# FCPA Winter Review 2008

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**Introduction**

FCPA enforcement actions brought by the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") rose dramatically in 2007, shattering the previous record for enforcement actions brought in one year. Between the DOJ and SEC, there were a total of 38 actions brought this past year, up 23 from 2006, which had been the busiest year on record.

In our 2007 Autumn Review, we reviewed all of the enforcement actions brought through the first nine months of 2007 and highlighted several noteworthy trends in the year's caseload, settlements, and investigations:

*Investigative Patterns*

- Emphasis on improper payments to Customs officials
- Heightened focus on the oil and gas industry
- Increased prosecution of non-U.S. companies
- More enforcement actions against individuals
- Multi-company investigations
- Larger penalties for repeat offenders

*Recurring Issues*

- Vicarious liability for the acts of third parties
- Due diligence of third parties as an element of "internal controls"
- Successor liability for the acts of acquired companies
- FCPA due diligence as a prerequisite to mergers

*Expansion of Sanctions*

- Record high penalties
- A greater variety of sanctions

- Disgorgement of profits as an additional penalty
- Refinement of the model for independent compliance monitors
- Evolving standards of cooperation with enforcement officials

*International Enforcement*

- Mixed record of enforcement in OECD countries
- Growing mutual legal assistance among national enforcement agencies
- Heightened enforcement of anti-corruption standards at the World Bank
- A pipeline of investigations, including large, multi-jurisdictional cases

These trends held true through the end of last year and have continued into 2008. Notably, individuals continued to be targeted, as enforcement actions were brought against another three executives. Several large, multi-jurisdictional cases moved forward; U.S. authorities brought actions against three more prominent companies in the Iraqi Oil for Food probe, and additional revelations in the Siemens' investigations showed bribery on an unprecedented scale. International enforcement was characteristically mixed: while the United Nations anti-corruption task force exposed over $600 million in tainted U.N. contracts, the United Kingdom continued to be criticized in connection with the BAE Systems investigation, and Nigeria pressured its top anti-corruption officer to step down.

Although this was a record-breaking year for the FCPA, Mark Mendelsohn, Deputy Chief of the Fraud Section in the DOJ's Criminal Division, has characterized the increased enforcement activity in 2007 as "just the tip of the iceberg." The record fines we saw in cases like *Baker Hughes* last year may well be eclipsed if the DOJ and SEC bring an enforcement action against Siemens in 2008, as is widely expected. Looking forward, this aggressive level of enforcement shows no signs of abating this year.

## Cases Against Corporations

### A. Siemens AG -- At Least €1.3 Billion in Questionable Payments

On November 8, 2007, Siemens AG ("Siemens") released an earnings statement and a disclosure entitled "Legal Proceedings" that revealed the most comprehensive information to date on the continuing investigations into the bribery scandal that has plagued the German industrial giant this past year. The new disclosures identify an additional €857 million ($1.27 billion) in questionable payments beyond €449 million ($664 million) the company had previously revealed, for a total of more than €1.3 billion ($1.92 billion). Some estimates, however, put this number at closer to €1.9 billion ($2.81 billion).

In October 2007, a German court fined Siemens €201 million ($297 million) based on related charges and ordered it to pay €179 million ($266 million) in additional back taxes because of improperly claimed tax deductions based on the questionable payments (see our Autumn Review). This penalty has been criticized by many as lenient in light of the enormous scope of the illicit payments at issue. German prosecutors are still pursuing cases against current and former Siemens employees.

Despite being penalized by the German legal system, Siemens is still under investigation in the United States by the SEC and DOJ as well as by authorities in Italy, France, China, Hungary, Indonesia, and Norway. Some of these investigations are focused on possible violations of law that relate to the U.N. Oil for Food Program. Siemens has stated that it is cooperating with the U.S. investigations and is said to be bracing itself for record-level penalties.

On January 16, 2008, Siemens issued a press release stating that its Supervisory and Managing Boards were recommending that shareholders postpone ratifying the actions of the company's current and former Managing Board members, a largely symbolic move that signal the importance attached to the company's ongoing internal investigation. Siemens also disclosed a letter that its Supervisory-Board chairman recently received from outside counsel conducting the company's internal investigation into the massive bribery scandal. The letter revealed that the law firm has "obtained significant new information" since November and has developed "very substantial leads" on the possible complicity on the part of current and former Managing Board members.

The source of these new leads, according to the letter, was an internal amnesty program for most employees that Siemens CEO Peter Löscher implemented this fall to spur on the stalled internal investigation. The amnesty program was scheduled to end in January 2008, but on January 31, 2008, the company announced that it was extending the amnesty offer through February. These developments are significant because evidence of an aggressive internal probe and company discipline taken against those primarily responsible for the alleged violations could be mitigating factors in any possible settlement Siemens hopes to reach with U.S. prosecutors. On January 24, the company revealed that its talks with the DOJ and SEC had shown "favorable progress" and that U.S. authorities "have signaled that they would soon begin discussions with us aimed at reaching a comprehensive and fair settlement."

***Noteworthy Aspects of the Siemens Investigation:***

- Siemens has reportedly spent $500 million on its internal investigation into the corruption allegations. It also recently informed its shareholders that compliance costs related to this scandal, apart from the sanctions that have been imposed, now amount to €1.1 billion ($1.6 billion).
- The enforcement penalties at the SEC's and DOJ's disposal, including the disgorgement of ill-gotten gains, could result in Siemens paying the largest FCPA penalty ever when this case is eventually resolved.

**B. Oil for Food Actions**

U.S. authorities brought enforcement actions against three more companies in the ongoing investigation into corruption surrounding the United Nations Oil for Food Program. In total, U.S. authorities have brought FCPA enforcement actions against six companies, including El Paso, Textron, Ingersoll-Rand, York International, Chevron, and Akzo Nobel. Of the six, Chevron received the largest monetary penalty, a combined $30 million in fines and penalties handed down in November.

The purpose of the Oil for Food Program was to enable Iraq to sell a certain amount of oil for humanitarian purposes to alleviate the effects of international trade sanctions. Proceeds from these oil sales were to be deposited in a U.N. escrow account so the organization could ensure that the funds were only used for approved humanitarian purposes. Most of the enforcement actions brought to date have involved companies paying kickbacks to Iraqi government officials in an attempt to secure contracts under this program. These illicit payments diverted funds from the U.N. escrow account and circumvented the international embargoes against Iraq.

***Ingersoll-Rand Co. Ltd.*** – On October 31, 2007, the DOJ announced a deferred prosecution agreement ("DPA") with The Ingersoll-Rand Co. Ltd. ("Ingersoll-Rand") and its subsidiaries on charges of conspiracy to commit wire fraud and conspiracy to violate the books and records provisions of the FCPA in connection with kickbacks paid under the Oil for Food Program. The same day, Ingersoll-Rand also reached a settlement with the SEC on related books and records and internal controls charges. As part of its DPA, Ingersoll-Rand acknowledged responsibility for its subsidiaries' actions and agreed to pay a $2.5 million penalty. In settling with the SEC, the company, without admitting or denying the allegations, agreed to pay a $1.95 million fine and disgorge approximately $2.27 million in profits and pre-judgment interest.

In its DPA, Ingersoll-Rand admitted that employees and agents of its subsidiaries paid kickbacks to the Iraqi government in an

attempt to secure contracts for oil-related service products, including road construction equipment, air compressors and parts, and refrigerated trucks. According to the DPA, between October 2000 and August 2003, employees of Ingersoll-Rand subsidiaries paid a total of $600,000 in kickbacks to the Iraqi government, while offering to pay an additional $250,000. They raised the money to make these illicit payments by inflating the price of their contracts by approximately 10% before submitting them to the U.N. for approval. The SEC complaint alleges even more payments from 2000 to 2003, accusing four Ingersoll-Rand subsidiaries of making $963,148 in kickback payments and authorizing another $544,697 in future payments. The subsidiaries characterized the payments as "after sales services fees," but they performed no services for the fees.

In resolving the matter, the DOJ and the SEC noted that they were influenced by (1) the thorough review the company conducted after the payments were discovered; and (2) the enhanced compliance policies and procedures the company implemented to prevent questionable payments like these from occurring in the future.

***Chevron Corp.*** – On November 11, 2007, the Chevron Corporation ("Chevron") announced a settled enforcement action with the SEC involving alleged FCPA violations under the Oil for Food Program. Days earlier, on November 8, 2007, Chevron had entered into a non-prosecution agreement with the DOJ and the Treasury Department on related charges. As part of these settlements, Chevron agreed to pay $30 million in fines and disgorged profits.

According to the SEC's complaint, from April 2001 through May 2002, third parties under contract with Chevron made about $20 million in illegal kickback payments directly to Iraqi-controlled bank accounts, bypassing the Oil for Food escrow account discussed above. The SEC complaint claims that Chevron knew or should have known about these payments. It also alleges that Chevron (1) failed to implement sufficient internal controls to detect and prevent these illicit payments and (2) failed to properly record the true nature of Chevron's payments to third parties, which in turn enabled the illicit payments.

The SEC complaint also asserts that Chevron purchased approximately 78 million barrels of crude oil from Iraq through 36 third-party contracts without ensuring compliance on the part of these third parties as required by company policy. In doing so, the SEC alleged Chevron ignored red flags (e.g., sellers with no oil experience and no assets). Consequently, Chevron paid inflated premiums that enabled the illicit payments. According the SEC complaint, one of the sellers even contends that the Chevron trader it dealt with was well aware that these premiums were funding illegal surcharges, but paid them anyhow.

In its agreement with the DOJ, Chevron agreed to forfeit $20 million to the U.S. government, $5 million to the Manhattan District Attorney's office, and $2 million to the Treasury's Office of Foreign Assets Control (for violating sanctions against the former government of Iraq). In settling with the SEC, Chevron consented to the entry of a final judgment permanently enjoining it from future violations of the FCPA and ordering it to pay a $3 million civil penalty and disgorge $25 million in profits. This $25 million disgorgement was deemed satisfied by the money Chevron is forfeiting to the DOJ and Manhattan District Attorney under the DOJ settlement agreement.

***Akzo Nobel, N.V.*** – On December 20, 2007, the SEC settled charges against Akzo Nobel, N.V. ("Akzo Nobel"), a Dutch pharmaceutical company with ADRs registered on the New York Stock Exchange, for violations of the books and records and internal controls provisions of the FCPA. Akzo Nobel, without admitting or denying the allegations, consented to the entry of a final judgment permanently enjoining it from future violations of FCPA and agreed to pay over $2.9 million in penalties, disgorgement, and pre-judgment interest. The same day, Akzo Nobel also entered into a non-prosecution agreement with the DOJ which requires the company to cooperate fully with the ongoing investigations into the Oil for Food Program. The DOJ asserted jurisdiction over Azko Nobel on the grounds that the company had, in the course of its conduct alleged in the government's complaints, directly or indirectly made use of the means or instrumentalities of U.S. interstate commerce.

The SEC complaint alleges that two Akzo Nobel subsidiaries made $279,491 in kickback payments related to the sale of humanitarian goods to Iraq under the program. The subsidiaries characterized the illicit payments as "after-sales service fees," but they involved no bona fide services. According to the complaint, Akzo Nobel's subsidiaries side-stepped the U.N. escrow account

by using third parties to send these kickbacks to Iraqi-controlled accounts in Lebanon and Jordan.

The SEC alleges that in September 2000, the Akzo Nobel subsidiary Intervet International B.V. acceded to an Iraqi ministry demand that it funnel kickbacks through the third-party agent the company used to conduct business in Iraq. To cloak these kickbacks, Intervet doubled the amount it claimed it paid its third-party agents and retroactively altered its books and records to reflect this increased fee. This scheme was used to pay $38,741 in after-sales service fees. The SEC contends that another Akzo Nobel subsidiary, N.V. Organon, inflated its initial contract price with Iraq by 10% to meet an Iraqi ministry demand for kickbacks, and then mirrored that inflated price on two subsequent contracts. Organon subsequently submitted these inflated contract prices to the U.N. and had an employee backdate price quotes that reflected the inflated price. Like Intervet, Organon simply increased its third-party agent's commission to pay the kickback. The SEC claims that Organon's employees knew the contract price the company submitted to the U.N. was inflated in order to cover kickbacks to the Iraqi Ministry of Health. It also alleges that Akzo Nobel knew or was reckless in not knowing about these illicit activities since it failed to maintain an adequate system of internal controls and recordkeeping to detect and prevent corruption.

Both the SEC and the DOJ noted that, in agreeing to settle, they each considered Akzo Nobel's prompt remedial acts as well as the cooperation the company afforded their staff. The DOJ stated that it agreed not to file criminal charges against Akzo Nobel in part because it expected Organon to reach a resolution with Dutch prosecutors on charges relating to the same conduct wherein the company is expected to be required to pay a criminal fine of around €381,000 ($556,000). If Organon fails to reach a resolution with Dutch prosecutors within 180 days, Akzo Nobel will have to pay the United States $800,000.

**Noteworthy Aspects of the Oil for Food Enforcement Actions:**

- Although most of the companies named in former Federal Reserve Chairman Paul Volcker's 2005 report on the U.N. Oil for Food Program were not from the United States, the U.S. government has undertaken the most aggressive pursuit of wrongdoers to date.
- As noted, Chevron consented to pay a combined penalty of $30 million in fines and disgorged profits and interest. The monetary penalties imposed by the SEC and the DOJ on other Oil for Food violators have varied significantly. In combined penalties, the government ordered *Azko Nobel* to pay approximately $2.9 million, *Ingersoll-Rand*, $6.77 million, *York International*, $22 million, *Textron*, $4.45 million, and *El Paso*, $8 million.
- None of the three latest enforcement actions required the appointment of a compliance monitor. In total, only one Oil for Food Program enforcement action, York International, has imposed such a requirement.
- As noted in our Autumn Review, vicarious liability is a recurring trend in FCPA enforcement. While this liability is often an aspect of actions based on the anti-bribery provisions for payments made by third party representatives to foreign officials, it can also arise from the failure to properly implement internal controls governing the retention and monitoring of third parties and failure to ensure third party payments are accurately recorded, as seen in the Chevron and Akzo Nobel settlements.
- The SEC and DOJ resolutions with Akzo Nobel indicate that the U.S. Government will investigate and punish a foreign entity even where the entity is already subject to prosecution by another country. In Akzo Nobel, the DOJ agreed to forego criminal charges and a criminal fine in recognition of the fact that the case was simultaneously being investigated by authorities in the Netherlands. In the Statoil case from 2006, however, the DOJ credited the company for the $3 million fine it had paid Norwegian prosecutors but still imposed an additional fine of $7.5 million. The DOJ is proceeding with investigations against Siemens (see above) and BAE (see below) despite the fact that officials in other countries have already investigated these companies.

**C. Medical Device Manufacturer Investigations -- Domestic Settlements Leading to Foreign Investigations**

This fall, the SEC began an "informal inquiry" into possible FCPA violations by several leading manufacturers of orthopedic medical

implants. The companies targeted, Biomet, Inc. ("Biomet"), Medtronic, Inc. ("Medtronic"), Smith & Nephew, PLC ("Smith & Nephew"), Stryker Corp. ("Stryker"), and Zimmer Holdings, Inc. ("Zimmer"), have all acknowledged the investigations in public statements and stated that they are cooperating, but each denies any wrongdoing.

According to the SEC notifications sent to the companies, the probe is focused on "direct and indirect" payments made in connection with "the sale of medical devices in a number of foreign countries." Some of the notifications indicated that the investigation is focused on Europe, including, among other countries, Greece, Poland and Germany. The SEC requested "any information concerning certain types of payments made directly or indirectly to government-employed doctors." As reflected in past FCPA actions involving *Syncor*, *Micrus*, and *Diagnostic Products Corporation*, U.S. authorities consider doctors that work at government-owned or managed hospitals abroad to be "foreign officials" under the FCPA.

Additionally, on December 4, 2007, in a Form 10-Q filing, Medtronic revealed that the investigation is broadening by noting that it had received a letter from the DOJ in November requesting that Medtronic provide the DOJ with any information that the company was providing to the SEC.

These overseas inquiries come on the heels of several DOJ settlements of U.S. domestic bribery charges involving these same medical device manufacturers. On July 18, 2006, Medtronic agreed to pay $40 million to settle allegations that it had provided kickbacks to U.S. doctors for using its products. On September 27, 2007, Biomet, Smith & Nephew, Stryker, Zimmer, and another company, Depuy Orthopedics, settled similar charges that they had paid orthopedic surgeons in the United States to be "consultants" and exclusively use their products. In settling, these companies consented to the appointment of compliance monitors and agreed to pay a total of $310 million. (While Stryker joined the settlement, it was not required to pay any portion of the fine.)

***Noteworthy Aspects of the Medical Device Manufacturer Investigations:***

- Zimmer recently disclosed that U.S. Attorney Christopher J. Christie required the company to hire a consulting firm headed by former U.S. Attorney General John Ashcroft to serve as its compliance monitor as part of its recent settlement of domestic bribery charges. News of this lucrative contract (worth between $28 to $52 million) has sparked allegations of cronyism. News outlets have also reported that last year, Mr. Christie steered similar monitorship contracts to two other former DOJ colleagues. This has ignited a firestorm of criticism, leading the Chairmen of the House and Senate Judiciary Committees to direct the GAO to scrutinize monitorships, which are a frequent component of FCPA settlements.
- This probe represents another example of an industry-wide investigation in which the government leverages one investigation into several others. Prior examples include the Oil for Food Program and Panalpina investigations as well as earlier investigations into kickbacks in the medical industry (e.g., Micrus, Syncor, and Diagnostic Products Corporation).

**D. BAE Systems -- Lack of Cooperation by the United Kingdom**

The DOJ is proceeding with an FCPA probe into possible bribery by the British arms firm BAE Systems ("BAE") even though the U.K. Government, according to both U.S. and U.K. media reports, has rebuffed U.S. efforts to investigate the alleged corruption.

In press accounts, BAE is alleged to have paid billions of dollars to the Saudi government over the years to secure massive contracts for the sale of arms. Specifically, these media outlets have reported that BAE deposited £1 billion ($1.97 billion) into the Washington bank account of Saudi Prince Bandar bin Sultan in exchange for his help in brokering the sale of Typhoon jet fighters to the Saudi government. In addition to this payment, the media reports allege that BAE also sent another £1 billion ($1.97 billion) to agents in Switzerland acting for other Saudi royals. Initially, U.K. prosecutors had been investigating the allegations, but former Prime Minister Tony Blair shut the probe down in 2006 on national security grounds.

Despite the United Kingdom's purported lack of cooperation, the U.S. and U.K. press are reporting that U.S. prosecutors have begun to actively investigate the case. This past August, they flew a British businessman named Peter Gardiner to Washington, DC, to testify about his involvement in the alleged funneling of millions of dollars from BAE to the Saudi royal family. Mr. Gardiner owned a travel agency that BAE employed to cater to the needs of its Saudi customers. To avoid attracting the attention of the British Government when deposing Mr. Gardiner, media outlets have reported that U.S. investigators routed him on a flight through Paris. The DOJ has also secured an agreement from Swiss prosecutors to share financial records linked to the Saudi royal family.

***Noteworthy Aspects of the BAE Systems Investigation:***

- Last March, the OECD's Working Group on bribery expressed "serious concerns" about whether the United Kingdom's decision to end its BAE investigation was "consistent with the OECD Anti-Bribery Convention." By denying the United States' requests for mutual assistance in its corruption investigation, the United Kingdom may possibly be violating its treaty obligations under the Convention once again.
- By shielding BAE from this investigation, the United Kingdom indirectly may be harming U.S. military contractors. According to public information, the United States suspects that BAE's potentially corrupt activities are not solely limited to Saudi Arabia, but include other markets such as the Czech Republic and Hungary where BAE has secured contracts over U.S. firms like Lockheed Martin and Boeing.

**E. Lucent Technologies Inc. -- Travel and Entertainment for Chinese Officials**

On December 21, 2007, Lucent Technologies ("Lucent") settled criminal and civil charges with the SEC and the DOJ relating to FCPA violations involving travel and entertainment provided to Chinese government officials. As part of the non-prosecution agreement with the DOJ, Lucent acknowledged the alleged books and records violations and agreed to pay $1 million.

Subsequently, in settling with the SEC, Lucent agreed to pay $1.5 million without admitting or denying the allegations. The settlements end an extended investigation into possible FCPA violations that occurred after Lucent's merger with Alcatel SA in November 2006. The DOJ agreement, however, stipulates that activities by Alcatel SA and its subsidiaries prior to the merger with Lucent are still under investigation in connection with possible FCPA violations in Costa Rica and elsewhere. This caveat is almost certainly connected to the guilty plea last June by former Alcatel executive Christian Sapsizian on charges that he violated the FCPA by bribing the director of Costa Rica's state-owned telecommunications authority (see our Autumn Review).

Lucent's DOJ agreement states that, from 2000 to 2003, Lucent spent millions of dollars on more than 300 trips for Chinese government officials that "included primarily" sightseeing, entertainment and leisure. During this process, Lucent improperly recorded the expenses for these trips and failed to implement sufficient internal controls to prevent questionable expenditures from being made. These trips were often characterized as "factory inspections" or "training" in Lucent's books and records, when, by 2001, Lucent actually no longer owned factories for its customers to tour. Instead, the trips were primarily sightseeing tours to places like Disneyland and typically lasted about two weeks, and cost as much as $55,000. The DOJ agreement specifically outlines 24 Lucent-sponsored pre-sale trips in 2002 and 2003, for various Chinese officials, including the heads of state-owned businesses, 12 of which were primarily
for sightseeing.

The SEC complaint covers the same activity as the DOJ agreement and alleges that from 2000-2003, Lucent spent over $10 million on trips for over 1,000 Chinese foreign officials, many of whom Lucent classified as "decision makers" for state-owned entities that were either prospective or existing Lucent customers. On many of these trips, the complaint claims, the officials spent little or no time in the United States visiting Lucent's facilities; rather "they visited tourist destinations . . . such as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City."

In addition to the monetary penalty imposed, Lucent's settlement also requires it to implement a rigorous compliance regime and adopt adequate internal controls, policies and procedures to ensure proper recordkeeping. The DOJ has agreed not to prosecute Lucent if the company remains compliant for two years. In settling with the SEC, Lucent also consented to the entry of a permanent injunction against future violations of the FCPA.

***Noteworthy Aspects of the Lucent Enforcement Action:***

- Although the non-prosecution agreement is cast in terms of an anti-bribery violation, the DOJ only alleges books and records and internal controls violations, an area that is typically enforced within the SEC's civil jurisdiction. The DOJ's pursuit of this case reflects the fact that the DOJ will aggressively prosecute payments that merely suggest bribery, even where the evidence is insufficient to establish an anti-bribery violation.
- Although a books and records case, the Lucent enforcement action provides guidance regarding the interpretation of the promotional defense to anti-bribery provisions. The promotional defense allows for payments to foreign officials for "the promotion, demonstration, or explanation of products or services." While the government does not allege that Lucent expected to profit by providing these trips, it does suggest that these expenses would not have qualified for the defense because they were not primarily for business. It also criticizes Lucent for not having sufficient internal controls to detect trips and expenses that were primarily focused on entertainment.
- The SEC complaint underscores the importance of compliance reviews and training, stating that "Lucent failed, for years, to properly train its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the Foreign Corrupt Practices Act."

**F. Tentative Settlement Agreements -- Willbros and Faro**

This fall, two companies disclosed tentative settlement agreements with the DOJ and SEC over violations of the FCPA that have yet to be announced by the agencies.

***Willbros*** **–** On October 31, 2007, Willbros Group, Inc. ("Willbros"), an international energy services provider, disclosed in its Form 10-Q regulatory filing that the company, along with its subsidiary Willbros International, Inc., had reached a tentative settlement with the DOJ and SEC over violations of the FCPA.

Willbros revealed in its regulatory filings that the violations stemmed primarily from its former operations in Nigeria, Bolivia, and Ecuador from 1996 to 2005. In January 2005, Willbros had announced an internal investigation into possible FCPA violations by the former president of Willbros International, James Tillery. The investigation uncovered improper payments to government officials in Bolivia, Nigeria, and Ecuador that were made by Mr. Tillery and others in exchange for construction contracts. The investigation also revealed that Mr. Tillery and several other employees and consultants appeared to own interests in enterprises that Willbros International had business dealings with and which paid and received improper payments, corporate opportunities, and benefits from suppliers. The company voluntarily disclosed its findings to the SEC and the DOJ.

Specific details will probably not be available until the government actually announces the settlement agreement, but the violations in Nigeria almost certainly relate to recent guilty pleas by two former Willbros executives, Jason Edward Steph and Jim Bob Brown, on charges that they conspired to bribe Nigerian government officials to obtain and retain pipeline construction business for Willbros (see below for a summary on Steph's plea).

On the DOJ side, a three-year deferred prosecution agreement would impose a monitor on the Willbros subsidiary, and require Willbros to pay an estimated $22 million fine and fully cooperate with the government. According to Willbros' Form 10-Q, the DOJ will file a twelve-count criminal information against the company and its subsidiary that will include "substantive violations of the anti-bribery provisions of the FCPA, and violations of the FCPA's books-and-records provisions."

On the SEC side, Willbros "will consent to the filing in federal district court of a complaint by the SEC, without admitting or denying the allegations . . . and to imposition of a permanent injunction." The company will also be required to pay an estimated $10.3 million in disgorgement and pre-judgment interest. According to the Form 10-Q, the SEC's complaint "will allege civil violations of the antifraud provisions of the Securities Act and the Securities Exchange Act, the FCPA's anti-bribery provisions, and the reporting, books and records and internal controls provisions of the Securities Exchange Act."

***Faro Technologies*** – On October 30, 2007, Faro Technologies ("Faro"), a Florida-based software company, disclosed in a press release that the company has reached a tentative settlement agreement with the DOJ and SEC over violations of the FCPA. Faro warned investors that it expects to pay an estimated $2.65 million in fines and penalties as part of this agreement.

In March 2006, Faro voluntarily notified the SEC and the DOJ about payments its Chinese subsidiary made that possibly violated the FCPA and other applicable laws. After discovering the payments, Faro commenced an internal investigation which identified $552,000 in improper referral fee payments from 2004 to 2006 that were connected to approximately $4.54 million in sales during that period. These referral fees had been recorded as selling expenses in the company's books and records. Faro provided the SEC and the DOJ with information from its internal investigation and cooperated with both agencies during their subsequent investigation.

While there are few specific details about the possible settlement, Faro's disclosure states it does not anticipate criminal charges being filed. In addition to the monetary sanctions, however, Faro believes the resolution will carry with it continuing obligations to the SEC and DOJ, including monitoring, adoption of a more rigorous compliance code, and cooperation with the government. The company believes that its monitoring obligations will run for a period of two years after the final resolution of violations at issue and it estimates that the costs associated with these obligations will be from $1 million to $2 million.

## Prosecution of Individuals

### Sanctions Against Individuals under the FCPA and Anti-Bribery Laws

There were a record number of enforcement actions against individuals for FCPA violations in 2007 at 16, more than doubling the previous record of 7 set in 2006. The cases this past year reflect the interconnectedness of individual and corporate prosecutions. The government has a pattern building on the prosecution and settlement of a corporation to pursue individual employees and vice versa.

**Steven Lynwood Head:** *Former Titan Africa CEO Sentenced* – On October 4, 2007, Steven Head, the former CEO of Titan Africa (a subsidiary of Titan Corporation), who in June pleaded guilty to one count of falsifying the books and records provision of the FCPA, was fined $5,000 and sentenced to six months imprisonment to be followed by three years of supervised release.

In January 2001, Mr. Head, in his position at Titan Africa, allegedly authorized the payment of $2 million in "advanced social fees" to the President of Benin's reelection campaign in return for a higher management fee on a wireless telephone contract in Benin. The wireless contract had called for Titan Africa to pay certain "social fees" to develop "sectors" in Benin, but those fees were not yet due and Mr. Head's plea agreement states that he was aware that these payments would not be used for the purposes identified by the contract. The agreement states that Mr. Head then submitted an invoice to Titan Corporation for these payments that falsely stated that they were for "consulting services."

Mr. Head's guilty plea followed the resolution of SEC and DOJ FCPA actions against Titan Corporation in 2005, that obligated the company to pay a disgorgement of $15.5 million along with a $13 million criminal penalty to satisfy the civil and criminal charges. The DOJ accepted a plea for just one count against Mr. Head relating to this incident and recommended a lower sentence

in return for Mr. Head's "substantial" assistance in the "investigation and prosecution of others," which suggests that there are more individual prosecutions of Titan employees yet to come.

**David Kay and Douglas Murphy:** *Prior FCPA Convictions Affirmed* – On October 24, 2007, the U.S. Court of Appeals for the Fifth Circuit affirmed the FCPA and obstruction of justice convictions of former American Rice, Inc. ("ARI") executives David Kay and Douglas Murphy. On January 10, 2008, the Court denied a petition en banc to review its decision.

Mr. Kay and Mr. Murphy, the former vice-president and president of ARI, respectively, were convicted in the fall of 2004 in connection with illicit payments, totaling more than $528,000, that were made to Haitian officials in an attempt to reduce duties and taxes on rice imported by ARI's Haitian subsidiary, the Rice Corporation of Haiti ("RCH"). The payments are alleged to have saved the company more than $1.5 million dollars in taxes.

In 2002, the district court initially dismissed the indictments against Mr. Kay and Mr. Murphy, finding that the FCPA did not cover the payments to the Haitian officials, but in 2004, the Fifth Circuit reversed that dismissal and remanded the case, holding that the indictment fell within the scope of the FCPA. On remand, a jury convicted both men. Mr. Kay was sentenced to 37 months in prison followed by two years of supervised release and fined $1,300. Mr. Murphy was sentenced to 63 months in prison and ordered to pay $1,400 in penalties. The defendants had remained free pending this appeal. Related charges brought by the SEC seeking $187,000 in civil penalties from each man have been pending as well.

**Jason Edward Steph:** *Guilty Plea by Former Willbros Executive* – On November 5, 2007, Jason Edward Steph, a 37-year-old former executive of the Houston-based oil, gas, and power company Willbros International, pleaded guilty to conspiring to bribe Nigerian government officials in order to obtain and retain pipeline construction business in Nigeria.

Mr. Steph had been indicted in July 2007 for several alleged violations of the FCPA related to his efforts to obtain this Nigerian contract (see our Autumn Review). Mr. Steph's indictment came on the heels of a plea agreement by another Willbros executive, Jim Bob Brown, on related charges. Mr. Brown pleaded guilty in September 2006 to arranging a $1.5 million payment to Nigerian government officials to try and secure pipeline construction business. Mr. Brown is currently awaiting sentencing.

Mr. Steph worked for Willbros from 1998 to April 2005. In his plea agreement, Mr. Steph admitted that in 2003, he agreed to make more than $6 million in illicit payments to Nigerian officials in order to obtain and retain a gas pipeline construction contract from joint venture controlled by the Nigerian state-owned oil company. He made this agreement along with two Willbros consultants and several employees of a German engineering and construction company. These payments were offered and made to officials from the state-owned oil company, a Nigerian political party, as well as a high-placed government official. As part of this scheme, Mr. Steph said that in February and March 2005, he and several others, including Mr. Brown, helped to arrange for a payment of around $1.8 million in cash to Nigerian government officials.

Mr. Steph agreed to cooperate with the DOJ as part of his plea agreement. He was scheduled to be sentenced on January 25, 2008, and faces up to five years in prison and a fine of up to $250,000.

**Gerald and Patricia Green:** *Bribes to Secure Thai Film Festival Contracts* – On December 19, 2007, Gerald Green, a Los Angeles film executive, and his wife, Patricia Green, were arrested on a criminal complaint filed by the DOJ alleging that they had conspired to bribe a Thai government official in violation of the FCPA. On January 16, 2008, a federal grand jury indicted the Greens on one count of conspiracy to bribe a foreign public official in violation of the FCPA and six substantive counts of violating the FCPA. The Greens pleaded not guilty on January 22, 2007, and have a trial date set for February 26, 2007.

In 2003, the Greens formed a company, Film Festival Management, specifically in order to bid on the management contract for the annual Bangkok International Film Festival. According to the indictment, from 2002 to 2007, the Greens conspired to bribe the then-governor of the Tourism Authority of Thailand (TAT), Juthamas Siriwann, who at the time was also president of the film

festival. The Greens allegedly made more than $900,000 in payments to Ms. Siriwann, who, in her position at TAT was then able to steer more than $7 million in contracts toward the Greens' management company, including contracts for the annual Bangkok International Film Festival.

The complaint contends that the Greens attempted to conceal these illicit payments by shielding how much they were earning off their contracts through the use of different businesses, some with fake addresses and telephone numbers. They also funneled "commission" payments to Ms. Siriwann through the foreign bank accounts of third-party intermediaries.

The Thai Government has reportedly sought cooperation from the FBI as it investigates whether to prosecute Ms. Siriwan or any other Thai official who may be implicated in the bribery scandal. In the wake of this scandal, Ms. Siriwan has resigned from her current position as deputy chairman of the People's Power Party, though she has denied any allegation of corruption on her part.

**Robert W. Phillip:** *Former Chairman of Schnitzer Steel Settles with the SEC* – On December 13, 2007, the SEC settled FCPA charges with Robert W. Philip, the former Chairman and CEO of Schnitzer Steel Industries, Inc. ("Schnitzer Steel"). Without admitting or denying the allegations, which related to Mr. Philip's alleged approval of cash payments and other gifts for officials at government-owned steel mills in China, Mr. Philip agreed to pay $261,400 in penalties, disgorgement, and pre-judgment interest as part of the agreement.

The SEC complaint contends that from 1999 through 2004, Mr. Philip authorized more than $200,000 in cash payments and other gifts to Chinese officials at government-owned steel mills in China to persuade them to buy scrap metal from Schnitzer Steel. These bribes allegedly generated more than $96 million in revenue, which resulted in $6.2 million in profits for Schnitzer. The complaint also claims that Mr. Philip authorized more than $1.7 million in illicit payments to managers of private steel mills in China and South Korea which generated more than $500 million in revenue and likely tens of millions in profits for Schnitzer.

The SEC charged Mr. Philip with violating the anti-bribery, recordkeeping, and internal controls provisions of the FCPA. The fact that no criminal charges have yet to be brought by the DOJ while the SEC has gone ahead and announced settled charges may suggest that no criminal charges are likely. In settling, Mr. Philip also agreed to an order enjoining him from any future violation of the FCPA. Mr. Philip's settlement follows a settlement by his former company, Schnitzer, on related charges in October 2006. Schnitzer paid more than $15 million in penalties and disgorgement to put to rest actions brought by both the SEC and DOJ.

DOJ Opinions

**Opinion Procedure Release 07-03 -- Payment to a Foreign Court**

On December 21, 2007, the DOJ released Opinion Procedure Release 07-03, in which it favorably considered a U.S. resident's request to make a payment required by a family court judge in an Asian country to cover certain litigation-related costs. The U.S. resident was involved in the disputed estate proceeding of a family member in an Asian country. In connection with these proceedings, the U.S. resident submitted an application for the court to appoint an estate administrator pending the court's decision on the disposition of the estate assets. To provide for this request, the Court asked the U.S. resident for an advance payment of around $9,000 to cover court costs and expenses related to the court-appointed administrator. Worried about whether such a payment was legal under the FCPA, the U.S. resident withdrew the application for the appointment of an administrator to allow for time to determine the payments legality under U.S. law. The U.S. resident represented that he had secured a written opinion from a lawyer with law degrees in both the United States and the Asian country in question that stated the lawyer's belief that the payment was explicitly allowed under the country's laws.

For the purposes of its opinion, the Department assumed that such a payment could be seen as an effort to obtain or retain

business, which would implicate the FCPA's anti-bribery provisions. The DOJ stated that it did not intend to take any enforcement action in this matter for two reasons. One, "the payment will be made to a government entity, the court clerk's office, rather than a foreign official" and "there is nothing to suggest that the presiding judge or the estate administrator will personally benefit from the funds . . ." And two, the contemplated payment was "'lawful under the written laws and regulations' of the foreign country according to an experienced attorney retained by the Requestor in the
Asian country."

**Opinion Procedure Release 08-01 -- Due Diligence before Acquisition**

On January 15, 2008, the DOJ released Opinion Procedure Release 08-01, in which it favorably considered a U.S. issuer's request for its wholly-owned subsidiary to invest in the controlling-stake of a foreign entity responsible for managing certain public services for a major foreign municipality. The U.S. issuer stressed the importance and urgency of the matter and requested an expedited review process. The DOJ obliged, issuing its opinion in just 13 days.

The U.S. Issuer is a Fortune 500 company with offices in over 35 countries and revenues of several billion dollars. The company is considering an investment into a foreign entity which provides public services to a foreign municipality and is currently jointly-owned by a government-owned enterprise and a private party, with the government holding a 56% stake. The U.S. Issuer would purchase a controlling stake in the foreign entity following the government's anticipated sale of its holdings in the entity and the private party would remain a minority interest holder. In preparing for the possible sale, the U.S. Issuer conducted extensive due diligence and planned on purchasing the controlling interest at a substantial premium above their initial public purchase price because it expected the government would be divesting its holdings in the company at below market cost. The U.S. Issuer, however, was concerned that the private party may be considered a "foreign official" under the FCPA making any premium on the controlling interest potentially an improper payment.

Based on the U.S. Issuer's substantial due diligence, the proposed contractual terms, and the transparency of the transaction, the DOJ determined that any premium paid on the controlling-interest would not violate the FCPA. The opinion release describes the U.S. Issuer's due diligence efforts in extensive detail and is a useful guide to others considering investments in foreign countries.

International Developments

**U.N. Anti-Corruption Task Force Exposes Corruption**

This year, the U.N. task force charged with pursuing fraud within the organization has exposed over $610 million in waste, fraud, mismanagement, and corruption in contracts for food, services, fuel, supplies, and construction connected with U.N. peacekeeping operations. In both public and confidential reports, the task force has highlighted widespread corruption that runs from U.N. headquarters to the many ongoing peacekeeping missions throughout the world. The reports underscore how the U.N. rather than acting to prevent this corruption has often enabled it by failing to actively pursue corruption and allowing procurement officials with notorious reputations to perpetuate fraud in mission after mission.

A recent investigation by the task force into the peacekeeping mission in Congo uncovered widespread corruption throughout the mission's entire purchasing department. It charged one U.N. official there, Abdul Karim Masri, with engaging in an "extensive pattern of bribery" in the performance of his duties and outlined various illicit activities in which he had taken part. Although suspicion has followed Masri for more than a decade, he has safely escaped repeated inquiries by the U.N.'s Office of Internal Oversight Services ("OIOS"). Another investigation in Haiti resulted in five employees being charged with misconduct for allegedly steering a multi-million dollar fuel contract to a Haitian company. The task force, however, has not been able to prove these employees profited from their act because it lacks subpoena power; it has pushed to have the case referred to the United

States or Haiti for prosecution.

In total, misconduct charges have been brought against 10 U.N. procurement officials over the past few months for allegedly soliciting bribes and rigging contract bids in Congo and Haiti. But in the face of these limited successes, there was a strong push within the U.N. General Assembly to pass a resolution at the end of December which would have forced the task force panel to close its operations within six months. The resolution also recommended the panel itself be investigated for impropriety. This effort was led by Singapore, which claims the task force did not deal with a U.N. official from Singapore fairly. Singapore had successfully lobbied the developing world's powerful Group of 77 caucus to support the resolution, but in last minute negotiations, a U.S. Ambassador was able to persuade the group to drop the effort.

This back and forth activity sheds light on the limits of the anti-corruption reforms that the U.N. has tried to impose since 1994, when it created the OIOS to stamp out rampant corruption. This latest crackdown grew out of the 2005 Volcker report on the U.N. Iraqi Oil for Food Program that led to the prosecution of a U.N. procurement officer and then suspension of several others. The task force, which is comprised of a number of Volcker's investigators, has since helped to successfully prosecute one of those suspended officials who, it should be noted, had previously been cleared by the OIOS.

Critics of the task force claim that it has overreached and denied suspects due process. They question the true extent of the alleged corruption, believe the task force wastes millions pursuing many claims that are never proven, and argue that some fraud is inevitable in a system of operations as large as the U.N.'s. These critics characterize the fraud found in Congo as an aberration and note some past corruption crackdowns have not withstood closer scrutiny. In rejecting calls to disband the task force, however, the U.N. has kept anti-corruption a top priority heading into 2008.

**Director of the World Bank's Anti-corruption Department Resigns**

Suzanne Folsom, director of the World Bank's Department of Institutional Integrity ("INT"), resigned on January 16, 2007, to return to the private sector; departing with her are her two deputies, Glenn Ware and Allison Brigati. Ms. Folsom was appointed to her position by former World Bank president Paul Wolfowitz. While at the Bank, Ms. Folsom gained a reputation for aggressively pursuing fraud and corruption. Under her direction, the INT recently completed an internal report which detailed $569 million worth of questionably used funds for several health projects in India.

The INT has been the target of controversy in recent years, but, as noted in our Autumn Review, an independent report by Paul Volcker last fall exonerated the INT with regard to allegations of unfairness and political motivation and expressed support for the aggressive Voluntary Disclosure program the Bank has put in place. The report also recognized notable successes by the INT while suggesting ways in which the World Bank might improve its efforts. Bank President Robert Zoellick commended Ms. Folsom for doing "very good work, [while] operating in extremely difficult circumstances." Johannes Zutt, a senior adviser at the Bank, was named acting director while a permanent replacement is sought.

**Top Nigerian Anti-Corruption Official Steps Down**

Nuhu Ribadu, the top anti-corruption official in Nigeria, has stepped down after being ordered by the head of Nigeria's police force to attend a year-long training course in the remote city of Jos. The reassignment, which had the approval of recently elected President Umaru Yar'Adua, has provoked widespread criticism that the new government was sidelining Mr. Ribadu, who had successfully prosecuted some of Nigeria's wealthiest politicians.

The timing of the transfer was particularly suspect, coming just weeks after the arrest of seven prominent former governors from President Adua's ruling party. Among them was James Ibori, a powerful politician who played a crucial role in helping President Adua win what observers have said was a flawed election in April 2007. Mr. Ibori has been accused of laundering tens of millions of dollars.

In 2002, Mr. Ribadu was chosen by then-President Olusegun Obasanjo to head up the new Economic and Financial Crimes Commission ("EFCC") created specifically to weed out domestic corruption. Mr. Ribadu's crusades against public corruption while at the EFCC have earned him the admiration and respect of the Nigerian public and the worldwide community. Although he was criticized by some for being selective in his targets, appearing at times to focus more on political enemies of the former President, the EFCC under Mr. Ribadu had essentially been the only government institution holding politicians accountable in one of the most corrupt countries in the world. During his five years as head of the EFCC, Mr. Ribadu charged, among others, prominent bankers, former ministers, politicians, and high-ranking political party members. He once estimated that corrupt officials have stolen or mismanaged upwards of $380 billion of Nigeria's wealth.

Mr. Ribadu's reassignment and subsequent resignation has sparked outrage at home and abroad, even prompting a letter of condemnation from Senator Russell Feingold. Some believe it may be a sign of more serious trouble on the horizon for Nigeria.

## Publications and Upcoming Speaking Engagements

### Publications

As noted in the Autumn Review, Miller & Chevalier's FCPA Practice Group authored The Global Overview and the United States Chapter in the 2007 edition of Getting the Deal Through: Anti-Corruption. Miller & Chevalier will similarly contribute to the 2008 edition, which will be distributed at the 6th Annual International Bar Association's Anti-Corruption Conference in Paris, France (see below). As with the 2007 edition, the book will include a discussion by local practitioners of anti-corruption legal frameworks and enforcement developments in countries throughout the world. The 2007 and 2008 editions may be purchased on-line at: http://www.gettingthedealthrough.com/.

### Upcoming Speaking Engagements

The International Bar Association will host its 7th Annual International Corporate Counsel Conference on February 17-19, 2008, at the Hilton Hotel in Frankfurt, Germany. Miller & Chevalier's Kathryn Cameron Atkinson will speak on the topic "Challenges when going global: Entering new markets."

The Institute for International and Comparative Law will host a forum on " International Corporate Compliance" on February 21-22, 2008, at the Ronald Reagan Building and International Trade Center in Washington, DC Miller & Chevalier's Kathryn Cameron Atkinson is co-chair of the event and will lead an "International Compliance Overview" workshop and moderate a luncheon workshop on "Designing and Maintaining an Effective Program: Is Integration Practicable?" Another member of Miller & Chevalier, Homer E. Moyer, Jr., will moderate a workshop on "Anti-Corruption Compliance."

The ABA will host the 22nd Annual National Institute on White Collar Crime on March 5-7, 2008, at the Miami Marriott in Biscayne Bay, FL. Miller & Chevalier's Homer E. Moyer, Jr. will participate on the panel "The Foreign Corrupt Practices Act at 30 Years."

The American Conference Institute will host its 19th National Conference on the Foreign Corrupt Practices Act on March 26-27, 2008, in Bridgewaters, the Historic South Street Seaport in New York, NY. Miller & Chevalier's Homer E. Moyer, Jr. is chairing the event and will speak on "Conducting Pre-Merger (or Pre-IPO) FCPA Due Diligence." Another member of Miller & Chevalier, John E. Davis, will also speak on the topic "Conducting Due Diligence of Foreign Third Parties to Minimize Liability Risks."

The American Conference Institute and the Canadian Institute will host the Canadian Forum on Bribery and Foreign Corruption on March 31-April 1, 2008, at The Fairmont Royal York in Toronto, Canada. Miller & Chevalier's Homer E. Moyer, Jr. will speak on

the topic of "Conducting Effective CFPOA/FCPA Due Diligence in Cross-Border Mergers, Acquisitions and Financings."

Miller & Chevalier's Brian A. Hill will co-chair a Conference on "Fraud and Procurement Contracting: Iraq and Beyond" on April 9, 2008 in Washington, DC Miller & Chevalier's James G. Tillen will speak on the topic of "FCPA and Iraq Reconstruction Contracting."

The Practicing Law Institute will host "The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks" on April 16, 2008, at the PLI California Center in San Francisco, CA. Miller and Chevalier's Kathryn Cameron Atkinson will speak at the event. For more information, please visit: http://www.pli.edu/product/seminar_detail.asp?404;http://www.pli.edu:80/product/program_detail.asp?ptid=511&stid=3&id=EN00000000038550.

The International Bar Association's Anti-Corruption Committee will host the 6th Annual Anti-Corruption Conference – "The Awakening Giant of Anti-Corruption Enforcement" on April 23-25, 2008, in Paris, France. Miller & Chevalier's Homer E. Moyer, Jr. will serve as Conference Chair and Speaker. For more information, please visit: http://www.int-bar.org/conferences/Anti_Corruption/.

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