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ADVISORY | Anti-Corruption

ANTI-CORRUPTION YEAR IN REVIEW: 2012

Although 2012 saw a relatively low number of enforcement actions, it remained a significant year for anti-corruption enforcement. Most notably, in November, the US Department of Justice ("DOJ") and US Securities and Exchange Commission ("SEC") jointly published their much-anticipated Resource Guide to the FCPA. That development alone made 2012 noteworthy; but the year also will be remembered for particular enforcement resolutions, developments in FCPA litigation, and legislative and enforcement developments around the world.

As we look back on the past year, compliance professionals and practitioners continue to watch in 2013 for developments relating to legislation and other events that date back one or two years, or even longer, such as the SEC's Dodd-Frank whistleblower program, the UK Bribery Act of 2010, and publicly reported "industry sweeps" and other significant investigations by US regulators. While we wait for any developments on these fronts, new issues have emerged that bear watching in the years ahead. Will Canada and countries across the European Union continue to step up their enforcement of foreign bribery? If so, how will they and US regulators ensure rational and fair outcomes for companies that face enforcement in multiple jurisdictions? How will the US courts resolve pending challenges to the US regulators' views on jurisdiction and the meaning of "foreign official" under the FCPA? Who will succeed Lanny Breuer, the outgoing Assistant Attorney General for the Criminal Division at the DOJ, and Robert Khuzami, the outgoing Director of Enforcement at the SEC?

Those questions aside, if public statements by US, UK, and other regulators are any guide, it seems likely that anti-corruption enforcement will remain strong for the foreseeable future. Likewise, public disclosures by companies regarding government investigations launched in 2012 and earlier, as well as legislative and enforcement activity in other countries, should lead to sustained levels of enforcement activity for years to come.

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2012 DEVELOPMENTS

DOJ/SEC FCPA Resource Guide

The most notable development of 2012 was the DOJ and SEC's release of their 120-page *Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "*Guide*"). While the *Guide* largely reflects existing law and positions taken in settled enforcement actions, it will be required reading for FCPA practitioners and compliance professionals. Several aspects of the *Guide* are worth noting:

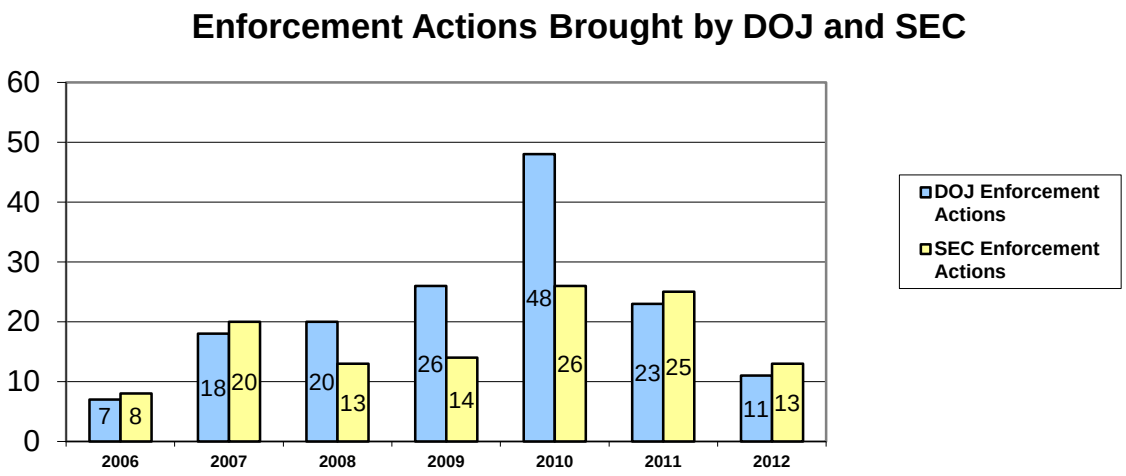
- **Expansive View of Jurisdiction:** The *Guide* articulates an expansive view of the jurisdictional reach of the FCPA, particularly with respect to foreign issuers and the requisite nexus to interstate commerce, foreign nationals, and non-issuer foreign companies. For example, the *Guide* indicates that foreign issuers, and their officers, directors, employees, agents, or stockholders, may subject themselves to jurisdiction based on nothing more than "placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States . . . [,] sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States." The *Guide* also indicates that a foreign national or company may be liable if it aids or abets, conspires with, or acts as an agent of an issuer or domestic concern, *regardless of whether the foreign national or company itself takes any action in the United States*. As discussed below, this is an area worth watching, as individual foreign national defendants in the *Siemens* and *Magyar Telekom* cases have challenged the SEC's jurisdictional theories, and court rulings are expected in 2013.
- **Pre-Acquisition Due Diligence and Post-Acquisition Integration:** The *Guide* states that enforcement actions based on successor liability are unlikely absent "egregious and sustained violations" or a failure to stop misconduct post-acquisition, but it also makes clear that acquiring companies must take steps to ensure that acquired companies are promptly integrated into the acquiring company's compliance framework. Indeed, pre-acquisition due diligence and post-acquisition integration constitute one of the ten "hallmarks of an effective compliance program" identified in the *Guide*, highlighting the importance of these compliance measures in the eyes of regulators.
- **Uncertain Benefits of Voluntary Disclosure:** While the *Guide* provides useful guideposts regarding declinations and the potential benefits of voluntary disclosure, it is our view that the *Guide* does not fundamentally alter the calculus of voluntary disclosure. The tangible benefits of self-reporting remain unclear; indeed, the DOJ and SEC's discussion of declinations arising in the context of voluntary disclosures does not elaborate on how regulators weigh voluntary disclosure when deciding whether to prosecute a matter, or to pursue a non-prosecution agreement ("NPA") rather than a deferred prosecution agreement ("DPA"). Absent concrete guidance in this area, companies will continue to struggle with whether the potential benefits of disclosure outweigh the drawbacks.
- **Dynamic Compliance Programs:** The *Guide* emphasizes the importance of having a dynamic compliance program – one that includes ongoing risk assessments, monitoring performance, auditing for effectiveness, and making appropriate modifications to the program. The unmistakable message is that when it comes to compliance programs, companies cannot "set it and forget it." In the words of the *Guide*, "a good compliance program should constantly evolve."
- **Enforcement Action as Quasi-Precedent:** The *Guide* effectively places settled enforcement actions on par with judicial precedent. The risk of this approach is that today's enforcement actions become tomorrow's unchallenged conventional wisdom. At the same time, the treatment of settled enforcement actions as precedent, coupled with the transparency provided by the *Guide*, offers practitioners the opportunity to argue for preferred results by drawing analogies to the case studies provided in the *Guide*.

A more detailed review of the *Guide* can be found in our November 2012 *Analysis of the FCPA Resource Guide*.

Enforcement Statistics and Notable Enforcement Developments

Measured simply by the number of enforcement actions, 2012 was a relatively slow year in FCPA enforcement, with fewer enforcement actions than any year since 2006. Nonetheless, in

settlements with 12 different companies, the DOJ and SEC netted more than $260 million in recoveries — more than half of which came from the pharmaceutical and medical device industries.



Notable 2012 developments included the following:

- **Marubeni Settlement Reflects Expansive View of Jurisdiction:** In the first enforcement action of 2012, Marubeni Corporation, a Japanese trading company headquartered in Tokyo, agreed to pay a $54.6 million criminal penalty under a two-year DPA for its role in the Bonny Island bribery scheme. The DOJ charged Marubeni with conspiracy and aiding and abetting, alleging that it acted as an agent of the TSKJ joint venture by paying bribes to low-level Nigerian government officials in order to obtain and retain engineering, procurement, and construction contracts. Jurisdiction was based on, among other things, meetings in the US, faxes sent to the US, and wire transfers to bank accounts in New York. More generally, the citation to Marubeni in the *Guide* likely reflects the DOJ and SEC's view that jurisdiction over foreign, non-issuer companies can be based on their role as an agent of (or co-conspirator with) US issuers or domestic concerns. Marubeni's $54.6 million fine brings the total fines and penalties of the Bonny Island bribery scheme to more than $1.7 billion.
- **Medical Device and Pharmaceutical Company Industry Investigations Result in $140 Million in Settlements:** Enforcement authorities reached settlements with three medical device companies and two pharmaceutical companies this year, recovering more than $50 million from device makers Smith & Nephew, Biomet, and Orthofix International, and nearly $90 million from pharmaceutical companies Pfizer and Eli Lilly.
- **Pfizer Settlement Reflects Government's View of Successor Liability**: In August 2012, Pfizer agreed to pay $60 million to the DOJ and SEC to resolve FCPA violations. The three-part settlement illustrated the potential importance of post-acquisition due diligence and integration of anti-corruption controls on successor liability. Although the DOJ imposed successor liability on an indirect subsidiary of Pfizer in connection with improper payments made before and after Pfizer's acquisition of Pharmacia in 2003, the DOJ declined to pursue charges against Pfizer for the pre-acquisition conduct of Wyeth subsidiaries acquired by Pfizer in 2009. Pfizer — which acquired Wyeth during the pendency of its FCPA investigation — conducted an extensive due diligence and investigative review of Wyeth's operations after the acquisition, and promptly integrated its internal controls program into the new Wyeth entities. The SEC brought separate civil actions against Pfizer and Wyeth covering different conduct, also declining to charge Pfizer itself for conduct by the Wyeth subsidiaries. The *Guide* confirms the significance of the due diligence and compliance steps taken by Pfizer, citing the Pfizer resolution as an example of how

such measures can decrease the likelihood of an enforcement action based on successor liability.

- **Oracle Settlement Demonstrates Broad Scope of Books and Records Provisions:** In August 2012, Oracle Corporation agreed to pay $2 million to settle SEC books and records and internal controls allegations. Notably, the SEC did not allege that Oracle made improper payments to foreign officials. Instead, it alleged that an Oracle subsidiary in India was "parking" funds with its distributors by creating "extra margins" between its prices to distributors and the distributors' prices to end-users. The SEC alleged that this practice created a risk that these "parked" funds could be used for improper purposes such as bribery. This matter serves as a reminder — repeated in the *Guide* — that the FCPA's books and records and internal controls provisions apply even in the absence of improper payments.
- **Allianz Settlement Demonstrates Importance of Effective Internal Response to FCPA Concerns:** In December 2012, Allianz SE, a German insurance and asset-management company whose ADRs were formerly registered with the SEC and traded on the NYSE, settled with the SEC for $12.3 million in connection with alleged FCPA violations in Indonesia. The existence of "special purpose accounts," from which Allianz's majority-owned subsidiary in Indonesia made more than $650,000 in improper payments, came to the attention of Allianz's internal audit function in 2005 as the result of a whistleblower complaint. While the subsequent audit resulted in an instruction to the subsidiary to close these accounts, the company did not undertake a broader investigation to identify the recipients of payments from these accounts and the purposes of the payments. The improper payments continued until 2008, and in 2009, a second complaint was made to Allianz's external auditors, leading to a larger scale internal investigation. The lesson that emerges is the importance of a comprehensive response to internal reports for bribery issues, including appropriate follow-up to ensure that problematic conduct ceases and to assess whether the incident was isolated or part of a recurring pattern.
- **Court Refuses to Approve IBM Settlement:** In March 2011, IBM reached a settlement with the SEC to resolve books and records and internal controls violations arising out of allegedly improper payments in South Korea and China. In addition to a payment of $10 million, IBM agreed to certain reporting requirements relating to future bribery allegations. In December 2012, when the parties sought judicial approval of this settlement, Judge Richard Leon of the US District Court for the District of Columbia refused to approve the settlement without the imposition of broader reporting requirements. Although IBM was willing to report future improper payments and books and records violations related to such improper payments, the company resisted Judge Leon's suggestion that the reporting requirement should extend to a broader array of accounting inaccuracies, claiming that such a requirement would be unduly burdensome. Judge Leon instructed the parties either to broaden the scope of the reporting requirements under the settlement or present data on how these requirements would be unduly burdensome. The outcome of this matter will be of particular interest given the general trend away from monitors and towards less onerous self-monitoring arrangements in recent FCPA resolutions.
- **Tyco Settles FCPA Charges Arising from Prior Resolution**: In September 2012, Tyco International entered into an NPA with the DOJ and agreed to pay more than $26 million to the DOJ and SEC in order to settle criminal and civil FCPA charges. Notably, this resolution stemmed from the company's voluntary disclosure of potential violations discovered during an extensive internal investigation undertaken as the result of a 2006 SEC settlement for accounting fraud and FCPA violations. The NPA with the DOJ recognizes Tyco's timely, voluntary, and complete disclosure, its global internal investigation, and its extensive remediation efforts. In addition to the NPA, a wholly-owned subsidiary pleaded guilty in the case and paid a $2.1 million criminal fine. Judge Leon has yet to approve Tyco's settlement with the SEC. While it was expected that the

settlement would be presented for approval at a January 31, 2013 hearing, Judge Leon instead called the parties into chambers for a status conference.

FCPA Litigation

- **District Court Addresses Facilitation Payments and Other FCPA Provisions on Noble Executives' Motions to Dismiss:** In February 2012, the SEC brought charges against three current and former executives of Noble Corporation, an oil services company, in connection with alleged bribery of customs officials in Nigeria. (In 2010, Noble settled FCPA charges as part of a sweeping enforcement action against freight forwarder Panalpina and six of its customers.) Noble's former Director of Internal Audit paid a $35,000 civil penalty to settle the charges against him. Two other Noble executives — the former CEO/CFO and the company's top executive in Nigeria — contested the SEC's charges. In December, Judge Keith P. Ellison of the US District Court for the Southern District of Texas granted in part and denied in part the two executives' motions to dismiss. The opinion marked the first time that a court considered the burden of proof applicable to the statute's facilitation payments exception, and addressed several other significant issues:
  - FACILITATION PAYMENTS: The court rejected the SEC's argument that the defendants had the burden of proving the applicability of the facilitation payments exception, holding instead that it is the SEC's burden to negate this exception. The court reasoned that "[t]he facilitating payments exception is best understood as a threshold requirement to pleading that a defendant acted 'corruptly.'" The court went on to hold that the SEC's allegations that the defendants authorized payments to secure import permits based on false paperwork were clearly outside the facilitating payments exception. However, it distinguished the authorization of payments made to extend these permits, finding that the SEC had not sufficiently alleged that the granting of such extensions is discretionary. The court gave the SEC leave to amend its complaint to cure this deficiency. The SEC filed its amendment in late January 2013.
  - "CORRUPTLY": Interpreting the meaning of the term "corruptly," the court held that the SEC need not plead that defendants knew their actions would constitute a violation of the FCPA or other law. Rather, the SEC needs to plead only that defendants "acted with the wrongful purpose of influencing a foreign official to misuse his official position." The court concluded that the SEC easily satisfied this requirement by pleading that the defendants authorized payments to obtain permits "based on false paperwork, in contravention of what Defendants knew to be the proper protocol."
  - FOREIGN OFFICIAL: The defendants argued that the "FCPA requires [the SEC] to allege the identity of the foreign official whose authority a defendant sought to misuse." The court disagreed, but declined to adopt a bright-line rule on this issue. The court acknowledged that there may be cases where it would be necessary for the SEC "to plead details about the foreign official's identity, duties and responsibilities." It ruled, however, that the SEC in this case had sufficiently pleaded the involvement of government officials through its allegations that Noble made improper payments to unidentified "Nigerian government officials."
- **Close of SHOT Show, Lindsey Manufacturing, and O'Shea Prosecutions:** The DOJ suffered several setbacks in 2012, including the unsuccessful termination of two closely watched prosecutions.
  - SHOT SHOW: The SHOT Show prosecutions, in which 22 defendants were charged with FCPA violations following an FBI sting operation at a January 2010 firearms industry trade show, came to a close in 2012 with no convictions. After a series of mistrials and acquittals, the DOJ moved in March 2012 to dismiss with prejudice the indictments against the remaining

defendants. The DOJ also moved to dismiss the charges against three defendants who had previously pleaded guilty. In July 2012, cooperating witness Richard Bistrong — who pleaded guilty in 2010 to one count of conspiracy to violate the FCPA — was sentenced to 18 months in prison and 36 months' probation, despite the DOJ's request that he receive no prison time because of his cooperation.

- **LINDSEY MANUFACTURING:** In May 2012, the DOJ dismissed its appeal of the decision of Judge Howard Matz of the Central District of California overturning the convictions of Lindsey Manufacturing and two of its executives, in effect ending the prosecution of the Lindsey defendants. Judge Matz's decision to overturn the convictions was based on prosecutorial misconduct.
- **O'SHEA ACQUITTAL:** In January 2012, US District Judge Lynn Hughes of the US District Court for the Southern District of Texas granted John O'Shea's motion for acquittal on all substantive FCPA charges. O'Shea is a former employee of a subsidiary of ABB Ltd., which settled charges by the DOJ and SEC in 2010 arising out of a scheme to bribe employees of a Mexican state-owned utility company. In February, the DOJ moved to dismiss with prejudice the remaining charges against O'Shea, including conspiracy and money laundering charges.

Although Chuck Duross, Deputy Chief of the DOJ's Fraud Section, acknowledged at a November 2012 conference that prosecutors "had some setbacks" and "learned lessons this past year," he also emphasized that the DOJ "will not shrink from the fight" and will continue to use "all the different tools that we have in our toolbox."

Declinations and Terminations of Investigations

The issue of declinations received significant attention in 2012. With the publicly announced declination of Morgan Stanley by the DOJ and SEC, extensive discussion of declinations in the *Guide*, and a number of press reports or public filings announcing declinations or the termination of investigations, practitioners now have many more data points in this area to consider.

- **Morgan Stanley:** In one of the most significant developments in 2012, the DOJ and SEC publicly credited — for the first time — a company's anti-corruption compliance program as a basis for declining to bring an enforcement action against a company. In April 2012, the DOJ and SEC announced a joint enforcement action against a former managing director of Morgan Stanley, Garth Peterson. The allegations centered on Peterson's secret business relationship with the former chairman of a Chinese state-owned entity who had influence over the success of Morgan Stanley's real estate business in Shanghai. Among other incidents of bribery and self-dealing, Peterson secretly arranged for himself, the Chinese official, and an attorney to acquire a valuable Shanghai real estate interest via a Morgan Stanley fund. Peterson pleaded guilty to a one-count criminal information for conspiring to evade internal accounting controls and settled civil charges with the SEC, agreeing to pay more than $250,000 in disgorgement and relinquish his interest in the Shanghai real estate (valued around $3.4 million as of the date of the settlement). He was later sentenced to nine months in prison.

  Notably, the DOJ and SEC publicly declined to charge Morgan Stanley with any FCPA violations and credited the company's anti-bribery policies and controls in the press releases and charging documents. Although some commentators have suggested that the Morgan Stanley declination may have owed more to Peterson's status as a "rogue" employee rather than the strength of the compliance program, it is nonetheless noteworthy that the DOJ and SEC explicitly credited Morgan Stanley's compliance program in explaining their decision not to bring an enforcement action against the company. While an effective compliance program does not provide a *de jure* safe harbor under the FCPA, the Morgan Stanley case may indicate a willingness by the DOJ and

SEC to provide a *de facto* safe harbor where the company can demonstrate both that it had an effective compliance program in place and that one of its employees acted alone in violating the FCPA.

- **Examples of Declinations in the DOJ/SEC *Guide*:** As discussed in our *Analysis of the FCPA Resource Guide*, the *Guide* provides six examples of recent declinations, revealing the following common threads: (1) all of the cases involved voluntary disclosure; (2) all involved immediate remediation and improvements to the company's compliance programs; and (3) four of the six cases involved bribes that were "small" or "relatively small."
- **Publicly Reported Declinations/Terminations of Investigations:** A number of companies announced (or were the subject of press reports) that they had received notifications from the SEC and/or DOJ terminating FCPA inquiries, including Academi LLC, Deere & Company, Hercules Offshore, Grifols SA, Huntsman Corporation, Nabors Industries Ltd., Schlumberger N.V., and W.W. Grainger, Inc.

DOJ Opinion Releases

- In the first opinion release issued in 2012 (No. 12-01), the DOJ concluded that it did not intend to take enforcement action against a US lobbying firm seeking to engage a consulting company whose partners include a member of the royal family in a foreign country. The DOJ took the position that the royal family member did not presently qualify as a foreign official, explaining that a "person's mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a 'foreign official.' Rather, the question requires a fact-intensive, case-by-case determination" that will turn on a number of factors, including (i) "how much control or influence the individual has over the levers of government power, execution, administration, finances, and the like"; (ii) "whether a foreign government characterizes an individual or entity as having governmental power"; and (iii) "whether and under what circumstances an individual or entity may act on behalf of, or bind, a government."
- The second opinion release in 2012 (No. 12-02) addressed the issue of travel and hospitality for foreign officials in a manner consistent with prior opinion releases and the *Guide*. The DOJ confirmed that it would not take any action against a group of US-based non-profits that arrange overseas adoptions and sought to host 18 foreign officials to meet with the non-profits' staff, review existing adoption files, and meet the parents of previously adopted children from the foreign country. The DOJ concluded that the proposed expenditures, which included hotel accommodations, meals, and round-trip airfare (business class for three minister-level officials and economy class for other officials) fell within the FCPA's reasonable and bona fide expenditures affirmative defense.

UK Developments During the UK Bribery Act's First Full Year in Effect

- **First Self-Report to Scottish Prosecutors:** In November, Scottish prosecutors announced the recovery of £5.6 million from drilling company Abbot Group Limited ("Abbot") after the company reported benefitting from corrupt payments made in 2007 by one of its subsidiaries. Although the civil recovery settlement was agreed pursuant to the UK Proceeds of Crime Act 2002, Abbot made its disclosure, the first of its kind in Scotland, in accordance with a self-reporting scheme introduced by Scottish prosecutors following the entry into force of the UK Bribery Act in July 2011.

  In announcing the civil recovery, the Scottish prosecutors explained the factors that they will consider when deciding whether a matter self-reported should result in a criminal prosecution or a civil settlement. The relevant criteria include the nature and seriousness of the offence and the harm caused, the extent of the wrongdoing within the business, the remedial measures

taken by the business, the adequacy of the anti-bribery policies and procedures adopted by the business, and whether the individuals who were involved in the wrongdoing have left the business.

- **Rolls-Royce Investigation Announced:** In December, Rolls-Royce announced that it had provided information to the UK Serious Fraud Office ("SFO") regarding alleged bribery and corruption involving its intermediaries in overseas markets, including Indonesia and China. According to press reports, the alleged misconduct is thought to have occurred both before and after the UK Bribery Act entered into force in July 2011. In publicizing its ongoing efforts to cooperate with the SFO, Rolls-Royce noted that its disclosures could result in prosecutions against the company and individuals. Media reports also suggest that Rolls-Royce informed the DOJ about the SFO inquiry.

Developments in China

The 2012 FCPA enforcement docket demonstrates the DOJ and SEC's continued focus on China. Of the 12 companies against which the DOJ/SEC brought enforcement actions in 2012, five were alleged to have engaged in improper conduct in China, as were two individuals who settled FCPA charges. These include the Pfizer, Tyco, and Biomet, matters discussed above, as well as the resolution of charges against former Morgan Stanley managing director Garth Peterson. While US companies are becoming well-versed in the corruption risk attendant to doing business in China, they should also take note of recent developments under Chinese law.

- In October 2012, China's Ministry of Finance issued draft *Administrative Measures on Non-Bid Government Procurement* (the "Draft Measures"). The Draft Measures aim to clarify processes and requirements, increase transparency, and prevent corruption in non-bid government procurement, one of three types of government procurement in China. Specifically, the Draft Measures provide suppliers that seek government contracts through non-bid government procurement with a clearer avenue for raising inquiries and complaints. The Draft Measures also clarify the type of behavior that could land a supplier on a government procurement blacklist. For more details about the Draft Measures, see our e-alert here.
- Following government efforts in 2011 to tighten regulation of commercial prepaid cards to combat corruption and enhance internal controls, the Ministry of Commerce of China and the People's Bank of China subsequently promulgated two sets of administrative regulations, both effective November 1, 2012. The former imposes regulations on registration, payment, record-keeping, and value requirements of prepaid cards, and thus touches upon both issuers and resellers, while the latter narrowly focuses on regulating issuers of pre-paid cards.
- Early this year, the R&D-based Pharmaceutical Association Committee ("RDPAC") published the 2012 version of RDPAC Code of Practice on the Promotion of Pharmaceutical Products (July 2012). The 2012 version, which is an update of the 2010 version, articulates a set of industry-developed standards regarding the promotion of pharmaceutical products and interactions with healthcare professionals.
- On December 31, 2012, the Supreme People's Court of China and the Supreme People's Procuratorate of China jointly released the "Interpretation of Several Issues Concerning the Specific Application of the Law in the Handling of Offering-Bribe Criminal Cases" (the "2012 Interpretation"). The 2012 Interpretation provides judicial guidance for prosecutors and judges to follow when prosecuting, judging, and sentencing individuals and entities that bribe government officials in China. The 2012 Interpretation is believed to be part of a broader effort to step up enforcement against individuals and entities who offer bribes, which historically have been prosecuted less frequently than the government officials who take bribes. The new Interpretation, effective as of January 1, 2013, carries the force of law in China.

- China continues to aggressively enforce its commercial bribery laws. Local Administrations for Industry and Commerce ("AICs") have broad powers to investigate and collect evidence — including conducting raids and interviewing employees — related to allegations of violations of commercial bribery laws and regulations, which fall under the auspices of the Anti-Unfair Competition Law. The laws and regulations are broadly drafted and aggressively enforced — sometimes unevenly — particularly in certain jurisdictions and against certain industries. AICs sometimes assert that conduct unlikely to violate the FCPA nevertheless violates China's commercial bribery laws.

WHAT TO WATCH FOR IN 2013

High Profile Investigations

There continue to be public reports of several notable government investigations, each of which would appear to carry the potential for sizable fines and other penalties.

- **Wal-Mart:** The FCPA attracted attention in April 2012 when the *New York Times* published a front-page story alleging that a Wal-Mart subsidiary made improper payments to Mexican officials, and that the company failed to respond appropriately when the allegations surfaced internally. The *Times* article, and a lengthy follow-up published in December 2012, alleged that Wal-Mart's Mexican subsidiary paid more than $24 million in bribes in order to obtain licenses to construct and operate stores throughout the country, including bribes made to alter zoning maps and circumvent regulations. The articles further claimed that, when the payments were initially discovered due to a whistleblower's allegations, the company rejected outside counsel's advice to conduct a thorough, independent investigation, instead placing the investigation in the hands of an in-house lawyer who had been accused of participating in the bribery scheme. Wal-Mart's investigation reportedly has since expanded to other foreign markets, including China, India, and Brazil.
- **Avon:** In 2008, Avon Products, Inc. voluntarily disclosed to the DOJ and SEC that it was conducting an internal investigation relating to potential FCPA violations. The investigation reportedly involves more than a dozen countries, including Argentina, Brazil, China, India, and Mexico. In February 2012, it was reported that prosecutors presented the case to a grand jury, with a focus on potentially corrupt payments in China. As part of the investigation, Avon has placed four executives on administrative leave and fired its vice-chairman, Charles Cramb. At the end of 2012, Andrea Jung, Avon's former CEO, stepped down as Avon's executive chairman. In a November securities filing, Avon announced that it is in ongoing discussions with the DOJ and SEC to resolve the matter, and that it expected to incur a material loss in any resolution.
- **Gaming Industry Investigations:** Two high-profile investigations involving the gaming industry are reported to be ongoing. Over the last two years, Las Vegas Sands Corporation ("LVS") and its CEO Sheldon Adelson have been the subject of DOJ and SEC inquiries relating to conduct in China and Macau. The investigation centers on LVS's expansion into Macau and its relationship with an attorney in Macau who also serves as a member of the Macau legislature. One of LVS's competitors, Wynn Resorts, and a former member of its Board, Kazuo Okada, are also under scrutiny relating to business in the Philippines and Macau. In early 2012, Wynn disclosed that it was the subject of an inquiry from the SEC involving a $135 million charitable contribution to the University of Macau. The investigation stemmed from a dispute between Wynn and Okada. In January 2012, Okada filed suit against Wynn in Nevada alleging FCPA violations relating to Wynn's charitable contribution in Macau. In February 2012, following a year-long internal investigation, Wynn's Board asked Okada to resign, and it is now actively trying to remove him from the Board.

Decisions on Jurisdiction and "Foreign Official" Questions

In 2013, we are likely to see decisions in the US courts on significant issues regarding jurisdiction and the meaning of "foreign official" under the FCPA.

- **Challenges to Jurisdiction from Foreign Nationals:**
  - **SEC v. Steffen (S.D.N.Y.):** German national Herbert Steffen, one of seven former Siemens AG executives against whom the SEC brought charges in 2011, filed a motion to dismiss in October 2012, arguing that he is not subject to personal jurisdiction in the US. Steffen has never been employed in the US, and he never traveled to the US in connection with Siemens' alleged bribery scheme. While the SEC alleged that Steffen discussed the scheme with co-defendant Uriel Sharef while Sharef was in the US, and that a portion of the funds used for bribes was deposited in a New York bank, the principal basis for the assertion of personal jurisdiction over Steffen is the SEC's contention that his conduct abroad resulted in "foreseeable consequences" in the US. The SEC argues that by pressuring a subordinate to pay bribes, Steffen caused illicit payments to be made and recorded as legitimate payments in Siemens' books and records, and that this ultimately caused "the falsification of Siemens' annual and quarterly filings with the SEC," as well as false Sarbanes-Oxley certifications. Steffen, who was not personally involved in the preparation of the relevant SEC filings and certifications, contends that this is insufficient to establish "minimum contacts" with the US because his conduct was not "expressly aimed" at the US, and was not the "proximate cause" of any injury to US investors. Briefing on Steffen's motion was completed in December 2012.
  - **Magyar Telekom Executives (S.D.N.Y.):** Similar to Steffen, in November 2012, former executives of Magyar Telekom Elek Straub, Andras Balogh, and Tamás Morvai, moved to dismiss an SEC civil complaint on jurisdictional grounds. The defendants — Hungarian citizens residing outside of the US — argue that the fortuitous and unintentional routing of e-mails through US-based network servers cannot satisfy the requirement that the defendants corruptly made use of instrumentalities of interstate commerce. Additionally, they assert that such an attenuated connection with the US does not establish the requisite "minimum contacts" to satisfy the due process requirements for the exercise of personal jurisdiction. The SEC asserts that the defendants' conduct "caused foreseeable consequences" in the US, namely Magyar Telekom's false SEC filings. The SEC points to a more direct role played by the defendants in the preparation of the relevant filings than it did in Steffen's case, alleging that "each played key roles not only in preparing Magyar's SEC filings, but in falsifying those filings as well." At oral argument on January 17, 2013, the SEC argued that the defendants took "conscious, direct action toward falsifying an SEC filing."
- **"Foreign Official" Challenge in the Eleventh Circuit:** Individual defendants have continued to challenge the government's broad interpretation of the term "instrumentality," under which employees of state-owned or -controlled enterprises qualify as "foreign officials." The issue reached an appellate court for the first time in 2012 when Joel Esquenazi and Carlos Rodriguez — convicted in August 2011 of paying more than $890,000 in bribes to employees of a Haitian state-owned telecommunications company — appealed their convictions to the US Court of Appeals for the Eleventh Circuit. The defendants argue that "instrumentality" includes only foreign, state-owned entities performing functions similar to government departments or agencies. Relying on the FCPA's legislative history, they have noted that Congress considered draft bills that specifically included as "instrumentalities" state-owned or -controlled entities but ultimately opted not to include such entities in the definition of "instrumentality." While the DOJ concedes that a state-owned enterprise must carry out a government function to be an "instrumentality," it asserts that the provision of commercial services, such as telephone

services, serves a government function. Briefing on the appeal was completed in October 2012; oral argument has not yet been scheduled.

The Direction of the Dodd-Frank Whistleblower Program

In 2012, the SEC's Office of the Whistleblower announced in its annual report to Congress that it received more than 3,000 tips from the public in fiscal year 2012, including 115 tips involving potential FCPA violations. As we continue to wait for the first whistleblower award in an FCPA matter, the most significant development in this area has been the emerging body of US law regarding the anti-retaliation provisions of Dodd-Frank. As we discussed in a previous client alert, in June 2012, Judge Nancy F. Atlas of the Southern District of Texas held in connection with a whistleblower report of alleged FCPA violations that the anti-retaliation provisions do not apply extraterritorially. That decision is now on appeal to the US Court of Appeals for the Fifth Circuit, which may provide clarity on a number of questions left unanswered in the lower court's opinion.

The Future of UK Enforcement

Developments in UK anti-corruption enforcement in 2012, including the installation of a new director at the SFO and the issuance of revised guidance by the SFO, have led to much debate, but no corporate prosecutions under the Bribery Act. The recent changes at the SFO, however, together with significant future developments — most notably including the introduction of DPAs — are expected to lead to major enforcement actions in the years ahead.

- **Introduction of DPA Legislation in the UK:** In October 2012, the UK Solicitor General, Oliver Heald QC, announced the UK Government's intention to introduce legislation giving the SFO and the Crown Prosecution Service ("CPS") authority to enter into DPAs to resolve certain economic crime issues, including bribery, fraud, and money laundering. The UK Government has tabled the legislation as an amendment to the Crime and Courts Bill, and has indicated that, subject to parliamentary approval, the SFO and CPS should be given the power to enter into DPAs in early 2014.

  Under the proposed legislation, organizations that enter into a DPA with the SFO or CPS will be required publicly to admit certain facts indicating wrongdoing and to comply with rigorous conditions (e.g., including the payment of a financial penalty, implementation or updating of a compliance program, payment of compensation to any victim(s), and disgorgement of profits). Organizations should be mindful of a number of key aspects of the proposals that are peculiar to the UK's proposed version of DPAs. The progress of DPA negotiations between an organization and a prosecutor will be overseen by a judge from an early stage in the discussions. The judge will be called upon to decide, at a preliminary hearing held in private, whether entering into a DPA in a particular case is likely to be in the interests of justice and whether the emerging terms of the agreement are fair, reasonable and proportionate. Assuming the discussions are permitted to proceed, the judge will be called upon, at a final hearing, to decide once again whether resolution of matters with a DPA is in the interests of justice and that the final proposed conditions attached to the DPA are fair, reasonable and proportionate. The details of a successful DPA are to be made public at the final court hearing.
- **SFO's Revised Guidance:** In October 2012, the SFO issued new guidance on corporate self-reporting, hospitality, and facilitation payments. The new guidance is the latest manifestation of the more traditional prosecutorial approach that Director David Green QC has adopted since taking office in April 2012. While the SFO has reiterated that bona fide hospitality will not lead to prosecution under the UK Bribery Act, its statements concerning self-reporting and facilitation payments may indicate a more marked change of position:

- The SFO's revised guidance on self-reporting no longer expresses any predisposition toward a civil settlement following a self-report. The guidance reiterates that each case will be decided on its own facts and that self-reporting will be just one of the factors that will be taken into account. The guidance states that the SFO reserves the right to prosecute any unreported violations as well as provide information on violations to other bodies.
- On the issue of facilitation payments, the SFO's new guidance does not offer any acknowledgement of the difficulties faced in this regard by organizations operating in countries in which demands for facilitation payments are ubiquitous or of the good faith efforts they may have been making to reduce and ultimately eliminate such payments.

Although the revised guidance marks a significant change in tone, it remains to be seen whether they herald any meaningful change in substance.

Increased Enforcement Activity in Canada

Recent enforcement actions in Canada may signal a significant increase in Canadian enforcement in the wake of a 2011 report from the Organisation of Economic Co-operation and Development criticizing Canada's limited enforcement of the Corruption of Foreign Public Officials Act ("CFPOA").

- **First Individual Trial for Bribery:** In September 2012, Nazir Karigar made history when he became the first individual to be tried for charges under the CFPOA. Karigar was charged in May 2010 with bribing Indian officials in order to secure a contract for his company; he pleaded not guilty, and his trial is ongoing.
- **SNC-Lavalin Executives Charged for Bribery in Bangladesh:** In June 2012, two former executives — Ramesh Shah and Mohammad Ismail — of Canadian engineering firm SNC-Lavalin Group were charged under the CFPOA. They are accused of bribing officials in connection with a bid to build the Padma Bridge in Bangladesh, a project that was to be partially funded by the World Bank.
- **Griffiths Energy Charged with Bribery in Africa:** In early January 2013, Griffiths Energy International announced that it pleaded guilty to one count under the CFPOA in relation to improper payments in Africa and agreed to pay C$10.35 million. Griffiths Energy voluntarily disclosed potential violations to Canadian officials and the DOJ following an internal investigation resulting from the discovery of suspicious contracts with a foreign official and his wife.
- **Pending FCPA and CFPOA Investigation:** In August 2012, Nordion Inc., a provider of medical isotopes, publicly disclosed that it had reported to both the DOJ and Canadian authorities potentially improper payments to a foreign supplier, which it discovered through an internal review. The investigation is ongoing.

The increase in enforcement actions appears to be more than a temporary uptick. On February 5, 2013, the Minister of Affairs, John Baird, announced proposed amendments to the CFPOA, stating that the Canadian government expects "Canadian businesses to play by the rules." The proposed amendments will do the following:

- Increase the maximum prison sentence under the CFPOA from 5 years to 14 years;
- Allow prosecution of Canadians and Canadian businesses based on nationality, broadening the current jurisdictional standard, which requires a "real and substantial link" between the conduct and Canada;
- Add a books and records offence;
- Remove the "facilitation payments" exception;

- Provide the Royal Canadian Mounted Police the exclusive authority to bring charges under the CFPOA; and
- Apply the statute to all businesses, not just those that operate for profit.

The Canadian government's increasingly aggressive efforts to combat corruption will be something to watch in 2013.

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