made by David Kay and Douglas Murphy. In appealing their convictions, Kay and Murphy claimed that

the favorable tax treatment they gained by payments to Haitian officials was not an unlawful benefit under the FCPA. The refusal of the Supreme Court to hear their case is viewed as a victory for the DOJ, establishing that the FCPA covers such indirect benefits.

At the international level, the progress of anticorruption efforts has been mixed. The U.K.'s fight against overseas corruption continued to receive strong criticism following the termination of the investigation into arms deals between BAE Systems PLC and Saudi Arabia. The complaints intensified after the House of Lords ruled that U.K. authorities correctly terminated the inquiry. The growing criticism, however, appears to have been effective in prompting the new director of Britain's Serious Fraud Office ("SFO") to take dramatic action to strengthen the U.K.'s anti-corruption enforcement. As part of this effort, the SFO adopted U.S.-style plea bargaining to encourage companies to cooperate with authorities in rooting out corruption. On October 6, 2008, the construction company Balfour Beatty became the first company to reach a plea bargain settlement with the SFO, admitting "payment irregularities" in a large Egyptian construction contract and agreeing to pay a penalty of over \$3.9 million in exchange for the dismissal of all charges.

Transparency International's recently released 2008 Corruption Perception Index has identified some significant changes in perception of corruption in various countries. For example, while the U.K.'s ranking on the Index declined in the midst of the criticism over the BAE investigation, Nigeria's ranking increased, apparently on the strength of progress the country has made in its fight against corruption. Nigerian authorities recently began investigations into the alleged bribery of senior government officials by a U.S. oil executive and into the alleged payment of \$12 million in bribes by Siemens AG executives. The need for Nigeria to continue to make improvements, however, is illustrated by the withdrawal of the global freight transport group, Panalpina, from Nigeria's domestic transportation services market because of the corruption challenges it faced.

The Siemens AG bribery scandal has broadened to include investigations by authorities in Argentina and Greece, and prosecutions in Germany and Norway, all of which could potentially result in billions of Euros in fines. On July 28, 2008, a German court found a Siemens executive guilty of funneling over \$66.5 million into a slush fund. Former business partners of Siemens have also initiated civil suits in Germany. Siemens recently announced that it will seek damages from eleven former senior executives.

The investigation into the alleged corruption of Israeli Prime Minister Ehud Olmert has intensified in the wake of his resignation. Prime Minister Olmert's travel expenses and dealings with a U.S. businessman have continued to be subject to close scrutiny, and in September, Israeli police formally recommended that he be indicted. The U.S. businessman, Morris Talansky, is seeking immunity from U.S. prosecution in exchange for giving further testimony to Israeli authorities.

In October, Peruvian Prime Minister Jorge del Castillo, tendered his resignation to President Alan Garcia, along with the entire Cabinet. The former Cabinet members are alleged to have solicited bribes in exchange for energy concessions in Peru.

In a new development arising out of the U.N. Oil for Food Program bribery scandal, the Republic of Iraq recently filed a civil suit in U.S. federal court against two individuals and over 90 companies. The defendants include companies such as BNP Paribas, El Paso Corp., Chevron Corp., Siemens, Daimler-Chrysler AG, and Volvo Construction Equipment International. In this case, Iraq seeks over \$1.4 billion in damages, asserting that the corruption caused "virtually incalculable" damage in terms of human suffering.

## Actions Against Corporations

### A. Con-Way Inc.

On August 27, 2008, Con-Way Inc. ("Con-Way"), an international freight forwarding company that operates in eighteen jurisdictions, [settled charges](#) with the SEC relating to violations of FCPA accounting provisions in the Philippines from 2000 to

2003. Without admitting or denying the charges, Con-Way consented to the entry of a Cease and Desist Order and agreed to pay a penalty of \$300,000.

The investigation into Con-Way extended to two wholly owned Con-Way entities, Emery Transnational, a shipping and freight-forwarding firm based in Manila, and Menlo Worldwide Forwarding Inc (“Menlo”). During the relevant period, Menlo was named Emery Freight Corporation (“Emery Freight”) and Con-Way was named CNF, Inc. In December 2004, Con-Way sold Menlo and Emery Transnational to an affiliate of UPS, but contracted to indemnify the purchaser for any losses resulting from FCPA violations. Menlo was charged with overseeing Emery Transnational operations.

The SEC alleged that from 2000 to 2003, Emery Transnational made payments to officials of the Philippine Bureau of Customs and the Philippine Economic Zone Area aimed at: (1) allowing Emery Transnational to store shipments longer than legally permitted; and (2) settling Emery Transnational’s disputes with Philippine Customs. These payments totaled \$244,000. Emery Transnational is also alleged to have made a series of payments totaling at least \$173,000 to fourteen state-owned airlines that conducted business in the Philippines. These payments fell into two categories:

(1) “weight-shipped” payments which caused officials to save space on state-owned aircraft; and (2) “gain share” payments which caused airlines to under-weigh shipments.

To fund these payments, Emery Transnational employees allegedly requested cash advances to “complete customs processing” or pay for “gain share” or “weight-shipped” expenses. The advances were issued in the form of checks made payable to Emery Transnational employees personally. According to the SEC complaint, the employees would give the appropriate government officers a cash payment upon receipt of the Company issued check. Emery Transnational did not identify the true nature of these payments in its books and records, nor were they supported by receipts from the Philippine government.

The SEC also alleged that Con-Way and Menlo required only periodic reports of Emery Transnational’s net profits during the period under review and that neither company requested any other financial information or operating records from Emery Transnational.

In 2003, Con-Way discovered the existence of these payments and instructed Menlo to launch an internal investigation. After completing the investigation, Con-Way disclosed the problems to the SEC, imposed stricter reporting and compliance requirements, and terminated several Emery Transnational employees. Con-Way also instituted FCPA training programs for employees.

### ***Noteworthy Aspects of the Con-Way Case***

- Several FCPA cases have involved the issue of successor liability. UPS, however, avoided successor liability for the activities of Menlo and Emery Transnational. This is likely due to the fact that Con-Way disclosed the issues to the SEC/DOJ prior to the UPS acquisition. UPS also shielded itself from liability by entering into an indemnification agreement.
- The Con-Way case, much like the enforcement action in Dow Chemicals (see our [2007 Autumn Review](#)), highlights the FCPA-related accounting liabilities that lower-level subsidiaries can create for their parent companies.
- The prosecution of Con-Way is further evidence of the U.S. authorities’ interest in freight forwarders -- companies that handle customs clearance, an area often rife with corruption. The SEC and DOJ are currently investigating Panalpina, an international freight forwarding company, as well as over a dozen of Panalpina’s customers in the oil and gas industry.

### **Actions Against Individuals**

## **A. Former KBR CEO and Chairman Albert “Jack” Stanley**

On September 3, 2008, Albert “Jack” Stanley, a former executive of KBR and its predecessors, entered into an agreement with the DOJ and pleaded guilty to conspiracy to violate the FCPA, among other charges, as part of a decade-long effort to secure engineering, procurement and construction contracts with Nigeria by providing illicit payments to Nigerian government officials. A sentencing date has not been set, but under the plea agreement, Stanley faces a maximum of seven years imprisonment and a restitution payment of \$10.8 million. In a related enforcement action, the SEC announced that Stanley had consented to a final judgment enjoining him from violating the anti-bribery, books and records, and internal controls provisions of the FCPA. As part of this plea and settlement, Stanley is permanently enjoined from violating the FCPA and has agreed to cooperate with the DOJ and SEC’s ongoing investigations.

Stanley had been a vice-president of Dresser Industries, Inc., which merged with Halliburton in 1998. As part of this merger, Halliburton combined Dresser’s construction subsidiary, Kellogg, with Halliburton’s own construction subsidiary, Brown & Root, Inc., to form KBR. Stanley was made CEO of this newly merged subsidiary KBR and later became its chairman. He was fired in 2004, after the illicit payments he had authorized were uncovered.

According to the [plea agreement](#), the illicit payments occurred from 1995 to 2004, while Stanley was helping to manage a four-company joint venture KBR was a part of in Nigeria called TSKJ. During this time, Stanley helped TSKJ channel approximately \$182 million to Nigerian officials in exchange for contracts worth an estimated \$6 billion to build liquefied natural gas facilities for an entity controlled by Nigeria’s government-owned oil company NNPC. In his position with KBR, Stanley participated in major decisions affecting the joint venture, including the hiring of two U.K. and Japanese agents who made the illicit payments to a broad range of Nigerian officials with Stanley’s authorization.

Stanley met with high-ranking Nigerian officials on several occasions to help to arrange these bribes. According to the [SEC complaint](#), Stanley and others falsely characterized the payments channeled through these two agents as legitimate “consulting” or “services” fees when they were aware that they were in actuality bribes. Stanley also admitted to receiving \$10.8 million in illegal kickbacks from a consultant he instructed KBR to hire in connection with liquefied natural gas projects around the world.

In June 2004, Stanley and the others involved in this bribery scheme were terminated for violations of Halliburton’s Code of Business Conduct. The DOJ attorney who prosecuted Stanley said that this plea agreement “demonstrates that corporate executives who bribe foreign government officials in return for lucrative business deals can expect to face prosecution.”

### ***Noteworthy Aspects of the Jack Stanley Plea***

- The DOJ noted that its prosecution of Stanley was aided by authorities in France, Italy, Switzerland and the U.K.
- Although not individually named in Stanley’s plea agreement, investigators have identified Jeffrey Tesler as the U.K. agent involved in Stanley’s bribery scheme. Tesler is an attorney in London who worked with Nigerian immigrants in the U.K. While he has not yet been charged in this matter, Mr. Tesler is now being investigated by the SFO for allegedly acting as a middleman by channeling millions in bribes to Nigerian government officials.

## **B. Azeri Oil Cases**

### ***Prosecutors Drop Charges Against David Pinkerton***

Federal prosecutors announced that they have dropped criminal charges against former AIG executive David Pinkerton. Pinkerton had been formally charged in October 2005 with bribing Azeri government officials in connection with the privatization of the state oil company, Socar. Prosecutors alleged that he conspired with co-investors Frederic Bourke Jr. and Viktor Kozeny (see

below) to gain permission to participate in Socar's privatization by bribing officials in Azerbaijan. Three other men, Hans Bodmer, Clayton Lewis, and Thomas Farrell, previously pleaded guilty to related charges.

On July 2, 2008, however, U.S. prosecutors requested that all charges against Pinkerton be dismissed. Based on evidence collected since Pinkerton's indictment, the Assistant U.S. Attorney concluded that further prosecution of Pinkerton would not be in the interest of justice and the request was judicially approved.

### ***U.S. Appeals Court Upholds the Dismissal of Most Counts Against Frederic Bourke Jr.***

On August 29, 2008, the U.S. Court of Appeals for the Second Circuit upheld the dismissal of most of the charges pending against Frederic Bourke Jr. on grounds that their statute of limitations had expired before his indictment. Bourke was an investor affiliated with both Pinkerton and Viktor Kozeny, the president and chairman of Oily Rock Group Ltd ("Oily Rock"). Bourke had allegedly invested in Oily Rock after that company, under the control of Kozeny, entered into a co-investment agreement with Pinkerton at AIG. Like Pinkerton, both Bourke and Kozeny have been charged with participating in the Azeri bribery scheme. Regarding Bourke, the government claimed he had committed numerous violations of the FCPA and Travel Act, as well as conspiracy, money laundering and making false statements to the FBI.

The Second Circuit agreed with the lower court's decision to dismiss all but one FCPA count against Bourke because much of the alleged criminal activity had occurred more than five years before Bourke's indictment. Since the government had failed to request a suspension of the five year statute of limitations for the crimes before it elapsed, the government was thereby barred from prosecuting them.

The related charges against Kozeny, however, were not affected by the court's decision. Kozeny is a resident of the Bahamas and is currently appealing orders of deportation and extradition. His absence from the United States prevented him from being a party to Bourke's case or otherwise fighting the charges against him.

### **C. Nexus Technologies Inc. Employees Arrested**

On September 5, 2008, the DOJ announced the arrest of four employees of Nexus Technologies, Inc. in Philadelphia for allegedly making improper payments to Vietnamese government officials in violation of the FCPA. The individuals -- Nam Nguyen, Joseph Lukas, Kim Nguyen, and An Nguyen -- are all U.S. Citizens.

Nexus Technologies is a Delaware corporation with offices in Philadelphia, New Jersey and Vietnam. According to the indictment, the four individuals paid Vietnamese Government officials approximately \$150,000 in bribes to secure contracts for technology equipment. The indictment further alleges that both Nam Nguyen and Joseph Lukas engaged in negotiations with Vietnamese Government officials regarding both the contracts and the payment of bribes.

[The indictment](#) charges the four individuals with one count of conspiracy to bribe Vietnamese public officials in violation of the FCPA and four counts of violating the FCPA itself. The conspiracy charge carries a maximum penalty of five years in prison and a fine of the greater of \$250,000 or twice the gain, and a three year term of supervised release. The FCPA charges carry a maximum penalty of five years in prison, a fine of the greater of \$100,000 or twice the gain and a three year term of supervised release.

### **D. Former Alcatel CIT Executive Christian Sapsizian Sentenced**

On September 23, 2008, former Alcatel CIT ("Alcatel") vice-president Christian Sapsizian was sentenced to 30 months in prison for violating the FCPA. Sapsizian was also ordered to forfeit \$261,500, pay a \$200 Special Assessment, and serve three years of supervised release. In exchange for the deal, Sapsizian agreed to cooperate with U.S. and foreign law enforcement in the ongoing

investigation.

As reported in our 2007 Autumn Review, Sapsizian, a French Citizen, pled guilty in June 2007 to paying more than \$2.5 million in bribes to a state-owned Costa Rican telecommunications company in order to secure contracts on behalf of Alcatel. Alcatel was ultimately awarded a \$149 million mobile telephone contract in 2001.

## **E. Virginia Physicist Arrested**

On September 24, 2008, the DOJ announced the arrest of Shu Quan Sheng (“Shu”), a physicist from Newport News, Virginia, on charges of offering bribes to Chinese officials in violation of the FCPA. Shu was also charged with export controls violations for illegally exporting space launch technical data to China. Shu is the President, Secretary and Treasurer of AMAC International, a high-tech company located in Newport News.

The indictment alleges that Shu provided assistance to several Chinese government entities concerned with the design of a space launch facility in Southern China. Shu also allegedly facilitated visits by Chinese officials to several European space launch and hydrogen production and storage facilities for research purposes. Shu is also said to have brokered a contract between the Chinese government and a French company for the production and supply of a hydrogen liquefier. The complaint also claims that Shu offered a series of bribes to Chinese officials to induce the award of the hydrogen project to this French company over its competitors. Both Shu and his company, AMAC, received commissions after the contract was awarded.

## **F. Richard John Novak receives Probation in Fake Degree Case**

On September 30, 2008, Richard John Novak was sentenced to three years of probation and 300 hours of community service for FCPA charges he pled guilty to in 2006.

Novak had been involved in a counterfeit ring which allegedly raised an estimated \$8 million by selling fake diplomas online to over nine thousand people. As part of this syndicate, Novak admitted paying more than \$43,000 in bribes to Liberian government officials in order to obtain accreditations for fictional Liberian universities. Many of the diplomas supported by the illicit accreditations were purchased by foreigners seeking entry into the United States.

Since 2005, a number of the participants in the diploma mill have been prosecuted on non-FCPA grounds and several imprisoned. Novak, and two others along with him who were charged with non-FCPA crimes, avoided prison sentences by cooperating with prosecutors.

## **G. Superseding Indictment Handed Down for Gerald and Patricia Green**

On October 1, 2008, the DOJ filed a [superseding indictment](#) against an L.A. film executive, Gerald Green, and his wife, Patricia, for allegedly bribing the governor of the Tourism Authority of Thailand (“TAT”). As reported in our 2008 Winter Review, the Greens were arrested in December, 2007 for allegedly bribing the governor of TAT, Juthamas Siriwan, in order to secure lucrative management contracts, including contracts to run the annual Bangkok International Film Festival.

Under the original indictment, the Greens were accused of paying more than \$900,000 in bribes to Siriwan in exchange for more than \$7 million in contracts for the Green’s production company. The superseding indictment charges the Greens with ten counts of violating the FCPA, among other charges. Similar to the government’s initial claims, the superseding indictment alleges that the couple bribed the governor of TAT to secure contracts and disguised the illicit payments as “sales commissions” on their books. The superseding indictment also alleges corruption on a much larger scale than the Green’s were initially charged with. It claims the Greens paid at least \$1.8 million in bribes for at least \$14 million in contracts. The couple pleaded not guilty initially and is scheduled to be arraigned on the new charges on October 14, 2008.

The claims in this superseding indictment have also intensified the Thai investigation surrounding Siwiran, the official whom the Greens allegedly bribed. The country's Department of Special Investigations recently recommended legal action against Siriwan over the allegations.

## DOJ Opinions

### **A. Opinion Procedure Release 08-02: Halliburton Post Acquisition Due Diligence**

On June 13, 2008, the [DOJ responded](#) to a request from the Halliburton Company for an opinion regarding due diligence concerns involved in the proposed acquisition of a U.K. company.

Halliburton informed the DOJ that due to legal restrictions in the U.K. there was insufficient time to complete the expected FCPA due diligence for the proposed acquisition. It also noted that it had entered into a confidentiality agreement with the target company that limited the information that it could provide to the DOJ in its opinion request.

Halliburton's inquiry was three-part: (1) whether its proposed acquisition itself would violate the FCPA; (2) whether Halliburton would inherit FCPA liability for the target company's pre-acquisition unlawful conduct; and (3) whether Halliburton would be held criminally liable for any post-acquisition unlawful conduct by the target company prior to completion of FCPA due diligence, where such conduct is identified and disclosed to the DOJ within 180 days of closing.

In response, the DOJ stated that it did not intend to take any enforcement action against Halliburton with respect to the (1) acquisition itself; (2) any pre-acquisition conduct by the target company which is disclosed to the DOJ within 180 days of closing; and (3) any post-acquisition conduct by the target company which does not continue beyond 180-days after closing or which cannot be fully investigated within the 180-day period.

#### ***Noteworthy Aspects of the Halliburton Opinion***

- Although the DOJ accepted Halliburton's representation that "in order to be a viable bidder" it had to enter into the confidentiality agreement here, the DOJ specifically "discouraged" companies seeking opinions in the future from entering into such agreements.
- The opinion stressed it was based on a unique situation where there was "insufficient time and inadequate access to complete appropriate pre-acquisition FCPA due diligence." Absent this urgency, it is likely that the DOJ would have rejected Halliburton's proposal. The speed with which this opinion was released, just days after Halliburton submitted the request, is particularly noteworthy. Per its regulations, the DOJ is supposed to issue opinions within 30 days of receiving the requests. In practice, however, it often takes months, which hinders the usefulness of what could be an important compliance mechanism. Halliburton's urgent deadline required the DOJ to act quickly if the opinion was to have any utility. Coupled with the speed with which the DOJ responded to the 08-03 Release below, the DOJ seems to be signaling its willingness to answer crucial questions under tight deadlines.

### **B. Opinion Procedure Release 08-03: Permissibility of Hospitality Expenditures**

Less than one month after the Halliburton Opinion, the DOJ issued another Opinion Procedure Release. On July 11, 2008, the [DOJ responded](#) in just four days to a request from TRACE International Inc. ("TRACE") for guidance as to the permissibility of certain hospitality payments.

TRACE, an organization specializing in anti-bribery initiatives and training, intended to sponsor approximately 20 Chinese journalists to attend a conference in Shanghai. Sponsorship would include transportation and lodging, in addition to meals and other incidental costs. The level of sponsorship would differ depending on whether the journalists were based locally or whether they had to travel in order to attend. TRACE set forth the specific dollar amounts for each level of sponsorship.

The organization also intended to provide a cash stipend to each of the sponsored attendees, as this is customary in China, but TRACE noted that the stipend would not be conditioned on subsequent coverage of the press event nor the nature of coverage. TRACE also guaranteed that it would accurately record the payments in its books and records.

In response, the DOJ indicated that it did not intend to take enforcement action with respect to either the cash stipends or payment of transportation and lodging costs. The DOJ concluded that such payments satisfy the FCPA's promotional expenses affirmative defense, since they relate directly to the "promotion, demonstration, or explanation of [TRACE's] products or services."

### ***Noteworthy Aspects of the TRACE Opinion:***

The DOJ's decision placed "no weight" on the customary nature of the of the proposed cash stipends, making clear that Chinese business practices were not relevant in its analysis. Instead, the Department relied on the fact that the payments satisfied the promotional expenses affirmative defense.

## **Other FCPA News**

### **A. Medical Device Investigation Expands to Include Wright Medical**

In a quarterly filing with the SEC in June 2008, Wright Medical Group ("Wright") revealed that it is under investigation by both the DOJ and SEC for violations of the FCPA. Wright manufactures and distributes orthopedic equipment. In the fall of 2007, several major medical device companies, including Smith & Nephew, Stryker, Biomet and Zimmer, announced that they were under investigation for possible violations of the FCPA (see our [2008 Winter Review](#)). U.S. authorities are investigating whether these companies made improper payments to doctors at foreign state-owned hospitals as incentives to use their products. Before news of these investigations broke, many of these same companies had settled domestic bribery charges of a similar nature.

### **B. Certiorari Petition Denied in the Kay & Murphy Case**

On October 6, 2008, the Supreme Court denied the petition for certiorari review made by David Kay and Douglas Murphy. As reported in our 2008 Winter Review and 2008 Spring Review, Kay and Murphy were found guilty of violating the FCPA for making payments to Haitian customs officials in exchange for reduced duties and taxes and had their appeal denied by the U.S. Court of Appeals for the Fifth Circuit. In their petition to the Supreme Court, Kay and Murphy argued that the FCPA did not apply to their activities because they did not intend to "obtain or retain business" when making their payments as required by the language of the FCPA. Specifically, they asserted that the FCPA should not be interpreted so broadly as to criminalize the attainment of other indirect business benefits such as tax reductions. They also argued that criminal sanctions, according to the terms of the FCPA, can only be imposed on defendants who act with the subjective knowledge that their actions violate the law. The government's indictment in this case had failed to allege any particular state of mind. Thus, Kay and Murphy argued, the Fifth Circuit was mistaken in holding that the government's omission to be harmless error and affirming their convictions. The refusal of the Supreme Court to review these arguments is viewed as a victory for the DOJ, and bolsters the argument that the FCPA prohibits payments to government officials in exchange for even indirect business benefits, such as favorable tax treatment.

## International Developments

### A. BAE and Criticism of the U.K.'s Anti-Corruption Efforts

**House of Lords Reversal:** The House of Lords ruled on July 30, 2008, that Britain's Serious Fraud Office ("SFO"), a U.K. agency tasked with investigating and prosecuting corruption, lawfully terminated its inquiry into certain dealings between Saudi Arabia and BAE Systems PLC ("BAE"), a British aerospace and defense company. This decision overturns an earlier ruling issued by the High Court, in which the judges determined that the SFO had acted in error.

As reported in both our 2008 Winter Review and 2008 Spring Review, the SFO had been investigating allegations that BAE paid £2 billion (nearly \$4 billion) to members of the Saudi royal family in exchange for its help in securing a contract for the sale of jet fighters to the Saudi government. In December 2006, reportedly at the direction of then Prime Minister Tony Blair, the SFO halted the inquiry because it damaged the U.K.-Saudi diplomatic relationship and had potentially harmful consequences to the U.K. national security.

The termination of the SFO's investigation was legally challenged, and the U.K.'s High Court ruled that the SFO erred in stopping the investigation. On appeal, however, the House of Lords overturned the High Court decision, finding that the SFO had "no option" but to discontinue the investigation in light of the security threat.

Notwithstanding the House of Lords' decision, the United States and Switzerland are continuing to investigate the allegedly corrupt arms deal. The U.S. investigation presents a unique set of problems for BAE because half of its business is now conducted within the United States. If the U.S. investigation is successful, BAE may face monetary penalties, a suspension from participating in U.S. government programs, or both. A temporary ban from contracting with the U.S. government would be highly detrimental to the defense firm.

**OECD Criticism:** Britain's record on fighting international corruption has led to harsh criticism from the Organization for Economic Co-Operation and Development ("OECD"). In June 2008, before the House of Lords handed down its decision, the OECD issued a letter to the British government attacking its failures in anti-corruption enforcement. The letter was signed by all of the OECD members except for Britain. In light of claims by the British government that international anti-corruption remains a high priority, the letter criticized the U.K.'s failure to bring a single anti-corruption case in the past seven years and questioned the U.K.'s commitment to fighting corruption. The letter also expressed concern that the SFO would downgrade its commitment to fighting corruption after the BAE investigation was halted.

**Transparency International Criticism:** The U.K. government was further criticized in Transparency International's ("TI") 2008 report on the Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. TI stated that Britain's key obstacle to enforcement is a lack of progress in enacting new bribery laws that would facilitate prosecution. The report concluded that the government had no "political will" to prosecute foreign bribery, and set forth four recommendations for the U.K. government to address Britain's lack of enforcement: (1) fast-track the enactment of new corruption laws, (2) introduce liability for persons who engage in bribery, (3) abandon a bill that would give the Attorney General the right to intervene in corruption investigations on the grounds of national security, and (4) establish an advisory service similar to the DOJ's Opinion Procedure Release.

**New BAE Corruption Allegations:** In September, Austrian police raided locations searching for evidence into whether BAE bribed decision makers to secure contracts to sell military aircraft in Austria and the Czech Republic. One of the locations searched was

the home of Alfons Mensdorff-Pouilly, an Austrian Count who is suspected of receiving “commission payments” from BAE and passing some of the money on as bribes. The alleged objective of the bribes was to persuade the Austrian air force to purchase BAE’s Eurofighter Typhoon fighter jets instead of U.S. F-16 aircraft built by Lockheed Martin.

## **B. U.K. Seeks to Strengthen Anti-Corruption Enforcement and Undertakes Landmark Prosecutions**

Following the criticism regarding the BAE investigation, the newly appointed director of the U.K.’s SFO, Richard Alderman, took action to strengthen Britain’s anti-corruption enforcement by instituting a U.S.-style plea bargaining system. Alderman hopes that such a system will encourage companies to work with the SFO to root out corruption and, in the long run, benefit companies as well as the public. These efforts appear to have borne fruit, as the U.K. successfully undertook its first prosecutions for overseas bribery this fall.

On October 6, 2008, Balfour Beatty (“Balfour”) became the first company to reach a plea bargain settlement with the SFO, admitting “payment irregularities” in the construction of Egypt’s Bibliotecha Alexandrina and agreeing to a penalty of over \$3.9 million for all charges to be dropped (Balfour had earned some \$65 million from the project, which it completed in 2002). The company cooperated with U.K. authorities by reporting the results of an internal investigation to the SFO in April 2005. In the settlement, Balfour admitted that one of its subsidiaries participated in illegal conduct which resulted in accounting errors at Balfour.

Under the SFO’s new leadership, the U.K. has also devoted more resources to investigating overseas corruption. In particular, the SFO has continued to investigate BAE’s activities in Tanzania, South Africa, the Czech Republic and Romania. It has also made significant efforts to build relationships with foreign regulators, helping thirty-one countries gather evidence for overseas corruption cases.

Beyond the SFO, the newly formed Overseas Anti-Corruption Unit (“OACU”) of the City of London Police has also contributed to the U.K.’s recent push to strengthen enforcement. On September 22, 2008, the OACU brought its first case, charging a former Ugandan Government official, with accepting bribes from a U.K.-based company that trained Ugandan soldiers to respond to chemical and biological threats. The official, Ananias Tumukunde, a former advisor to the Ugandan president, was sentenced to one year in jail. Niels Tobiasen, a Danish national who admitted to paying over \$120,000 in bribes to Tumukunde, was sentenced to five months imprisonment a few days later. On October 6, 2008, it was reported that the OACU is also teaming up with Danish investigators to look into whether there was corruption involved in a prominent United Nations deal to provide life-saving drugs to the Congo. At issue is roughly \$1 million in alleged payments by the Danish firm Missionpharma, an organization which works to supply generic medicines to third-world countries.

## **C. Global Anticorruption Movement and Transparency International’s 2008 Corruption Perception Index**

On September 23, 2008, TI released its 2008 Corruption Perception Index (“CPI”), an index which tracks perceived levels of governmental corruption in 180 countries. This year, Denmark, New Zealand and Sweden again topped the scale with a score of 9.3, while Somalia, Myanmar, Iraq and Haiti ranked at the bottom of the scale, all scoring 1.4 or less. The United States, which has sat in 20th position for two straight years, moved up two places in the 2008 rankings to 18th, with a score of 7.3 (up from 7.2). The U.K., however, saw its score decline from 8.4 to 7.7, causing it to drop four spots in the index from 12th to 16th.

While Nigeria received a relatively low score of 2.7 this year, this was a significant improvement over last year’s score of 2.2. As noted in our 2008 Winter Review, Nigeria’s newly elected president, Umaru Yar’Adua, elicited domestic and international outrage in December 2007, for seemingly sidelining a top Nigerian anti-corruption official. This year, however, Yar’Adua still appears to be following through on his promise to crack down on corruption. For instance, the country recently requested assistance from the U.S. authorities in investigating senior Nigerian government officials implicated by Jason Steph, a former Willbros oil executive who pleaded guilty to Nigerian-related FCPA charges in the U.S. last year (see our 2007 Autumn Alert). Additionally, Nigerian

security agencies recently began investigating \$12 million in alleged bribes to Nigerian officials by Siemens AG executives.

## **D. Siemens Investigation**

Although several news outlets have reported that Siemens is nearing a settlement with U.S. authorities, no concrete details have emerged. The fallout from the Siemens investigation continues, however. We have tracked the progress of this far-reaching and continually expanding probe in our 2007 Autumn Review, 2008 Winter Review, and 2008 Spring Review. New developments include:

**Worldwide Enforcement:** In mid-August, Argentine authorities searched Siemens' Buenos Aires offices for evidence of bribe payments to the former Argentine president, Carlos Menem. Authorities allege that Siemens paid Menem over \$14.7 million to secure a 1989 digitization project in Argentina. The contract was signed by Menem, but later cancelled by Menem's successor, Fernando de la Rúa in 2001. Siemens is alleged to have paid further bribes to de la Rúa's successor, Nestor Kirchner, to have the contract restored.

On July 1, 2008, Norway announced it would impose a \$400,000 fine against Siemens' Oslo operations for "corruption" in defense contracts. This is the second time Norway has fined Siemens; the first coming in February, when police levied a \$1.8 million fine against the company for "intentionally defrauding the military." Siemens has said it will challenge the \$400,000 fine.

**Judicial Decisions:** On July 28, 2008 a Munich court found Reinhard Siekaczek, a former sales manager at Siemens' telecommunication equipment division, guilty of breach of trust and funneling over \$66.5 million into a slush fund used for illicit payments. The court gave Siekaczek a two-year suspended sentence and fined him nearly \$170,000 for his involvement in what it called Siemens' "system of winking acquiescence and organized irresponsibility." Siekaczek had testified that he built the slush fund at the direction of his superiors. Notably, Siekaczek's testimony formed the basis of the \$300 million settlement Siemens reached with German prosecutors in October 2007 over allegations that its telecom unit had made hundreds of millions of Euros in illicit payments.

**New Prosecutions:** New charges are also emerging in Germany, as German authorities have accused former board member Johannes Feldmayer of authorizing more than \$40.7 million in payments to a workers' group to facilitate friendly labor relations. Feldmayer is the first former board member to be officially charged in the corruption scandal.

**Siemens Claims Damages Against Former Executives:** In late July, Siemens announced that it will seek damages from eleven former senior executives for their roles in the on-going bribery scandal, including two former Siemens CEOs, Heinrich von Pierer and Klaus Kleinfeld. Von Pierer was the Siemens CEO from 1992 to 2005, and Kleinfeld was CEO from 2005 to 2007. Munich prosecutors have already launched civil proceedings against Kleinfeld, von Pierer, and other board members for failure to adequately oversee corporate operations. It is rumored that the company may also seek damages against second-tier executives who were similarly involved in the corruption scandal.

## **E. Israeli Prime Minister Ehud Olmert Resigns**

**Olmert Confirms Resignation:** On September 21, 2008, Israeli Prime Minister Ehud Olmert tendered his resignation in the wake of a continuing investigation into allegations of corruption. Olmert's term was to run through 2010, but on July 30, he held a press conference to announce his intent to resign as prime minister after the Kadima party elections in late September (which Israel's Foreign Minister Tzipi Livni carried). As we noted in our 2008 Spring Alert, allegations surfaced earlier this year that during his tenure as Mayor of Jerusalem and subsequently as cabinet minister, Olmert had taken an estimated \$150,000 in cash stuffed into envelopes from an American business man named Morris Talansky. Olmert has admitted to taking the money, but insists that it was all in the form of legal donations to his political party.

**Indictment Recommended:** As part of the inquiry into these allegations, Olmert was questioned by Israeli authorities for the seventh time in late August, and on September 8, 2008, Israeli Police formally recommended an indictment of Olmert on charges of bribery, fraud, money laundering and breach of public trust. Since recommending the indictment, police have questioned Olmert yet again. The investigation has widened this summer beyond the Talansky donations into whether Olmert also double or triple-billed state institutions for official travel while he served as the Mayor, questions regarding the purchase of a home, and certain political appointments.

**Talansky Seeks Immunity U.S.:** Talansky, the New York-based financier at the heard of these allegations, has already testified in the case, but recently refused to return to Israel for another round of testimony on the advice of his lawyers unless U.S. authorities offered him immunity from prosecution in the U.S. Talansky learned this late this summer that a grand jury has convened to consider the fraud allegations against him.

## **F. Panalpina Pulls out of Nigerian Domestic Market**

On July 30, 2008, Panalpina, the global freight transport group that is currently at the center of an industry-wide FCPA investigation by the DOJ, announced that it will withdraw all domestic services from Nigeria in late 2008. The announcement came despite reports of the Company's world-wide growth. According to Panalpina's press release, Nigeria's opaque legal system and the corruption challenges it presents have hindered the company's ability to service its clients adequately, and this is now affecting Panalpina's activity in the rest of West Africa. Local and domestic transportation services will likely be sold to Nigerian investors. The withdrawal, however, will not affect international transportation services to and from Nigeria's ports, including flight and shipping services.

## **G. Alstrom Investigation**

Investigations are continuing into the French engineering firm Alstrom SA for allegedly paying bribes to win contracts in South America and Asia. As we reported in our 2008 Spring Alert, Alstrom is said to have used intermediaries to make hundreds of millions of dollars in payments to secure lucrative contracts in the regions.

In July 2008, prosecutors from Brazil, Switzerland, and France reportedly met in Paris and agreed to assist one another in their respective investigations into Alstrom's activity in Brazil. Brazilian investigators suspect a sociologist named Claudio Mendes served as a middleman in channeling funds to former Sao Paulo state officials. Documents seized in the probe show that senior company officials in Paris directed money through shell companies into Swiss bank accounts that was then sent to independent consultants such as Mendes. The only purpose of these consulting agreements reportedly was to divert money into the hands of government officials.

Following the meeting, Swiss police conducted a raid of numerous Alstrom offices in Switzerland and arrested a former Alstrom manager. In September, Swiss prosecutors announced that Alstrom is thought to have spent tens of millions of dollars more than was previously alleged in an effort to win international contracts.

## **H. StatoilHydro Executives Resign Following Internal Investigation**

On October 7, 2008, StatoilHydro USA ("StatoilHydro") announced the resignation of two senior executives in Norway following an internal probe into questionable payments made to secure business in Libya. The investigation focused on Libyan consultancy deals made by Saga Petroleum ("Saga") and Norsk Hydro ("Hydro"). Hydro purchased Saga in 1999 and merged with Statoil in 2007 to become StatoilHydro.

In a company press release, StatoilHydro revealed that the consultancy agreements "could be problematic in relation to Norwegian and U.S. anti-corruption legislation," and that Hydro failed to disclose problematic issues to Statoil before merging with Statoil."

Specifically, the report found Hydro paid \$7.4 million in suspect consultancy fees, booking most of them as charges for “past services.” StatoilHydro has not made any public statement about the connection between the two executives and the findings of the investigation, though both men formerly worked for Hydro. The findings of the investigation have been handed over to Norwegian police, which will examine them before deciding whether to launch its own investigation.

On October 8, 2008, two of Europe’s biggest energy groups -- Repsol YPF and Total -- were also implicated in the same bribery scheme. Both have denied any wrong-doing.

## **I. Iraq Sues More Than 90 Companies Over Oil for Food Bribery Scandal**

On June 27, 2008, the Republic of Iraq [filed suit](#) in the U.S. District Court, Southern District of New York against 91 companies and two individuals that were allegedly involved in the Oil for Food bribery scandal. As reported in our 2007 Autumn Review, 2008 Winter Review, and 2008 Spring Review, the Oil for Food Program was established by the U.N. to allow the Iraqi government to sell oil in spite of existing embargoes in order to buy goods for humanitarian purposes. Proceeds from the oil sales were deposited in a U.N. escrow account, and the U.N. was tasked with ensuring that the funds were only used for humanitarian purposes. Dozens of companies circumvented this escrow account, however, and paid kickbacks to Iraqi officials to secure contracts under the program. U.S. authorities have pursued enforcement actions against companies alleged to have taken part in this scheme and have imposed large fines on companies that have benefited from the corruption.

Now, the Iraqi government itself is seeking over \$10.4 billion from 91 companies that reportedly participated in the scheme, including well-known companies such as BNP Paribas, Chevron Corp., Siemens, and Daimler-Chrysler AG. Two prominent Texas oilmen, David B. Chalmers Jr. and Oscar S. Wyatt Jr., are also individually named as defendants. The complaint notes that the corruption of the Oil for Food Program has been described as “the largest financial fraud in human history,” and that “its impact on the people of Iraq went far beyond financial loss...[affecting] the very lives and health of the Iraqi people.” Indeed, it states that “[t]he resulting damage in human suffering caused to the Republic of Iraq and to the people of Iraq is virtually incalculable.”

## **J. Peruvian President Alan Garcia’s Cabinet Resigns Over Alleged Bribery**

On October 11 2008, President Alan Garcia of Peru accepted the resignation of his entire cabinet amidst allegations of bribery and corruption. Along with fourteen other Cabinet members, Prime Minister Jorge del Castillo tendered his resignation to the President. The former Cabinet members are alleged to have solicited bribes from a European firm in exchange for energy concessions. The resignations came after audiotapes, which detail the bribery scheme, were leaked to the public.

## **K. Liberian Government Denies Bribery Allegations**

The Liberian Government is denying allegations of a bribery scheme between senior officials and the Liberian International Ship and Corporate Registry (“LISCR”). In August 2008, a series of e-mails surfaced indicating that senior members of President Ellen Johnson Sirleaf’s Cabinet had accepted bribes from the LISCR to secure a contract renewal. The LISCR is seeking to renew its contract to operate in the Liberian maritime program. If substantiated, the charges implicate both the FCPA and Liberian anti-corruption laws. In response the Liberian Government has suspended all negotiations with the LISCR.

## **L. Former Aid to Former Taiwanese President Denies Attempted Bribery of U.S. Officials**

Wu Li-pei, a former aid to former Taiwanese President Chen Shui-bian, has denied charges that he attempted to bribe U.S. politicians in order to promote U.S.-Taiwanese relations. The allegations are that former president Chen wired approximately \$2 million to Wu’s bank account, which Wu then used to pay senior U.S. government officials. After being questioned by Taiwanese police in early October, Wu allowed local prosecutors access to his foreign bank accounts.

## Publications, Speaking Engagements, Recognition, and Awards

### Publications

Matthew T. Reinhard and James G. Tillen published an article in the August 2008 edition of *The Corporate Secretary*, entitled "[Predicting the Next Target?](#)" The article discusses lessons learned from FCPA enforcement actions against specific industries, and makes predictions for future enforcement focuses. .

### Speaking Engagements

Homer E. Moyer Jr. and James G. Tillen will participate in several corruption related panels at the International Bar Association's ("IBA") Annual Conference in Buenos Aires, Argentina. The conference will take place between October 12 and October 17. Mr. Moyer and Mr. Tillen serve as Chair and Secretary respectively of the Anti-Corruption Committee of the IBA.

Homer E. Moyer Jr. will present at the Rule of Law Symposium at the University of Minnesota Law School on November 14, 2008.

The ACI's 20th national FCPA conference will be held at the Potomac National Harbor, MD between November 18 and November 19. Homer E. Moyer Jr. will serve as the conference chair and a co-panelist with Kathryn Cameron Atkinson.

### In the News

The August 11 edition of Financial Week quotes John Davis in an article entitled "Olympics seen as a biz bribe tar pit." When asked about the FCPA risks involved in the recent Beijing Olympics, Mr. Davis was quoted as saying, "It is a worldwide event...with lots of opportunity to wine and dine government officials."

Miller & Chevalier's FCPA practice was named in an August 12 article featured in the Brazilian paper, *Valor Economico*. The article mentions a presentation given by J. Matteson Ellis and James G. Tillen in Brazil earlier this year.

### Honors and Awards

Homer E. Moyer Jr. received the American Bar Association Section of International Law's Lifetime Achievement Award at the section's anniversary dinner on August 9. Former Supreme Court Justice Sandra Day O'Connor praised Mr. Moyer for his "vision and leadership" and described him as his "generation's pioneer rule of law reform and its foremost proponent."

Homer E. Moyer Jr. was named as an FCPA expert in the 2008 edition of *Chambers USA: America's Leading Lawyers for Business*.

Several Miller & Chevalier attorneys were selected for inclusion in the 2009 edition of the *Best Lawyers in America*. These attorneys include FCPA Practice Group Members James A. Bensfield and Homer E. Moyer Jr.

For further information, please contact any of the following lawyers:

Homer Moyer, [hmoyer@milchev.com](mailto:hmoyer@milchev.com), 202-626-6020

John Davis, [jdavis@milchev.com](mailto:jdavis@milchev.com), 202-626-5913

Kathryn Cameron Atkinson, [katkinson@milchev.com](mailto:katkinson@milchev.com), 202-626-5957

James Tillen, [jtillen@milchev.com](mailto:jtillen@milchev.com), 202-626-6068

---

The information contained in this communication is not intended as legal advice or as an opinion on specific facts. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. For more information, please contact one of the senders or your existing Miller & Chevalier lawyer contact. The invitation to contact the firm and its lawyers is not to be construed as a solicitation for legal work. Any new lawyer-client relationship will be confirmed in writing.

This, and related communications, are protected by copyright laws and treaties. You may make a single copy for personal use. You may make copies for others, but not for commercial purposes. If you give a copy to anyone else, it must be in its original, unmodified form, and must include all attributions of authorship, copyright notices, and republication notices. Except as described above, it is unlawful to copy, republish, redistribute, and/or alter this presentation without prior written consent of the copyright holder.