By William G. Bruner, John Parker Sweeney and Winifred M. Weitsen

Aggressive Use of New Enforcement Tools by the Administration

Enacted hastily in the post-Watergate Era's ethical fever, the Foreign Corrupt Practices Act (FCPA) was designed to eliminate bribery of foreign officials by American companies doing business abroad. The FCPA does so by broadly prohibiting American companies from making corrupt payments to foreign officials and requiring companies to maintain books and records and accounting systems sufficient to ensure that a company's outside auditors will discover corrupt payments.

The past 18 months have seen an unprecedented number of criminal and civil proceedings and settlements involving American companies, and in many cases, individual company officials for FCPA violations. Almost as remarkable as the recent law enforcement efforts of the U.S. Department of Justice's Criminal Division (DOJ) and the U.S. Securities and Exchange Commission (SEC) are the unprecedented sword rattling of both agencies. Senior officials have made themselves available and spoke candidly not just on their considerable enforcement record, but also about personnel staffing details and enforcement policy initiatives usually not discussed publicly.

Both agencies have added staff to dedicated units of seasoned prosecutors to pursue even more enforcement actions. And both agencies have targeted individuals and relied increasingly on "flipping" those individuals to make cases against their companies.

At the same time that the Obama administration has funneled more budget dollars into FCPA enforcement, Congress gave these agencies a boost in the Wall Street Reform and Consumer Protection Act, also known as the Dodd-Frank Act, Public Law No: 111-203. The Dodd-Frank Act clarified that the scienter requirement for proving aiding and abetting liability under the FCPA includes recklessness, thereby settling this issue and expanding the scope of SEC enforcement authority over company employees and other individuals.

The Dodd-Frank Act also empowered the SEC to reward whistleblowers. On November 3, 2010, the SEC proposed a new rule establishing its Whistleblower Program under the Dodd-Frank Act to

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reward individuals who provide the agency with high-quality tips that lead to successful enforcement actions. The SEC release announced, "To be considered for an award, a whistleblower must voluntarily provide the SEC with original information about a violation of the federal securities laws that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million."

"We get thousands of tips every year, yet very few of these tips come from those closest to an ongoing fraud," said SEC Chairman Mary L. Schapiro. "Whistleblowers can be a source of valuable firsthand information that may otherwise not come to light. These high-quality leads can be crucial to protecting investors and recovering ill-gotten gains from wrongdoers."

On January 13, 2010, SEC Enforcement Director Robert Khuzami announced that Cheryl Scarboro would be chief of the Foreign Corrupt Practices Act Unit that "will focus on enforcing the law and regulations that prohibit corporate bribery of foreign officials." He emphasized that the unit "will utilize enhanced training, hiring of and consultation with individuals with industry experience or other specialized skills, targeted investigative approaches, and in some cases new technology, to conduct more efficient and comprehensive investigations."

In a March 19, 2010, speech, Khuzami reiterated that the SEC had set up a new FCPA specialized enforcement unit—one of only five such specialized enforcement units at the SEC—focused on FCPA prosecution, with a core group of enforcement lawyers who are developing expertise and in-depth knowledge of certain global regions and business practices. Khuzami acknowledged that the SEC historically had "relied on issuers to self-report their violations, after conducting internal investigations." He warned companies, however, that the SEC now would be "more proactive in investigations, learning of possible violations in advance of self-reporting, working more closely with our foreign counterparts, and taking a more global approach to these violations." Khuzami declared that "the Foreign Corrupt Practices Act Unit will focus on proactive approaches to identifying violations of the Foreign Corrupt Practices Act, which prohibits U.S. companies from bribing foreign officials for government contracts and other business."

In his January 13, 2010, speech Khuzami also announced that "we are expanding the Division's investigative toolbox to include cooperation agreements and related initiatives. Our new cooperation program has the potential to be a game-changer for the Enforcement Division. For the first time, we will have a formal framework of incentives—incentives to secure the cooperation of persons who saw, heard and witnessed securities fraud first-hand—and who can walk into a courtroom, raise their right hand and tell their story to the world."

The SEC will agree to recommend consideration of an individual's cooperation with enforcement agencies when civil remedies or criminal penalties are assessed against the individual.

Khuzami ticked off the benefits to law enforcement from these individual cooperation arrangements:

- "Cases aided by cooperator testimony can be made quickly and efficiently, because cooperators are most often insiders who have seen and heard all that happened. Their testimony is often spot-on and irrefutable. Charges supported by cooperator testimony can be resolved or litigated from a position of strength."
- "More wrongdoers can be brought to justice due to the increased efficiency of cooperator-aided cases."
- "[C]ooperating witnesses can be the master key that unlocks the intricacies of cases involving complex transactions that might otherwise escape detection, or enable authorities to apprehend the higher-ups whose culpability can be the most challenging to establish."

Khuzami described the three new cooperation tools in more detail as follows:

- "Cooperation Agreements. They are formal written agreements in which the Division of Enforcement agrees to recommend to the Commission that a cooperator receive credit for cooperating in its investigations or related enforcement actions. Such credit will only be extended if the cooperator provides substantial assistance in those investigations and enforcement actions."
- "Deferred Prosecution Agreements. These are formal written agreements in which the Commission agrees to forego an enforcement action against a cooperator—if the individual or company agrees to cooperate fully and truthfully and to comply with certain reforms, controls and other undertakings."
- "Non-prosecution Agreements. These are formal written agreements, entered into under very limited and appropriate circumstances, in which the Commission agrees not to pursue an enforcement action against a cooperator. Here too the agreement would only be entered if the individual or company agrees to cooperate fully and truthfully in connection with an investigation or enforcement action and to comply with express undertakings."

Khuzami emphasized the urgency for individuals considering cooperation. Now, he said, "when you engage in misconduct, you now have to think even harder about the possibility of others coming forward to report to the SEC your secret conversations, your hushed plans, your schemes and deceptions…. Latecomers rarely will qualify for cooperation credit, so there is every reason to step forward—before someone else does—while you are in a position to benefit from your knowledge of wrongdoing."

In an October 14, 2010, speech, SEC Deputy General Counsel Mark Cahn announced that 2010 SEC FCPA enforcement numbers would surpass any prior year both for charging individuals and for the size of penalties and disgorgements. He said that, in a recent addition to SEC

enforcement manual detailing individual cooperation agreements, the SEC would expand its cooperation policy to include an individual's cooperation. Under this policy, Cahn declared that the SEC will agree to recommend consideration of an individual's cooperation with enforcement agencies when civil remedies or criminal penalties are assessed against the individual. In fact, the SEC recently has focused enforcement efforts on individuals, filing many complaints against individuals, and many litigation releases have indicated that individuals have cooperated.

During a November 16, 2010, speech, Assistant Attorney General Lanny Breuer highlighted the DOJ's "new era of FCPA enforcement." Focusing on the DOJ's commitment to ensure the integrity of the marketplace, Breuer maintained that FCPA enforcement properly holds those accountable who make corrupt payments to foreign officials, and additionally, it creates a transparent and fair international business climate. Addressing skeptics, he stated that FCPA enforcement does not put American businesses at a competitive disadvantage with their foreign counterparts, which he supported by emphasizing the DOJ's FCPA enforcement against not only U.S. companies, but also foreign companies or U.S. subsidiaries of foreign companies. Breuer stressed that the United States leads by example, and he presented illustrations of the DOJ's FCPA enforcement prowess.

Notably, in this new era, the DOJ's FCPA enforcement has evolved and significantly increased its FCPA-dedicated resources. First, the DOJ reconstituted its team with seasoned assistant U.S. attorneys with significant trial experiences, as well as international and financial expertise, as in the SEC Foreign Corrupt Practices Act Unit. Within the last year, DOJ appointed Denis McInerney, a former deputy chief of the Criminal Division of the U.S. Attorney's Office of the Southern District of New York, to lead the Fraud Section. Likewise, in January 2010, Greg Andres, the former chief of the Criminal Division of the U.S. Attorney's Office of the Eastern District of New York, became the deputy assistant attorney general overseeing the Fraud Section. Charles Duross, who has focused primarily on FCPA cases since 2006, is now the deputy chief of the Foreign Corrupt Practices Act Unit. According to Breuer, the DOJ has also "substantially increased the number of prosecutors in the FCPA Unit." Other dedicated personnel include 12 special agents in the Federal Bureau of Investigation's Washington Field Office committed to FCPA enforcement.

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Second, the DOJ has teamed up with U.S. attorneys around the country to investigate and prosecute FCPA cases. Through direct prosecutor-to-prosecutor relationships, as well as formal channels of cooperation, FCPA criminal prosecutions are becoming more efficient. For example, the Foreign Corrupt Practices Act Unit solicits its assistance from the prosecutors in the Asset Forfeiture and Money Laundering Section. Through this partnership and the newly created Kleptocracy Asset Recovery Initiative, the Foreign Corrupt Practices Act Unit and Asset Forfeiture and Money Laundering Section hope to increase FCPA prosecutions, and their efforts to recover the proceeds of FCPA-related corruption that have been laundered from abroad to or through the United States. The United States has also committed to doubling the staffing to support the U.S. Department of State's anti-kleptocracy efforts. Citing this partnership, Breuer noted the DOJ's comprehensive approach to fighting foreign corruption.

The DOJ's comprehensive approach has not only extended government partnerships within the United States, but it has extended the DOJ's partnerships with foreign governments on behalf of the United States as well. The United States is a signatory to the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and it participates in the OECD Working Group on Bribery in International Business Transactions. The OECD Working Group on Bribery in International Business is responsible for monitoring the implementation and enforcement of the OECD anti-bribery convention. The DOJ's relationships with other member country governments are evident in three recent examples. In June 2010, Paris-based Technip S.A., an engineering and construction firm specializing in the oil and gas services industry, resolved FCPA-related charges concerning its role in a joint venture's illegal payments to Nigerian government officials to win contracts worth $6 billion to build massive LNG facilities on Nigeria's Bonny Island.

In a DOJ press release of June 28, 2010, FBI Assistant Director Kevin L. Perkins, referring to the cooperation of France, Italy, Switzerland, and the United Kingdom, was quoted as stating, "This case demonstrates the FBI's commitment to aggressively investigate violations of this law. We will continue to investigate FCPA matters by working in partnership with other law enforcement agencies, both foreign and domestic, to ensure that both corporations and executives who bribe foreign officials in return for lucrative business contracts are punished." The DOJ's comments paralleled Perkins' comments.

Likewise, the DOJ acknowledged the substantial assistance of the U.K.'s Serious Fraud Office in two cases resolved in March 2010: (1) BAE Systems plc, a U.K. company, pleaded guilty to bribery-related offenses and agreed to pay a $400 million criminal fine; and (2) Innospec Inc., a Delaware corporation, pleaded guilty and agreed to pay a $14.1 million criminal fine. Clearly, the DOJ is aggressively investigating and prosecuting international bribery by U.S. and foreign corporations alike.

Arguably, this infusion of resources, personnel, and partnerships has spearheaded the significant increase in FCPA prosecutions. In his November 16, 2010, speech, Breuer offered the following statistics: (1) in 2004, two individuals were charged under the FCPA and roughly $11 million collected

in criminal fines; (2) in 2005, five individuals were charged and roughly $16.5 million collected; and (3) in the past year, 50 individuals had been charged and nearly $2 billion collected. In fact, the top five FCPA recoveries to date were each in excess of several hundreds of millions of dollars: (1) Siemens (Germany), $800 million in 2008; (2) KBR/Halliburton (USA), $579 million in 2009; (3) BAE (U.K.), $400 million in 2010; (4) Snamprogetti Netherlands B.V./ENI S.p.A (Holland and Italy), $365 million in 2010; and (5) Technip S.A. (France), $338 million in 2010.

Moreover, when Breuer delivered his speech on November 16, 2010, approximately 35 defendants were awaiting trial on FCPA charges in the United States. Breuer had predicted that increase in prosecutions of individuals in a November 2009 speech, "In fact, prosecution of individuals is a cornerstone of our enforcement strategy.… Put simply, the prospect of significant prison sentences to individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations." This focus was underscored when the DOJ unsealed indictments against 22 defendants in the defense and law enforcement products industry in January 2010. Importantly, those indictments signaled the DOJ's decision to employ traditional "blue-collar" tactics, such as undercover law enforcement techniques.

Indeed, 2010 witnessed the longest prison sentence ever imposed in a FCPA case. In April 2010, Charles Jumet was fined $15,000 and sentenced to 87 months in prison for his role in a conspiracy to bribe Panamanian government officials to obtain contracts on behalf of Ports Engineering Consultants Corporation to maintain lighthouses and buoys along Panama's waterway. On June 25, 2010, Jumet's coconspirator, John Warwick, was sentenced to 37 months in prison and forfeited $331,000 in proceeds of the crime. In addition to FCPA violations, Jumet was also charged with making false statements to prosecutors, and in delivering Jumet's sentence, U.S. District Judge for the Eastern District of Virginia Henry E. Hudson commented that Jumet "deceived" and "obstructed justice," which may account for the 50-month disparity between the codefendants' sentences.

The DOJ and SEC have also targeted certain industries to ensure FCPA compliance. The health care industry, and more recently the oil, gas and mining industry, have been in the government's sights. In November 2009, Breuer warned pharmaceutical companies and medical device companies that the DOJ would be "vigilant" in holding companies accountable for FCPA violations. Likewise, in November 2010, the DOJ and SEC both settled with several companies in the oil and gas industry: Panalpina World Transport and its U.S.-based subsidiary, involved in global logistics, and the energy companies Shell, Transocean, Tidewater, Noble Corporation, and Pride International.

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To this end, U.S. government agencies have assisted countries in building transparent and accountable practices in the extractive industries sector, and Congress passed the "Publish What You Pay" law, a provision of the Dodd-Frank Act, "Disclosure of Payments by Resource Extraction Issuers," which requires oil, gas, and mining companies to report payments to the United States or any foreign government for resource extraction. In the recent "G-20: Fact Sheet on a Shared Commitment to Fighting Corruption," released by the White House on November 12, 2010, the United States noted that it became the largest donor to the Extractive Industries Transparency Initiative, a coalition of governments, companies, civil society groups, investors and international organisations," by donating $10.5 million to the initiative over the last three years. *See What Is the EITI?*, http://eiti.org/node/22. President Obama and the other G-20 leaders identified the "three pillars" of their agenda: (1) a common approach to building an effective global anticorruption regime; (2) specific commitments to show collective leadership by taking action in high-priority areas that affect world economies; and (3) a commitment to engaging private sector stakeholders in the development and implementation of cooperative practices in support of a clean business environment.

Companies in all sectors that have FCPA exposure should take note of the DOJ's warnings. A strong FCPA compliance program is essential for every company. As Breuer suggested in his November 16, 2010, speech, companies should review the veracity of their compliance programs, and if necessary, strengthen them. He noted the OECD's 2010 "Good Practice Guidance on Internal Controls, Ethics, and Compliance." This flexible guidance strives to identify best practices to implement effective internal controls, ethics, and compliance programs. As expected, it counsels that companies should have the appropriate tone-at-the-top and clearly indentify and define their prohibitions against bribery. Through internal controls and audit procedures, independent compliance authority and resources, proper financial and accounting procedures, ongoing training and discipline, and periodic review, companies can create substantive compliance programs to prevent violations in seven key areas: (1) gifts; (2) hospitality, entertainment, and expenses; (3) customer travel; (4) political contributions; (5) charitable donations and sponsorships; (6) facilitation payments; and (7) solicitation and extortion.

Establishing an excellent compliance program will serve two purposes. First, it will help to prevent misconduct from occurring, and, second, the DOJ has indicated that it will also improve a company's position with the government in the event of an investigation. In August 2010, the DOJ noted in a footnote in Universal Leaf's sentencing memorandum that, "The agreed upon disposition partly reflects credit given for Universal's pre-existing compliance program." Universal became aware of its problem in Brazil through a hotline tip. Similarly, in November 2010,

Foreign Corrupt Practices Act › page 72

Foreign Corrupt Practices Act ❮ page 61

Nobel Corporation, an oil and gas company, mentioned briefly above, entered into a non-prosecution agreement, which noted "the existence of Noble's pre-existing compliance program and steps taken by Noble's Audit Committee to detect and prevent improper conduct from occurring." It is likely that future settlements will highlight such preexisting compliance efforts.

There is no parallel in the FCPA realm to the antitrust division's Amnesty program, and based on recent testimony that Greg Andres, Deputy Assistant Attorney General of the Justice Department's criminal division, provided before a Senate Judiciary Committee panel in late November, there will not be one. Andres stated, "We don't believe that immunity is appropriate, just as we don't believe that a bank robber could get immunity for disclosing that he robbed a bank." Yet, both the Universal and Noble DOJ press documents also noted the companies' timely self-disclosure and cooperation. What constitutes "meaningful credit" in the DOJ's purview, however, is a subject of much consternation. For a company and its counsel, determining whether to self-disclose is not an easy question. While the facts and circumstances of each case will shape each disclosure decision, having pre-existing, strong compliance programs can aid in making the determination. Additionally, if the DOJ continues to incorporate cooperation by companies into its settlements, practitioners and executives eventually will gain a clearer picture of what constitutes cooperation credit.

The SEC's and the DOJ's stepped up FCPA enforcement efforts recently were commended by the OECD's Working Group on Bribery in International Business. In finding the United States fully compliant with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation for Further Combating Bribery, the OECD Working Group highlighted a number of best practices developed by the United States in its efforts to combat foreign bribery.

The November 3, 2010, SEC release announcing the OECD findings characterized the report's highlights as follows:

> [T]he report noted that the creation of dedicated, specialized units within the Department of Justice Criminal Division's Fraud Section and the FBI to focus on potential violations of the Foreign Corrupt Practices Act (FCPA) significantly increased the rate of enforcement, and that the creation of a new unit at the SEC should further strengthen enforcement efforts. The report also welcomed U.S. efforts toward close cooperation with foreign authorities and the regular interaction between U.S. and foreign law enforcement, noting that this cooperation is essential to ensuring an effective global fight against corruption.

"Bribing foreign government officials is not a legitimate way to do business," said Assistant Attorney General Breuer. "The United States has risen to the forefront of enhanced global efforts to combat foreign bribery, including through our vigorous enforcement of the FCPA. We appreciate the Working Group's recognition of our success in holding companies and individuals accountable for their criminal wrongdoing, raising awareness among the business community, and increasing cooperation with our foreign law enforcement counterparts."

"We welcome this report, which recognizes the significant steps law enforcement agencies in the United States have taken to enforce the FCPA," said SEC Enforcement Director Khuzami. "The SEC has created an FCPA unit to crack down on cross-border bribery, and in the first nine months of 2010 alone, we obtained more than $400 million in disgorgement and penalties. Word is getting out that bribery is bad business, and we will continue to work closely with the business community and our colleagues in law enforcement in the fight against global corruption."