

Foreign Corrupt Practices Act Enforcement Activity: 2013 Year in Review and 2014 Preview

I. Introduction

The 2013 calendar year saw several significant developments in the enforcement of the Foreign Corrupt Practices Act (FCPA). The United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) combined to collect in excess of \$635,000,000 in civil and criminal penalties from individual and corporate investigation targets; in the first month of 2014, the agencies collected an additional \$384,000,000 in a single settlement. In addition, the DOJ and the SEC demonstrated an expansion of their enforcement capabilities, settling a greater number of actions in 2013 than in the previous year. This client update details the year's most prominent enforcement themes, and then briefly describes several of the most noteworthy FCPA enforcement settlements of 2013 and early 2014.

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II. Trends in FCPA Enforcement

A. Broad Geographic Reach in Diverse Collection of Industries

Recent FCPA enforcement has expanded beyond a handful of select industries and conduct in traditional corruption "hot spots," and 2013 continued that trend. Investigations and prosecutions resolved in 2013 covered 19 different countries, involving conduct on every continent except Australia and Antarctica. Although a large number of actions implicated the oil and gas industries, enforcement agencies also targeted apparel, technology, financial services, and medical companies. The kinds of industries scrutinized by investigators appear to be further expanding: Three traders with a U.S. broker-dealer pleaded guilty in August to giving kickbacks to a Venezuelan official to route additional trades from the state development bank through their trading desk¹; retail giant Wal-Mart is under investigation for allegedly paying bribes in Mexico, Brazil, India and China and for covering up prior allegations of corrupt activity²; cosmetics company Avon Products Inc. is reportedly negotiating a settlement with U.S. authorities over its marketing practices in

¹ Press Release, *Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice*, Department of Justice, August 30, 2013. Available at <http://www.justice.gov/opa/pr/2013/August/13-crm-980.html>. The Venezuelan official entered a guilty plea in November to charges that she conspired to violate the Travel Act and commit money laundering. See Press Release, *High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty to Participating in Bribery Scheme*, Department of Justice, November 18, 2013. Available at <http://www.justice.gov/opa/pr/2013/November/13-crm-1229.html>.

² Wal-Mart's 10-Q, filed September 5, 2013, available at <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=112761&fid=9003275>.

China³; and published reports last year stated that the SEC was examining several Hollywood film studios' interactions with the state agencies that control Chinese filmmaking and distribution.⁴

B. Higher Settlement Amounts

In 2013, the DOJ and SEC together collected over \$635 million in penalties, disgorgement and interest through negotiated settlements – nearly two and a half times the total collected in 2012, although well short of the \$1.8 billion collected by the agencies in 2010. Even before the November announcement of the Weatherford settlement, a DOJ official said that 2013 was already the fifth-biggest year in the statute's history for penalties paid.⁵ Two of last year's settlements – those of Weatherford International and Total S.A. – were added to the list of the ten largest FCPA resolutions of all time, with the January 2014 Alcoa settlement also joining the all-time top ten list.

The average corporate penalty paid in 2013 was \$74 million, in line with settlements paid out in 2011, but more than double the average penalty paid in 2012. There are indications that larger penalties are becoming the norm: cosmetics manufacturer Avon disclosed in August 2013 that DOJ and SEC had rejected its settlement offer of \$12 million for charges of improper promotion practices in China,⁶ and the company wrote in its October 2013 filing that counteroffers from the SEC staff were unreasonably high.⁷ The rising cost of FCPA enforcement is illustrated by the December 2013 announcement of a \$32 million government settlement with construction company Bilfinger SE, to resolve charges that Bilfinger used bribery to obtain a contract on a Nigerian gas pipeline project. In contrast, Willbros Group, Bilfinger's joint venture partner on the same Nigerian project, paid only \$22 million in 2008 to settle both allegations relating to its conduct on the project, as well as unrelated charges of bribes paid by Willbros in connection with an Ecuadorian gas pipeline project.⁸

C. Increase in Self-Reporting

Enforcement authorities have placed an increased emphasis on encouraging self-reporting by corporations this year, and in turn appear to be exercising prosecutorial discretion when cooperative companies lead thorough investigations and voluntarily disclose relevant information. Both Ralph Lauren and Diebold received conspicuous praise from investigators for responsible corporate citizenship and self-reporting: In announcing the Ralph Lauren resolution, DOJ said its decision to grant the company a non-prosecution agreement was based on Ralph Lauren's "extensive, thorough, and timely cooperation, including self-disclosure of the misconduct, voluntarily making employees available for interviews, making voluntary

³ Richard L. Cassin, *Feds reject Avon settlement offer*, The FCPA Blog, August 1, 2013. Available at <http://www.fcpablog.com/blog/2013/8/1/feds-reject-avon-settlement-offer.html>.

⁴ Michael Cieply, *Inquiry Into China Film Trade Unnerves Hollywood*, New York Times, February 17, 2013. Available at <http://www.nytimes.com/2013/02/18/business/sec-inquiry-into-china-film-trade-unnerves-hollywood.html>.

⁵ George J. Terwilliger III, et al., *Senior US officials discuss FCPA enforcement trends and activity*, Morgan Lewis, November 22, 2013. Available at <http://www.lexology.com/library/detail.aspx?g=ccaf9bfe-f9cf-4ddf-add6-39ca236519ae>.

⁶ Richard L. Cassin, *Feds reject Avon settlement offer*, The FCPA Blog, August 1, 2013. Available at <http://www.fcpablog.com/blog/2013/8/1/feds-reject-avon-settlement-offer.html>.

⁷ Richard L. Cassin, *Avon: SEC wants 'significantly greater' FCPA penalty*, The FCPA Blog, October 31, 2013. Available at <http://www.fcpablog.com/blog/2013/10/31/avon-sec-wants-significantly-greater-fcpa-penalty.html>.

⁸ Mike Koehler, *Of Note from the Bilfinger Enforcement Action*, FCPA Professor, December 11, 2013. Available at <http://www.fcpaprofessor.com/of-note-from-the-bilfinger-enforcement-action>.

document disclosures, conducting a worldwide risk assessment, and making multiple presentations to the Department on the status and findings of the internal investigation and the risk assessment.”⁹

Other companies currently under investigation are also conducting their own internal reviews in cooperation with the government. Wal-Mart – which reportedly decided to disclose allegations of bribery to U.S. authorities after it learned the *New York Times* was planning an investigative series on the company¹⁰ – has disclosed to investors that it spent \$43 million on FCPA compliance investigations and inquiries in the third quarter of 2013 alone. Wal-Mart has proceeded to make voluntary disclosures to the government, rather than being subject to subpoena. As discussed previously, Avon has also disclosed increased compliance costs to investors. So has British pharmaceutical manufacturer GlaxoSmithKline, which has been widely reported to be under investigation by Chinese authorities for possible bribery of health care professionals in that country, and whose board of directors authorized an independent internal investigation of Chinese sales practices in response to those reports.

Instances of self-reporting may have been spurred by the whistleblower provisions of the Dodd-Frank Act; some commentators have speculated that the desire to avoid large payouts to whistleblowers might motivate companies to report allegations after only preliminary investigation.¹¹ According to the *Wall Street Journal*, GlaxoSmithKline began its investigation in China after an anonymous whistleblower tip was sent to executives, compliance officers, and the board of the company.¹²

D. Focus on Individual Prosecutions

2013 also saw a greater emphasis on pursuing FCPA liability for individuals. Then Acting Assistant Attorney General Mythili Raman told an audience last June that “we are now – more than ever – holding individual wrongdoers to account.” In a speech in November, SEC enforcement co-director Andrew Ceresney trumpeted the agency’s progress in pursuing individuals as well as companies, noting that individual cases have “great deterrent value.”¹³ Ceresney acknowledged, however, that cases against individuals pose different challenges: While corporations seldom have gone to trial in the history of the FCPA, individuals facing fines or criminal convictions are much more likely to hold the government to its burden of proof. In some cases, individual prosecutions also pose jurisdictional difficulties that corporate resolutions do not.

Enforcement agencies resolved a number of individual cases in 2013. Among them, the DOJ in April settled a two-year-old action with Uriel Sharef, a former executive with Siemens, who was accused of orchestrating a bribery scheme for Siemens to obtain a contract to produce national ID cards in Argentina.¹⁴ Two executives of U.S.-based Lufthansa subsidiary Bizjet International also pled guilty in April to charges of bribing state

⁹ Press Release, *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty*, Department of Justice, April 22, 2013. Available at <http://www.justice.gov/opa/pr/2013/April/13-crm-456.html>.

¹⁰ David Voreacos and Greg Farrell, *Wal-Mart Not Alone in Late Disclosure of Bribe Probe*, Bloomberg, May 17, 2012. Available at <http://www.bloomberg.com/news/2012-05-17/wal-mart-reluctance-to-reveal-bribery-is-common-business-posture.html>.

¹¹ Lucinda Low, et al., *FCPA Self-Reporting and the Effects of the Dodd-Frank Whistleblower Provisions: A New Calculus*, PLI, May 5, 2011. Available at <http://www.steptoe.com/assets/htmldocuments/PLI%20FCPA%20-%20FCPA%20Self-Reporting%20-%20May%202011.pdf>.

¹² Christopher Matthews and Jessica Hodgson, *GlaxoSmithKline Probes Bribe Allegations in China*, Wall Street Journal, June 12, 2013. Available at <http://online.wsj.com/news/articles/SB10001424127887324798904578529413574312372>.

¹³ Andrew Ceresney, *Keynote Address at the International Conference on the Foreign Corrupt Practices Act*, November 19, 2013. Text available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

¹⁴ Press Release, *Former Siemens Executive Uriel Sharef Settles Bribery Charges*, US Securities and Exchange Commission, April 16, 2013. Available at <http://www.sec.gov/litigation/litreleases/2013/lr22676.htm>.

agencies in Mexico, Brazil and Panama in exchange for airplane maintenance contracts. Two executives of a French power and transportation company (unnamed by the government, but reported in the media to be Alstom, S.A.) pled guilty in April and July 2013 to bribing Indonesian officials to obtain a \$118 million contract for power-related services, while a third executive was indicted for the same conduct.¹⁵ The focus on individual prosecutions continued in January 2014, when the United States Attorney's Office for the District of New Jersey unsealed charges against two former chief executive officers of Petro Tiger Ltd, a British Virgin Islands oil and gas company with operations in Colombia and offices in New Jersey, related to an alleged bribery scheme to pay Colombian officials to secure approval for a \$39 million oil services contract. In the same January announcement, U.S. officials also disclosed that Petro Tiger's former general counsel had pled guilty in November 2013 to bribery and fraud charges related to the same conduct.¹⁶ Shortly after the unsealing of these charges, former Petro Tiger co-CEO Kurt Hammarskjold pled guilty on February 18, 2014 to the criminal information charging him with conspiracy to violate the FCPA and to commit wire fraud in connection with the Colombian scheme.¹⁷

However, Ceresney's cautions about the challenges of enforcement against individuals also were realized. Two additional executives from Bizjet International remain abroad and have not been arraigned on their indictments.¹⁸ Two executives of Terra Telecommunications who were convicted of bribing employees of a state-owned Haitian telecommunications company have appealed to the Eleventh Circuit, arguing that the payment recipients were not "foreign officials" under the FCPA; the statute's definition of "foreign official" has never been evaluated by a federal appellate court.¹⁹ Finally, two federal judges in New York in February 2013 examined the question of when personal jurisdiction over a foreign executive is established under the FCPA, reaching very different conclusions. United States District Court Judge Shira Scheindlin dismissed the civil case against a Siemens executive, Herbert Steffen, ruling that Steffen did not have "minimum contacts" with the United States, nor was his behavior in encouraging the payment of bribes in Argentina directed at causing harm here.²⁰ United States District Court Judge Richard Sullivan, however, ruled that the SEC had established jurisdiction over a Hungarian executive of Magyar Telekom because the executive's actions in falsifying the company's books to conceal payments in Macedonia were designed to violate U.S. securities regulations, and thus were directed at the United States.²¹ As the 2013 record reflects, individual challenges to the FCPA seem likely to drive future interpretation and application of the statute.

¹⁵ Press Release, *Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme*, Department of Justice, July 30, 2013. Available at <http://www.justice.gov/opa/pr/2013/July/13-crm-862.html>.

¹⁶ U.S. Attorney's Office, District of New Jersey, *Foreign Bribery Charges Unsealed against Former Chief Executive Officers of Oil Services Company*, Press Release 14-005, Jan. 6, 2014.

¹⁷ Press Release, *Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery*, Department of Justice (Apr. 5, 2013), available at <http://www.justice.gov/opa/pr/2013/April/13-crm-388.html>.

¹⁸ Samuel Rubinfeld, *FCPA 'Foreign Official' Question Reaches Appellate Spotlight in Esquenazi Case*, Wall Street Journal, October 10, 2013. Available at <http://blogs.wsj.com/riskandcompliance/2013/10/10/fcpa-foreign-official-question-reaches-appellate-spotlight/>.

¹⁹ Opinion and Order, *US Securities and Exchange Commission v. Uriel Sharef et al.*, 1:11-cv-09073-SAS, February 19, 2013. Steffen was the only one of the six Siemens individual executives to actively contest the SEC's charges: as discussed above, Uriel Sharef and two other executives settled with the Commission; the SEC voluntarily dismissed charges against another defendant; and Judge Scheindlin entered default judgments against the remaining two defendants in February 2014.

²⁰ Memorandum and Order, *US Securities and Exchange Commission v. Elek Straub et al.*, 1:11-cv-09645-RJS, February 8, 2013. See also Benjamin Gruenstein, *Upswing in FCPA Cases Results in Increased Judicial Oversight*, New York Law Journal, July 8, 2013. Available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202609540508&slreturn=20131119103916>.

²¹ See ACI Conference Agenda, <http://www.fcconference.com/agenda.html>.

E. Use of Third-Party Intermediaries as Conduits for Improper Benefits

Regulators also remained focused on matters in which foreign officials receive improper payments through third-party intermediaries. At a November 2013 international anti-corruption conference,²² SEC FCPA Unit Chief Kara Brockmeyer noted that two-thirds or more of her team's cases have fact patterns involving the use of intermediaries, and several of last year's notable settlements featured such allegations. In the Ralph Lauren action, the company's Argentine subsidiary routed payments to a customs vendor, who in turn provided improper benefits to public officials in exchange for obtaining necessary paperwork for imports, approving customs clearance of items without documentation, and circumventing inspection protocols. Similarly, oil and gas company Parker Drilling entered into a three-year deferred prosecution agreement with the DOJ and reached a parallel civil settlement with the SEC in April 2013 over improper payments and entertainment provided to Nigerian government officials. In the Parker Drilling case, the payments at issue were not made directly by the company, but rather through an intermediary agent with whom Parker Drilling allegedly contracted through its law firm. Allegations made by SEC against Stryker Corporation also included a claim that the company's Mexican subsidiary directed a law firm to pay approximately \$46,000 to a Mexican government official in order to win a contract bid, which payment was then booked by the Mexican subsidiary as a legitimate legal expense.

Travel agencies also remain third parties of interest to both domestic and foreign regulators. In China, travel vendors are at the center of the country's investigation into bribery of doctors by GlaxoSmithKline's Chinese affiliate.²³ Like the use of the law firms in the Parker Drilling and Stryker settlements, the use of travel vendors potentially permits improper payments to be disguised as travel and entertainment costs, or general marketing expenses. In industries that have large travel and marketing budgets, the potential for misuse of these vendors increases. Although travel agency payments did not appear to be a major component in the FCPA resolutions announced in 2013, these vendors' roles in ongoing investigations around the world increase the likelihood that U.S. regulators will be closely attuned to travel expenditures in the coming years.

F. Increased Collaboration with Foreign Regulators

Enforcement of the FCPA in 2013 also saw a significant increase in cross-border collaboration between United States regulators and foreign regulatory bodies, due both to strengthened foreign bribery laws abroad as well as increased information-sharing with foreign law enforcement agencies. At the June 2013 Global Anti-Corruption Congress, Acting Assistant Attorney General Mythili Raman noted that increased foreign involvement in international bodies like the OECD Working Group on Bribery demonstrates that "we are cooperating with foreign law enforcement on foreign bribery cases more closely today than at any time in history."²⁴

The most prominent example of this trend last year was the investigation of French oil and gas corporation Total, S.A., which represents the first collaborative effort under the FCPA by U.S. and French authorities. Following the DOJ's settlement with Total, French enforcement authorities requested that four company

²² David Barboza, *Glaxo Used Travel Firms in Bribery, China Says*, N.Y. Times (July 15, 2013), available at http://www.nytimes.com/2013/07/16/business/global/glaxo-used-travel-firms-in-bribery-china-says.html?_r=0.

²³ Michael Martina, *GSK Used Travel Agencies for China Bribes: Police*, Reuters (July 15, 2013), available [here](#).

²⁴ Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order and Disgorgement, *In the Matter of Koninklijke Philips Electronics N.V.*, (Apr. 5, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-69327.pdf>.

executives be referred to the French Criminal Court to face charges of having violated that country's foreign bribery laws.

It is not always the United States that acts first. The SEC's Koninklijke Philips Electronics action demonstrates how foreign investigative efforts can serve as a catalyst for subsequent United States enforcement action. Following the foreign arrest of employees of the Polish subsidiary of Philips Electronics for health care-related bribery in 2009, the company conducted an internal investigation into the conduct in question. The company elected to self-report its findings to the SEC and DOJ in 2010, and agreed to pay \$4.5 million to the SEC in combined prejudgment interest and disgorgement penalties to resolve charges that the Polish subsidiary's employees made payments to public officials in order to secure public tenders for the purchase of certain medical equipment.²⁵

Although the United Kingdom's Serious Fraud Office (SFO) has yet to bring a corporate prosecution since the implementation of the UK Bribery Act in 2010, the office appears to be making increasingly concerted efforts to target major corporations. In August 2013, the SFO brought its first charges under the Bribery Act against four executives of Sustainable AgroEnergy plc, in connection with an alleged £23 million fraud relating to the sale of biofuel investment products. In November 2013, the SFO announced that it had initiated an investigation into the security firms G4S plc (responsible for security at the London 2012 Olympic Games) and Serco Group plc regarding overbilling of government contracts. And in December 2013, UK aircraft engine manufacturer Rolls-Royce Holdings plc announced that the SFO had commenced a criminal investigation into allegations that the company bribed officials in China and Indonesia through third-party intermediaries. Rolls-Royce initially self-reported the alleged misconduct to the SFO in 2012, some of which may date back to the 1990s (predating the Bribery Act itself). The allegations include charges that the company provided \$20 million and a car to the son of Indonesia's former dictator General Haji Muhammad Suharto as a bribe to influence the purchase of Rolls-Royce aircraft engines by Indonesian airlines.²⁶

The enactment of the UK Crime and Courts Act in August 2013 also is expected to significantly change the UK's approach to dealing with bribery and corruption. That legislation introduced the National Crime Agency, a new government organization that will have both an investigatory and criminal intelligence function (similar to the United States Federal Bureau of Investigation), to work alongside the SFO. The Crime and Courts Act also provides additional tools for the SFO to address bribery and corruption, with deferred prosecution agreements made available for the first time in the UK beginning in February 2014, as well as proposals to offer financial incentives to whistleblowers. The net effect of these changes is that the UK enforcement environment will now trend toward the United States enforcement climate.

III. Major Cases of 2013 and Early 2014

Weatherford International, Ltd. DOJ and SEC announced a \$253 million "global settlement" of criminal and civil charges with oilfield supplier Weatherford International on November 26, 2013, related to the

²⁵ Alan Tovey, *SFO launches formal bribery investigation at Rolls-Royce*, The Telegraph, December 23, 2013. Available at <http://www.telegraph.co.uk/finance/newsbysector/epic/rrdot/10534406/SFO-launches-formal-bribery-investigation-at-Rolls-Royce.html>.

²⁶ Press Release, *Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations*, Department of Justice, November 26, 2013. Available at <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>.

company's purported bribery of foreign officials in Africa and the Middle East.²⁷ The company also settled charges filed by the Department of the Treasury's Office of Foreign Asset Control ("OFAC") and Commerce's Bureau of Industry and Security ("BIS"). Weatherford signed a deferred prosecution agreement with the DOJ and agreed to pay \$87.2 million to settle criminal charges that it violated the internal controls provisions of the FCPA.²⁸ The company also agreed to pay \$65.6 million in disgorgement and interest to settle the SEC's civil complaint charging that Weatherford violated the anti-bribery, books-and-records, and internal controls requirements of the Exchange Act.²⁹ As part of this global resolution, Weatherford additionally paid an administrative civil penalty of \$50 million to resolve BIS charges that it exported oil and gas equipment from the United States to Cuba, Iran, and Syria in violation of the Export Administration Regulations and the Iran Transactions and Sanctions Regulations, and settled charges by OFAC that the same export activities also violated Treasury's embargo regulations. The SEC's complaint suggested that inaccurate accounting of Weatherford's transactions with embargoed countries may have constituted separate violations of the books-and-records and internal controls provisions of the Exchange Act. Finally, one of Weatherford's subsidiaries signed a separate agreement admitting to violations of the anti-bribery provisions of the FCPA and paid a \$450,000 penalty. Overall, Weatherford's was the eighth-largest FCPA settlement in the statute's history, and this case marks the first time that the SEC has alleged books-and-records charges based on a public company mischaracterizing transactions to hide the fact that it violated export control and sanctions laws.

According to the criminal information filed by the DOJ, a lack of sufficient internal controls created a corporate environment at Weatherford where illegal bribery was acceptable.³⁰ Weatherford and its subsidiaries made improper payments to government officials in Africa through a joint venture in order to secure sensitive information about its competitors' pricing and obtain valuable contracts; paid bribes to a foreign government official through a freight forwarder in order to ensure that the government would renew a contract; awarded \$15 million in funds to a distributor through improper volume discounts that were used to create a slush fund to bribe decision-makers at a national oil company in the Middle East; and paid \$1.5 million in kickbacks to the Iraqi government in order to obtain contracts related to the United Nations' Oil for Food Program.

Total, S.A. French oil and gas company Total, S.A., which is listed on the NYSE, agreed to the third-largest settlement in FCPA history in May 2013 to resolve charges related to bribes paid to Iranian officials during the period from 1995 to 2004, as Total sought development contracts in the Iranian market.³¹ The company entered into a three-year deferred prosecution agreement with the DOJ, and paid \$245.2 million to settle criminal charges of conspiracy and violations of the FCPA books-and-records and internal controls provisions, as well as paying \$153 million in disgorgement and prejudgment interest to the SEC. The SEC alleged that Total made more than \$150 million in profits through the bribery scheme, whereby seemingly

²⁷ Deferred prosecution agreement available at <http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-DPA.pdf>.

²⁸ Press Release, *SEC Charges Weatherford International with FCPA Violations*, Securities and Exchange Commission, November 26, 2013. Available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694>.

²⁹ Information available at <http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-Information.pdf>.

³⁰ Press Release, *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, Department of Justice, May 29, 2013. Available at <http://www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-information-filed.pdf>.

³¹ Samuel Rubinfeld, *Stryker Corp. Settles FCPA Case, Pays \$13 Million*, Wall Street Journal, October 24, 2013. Available at <http://blogs.wsj.com/riskandcompliance/2013/10/24/stryker-corp-settles-fcpa-case-pays-13-million/>.

legitimate consulting agreements were drawn up with intermediaries chosen by Iranian officials to whom the improper payments were subsequently funneled.

At the same time that the SEC settlement was announced, French authorities stated that they also planned to bring charges in their criminal courts against Total, its chairman and chief executive officer, and two other individuals for violations of French anti-corruption law.

Diebold. ATM manufacturer Diebold signed deferred prosecution agreements with the DOJ and SEC on October 22, 2013 to settle violations of the anti-bribery, books-and-records and internal controls provisions of the FCPA, agreeing to pay a total of \$48.17 million in penalties, disgorgement and interest. According to the DOJ's criminal information, Diebold paid \$1.75 million in cash, gifts, and travel expenses between 2005 and 2010 to secure contracts with state-owned and -controlled banks in China and Indonesia, falsely recording the amounts as legitimate payments routed through third parties and, in the case of leisure trips given to some officials, as travel to training meetings. The company also entered into a false contract for services with a Russian distributor, which used the funds to bribe employees of private banks in that country.

Ralph Lauren Corporation. The DOJ and SEC announced twin non-prosecution agreements with New York clothing company Ralph Lauren on April 22, 2013, after the parent corporation self-reported that one of its subsidiaries had made payments over a five-year period to Argentinian customs officials to clear goods without inspection or proper documentation. The payments were routed through a customs clearing agency, which created fake invoices for legitimate services. Both federal agencies lauded Ralph Lauren's prompt reporting and thorough self-investigation of the violations, and the company paid only an \$882,000 criminal penalty and \$734,846 in disgorgement and interest to the SEC.

Stryker. Of the major settlements concluded in 2013, Stryker Corporation's covered conduct over the broadest geographic area. The medical device and technology company agreed to the resolution of an administrative proceeding before the SEC, which alleged that from 2003 to 2007, the company used third parties to make payments to keep or win contracts to supply medical products and devices to state-controlled entities in Mexico, Poland, Romania, Argentina and Greece. Stryker and its subsidiaries purportedly concealed these payments as legal expenses (with, in one instance, a Mexican law firm acting as intermediary), honoraria for speaking engagements, donations for medical research, and travel to tour Stryker's U.S. facilities. To settle these charges (which Stryker neither admitted or denied), the company paid civil disgorgement of \$7.5 million, prejudgment interest of \$2.28 million, and a penalty of \$3.5 million. Stryker's conduct was charged solely under the books-and-records and internal controls provisions, and not the anti-bribery provision. Upon announcement of the SEC settlement, a Stryker spokesperson said the DOJ had closed a parallel investigation into the company.³²

Alcoa World Alumina LLC. In the first major settlement of 2014, aluminum giant Alcoa paid \$384,000,000 in a global settlement with DOJ and SEC to resolve charges that it paid millions of dollars in bribes to officials in Bahrain through an intermediary. The settlement included a \$209,000,000 criminal fine; a \$14,000,000 asset forfeiture; and \$161,000,000 in civil disgorgement. The DOJ criminal information detailed complex financial transactions used to facilitate kickback payments from Alcoa's Australian subsidiary to officials of Alba, an aluminum smelter controlled by the government of Bahrain, to which Alcoa purportedly supplied raw

³² Press Release, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture*, Department of Justice, January 9, 2014. Available at <http://www.justice.gov/opa/pr/2014/January/14-crm-019.html>.

materials at inflated prices. Beginning as early as 1988, the intermediary, a friend of members of Bahrain's royal family, acted as a sham sales agent and was given bribe payments disguised as commissions.³³

In investigating Alcoa, DOJ and SEC cooperated with law enforcement agencies in Switzerland, the UK, Canada, Liechtenstein, Norway and Australia, as well as the Serious Fraud Office. In a press release, SEC enforcement division chief Kara N. Brockmeyer noted that "the extractive industries have historically been exposed to a high risk of corruption, and those risks are as real today as when the FCPA was first enacted."³⁴

IV. Conclusion

The ongoing FCPA investigations disclosed to investors and reported in the media in 2013 indicate that SEC and DOJ are widening their focus in regards to industries and regions targeted, and expanding their scrutiny from companies' direct payments to include greater focus on the use of third-party intermediaries. Greater cooperation with foreign enforcement bodies also increases the likelihood that FCPA investigations may involve parallel overseas inquiries. Meanwhile, the law underlying the FCPA will continue to be developed by defendants in individual actions, who are more likely to go to trial and challenge the government's broad interpretation of the statute.

Given some of the high-dollar settlements announced last year and the signals from public announcements in early 2014, it seems likely that the cost of noncompliance with the FCPA will rise in the coming year. Independent self-assessment and internal investigation, however, will continue to serve as a sound investment in minimizing FCPA risks and increasing a company's chances of working cooperatively with the government to resolve liability for potential violations of the statute.

Ropes & Gray regularly advises clients on FCPA compliance and investigations. If you have questions about these recent enforcement trends, please contact the Ropes & Gray attorneys with whom you regularly work.

³³ Press Release, *SEC Charges Alcoa With FCPA Violations*, Securities and Exchange Commission, January 9, 2014. Available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936#.UvEH1fldV8E>.