Miller & Chevalier

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International Alert

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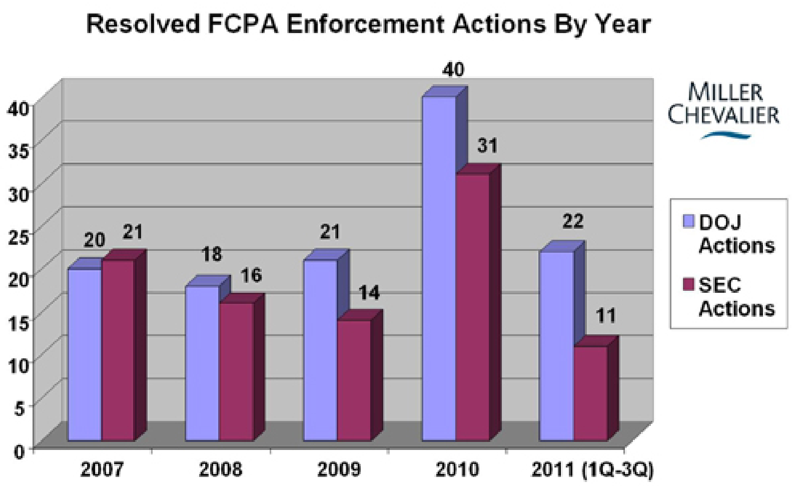
Introduction

With thirty-three resolved Foreign Corrupt Practices Act ("FCPA") matters to date, the number of enforcement actions in 2011 will almost certainly exceed that of 2007-2009, but 2011 is slightly behind 2010's record pace. Since last June, Armor Holdings settled with the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") over allegations it made corrupt payments through subsidiaries and agents to U.N. officials; the SEC issued a Cease-and-Desist Order to Diageo plc related to payments made to government officials in India, Thailand, and South Korea; and Bridgestone pled guilty to FCPA and antitrust violations.



Note: Updated through Sept. 30, 2011. These statistics count resolutions involving multiple distinct companies and/or individuals in a single settlement or case as separate enforcement actions. They also include the resolved enforcement actions against BAE and James Giffen, although neither was technically convicted on an FCPA charge.

With respect to individual enforcement this quarter, U.S. District Judge Joan A. Lenard in the Southern District of Florida sentenced Jorge Granados, the founder and former Chairman and CEO of Latin Node, to serve 46 months in prison, followed by two years of supervised release, for paying bribes to former government officials in Honduras. Gerald and Patricia Green, on the other hand, fared more favorably this quarter when prosecutors dropped an appeal against the sentence imposed against the Hollywood producers in their case involving the payment of bribes to Thai officials.

The *Carson*, *Haiti Teleco*, and Shot Show cases remain in litigation. In *Carson*, prosecutors have filed a set of proposed jury instructions asserting that for a defendant to be convicted of an FCPA violation, he or she need not have known that any intended bribe recipients qualified as "foreign officials" under the FCPA, but simply need to have known (or believed) that the intended recipients were employed by the companies that prosecutors assert were state-owned instrumentalities. Carlos Rodriguez, a Haiti Teleco defendant, has requested that his case be dismissed on the basis of the *Carson* jury instruction after he and Joel Esquenazi were convicted on August 5 on conspiracy, FCPA, money laundering, and wire fraud charges. Rodriguez's defense follows his wrangling with U.S. prosecutors over the effects of declarations provided by Haitian Prime Minister, Jean Max Bellerive. An initial declaration stated that Haiti Teleco, the employer of the individuals allegedly receiving bribes, was not a state enterprise. However, a subsequent declaration provided through U.S. prosecutors stated that Haiti Teleco was controlled by the Haitian government until 2011.

On July 7, the first Shot Show case ended in a mistrial and those defendants are seeking acquittal on the FCPA conspiracy count. Jury selection in the second Shot Show trial began at the end of September. The second case will likely garner a great deal of attention in light of the earlier mistrial.

Meanwhile, legislators on Capitol Hill are soon expected to consider proposed reforms to the FCPA, including possibly a compliance program defense, a "willfulness" requirement for corporate criminal liability, clarifications to the definition of "foreign official," and the limitation of parent civil liability for acts by a foreign subsidiary. In addition, Senators Levin and Grassley have proposed the Incorporation Transparency and Law Enforcement Assistance Act, which would increase information collection on corporations by states in an effort to identify the beneficial owners of shell companies used for illicit means.

Most notably on the international scene, the United Kingdom announced its first prosecution under the U.K. Bribery Act. The case was not related to foreign bribery, but was brought against an administrative court clerk in London who solicited £500 to influence the outcome of a case involving a traffic offense. Corporate prosecution efforts related to foreign payments are likely still in the pipeline.

Actions Against Corporations

Bridgestone Corporation

On September 15, 2011, Bridgestone Corporation, a Japanese company that is the largest manufacturer of tires and rubber products in the world, agreed to plead guilty to a two-count information alleging FCPA-related and antitrust violations, to pay a resulting $28 million criminal fine, and to enhance its anti-corruption compliance program and internal controls. The first count of the information alleged that Bridgestone conspired to suppress competition by rigging bids, fixing prices and allocating market shares for sales of marine hose in the United States and elsewhere in violation of section one of the Sherman Act (15 U.S.C. § 1).

The second count alleged that Bridgestone Corporation conspired with employees of Bridgestone Industrial Products of America, Inc. ("BIPA"), Bridgestone's subsidiary, to violate the FCPA's anti-bribery provisions by making corrupt payments to foreign officials in Mexico and other Latin American countries. The plea agreement states that on behalf of Bridgestone, BIPA's Houston office entered into commission-based contracts with BIPA's local sales agents, between 1999 and 2007, to make improper payments to officials at state-owned customers to secure the sale of industrial products to those customers in Argentina, Brazil, Ecuador, Mexico, and Venezuela, among other countries. The information mentioned only one customer by name: Petroleos Mexicanos ("PEMEX").

The plea agreement states that while the specifics varied among different products, most sales generally followed a similar pattern: local sales agents in various countries in Latin America gathered information related to potential projects and relayed that information to their respective contacts at BIPA. BIPA then forwarded the information provided by the local agents to the employee at Bridgestone's International Engineered Products Department ("IEPD") in Japan responsible for that product. The local agents often agreed to pay officials within the state owned customer a percentage of the total value of the proposed deal. According to the plea agreement, employees of BIPA and Bridgestone in Japan were aware of and authorized these payments, which were funded through commissions paid to the agents.

In total, Bridgestone allegedly authorized and approved more than $2 million in corrupt payments to be made through BIPA's local sales agents to employees of state-owned customers. According to the plea, these payments resulted in a profit to Bridgestone and BIPA of $17 million.

Noteworthy Aspects

- **Jurisdictional Questions** - Although Bridgestone, a Japanese corporation, had issued American Depository Receipts ("ADRs"), those ADRs were Level I (or "over-the-counter") ADRs that do not trigger the Exchange Act's registration or reporting requirements, meaning that Bridgestone is not an issuer for purposes of the FCPA. Indeed, the DOJ claimed jurisdiction over Bridgestone under section 78dd-3 of the FCPA, which creates jurisdiction over anyone taking an act in furtherance of a bribe "while in the territory of the United States." As reported in our FCPA Summer Review 2011, in the first Shot Show case, Judge Leon's comments noted his interpretation that jurisdiction under this provision exists when a non-U.S. citizen or company takes an act in furtherance of an improper payment *while physically* in the territory of the United States. The information notes a number of instances of BIPA personnel and agents taking actions in Houston related to the conspiracy to make these payments.

- **No DPA or NPA Despite Cooperation** - The DOJ used glowing terms to describe Bridgestone's cooperation and remediation efforts, and yet the public documents indicate no offer of a deferred prosecution agreement or non-prosecution agreement. For example, the DOJ commended Bridgestone for its "extraordinary" cooperation with its investigation. Additionally, the DOJ lauded Bridgestone for engaging in extensive remediation, including, making its Japanese employees available for interviews, dismantling the department that instigated most of the FCPA violations, closing its Houston BIPA office, terminating many of its third-party agents and taking remedial actions with respect to employees responsible for many of the corrupt payments.

- **Others Involved** - Bridgestone is the fifth company the DOJ has charged with antitrust violations in its investigations of the industry. Additionally, nine individuals have been convicted of antitrust violations and sentenced to prison. One of those is Japanese citizen Misao Hioki, the general manager of Bridgestone's IEPD. As reported in our FCPA Winter Review 2009, Hioki allegedly had caused employees and agents of Bridgestone to make over $1 million in illicit payments to foreign officials employed at state companies.

Diageo plc

On July 27, 2011, the SEC issued a Cease-and-Desist Order against Diageo plc, a multinational producer and distributor of premium-branded liquors headquartered in London, to resolve an investigation into the company's alleged violations of the FCPA's accounting provisions. Diageo is considered an issuer under the FCPA because the company trades its ADRs on the New York Stock Exchange (meaning that, unlike in *Bridgestone*, the ADRs are not "over-the-counter," and do trigger the Exchange Act's reporting requirements). As part of the Order, the SEC required Diageo to pay disgorgement in the amount of $11,306,081 and a $3 million civil penalty, which settled the Commission's investigation into allegations that Diageo's subsidiaries in India, Thailand, and South Korea made illicit payments to officials in those countries from 2003 to 2009.

According to the SEC, from 2003 to 2009, Diageo's wholly-owned indirect subsidiary, Diageo India Pvt. Ltd. ("DI"), engaged third-party distributors and sales promoters in India to provide illicit payments totaling approximately $1.7 million to hundreds of Indian officials -- from employees of government liquor stores and military canteens to excise tax and other government administrators -- in exchange for increased sales orders, in-store product placement and promotion, label registrations, import permits, and other administrative approvals. The SEC Order states that DI made these payments primarily through inflated commission payments to DI distributors, who passed on the extra cash to targeted Indian officials. The SEC alleges that Diageo obtained nearly $11 million in gains from these activities. The SEC Order states further that DI failed to properly record these payments in violation of the FCPA's books and records provisions.

In Thailand, Diageo operated through a joint venture, Diageo Moet Hennessy Thailand ("DT"), in which it held an indirect majority interest and operational control. According to the SEC, between 2004 and 2008, DT retained the consulting services of a Thai government and political party official for the purpose of lobbying for the company's positions on key tax and customs issues. The SEC alleged that DT paid the official's consulting firm a total of nearly $600,000 (including over $15,000 in entertainment expense reimbursements), even though senior DT management knew that the official was a principal of the firm, that the payments were made in exchange for his services and accrued to his benefit, and that he was a government officer. Although the SEC did not venture an estimate of the financial impact of the services the Thai official provided, it did allege that the official's services "contributed to Diageo's successful resolution" of several transfer pricing and import tax disputes between the company and the Thai government. The SEC Order states that, in violation of the FCPA's books and records provisions, DT improperly accounted for its payments to the Thai official in that DT's books and records did not reflect the true nature of the services provided and who provided them.

Finally, in South Korea Diageo operated through its wholly-owned indirect subsidiary, Diageo Korea Co. Ltd. ("DK"), which allegedly provided illicit payments to Korean customs officials and military officials from 2002 to 2006. The Commission alleged that DK provided Korean customs officials with money, travel, and entertainment from 2003 to 2004 to obtain a more advantageous formula for calculating transfer prices that yielded a tax rebate for DK of approximately $50 million. According to the SEC, during that effort DK paid nearly $110,000 in travel and entertainment costs for Korean officials involved in the negotiations. For example, on a trip to a Windsor Scotch factory in Scotland, DK officials also took Korean officials on a purely recreational side-trip to Prague and Budapest. The SEC also alleged that three months after DK received the tax rebate, a DK manager provided a Korean customs official who had played a key role in the negotiations with approximately $86,000 through a cash kickback scheme involving a third-party customs broker.

In addition to making illicit payments to Korean customs officials, the Commission alleged that from 2002 to 2006 DK routinely made hundreds of small payments (known as "rice cake" payments) in the form of cash or gift certificates to South Korean military officers who were involved in liquor procurement. The payments were allegedly made several times each year for holidays and vacations in amounts of $100 to $300, for a total of $64,184. According to the SEC, in 2004 a senior officer in Diageo's global compliance department explicitly approved the payments after being told by a DK official that the company would be at a competitive disadvantage if it did not do so. During the same four-year period, DK also allegedly provided hundreds of payments known as "Mokjuksaupbi" or "relationship" payments, worth a total of approximately $165,000, to military officials to influence their purchasing decisions. The SEC's Order states that DK failed to properly record all of these payments in violation of the FCPA's books and records provisions.

The SEC noted that the extent and duration of the illicit payments made by Diageo's subsidiaries, as well as their improper recording, demonstrated that Diageo failed to devise and maintain sufficient internal accounting controls in violation of the FCPA's internal controls provisions.

The Commission acknowledged Diageo's voluntary reporting of these issues, as well as its cooperation during the investigation and its adoption of certain remedial measures, including employee termination and "significant enhancements to its compliance program." Diageo agreed, per the terms of the Order, to refrain from future violations of the FCPA's books and records and internal controls provisions.

Noteworthy Aspects

- **No Anti-Bribery Violations** - The SEC did not charge Diageo with violating the FCPA's anti-bribery provisions, despite the fact that the Cease and Desist Order refers to illicit payments made by Diageo's subsidaries to foreign officials. The absence of bribery charges is likely a result of the SEC's inability to set forth allegations implicating the parent company's involvement in the activity or sufficient U.S. nexus to the illicit payments. However, the revenue obtained (at least by DI) from the illicit payments was a basis for the disgorgement amount.

- **Common FCPA Risk Areas Involved** - The case involves risk areas that have been addressed in a number of other enforcement actions: payments to customs officials and reimbursement for recreational travel and entertainment costs (*see, e.g.*, the *Panalpina* cases in the FCPA Winter Review 2011 and the *IBM* case in the FCPA Spring Review 2011). Compliance programs that do not address these and other well-documented issues risk being considered ineffective.

- **Doing Business With Foreign Officials** - The SEC took issue with DT's hiring of a Thai government and political party official who provided consulting services in connection with multimillion dollar tax and customs disputes with the Thai government. While such relationships are not per se prohibited by the FCPA (and indeed have been allowed in several past DOJ releases), they raise significant risks (as demonstrated here and in, for example, the BellSouth case). The SEC noted a number of red flags related to the business relationship here, and this matter may signal aggressive scrutiny of any such relationships by the enforcement agencies.

- **Corporate Growth and Managing FCPA Risks** - According to the SEC Order, "Diageo's history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs." Diageo was formed as part of the 1997 merger of Guinness plc and Grand Metropolitan plc, in which Diageo acquired both DI and DT. Diageo acquired DK in 2001. The SEC alleged that at the time of these acquisitions, "Diageo recognized that its new subsidiaries had weak compliance policies, procedures, and controls" but "failed to make sufficient improvements to these programs until mid-2008." Other cases and agency guidance (for example, DOJ Opinion Procedure Release 08-02) note that U.S. enforcement officials expect companies to assertively impose anti-corruption compliance programs and controls over newly-acquired enterprises.

- **Related Foreign Prosecutions** - According to Diageo's 2010 Annual Report, DK and several of its current and former employees were investigated by Korean authorities regarding the matters alleged in the SEC Order. Two former DK employees were convicted of providing improper payments to a Korean customs official, and a former and two current DK employees were convicted on various counts of tax evasion. It is now commonplace for companies and their employees to face multiple investigations by both U.S. and host government authorities for alleged corrupt payments.

Armor Holdings, Inc.

On July 13, 2011, Armor Holdings, Inc. ("Armor"), a manufacturer of security products, entered into dispositions with the DOJ and SEC over allegations that it violated the anti-bribery, books and records and internal controls provisions of the FCPA. Specifically, U.S. enforcement agencies alleged that the company, through subsidiaries and agents, made corrupt payments to a U.N. official and improperly omitted from its books millions of dollars in additional payments to third-party intermediaries who brokered the sale of goods to foreign governments. As part of its settlements, Armor, a former U.S. issuer, agreed to pay $16 million in penalties, disgorgement and prejudgment interest.

According to the pleadings, from 2001 to 2006, Armor caused its U.K. subsidiary, Armor Products International, Ltd. ("API"), to pay more than $220,000 in commissions to a third-party intermediary for purportedly legitimate services while knowing that a portion of this money would be used to induce a U.N. procurement official to award API with two U.N. contracts to supply body armor for use on peacekeeping missions. These commissions were then falsely recorded in the company's books and records. The SEC Complaint estimates that Armor earned more than $7.1 million in gross revenues and $1.5 million in net profits through the scheme.

The pleadings also state that from 2001 to 2007, Armor's U.S. subsidiary, Armor Holdings Products, LLC ("AHP") systematically kept nearly $4.4 million in additional commission payments off of its books and records, channeling these payments from government customers to third-party intermediaries who helped to broker the sale of goods to the foreign governments. According to the pleadings, AHP continued to handle commission payments in this manner despite warnings from auditors that the practice violated the U.S. Generally Accepted Accounting Principles.

In settling with the SEC, Armor, without admitting or denying the allegations, consented to the entry of a permanent injunction against it on charges that it violated the anti-bribery, books and records and internal controls provisions of the FCPA. In addition, Armor agreed to pay a $3.68 million civil penalty and approximately $2 million in disgorgement and prejudgment interest. In settling with the DOJ, Armor entered into a two-year non-prosecution agreement that similarly alleged violations of the anti-bribery, books and records and internal controls provisions of the FCPA, but which brought no formal charges against the company. As part of the settlement, Armor was assessed a $10.29 million criminal penalty, required to continue cooperating with the prosecutors, and ordered to self-monitor its compliance efforts during the term of the agreement.

Noteworthy Aspects

- **Acceptance of Responsibility** - In settling with the DOJ, Armor accepted responsibility for improper payments its subsidiary channeled through a third-party intermediary to a U.N. official. The SEC likewise held Armor responsible for these payments, characterizing the employees of AHP and API involved as "agents of Armor Holdings." As seen in past dispositions, the DOJ will hold parent companies strictly liable for anti-bribery violations by their subsidiaries even where no parent company involvement is apparent, which serves as a reminder of the importance of implementing a compliance program that permeate down through an organization to both its foreign and domestic branches, subsidiaries, and agents.

- **Bribery of U.N. Officials** - Armor's settlement is another example of how the definition of "foreign official" under the FCPA extends beyond officers or employees of foreign governments (or state instrumentalities) to include individuals working for public international organizations such as the United Nations.

- **Impetus for the FBI Sting Operation** - Richard Bistrong, AHP's former Vice-President for International Sales, orchestrated the schemes outlined above with the help of API's Managing Director and a senior AHP Finance employee. After his arrest in 2007, Bistrong agreed to cooperate with the FBI in an undercover sting operation aimed at others in the defense and law enforcement industry, leading to the SHOT Show arrests, which included the former CEO and President of Armor, Jonathan Spiller, and a former associate of Armor's, Stephen Gerard Giordanella (*see* our January 20, 2010 Sting Operation FCPA Alert). Spiller pled guilty in March 2011 to charges stemming from this FBI sting operation (*see* our FCPA Spring Review 2011).

- **BAE's Acquisition Due Diligence** - The pleadings allege that certain misconduct by AHP occurred through June 2007, shortly before BAE Systems, Inc., a U.S. subsidiary of BAE Systems plc, acquired Armor in July 2007. This timing suggests that either BAE or Armor may have discovered the FCPA violations during the pre-acquisition due diligence process. This is supported by the fact that the DOJ credited Armor with a "complete voluntary disclosure of the conduct" and lauded the "extensive remedial efforts undertaken before and after [Armor's] acquisition by BAE." Armor's on-going obligations under the non prosecution agreement extend to "legacy Armor operations" but not to BAE itself. This suggests that BAE, through effective pre and post-acquisition due diligence, successfully limited liability in this matter to Armor and its legacy operations. The DOJ specifically highlighted several mitigating factors responsible, in part, for its decision to only bring a non-prosecution agreement against Armor, including Armor's implementation of BAE's due diligence procedures for new agents and distributors and the application of BAE's compliance policies and internal controls to all of Armor's businesses.

- **Remediation and Self-Monitoring** - The DOJ press release states that Armor was not required to retain a corporate monitor because of the company's "implementation of BAE's due diligence protocols and review processes, its application of BAE's compliance policies and internal controls to all Armor businesses, its extensive remediation and improvement of its compliance systems and internal controls, as well as the enhanced compliance undertakings included in the agreement." Instead, Armor must self-monitor, reporting to the DOJ "on the implementation of its remediation and enhanced compliance efforts every six months for the duration of the agreement." The imposition of such self-reporting requirements is a fairly recent enforcement phenomenon, but it appears it is becoming the DOJ's preferred approach in FCPA dispositions, with the DOJ now requiring it in the majority of recent corporate settlements.

- **Responding to Audits** - On at least two occasions auditors flagged Armor's practice of not recording commission payments channeled to certain third party intermediaries as highly improper. Yet there is no indication that the company took any steps to address the issue. This underscores the importance of not only conducting periodic audits of high risk areas, but of also effectively responding to any compliance issues identified by these audits. Uncovering a compliance problem but failing to adequately address it may actually serve to exacerbate the issue if it ever comes to the attention of enforcement authorities.

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Actions Against Individuals

Carson Litigants to Stipulate the Level of Knowledge Required to Violate the FCPA

As reported in our FCPA Summer Review 2011, the defendants in *United States v. Carson* are accused of bribing employees of state-owned companies in China, Korea, Malaysia, and the United Arab Emirates. After a series of motions over the merits of the charges brought against them, the defendants are now trying to agree with prosecutors on a set of jury instructions for the trial, which is scheduled to commence on June 5, 2012.

On September 21, 2011, prosecutors and defendants filed a joint stipulation in connection with proposed jury instructions to govern the case, tentatively agreeing that a person must know that the recipient of a bribe is in fact a foreign official in order to violate the FCPA. The stipulation was filed in response to a question from Judge James Selna about the requisite level of knowledge to be convicted of an offense under the Act. The sides could not settle on final language for a proposed jury instruction, however, and prosecutors subsequently filed a set of proposed jury instructions on September 26, 2011 that clarified the DOJ's position on this element:

> The government need not prove that the defendant knew the legal definition of 'foreign official' under the FCPA or knew that the intended recipient of the payment or gift fell within the legal definition. The defendant need not know in what specific official capacity the intended recipient was acting, but the defendant must have known or believed that the intended recipient had authority to act in a certain manner as specified in element 6.

Thus, according to prosecutors, the Carson defendants, to be convicted, do not need to have known that any intended bribe recipients qualified as "foreign officials" under the FCPA, but simply had to have known (or believed) that the intended recipients were employed by the companies that prosecutors assert were state-owned instrumentalities.

The tentative agreement entered into by the prosecution and its proposed instruction here are not binding on prosecutors in future FCPA cases, but they nonetheless provide some insight into how the DOJ may interpret the elements of the statute going forward. They may also provide fodder for future appeals. Carlos Rodriguez, a recently convicted defendant in the Haiti Teleco case (see below) has already cited to the Carson prosecutors' interpretation here in a reply brief seeking acquittal. The Carson defendants are scheduled to file their proposed set of jury instructions on October 10, 2011.

Haiti Teleco Developments

The summer and early fall produced several developments in the Telecommunications D'Haiti ("Haiti Teleco") bribery scheme matters, previously discussed in our FCPA Spring Review 2010, FCPA Summer Review 2010, FCPA Autumn Review 2010, and FCPA Spring Review 2011.

On July 12, 2011, the DOJ filed a Superseding Indictment against former Haiti Teleco official Jean Rene Duperval and intermediary Marguerite Grandison (indicted in December 2009), as well as telecommunications company Cinergy Telecommunications Inc. ("Cinergy"), Cinergy's president, Washington Vasconez Cruz and director, Amedeus Richers, and former Haiti Teleco official Patrick Joseph. The conduct at issue in both charging documents involves a conspiracy by U.S. telecommunications companies, intermediary companies, and employees of both to make improper payments to Haitian officials in exchange for business advantages.

On August 5, 2011, a Miami-Dade jury convicted two former executives of telecommunications company Terra, Joel Esquenazi and Carlos Rodriguez, on charges of conspiracy to violate the FCPA and wire fraud and multiple counts of substantive FCPA and money laundering violations. The FCPA counts were based on the theory that Haiti Teleco was an "instrumentality" of the Haitian government and therefore the Haiti Teleco employees who received improper payments were "foreign officials" under the FCPA.

As discussed in our FCPA Winter Review 2010 , Esquenazi and Rodriguez were indicted in December 2009, along with former Haiti Teleco officials Robert Antoine and Jean Rene Duperval and intermediary Marguerite Grandison. Slightly less than three weeks after their conviction, on August 24, 2011, Rodriguez (joined by Esquenazi on August 25) filed two motions for acquittal or for a new trial, claiming that newly-discovered evidence revealed that Haiti Teleco was never a state-owned entity. Specifically, Rodriguez cited a July 26, 2011 declaration by Haiti's Prime Minister, Jean Max Bellerive, received by defense counsel on August 10. In the declaration, Bellerive said: "Teleco has never been and until now is not a state enterprise." Thus, Rodriguez and Esquenazi argued that two elements of the FCPA charges were not satisfied, namely: (i) that employees of Teleco, due to their capacity as officers or employees of Teleco, were officers or agents of the Republic of Haiti, and (ii) that the payments in the indictment made to the officers or employees of Teleco influenced any official government act. Rodriguez and Esquenazi presented an alternative argument for an evidentiary hearing concerning when the government received the declaration.

In a September 12, 2011 reply filing, the DOJ provided a second Bellerive declaration, dated August 25, in which the Prime Minister stated that he did not know his original statement would be used in criminal proceedings in the United States or that it would be used to argue that Haiti Teleco is not part of the Public Administration of Haiti; rather, the declaration was for internal purposes "in support of the on-going modernization process of Teleco." The Prime Minister then stated that before Haiti Teleco's modernization concluded in 2011, the Haitian government fully-controlled Haiti Teleco through its 97% ownership of the institution. The DOJ admitted to providing assistance to Bellerive in preparing the second declaration, which included a statement that the government of Haiti supported the United States government's fight against corruption, "especially in light of the fact that such actions violate Haitian laws. Haiti has been the victim of such illegal actions that have resulted in loss of revenue for Haiti."

In his September 28, 2011 reply brief seeking acquittal, Rodriguez cited the proposed jury instruction filed by the DOJ in *U.S. v. Carson* to support his argument for dismissal based on insufficient evidence. Referencing the proposed instruction, Rodriguez claimed the FCPA requires proof by the government that he knew the individuals operating Haiti Teleco were foreign officials acting in their official capacities. However, according to Rodriguez, the DOJ failed to establish that he had any knowledge that Robert Antoine (then-Director of International Affairs for Haiti Teleco) was working for a state owned entity in his official capacity as a government official. Instead, Rodriguez argued, the DOJ only proved that he participated in a teleconference with Antoine, congratulated colleague Antonio Perez (see our FCPA Spring Review 2009 and FCPA Spring Review 2011 for discussion of former Terra controller Perez' guilty plea and sentencing) for successfully reducing Teleco's rates following negotiations with Antoine, signed all of the checks issued by the accounting department, and reviewed Terra's financials on a high level.

Rodriguez also presented a new argument, contending that his conviction was based on improper jury instructions that did not require the jury to find that he knew that Haiti Teleco employees were government officials. Quoting the DOJ's proposed Carson instruction (". . . the defendant must have known or believed that the intended recipient had authority to act in a certain manner as specified in element 6."), Rodriguez then claimed that the jury in his case applied a strict liability standard, whereby the act of making payments to a foreign official was sufficient to establish his culpability without inquiry into his frame of mind. It is not clear which element of the *U.S. v. Rodriguez* jury instructions Rodriguez considers improper because he did not provide a specific citation. However according to the Court's Final Instructions to the Jury , the jury was instructed to address Rodriguez' frame of mind. The jury was told that the DOJ had to prove that an improper payment was "made to any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official" and a person's state of mind is "knowing" if he "is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur," or if he "has a firm belief that such circumstance exists or that such result is substantially certain to occur."

This is not the defendants' first challenge to the DOJ's foreign official theory. In November 2010, Esquenazi contested the theory but the judge determined that the issue was premature and was a matter for the jury to decide at trial.

Former Latin Node CEO Sentenced to 46 Months in Prison

On September 7, 2011, Jorge Granados, founder and former Chairman and CEO of Latin Node Inc., was sentenced to 46 months in prison followed by two years of supervised release in the Southern District of Florida for bribing government officials in Honduras (see DOJ press release). As detailed in our FCPA Winter Review 2011, Granados was indicted in December 2010, along with Latin Node's former Vice President of Business Development Manuel Caceres, on nineteen counts including conspiracy and violations of the FCPA's anti-bribery provisions, and international money laundering. While both former executives initially pled not guilty to all nineteen counts, as reported in our FCPA Summer Review 2011, in May 2011, both Granados and Caceres pled guilty to a single count of conspiracy to violate the FCPA in exchange for the DOJ agreeing to dismiss all of the remaining counts. Caceres testified as a cooperating witness in the Granados sentencing hearing and is scheduled to be sentenced on November 28, 2011.

In addition to Granados and Caceres, as reported in our FCPA Spring Review 2011, Manuel Salvoch (another former CEO) and Juan Pablo Vasquez (former VP of Sales, among other positions) were also indicted and pled guilty in January 2011. They are scheduled to be sentenced in December of this year. Latin Node also pled guilty in 2009 to a criminal information with one count of violating the FCPA and agreed to pay a $2 million fine following a voluntary disclosure filed by its parent company eLandia International Inc. (see our FCPA Spring Review 2009).

The 46 month prison term imposed on Granados is one of the harshest FCPA-related sentences imposed on an individual to date, topped only by the sentence imposed on Charles Edward Jumet (87 months) and Juan Diaz (57 months) (see our FCPA Summer Review 2010 and FCPA Autumn Review 2010). Each of the three remaining defendants from Latin Node faces the possibility of up to five years imprisonment.

Prosecutors Drop Appeal Against Hollywood Producers While the DOJ and Thai Officials Proceed With Legal Action Against Former Tourism Official

In the latest development in the case against Hollywood film producers Gerald and Patricia Green (previously covered in our FCPA Autumn Review 2010, FCPA Winter Review 2010, FCPA Autumn Review 2009, FCPA Spring Review 2009, and FCPA Autumn Review 2008), the Department of Justice has asked the Ninth Circuit Court of Appeals to dismiss its appeal of the sentences imposed against the Greens. The Greens were convicted of paying $1.8 million in bribes to Juthamas Siriwan, the former governor of the Tourism Authority of Thailand, in exchange for $13.5 million in contracts to produce a film festival in Bangkok. The Greens were sentenced to six months in prison in August 2010 after prosecutors initially sought sentences of 20 years each. While the Justice Department has declined to comment on the dismissal, according to press reports, Gerald Green is 79 years old and suffers from emphysema. The Greens have already served their sentences and are appealing their convictions.

The U.S. Justice Department has also charged Ms. Siriwan and her daughter with money laundering, with the predicate offense being a violation of the FCPA and of Thai law. Reportedly, Thailand's National Counter-Corruption Commission ("NCCC") has endorsed the findings of a subcommittee that Ms. Siriwan accepted bribes from the Greens, in violation of Thai law. The committee also found Ms. Siriwan's daughter guilty as an accomplice. The NCCC will forward its conclusion to the Attorney-General to take legal action against both mother and daughter.

Domestic Litigation

NewMarket and Innospec Settlement

On September 22, 2011, a U.S. District judge in the Eastern District of Virginia approved a settlement of the civil suits filed by

NewMarket Corp. ("NewMarket") against Innospec Inc. ("Innospec") and its subsidiaries, Alcor Chemie Vertriebs GmbH and Innospec Limited. Under the terms of the settlement as disclosed in Innospec's 8-K filing, Innospec will pay Newmarket a total of approximately $45 million to settle the civil actions.

NewMarket filed the actions in July 2010, as reported in our FCPA Autumn Review 2010 , claiming that Innospec committed unlawful conspiracy in violation of the Virginia Business Conspiracy Act and unlawful commercial bribery in violation of the Robinson-Patman Act and the Virginia Antitrust Act. The complaint alleged that Innospec paid bribes to foreign officials in Iraq to ensure that NewMarket's competing fuel additive failed field tests, and paid bribes to Indonesian government officials to continue using Innospec's fuel additive over NewMarket's alternative. Newmarket learned of the alleged conduct through the enforcement actions against Innospec by the Serious Fraud Office ("SFO"), the DOJ, and the SEC discussed in our FCPA Spring Review 2010 .

U.S. Legislative Developments

Proposed Reforms to the FCPA

Proposed reforms to the FCPA are back in the news, with talk of a bill to be introduced soon and arguments from civil society groups against changing key provisions of the statute. Almost a year after the U.S. Chamber Institute for Legal Reform released a white paper proposing amendments to the FCPA, the Open Society Foundation has responded with a white paper of its own.

The Chamber's white paper released in October 2010, " Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act," focuses on several proposed reforms, including a compliance program defense, limitations on successor liability, a "willfulness" requirement for corporate criminal liability, clarification of the definition of "foreign official," and limitation of parent civil liability for acts by a foreign subsidiary. The Open Society Foundation published its rejoinder on September 16, 2011, entitled "Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act ." Authored by David Kennedy, Professor at Harvard Law School and Dan Danielsen, Professor at Northeastern Law School, the paper argues that the FCPA is working as Congress intended, and new legislation is neither necessary nor advisable.

The Open Society Foundation's white paper comes on the heels of recent hearings in both the Senate and the House of Representatives discussing FCPA enforcement and possible reforms. As reported in our FCPA Summer Review 2011, the U.S. House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, chaired by Representative Jim Sensenbrenner (R-WI), held a hearing on the FCPA on June 14, 2011. Rep. Sensenbrenner promised at the hearing to introduce a bill reforming the FCPA. On the Senate side, the Judiciary Committee's Subcommittee on Crime and Drugs, chaired by Senator Arlen Specter (D-PA), held a hearing on November 30, 2010, covered in our FCPA Winter Review 2011 .

While legislation has not yet materialized, we will closely monitor any such developments as they occur.

Reintroduction of the Incorporation Transparency and Law Enforcement Assistance Act

On August 2, 2011, for the third time since 2008, Senator Carl Levin (D-MI), chairman of the Senate Permanent Subcommittee on Investigations, introduced the Incorporation Transparency and Law Enforcement Assistance Act ("the Act"), S. 1483, along with his cosponsor, Senator Charles Grassley (R-IA), ranking member of the Senate Judiciary Committee.

The Act requires states to collect and maintain information on the identities of persons -- including names, addresses, and drivers license or passport numbers -- who own the roughly two million corporations and limited liability companies formed under the laws of the fifty states each year.

The bill's intent is to make it easier for U.S. law enforcement to identify the "beneficial" owners of shell corporations who may be using state corporate laws to conceal their fraudulent activities, from Ponzi schemes, to money laundering, to tax evasion. States would be required to give law enforcement officials access to the information upon presentation of a subpoena or summons, and states would also have the option of making the information publicly available. States would not be required to verify the information submitted; instead, the Act penalizes the submission of fraudulent information.

As an example of the abuse the bill is intended to correct, Senator Levin, in his Floor Statement introducing the Act, cited the fact that over two thousand U.S. shell corporations formed for unidentified persons under Wyoming law shared the same address at a small house in Cheyenne, Wyoming, including a corporation owned by former Ukrainian Prime Minister Pavlo Lazarenko, who has been convicted of money laundering and extortion. The company responsible for setting up the so-called "shelf" corporations at the Cheyenne address promoted its services by extolling the benefits of corporate anonymity.

International Developments

First U.K. Bribery Act Prosecution Announced

On August 31, 2011, the U.K. Crown Prosecution Service ("CPS") announced that it would bring the first charges ever under the U.K. Bribery Act. The CPS alleged that Munir Yakub Patel, acting in his capacity as an administrative clerk at the Redbridge Magistrates' Court in Ilford, London, offered to influence the course of a criminal proceeding related to a traffic offense in exchange for £500 (approximately $790).

The CPS asserted that Mr. Patel's alleged request of or agreement to receive a bribe intending to improperly perform his functions violates section 2(1) of the U.K. Bribery Act. This offense carries a maximum sentence of ten years imprisonment. Mr. Patel is scheduled to be charged at Southwark Crown Court on October 14, 2011.

Commentators have frequently compared the U.K. Bribery Act, which came into force on July 1, 2011 (see our FCPA Autumn Review 2010 and our April 12, 2011 Alert), to the FCPA. As a result, many multinational companies and their lawyers have focused on the law's prohibitions of foreign bribery and how those prohibitions will be interpreted and enforced by the U.K. SFO. This case, brought by the CPS, is a reminder that, unlike the FCPA, the U.K. Bribery Act prohibits both domestic and foreign bribery. Because the domestic cases will often be easier to investigate and try in court, domestic cases may establish precedent for the SFO in its prosecutions of international bribery.

Total S.A. Faces Bribery Investigations in France and the United States

On July 28, 2011, French judge Serge Tournaire referred former French Minister of the Interior, Charles Pasqua, former Total CEO, Christophe de Margerie, 18 other individuals, and Total S.A. ("Total") itself to the Paris criminal court over allegations of corruption related to the U.N. oil-for-food program. The French investigation into Total's involvement in and potential corruption related to the oil-for-food program began in 2002. In 2009, the prosecutor recommended dismissal of the case. Nevertheless, Judge Tournaire decided to pursue the case after adding Total as a corporate defendant.

As reported in our FCPA Spring Review 2011 and our FCPA Autumn Review 2010 , U.S. enforcement agencies have investigated over a dozen companies for alleged corruption arising from their involvement in the oil-for-food program in Iraq. The Volcker report, which investigated allegations of corruption related to the program, found that in 2005 more than 2,000 companies had been involved in paying approximately $1.8 billion in illicit surcharges and kickbacks through the program. In addition, the Volcker report concluded that Iraq preferred to sell oil to countries that favored lifting sanctions against Iraq, including France and Russia. Total had one of the largest oil-for-food contracts, valued at approximately $1.75 billion.

Total denies wrongdoing, noting the prosecutor's recommendation to drop the case. The case will likely go to trial in 2012.

In the United States, Total also faces a bribery-related investigation. In March 2011, Total reported that it is in negotiations with the DOJ and SEC to settle the enforcement agencies' probe into bribes a Total consultant allegedly paid to Iranian officials to secure contracts to develop parts of Iran's South Pars gas field. The SEC opened its investigation in 2003, and the DOJ followed suit.

Macmillan Publishers Limited Settles with SFO

On July 22, 2011, the SFO announced that Macmillan Publishers Limited ("Macmillan") would pay £11.3 million (approximately $18.3 million) and undergo a monitorship pursuant to a civil order brought under Part 5 of the Proceeds of Crime Act 2002. The SFO investigation related to conduct by Macmillan's Education Division in public tenders in Rwanda, Uganda, and Zambia from 2002 to 2009. This enforcement action did not involve the U.K. Bribery Act because the conduct at issue preceded passage of the Act.

The SFO's investigation began as a result of a report from the World Bank that an agent for Macmillan Education attempted to pay a bribe in an unsuccessful bid for a World Bank contract in southern Sudan. As reported in our FCPA Summer Review 2010 , the World Bank debarred Macmillan for a minimum of three years as part of a settlement agreement related to those allegations.

After the SFO received the World Bank's report, the City of London Police executed search warrants in December 2009. In March 2010, Macmillan reported to the SFO, which then required Macmillan to follow the procedures outlined in its protocol on self-reporting cases of overseas corruption. This process included retaining outside counsel to conduct a review of Macmillan's books and records to identify areas of corruption risk, followed by a collaborative effort by the SFO, City of London Police, and the World Bank to identify areas within the business that potentially presented corruption risk. The SFO then required Macmillan's outside counsel to conduct detailed investigations of all public tender contracts from 2002 to 2009 in three jurisdictions: Rwanda, Uganda, and Zambia.

According to the SFO's release, as a result of the investigation, "it was plain that the Company may have received revenue that had been derived from unlawful conduct" under the Proceeds of Crime Act 2001. The SFO stated that it was "impossible to be sure that the awards of tenders to the Company in the three jurisdictions were not accompanied by a corrupt relationship." The order was thereby designed to capture "all potential unlawful conduct," resulting in a recovery of £11,263,852 in addition to recovery of the SFO's costs in pursuing the order, amounting to £27,000.

The Macmillan settlement follows two other noteworthy civil recovery orders for overseas corruption this year. As reported in our FCPA Spring Review 2011, in February, the SFO obtained an order against M.W. Kellogg Ltd for £7 million, and in April, the agency obtained an order against DePuy International Ltd. for £4.8 million.

U.K. Financial Services Authority Fines Insurance Broker for Alleged Controls Deficiencies

On July 21, 2011, the U.K. Financial Services Authority ("FSA") announced that Willis Limited ("Willis"), one of the largest insurance and reinsurance brokers in the London Market, was fined £6.895 million (approximately $10.73 million) for anti-corruption systems and controls failings. Given the FSA's role as financial regulator and the statutory basis for the charges, this case can be viewed as roughly equivalent to an FCPA internal controls matter brought by the SEC. According to the announcement, this is the largest fine imposed by the FSA in relation to financial crime systems and controls to date.

The FSA's Final Notice for Willis provides a detailed account of past deficiencies of the company's compliance program. In particular, the Final Notice discusses the following specific compliance program shortfalls:

- Failure to record commercial rationale to support payments to third parties

- Insufficient due diligence on third parties

- Failure to review relationships with third parties on a regular basis
- Failure to adequately monitor staff to ensure third party oversight
- Failure to inform senior management about the performance of relevant compliance policies and controls to allow management to assess whether bribery and corruption risks were being mitigated effectively

Thus, the Final Notice provides useful guidance on U.K. authorities' expectations for many key aspects of anti-corruption compliance programs. Though this is not a U.K. Bribery Act case, it may give some idea of what U.K. authorities would consider to be "adequate procedures" under the U.K. Bribery Act's affirmative defense for companies.

This case is also noteworthy for highlighting the FSA's continued focus on the adequacy of anti-corruption controls of financial institutions. As reported in our FCPA Winter Review 2009, in 2009, the FSA levied a £5.25 million fine against AON Limited, a U.K. subsidiary of a U.S.-based insurance group, for similar violations. Since that time, the FSA has made efforts to alert companies in this sector about threats posed by third parties. In the current case, the FSA stated that Willis' violations were "particularly disappointing as [the FSA has] repeatedly communicated with the industry on this issue and... previously taken enforcement action for failings in this area."

Australia Enters Anti-Corruption Enforcement Arena With Charges Against Banknote Makers

On July 1, 2011, the Australian Federal Police ("AFP") initiated actions against banknote makers Securency International ("Securency"), Note Printing Australia Ltd. ("Note Printing"), and several of their executives for allegedly violating portions of Australia's criminal code prohibiting bribery of foreign government officials and false accounting. Notably, the Reserve Bank of Australia ("RBA"), which is Australia's central bank and is accountable to Australia's Parliament, partially owns Securency and wholly owns Note Printing. As a result, the AFP's enforcement action is against a subsidiary of its own government.

While criminal charging documents are not made available to the public in Australia, press coverage indicates that, in addition to criminal charges against Securency and Note Printing, former executives, including Securency's CEO, Myles Curtis, CFO, Mitchell Anderson, and Sales Executives, Ron Marchant and Cliff Gerathy, and Note Printing's CEO, John Leckenby, CFO, Peter Hutchinson, and a Sales Executive, Barry Brady, have each been charged with bribery offenses under sections 11.5(1) and 70.2 of the Criminal Code Act of 1995. Additionally, Mr. Gerathy of Securency has been charged with violations of section 83(1) of the Crimes Act of 1958 for false accounting.

The conduct at issue involves alleged bribery of public officials in Malaysia, Indonesia, and Vietnam in order to win contracts for the printing of foreign currency polymer banknotes. The alleged bribes took place between 1999 and 2006, and reportedly amounted to nearly $17 million. Additional activities under investigation include an alleged $20 million paid to intermediaries in Nigeria to secure contracts, as well as activities in Europe, the United Kingdom (including the September 15, 2011 arrest of British businessman Bill Lowther who was released on bail and set to appear in court on December 2), and the United States relating to the identified conduct at issue, as well as potentially additional conduct in other countries. The AFP has staffed this multi-year investigation, as previously reported in our FCPA Winter Review 2011, with a 20-person task force and considers it to be complex in nature. At this time, all of the individuals who have been charged reportedly deny any wrongdoing.

As international cooperation becomes more commonplace in the anti-corruption arena, further actions by other countries against Securency, Note Printing, and its employees and intermediaries are likely. The AFP has received considerable support from its international anti-bribery counterparts, including from the U.K.'s SFO, the Malaysian Anti Corruption Commission ("MACC"), the Malaysian Attorney General's Chambers and the Indonesian National Police. The cooperation has already resulted in two separate charges by the MACC in Malaysia.

Following heavy criticism from the OECD, Australia amended its penalty regime for foreign bribery violations in February 2010.

However, because the alleged crimes at issue occurred before the amendments, the applicable penalties will be determined under the old criminal code, under which the monetary penalties are not as harsh. Nevertheless, this enforcement action comes after two years of investigation, and constitutes Australia's first prosecution under its foreign bribery legislation, which was introduced in December 1999.

UNODC Launches Virtual Anti-Corruption and Asset-Recovery Library

UNODC has assembled a virtual legal library, which contains anti-corruption legislation and jurisprudence from more than 175 countries. The electronic database combines legal and non-legal information on anti-corruption and asset recovery. It includes anti-corruption laws mandated by the U.N. Convention against Corruption, which has 154 State parties.

The database is part of Tools and Resources for Anti-Corruption Knowledge ("TRACK"), an online portal that aims to connect investigators and prosecutors throughout the world. The joint UNODC and World Bank Stolen Asset Recovery Initiative, the Organization for Economic Cooperation and Development, the African Development Bank, the Asian Development Bank and the Council of Europe's Group of States against Corruption are all TRACK partner organizations. This database could also serve as a resource for companies to identify local anti-corruption laws for inclusion in training materials and for assessing the appropriateness of transactions abroad.
