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Developments in U.S. and International Efforts to Prevent Corruption

MARGARET AYRES, JOHN DAVIS, NICOLE HEALY AND ALEXANDRA WRAGE*

I. Introduction

In 2006, U.S. enforcement of the Foreign Corrupt Practices Act (FCPA) was book-ended by major policy pronouncements by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ). Each pronouncement focused on the roles of cooperation and disclosure by defendants in the agencies' decisions regarding charging and penalties in FCPA cases. The year 2006 also featured a substantial increase in FCPA cases against individuals. Seven of the eleven announced cases focused on individuals, a trend unprecedented in the history of the statute. Six of those cases were against executives of companies that previously had settled FCPA-related charges. Internationally, anti-corruption efforts appeared to be on the increase. The United Nations Convention Against Corruption (UNCAC) reached eighty ratifications,¹ including the United States. The first Conference of States Parties was held in Amman, Jordan in December 2006.²

II. U.S. Developments

The year began with the SEC's Statement Concerning Financial Penalties.³ Issued by a unanimous Commission in conjunction with the announcement of two non-FCPA settlements, the statement highlighted not only cooperation and remediation by the companies involved, but also refocused the penalty calculations regarding the possible effects of large fines on current shareholders in securities-related cases. The Commission noted that "clarity, consistency, and predictability" of decisions on corporate penalties are "impor-

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1. See United Nations Office on Drugs and Crime, http://www.unodc.org/unodc/crime_signatures_corruption.html (last visited Nov. 28, 2006).

2. Results of the conference were released too late to be included in this paper.

3. See SEC Press Release No. 2006-4, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 6, 2006), <http://www.sec.gov/news/press/2006-4.htm>.

tant.”⁴ The statement then asserted that the “appropriateness of a penalty on the corporation in a particular case” depends “principally on two considerations”: (1) “The presence or absence of a direct benefit to the corporation as a result of the violation” and (2) “The degree to which the penalty will recompense or further harm the injured shareholders.”⁵ In addition, the SEC listed “several additional factors that are properly considered” in a penalty determination: the need to deter the particular type of offense; the extent of injury to innocent parties; whether complicity in the violation is widespread throughout the company; the “level of intent” of the wrongdoers; the degree of difficulty in detecting the type of violation; “presence or lack of remedial steps by the corporation;” and the extent of cooperation with the SEC and other law enforcement authorities.⁶

Read in conjunction with the Commission’s 2001 “Seaboard Report,”⁷ which focuses on how the agency assesses cooperation by companies in investigations and covers many of the same considerations (though with different emphases), the January 2006 statement represented the Commission’s attempt to heighten the transparency and consistency of its enforcement decisions in the FCPA and other securities enforcement areas.

On October 16, 2006, Assistant Attorney General (AAG) Alice Fisher delivered a speech at an American Bar Association event outlining the Criminal Division’s enforcement priorities for the FCPA.⁸ AAG Fischer emphasized that “voluntary disclosure, followed by extraordinary cooperation” results in a “real, tangible benefit” to the company, noting the penalty/fine levels and deferred prosecution agreement, rather than a guilty plea, as evidence of this benefit in the *Schnitzer* matter (discussed below).⁹ Although AAG Fisher asserted that there has always been a benefit to cooperation and disclosure, she commented that “nothing is off the table when you voluntarily disclose.”¹⁰ Moreover, despite recent trends, she commented that there is “no presumption” that a compliance consultant will be required for every FCPA disposition.¹¹ A strong company management team, the “pervasiveness of the problem,” and the nature of the company’s existing policies and procedures are all factors the DOJ weighs in determining whether a monitor is appropriate.¹²

United States v. Novak. On March 21, 2006, Richard Novak pled guilty to conspiracy and violation of the FCPA’s anti-bribery provisions for payments to Liberian diplomats.¹³ Novak paid employees of the Liberian embassies in Washington, D.C. and Accra, Ghana, and the Liberian Ministry of Education in Monrovia, Liberia, for certificates of accredita-

4. *Id.*

5. *Id.*

6. *Id.*

7. See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the “Seaboard Report”), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

8. See Alice S. Fisher, Assistant Attorney General, Criminal Division, Prepared Remarks for the American Bar Association, National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), (transcript available at <http://www.usdoj.gov/criminal/fraud/speech/10-16-06AAGFCPASpeech.pdf>).

9. *Id.* at 5.

10. *Id.* at 6.

11. *Id.* at 6-7.

12. *Id.* at 7.

13. See *United States v. Novak*, Case No. CR-05-180-3-LRS (E.D. WA March 20, 2006) (Plea Agreement).

tion from Liberia's Board of Education for fictitious universities he and his employers had created.

United States v. Salam. On March 24, 2006, the DOJ announced that Faheem Mousa Salam, an employee of a government contractor working in Iraq, had been arrested and charged with violating the FCPA.¹⁴ According to the criminal complaint, Salam offered a bribe to a senior official with the Iraqi Police to induce him to purchase a map printer and 1,000 armored vests. The official informed U.S. authorities of the offer and agreed to act as a confidential informant. Salam also met and discussed additional improper payments with an undercover agent posing as a U.S. procurement officer. On August 4, 2006, the DOJ announced that Salam pled guilty to an FCPA anti-bribery charge.¹⁵ In addition to the sting operation, the case is notable in that it was based only on an offer of an improper gift, rather than an actual payment. It also provides a rare example of the use of the statute's nationality-based jurisdiction to charge an individual. The case arose in the context of other efforts, including prosecution for domestic bribery, to address corruption in the procurement processes related to the Iraq reconstruction.¹⁶

SEC v. Tyco International Ltd. On April 17, 2006, the SEC announced a settlement with Tyco International Ltd. (Tyco) that resolved accounting fraud violations and FCPA charges arising from activities undertaken during Dennis Kozlowski's tenure as CEO.¹⁷ Without admitting or denying allegations in the SEC complaint, Tyco consented to a permanent injunction barring it from violating certain provisions of the securities laws, including the FCPA, and agreed to pay a \$50 million civil penalty and \$1 disgorgement.¹⁸ The FCPA anti-bribery and recordkeeping charges were related to Tyco affiliates' activities in Brazil and South Korea. Significantly, however, the settlement did not require Tyco to retain an independent compliance monitor to review its FCPA program and make recommendations, possibly in part because of the large-scale overhaul Tyco had already undertaken of its compliance systems. Like other cases before it, the Tyco matter highlighted the potential FCPA compliance risks related to mergers and acquisitions—the SEC complaint noted that Tyco acquired the companies despite due diligence that revealed that illicit payments to government officials were common in Brazil and South Korea and that employees at the affiliates did not receive adequate post-merger instruction regarding compliance with the FCPA.¹⁹ In addition, the SEC alleged that Tyco did not have a “uniform, company-wide FCPA compliance program in place or a system of

14. Press Release, Department of Justice, U.S. Civilian Translator Arrested for Offering Bribe to Iraqi Police Official (Mar. 21, 2006), available at http://www.usdoj.gov/criminal/press_room/press_releases/2006_4523_3-24-06IragSalam.pdf.

15. Press Release, Department of Justice, U.S. Civilian Translator Pleads Guilty to Offering Bribe to Iraqi Police Official (Aug. 4, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_crm_500.html. See *United States v. Salam*, Case No. 06-00157 (D.C. Cir. Aug. 4, 2006) (Plea Agreement & Statement of Offense).

16. See *United States v. Stein*, Case No. 1:06-cr-00016-CKK (D.C. Cir. Jan. 23, 2006) (Plea Agreement); *United States v. Bloom*, Case No. 1:06-cr-00053-CKK (D.C. Cir. Feb. 27, 2006) (Plea Agreement).

17. See *SEC v. Tyco Int'l Ltd.*, Case No. 06 CV 2942 (S.D.N.Y. Apr. 17, 2006); SEC Accounting and Auditing Enforcement Release No. 2414 (Apr. 17, 2006); SEC Litigation Release No. 19657 (Apr. 17, 2006).

18. The high fine assessed against Tyco likely stemmed from the billion dollar accounting fraud, with the FCPA violations only a contributing factor.

19. See Complaint, *SEC v. Tyco Int'l Ltd.*, Case No. 06 CV 2942 (Apr. 17, 2006), ¶ 53, available at <http://www.sec.gov/litigation/complaints/2006/comp19657.pdf>.

internal controls sufficient to detect and prevent FCPA misconduct at its globally dispersed business unit.”²⁰

In the Matter of Oil States International. On April 27, 2006, the SEC accepted a settlement offer from Oil States International (OSI) related to violations of the FCPA’s books, records, and internal controls provisions.²¹ Without admitting or denying the SEC’s allegations, OSI consented to entry of a final judgment that ordered OSI to cease and desist from violating the FCPA, without any additional penalties. According to the order, OSI’s wholly-owned subsidiary, HWC, had a branch office in eastern Venezuela that hired a Venezuelan consultant who conspired with the branch office and officials of state-owned Petróleos de Venezuela, S.A. (PdVSA) to inflate invoices, kick back the excess to the PdVSA employees, and improperly bill PdVSA to even the profit margin.²² From December 2003 to December 2004, the scheme resulted in about \$348,350 in improper payments to employees of PdVSA. In August 2004, senior HWC management in the United States discovered the scheme and reported it to OSI’s management, which then reported it to the company’s audit committee.²³ An internal investigation was undertaken and remedial actions implemented. In accepting the company’s offer of settlement, the order noted that the SEC considered OSI’s prompt remedial acts and its cooperation in determining the appropriate disposition.²⁴

United States v. Head. On June 23, 2006, Steven Head, the former CEO of Titan Africa, pled guilty to one count of falsifying the books and records of an issuer under the FCPA.²⁵ In January 2001, Head allegedly authorized the payment of \$2 million in “advanced social fees” to the President of Benin’s reelection campaign in return for a higher management fee on a wireless telephone contract in Benin. The wireless contract had called for Titan to pay certain “social fees” to develop “sectors” in Benin, but those fees were not yet due and the plea agreement states that Head was aware that these payments would not be used for the purposes identified by the contract. The agreement states that Head then submitted an invoice to Titan for these payments that falsely stated that they were for “consulting services.”²⁶ The DOJ accepted a plea on just one count against Head stemming from this incident and recommended a lower sentence in return for Head’s “substantial” assistance in the “investigation and prosecution of others.”²⁷ This suggests that there may be more individual prosecutions of Titan employees yet to come.

SEC v. Samson, Munro, Campbell, and Whelan. On July 5, 2006, the SEC charged four former ABB employees, John Samson (regional sales manager for West Africa), John Munro (senior vice-president of operations), Ian Campbell (vice-president of finance), and

20. *Id.* ¶ 55.

21. *See In the Matter of Oil States International, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934* (Apr. 27, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-53732.pdf>.

22. *Id.* ¶ 5.

23. *Id.* ¶ 10.

24. *Id.* ¶ 5.

25. *See United States v. Head*, Case No. 06-CR1380-BEN (S.D. Cal. June 23, 2006) (Plea Agreement).

26. In 2005, the SEC and DOJ resolved FCPA actions against Titan that obligated Titan disgorge \$15.5 million and pay a \$13 million criminal penalty. *See United States v. Titan Corp.*, Case No. 05CR0314-BEN (S.D. Cal. Mar. 2005); *SEC v. Titan Corp.*, Case No. 05-0411 (D.C. Cir. March 1, 2005) (Complaint); SEC Litig. Release No. 19107 (Mar. 1, 2005).

27. As of December 1, 2006, Head had not yet been sentenced.

John Whelan (vice-president of sales) with violating the anti-bribery and books, records, and internal accounting control provisions of the FCPA.²⁸ The SEC alleged that these employees paid approximately \$1 million in bribes to Nigerian government officials in an effort to secure a contract to provide equipment for an oil drilling project in Nigeria and that Samson also received \$50,000 in kickbacks from one of the officials who received illicit payments. Without admitting or denying the allegations in the complaint, Samson, Munro, Campbell, and Whelan consented to the entry of final judgments that included civil monetary penalties and disgorgement.²⁹ This case is noteworthy in that three of the four individuals were not U.S. citizens and worked for non-U.S. subsidiaries of a Swiss parent company.

SEC v. Pillor. On August 15, 2006, the SEC announced and settled charges against David Pillor,³⁰ the former senior vice-president for sales and board member of InVision Technologies, an entity that had previously settled related FCPA charges with the DOJ in 2004 and the SEC in 2005.³¹ The SEC alleged that Pillor aided and abetted InVision's failure to establish adequate internal controls and that he "indirectly caused the falsification of the company's books and records."³² Without admitting or denying the allegations, Pillor settled the complaint with an injunction and a \$65,000 civil penalty. The SEC's complaint stated that, due to his position in the company, Pillor was responsible for InVision's inadequate FCPA compliance in the company's sales organization.³³ The SEC also stated that Pillor received emails from regional sales managers suggesting that the foreign agents intended to make improper payments to foreign officials but did not address these communications and subsequently approved payment without further inquiry, leading the company to record the payments as legitimate business expenses, contributing to the company's books and records violations.³⁴ The SEC made a strong statement regarding the personal responsibility of individual corporate officers and directors for failures of corporate internal controls. This case represents one of the strongest statements by U.S. enforcement authorities thus far regarding the individual liability that can arise from willful blindness to potential FCPA issues by employees of issuers.

SEC v. Ott & Young. On September 6, 2006, the SEC filed civil enforcement actions against two former executives of IXTC Corp., Steven Ott, the former vice-president for Global Sales, and Roger Michael Young, the former managing director for Middle East and Africa, charging violations of both the FCPA anti-bribery and accounting provi-

28. See *SEC v. Samson*, Civ. Act. No. 1:06CV01217 (D.C. Cir. July 5, 2006) (Complaint), available at <http://www.sec.gov/litigation/complaints/2006/comp19754.pdf>; SEC Litig. Release No. 19754 (July 5, 2006).

29. These settlements followed the resolution of a prior enforcement action against ABB in connection with these and other illicit payments. ABB paid \$5.9 million in disgorgement and prejudgment interest and a \$10.5 million civil penalty to the SEC, and additional criminal penalties in a related DOJ case. See *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.*, Case No. 04-CV-27901 (S.D. Tex. July 6, 2004) (Plea Agreement); *SEC v. ABB Ltd.*, Case No. 1:04CV1141 (D.D.C. July 5, 2004) (Complaint); SEC Litig. Release No. 18775 (July 6, 2004).

30. See *SEC v. Pillor*, Case No. 06-4906 (N.D. Cal. Aug. 15, 2006) (Complaint), available at <http://www.sec.gov/litigation/complaints/2006/comp19754.pdf>; SEC Litig. Release 19803 (Aug. 15, 2006).

31. See *In the Matter of GE-InVision, Inc.*, SEC Accounting and Auditing Enforcement Release No. 2186 (Feb. 14, 2005).

32. Complaint, *supra* note 30, ¶ 26.

33. Complaint, *supra* note 30, ¶ 28-29.

34. *Id.* ¶ 15.

sions.³⁵ The Commission is seeking injunctions, disgorgement of ill-gotten gains, and civil penalties. According to the SEC's complaint, to which Ott and Young have not yet responded, these former employees of ITXC approved and negotiated over \$260,000 in improper payments to senior officials of state-owned telecommunications companies in Nigeria, Rwanda, and Senegal in order to secure contracts valued in the complaint at over \$11 million.³⁶ All of the payments were recorded as legitimate business expenses on ITXC's books, and thus, according to the SEC complaint, all raise books and records violations. The SEC also stated that the two former employees' actions "aided and abetted" ITXC's violations of the internal controls provisions of the FCPA.³⁷

SEC v. Brown. On September 14, 2006, the SEC announced a civil action and settlement against Jim Bob Brown, a former supervisory employee in the Nigerian and Latin American operations of the public oilfield services company Willbros, for violations of the FCPA's anti-bribery and accounting provisions.³⁸ The SEC alleged three separate bribery schemes in Nigeria and Ecuador. According to the SEC, to generate cash to meet his Nigerian commitments, Brown asked for an agreement with a new "consultant" and entered into a contract after receiving "what he perceived as authorization."³⁹ However, soon after, the company's general counsel instructed that no payments were to be made on the contract until it had been more carefully reviewed under "heightened FCPA procedures the company was implementing."⁴⁰ As a result of that review, the contract was apparently voided. Brown agreed to settle the SEC charges for a to-be-determined penalty and to enter a guilty plea with the DOJ. He is reported to be cooperating with continuing investigations of Willbros and other personnel.

Statoil. On October 13, 2006, Statoil ASA, a Norwegian company listed on the New York Stock Exchange, entered into dispositions of investigations by the DOJ and SEC of its business activities in Iran that involved a promise of almost \$15 million over eleven years to an Iranian official in relation to gas field development contracts.⁴¹ This represents the first enforcement action by the Department against a foreign issuer with no U.S.

35. See *SEC v. Steven J. Ott and Roger Michael Young*, Civ. Action No. 06-4195 (GEB) (D. N.J. Sept. 6, 2006) (Complaint), available at <http://www.sec.gov/litigation/complaints/2006/comp19821.pdf>; SEC Litig. Release No. 19821 (Sept. 6, 2006).

36. Complaint, *supra* note 35, ¶ 2.

37. *Id.* ¶ 3. The SEC filed an earlier complaint against another former ITXC employee (the regional director for Africa and a subordinate of the two individuals more recently implicated) in September 2005. See *SEC v. Yaw Osei Amoako*, Civ. Action No. 05-4284-GEB (D.N.J. Aug. 30, 2005); SEC Litig. Release No. 19356 (Sept. 1, 2005). On September 6, 2006, the DOJ announced that this subordinate had pleaded guilty to a criminal information with one count of conspiracy to pay bribes to foreign officials. The DOJ noted that it had asked the SEC to stay its civil enforcement action against the subordinate during the pendency of the criminal investigation. The timing of the filings shows continuing close cooperation between the two enforcement agencies.

38. See *SEC v. Jim Bob Brown*, Civ. Action No. 06-CV-2919 (S.D. Tex. [Houston] Sept. 14, 2006) (Complaint), available at <http://www.sec.gov/litigation/complaints/2006/comp1982132.pdf>; SEC Litig. Release No. 19832 (Sept. 14, 2006).

39. Complaint, *supra* note 38, ¶ 16.

40. *Id.*

41. Press Release No. 2006-174, Securities and Exchange Commission, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006), available at <http://www.sec.gov/news/press/2006/2006-174.htm>; In the Matter of Statoil ASA, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (Oct. 13, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>.

operations. According to the SEC, payments under this contract were booked inaccurately as legitimate consulting fees, circumventing Statoil's already insufficient internal controls. Statoil entered into a three-year deferred prosecution agreement (DPA) whereby it acknowledged violations of the FCPA, agreed to pay a \$10.5 million penalty, and agreed to retain an independent compliance consultant.⁴² Of that penalty, \$3 million was deemed to have been satisfied by penalties Statoil had previously paid to Norwegian enforcement authorities. DOJ cited remedial actions by Statoil as contributing to its willingness to resolve the investigation through a DPA. The SEC disposition also required a compliance consultant, a cease-and-desist order, and disgorgement of \$10.5 million in profits.⁴³ In a new development, the government and the company agreed to a detailed statement of work for the compliance consultant, who effectively would be selected by the government.

Schnitzer Steel. On October 16, 2006, Schnitzer Steel Industries, Inc. entered a DPA with the DOJ and agreed to a cease-and-desist order with the SEC, including disgorging approximately \$7.7 million, representing its illicit profits plus prejudgment interest.⁴⁴ Schnitzer's wholly-owned Korean affiliate, SSI International Far East Ltd. (SSI Korea), simultaneously pled guilty to violations of the FCPA, conspiracy, and wire fraud, and agreed to pay a \$7.5 million criminal fine.⁴⁵ According to the agencies, SSI Korea made over \$1.8 million in improper payments to employees of "nearly all" of Schnitzer's government-owned customers in China as well as to employees of private customers in China and South Korea.⁴⁶ The SEC noted Schnitzer's lack of internal controls and FCPA training as well as the company's failure to establish an FCPA compliance program, the most explicit reference to date tying the existence of a compliance program into the assessment of the adequacy of internal controls under the FCPA.⁴⁷ Both agencies emphasized Schnitzer's voluntary disclosure, cooperation, and outstanding remediation as key factors in the relatively low fine and the DPA. Another new development from this case is the use of the wire fraud statute to punish the commercial bribery of persons who are not foreign officials where there are clear U.S. connections. Such an enforcement approach could encourage other efforts to reach payments that have traditionally been beyond the ambit and

42. See *United States v. Statoil ASA*, Case No. 06-cr-00960 -RJH-1 (S.D.N.Y. Oct. 13, 2006) (Deferred Prosecution Agreement); Press Release, United States Attorney, Southern District of New York, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), available at <http://www.usdoj.gov/usao/nys/pressreleases/October06/statoildeferredprosecutionagreementpr.pdf>; Press Release, Statoil ASA, Horton Case Settlement (Oct. 13, 2006), available at <http://www.statoil.com/statoilcom/svg00990.nsf/UNID/41256A3A0055DD32C1257206004590A6?OpenDocument&kat=NYhet>.

43. See *In the Matter of Statoil ASA*, Sec. Exchange Act Release 54599 (Oct. 13, 2006) (Cease-and-Desist Order).

44. See *In the Matter of Schnitzer Steel Indus. Inc.*, SEC Accounting and Auditing Enforcement Release 2493 (Oct. 16, 2006); *In the Matter of Schnitzer Steel Indus. Inc.*, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (Oct. 16, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54606.pdf>.

45. See *United States v. SSI Int'l Far East Ltd.*, Case No. CV 06-398 (D. Or. Oct. 16, 2006).

46. See, e.g., *In the Matter of Schnitzer Steel Indus. Inc.*, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934 (Oct. 16, 2006), ¶ 1, available at <http://www.sec.gov/litigation/admin/2006/34-54606.pdf>.

47. *Id.* ¶ 13.

interest of the FCPA. This DPA also contains more detailed policies for the activities of the independent compliance consultant than past FCPA dispositions.

III. Enforcement Actions Abroad

Australia. An independent governmental commission has cleared the Australian government and its officers of any illegal activity surrounding the Australian Wheat Board (AWB) and the U.N. Oil-for-Food Program.⁴⁸ The commission did recommend that eleven former AWB executives be considered for prosecution for paying kickbacks to the former Saddam Hussein regime to secure wheat contracts through the U.N. program.⁴⁹ AWB may also lose its monopoly on Australian wheat exports.⁵⁰ In addition, Woodside Petroleum, an oil and gas producer, is cooperating with an Australian Federal Police investigation into allegations that it paid bribes to the former Mauritanian oil minister in connection with its activities in the petroleum industry in Mauritania.⁵¹

Bolivia. The Bolivian government plans to prosecute former executives of the Bolivian state oil company, former executives of Enron, and former Bolivian president Gonzalo Sanchez de Lozada because of "alleged irregularities in contracts" in connection with the Bolivia-Brazil pipeline. Enron is also alleged to have used bribery to obtain a 40 percent interest in the Bolivian tranche of the project and to have profited on an investment it never made.⁵²

Brazil. The Brazilian government has sued GTech to recover money paid to GTech in connection with contracts it claims are illegal because Brazilian officials were bribed by former GTech employees. As a result, Brazil's federally-controlled bank and lottery operator has elected to develop an in-house lottery platform and phase out GTech as its service provider, ending GTech's monopoly and substantially reducing its revenue in Brazil. GTech employees may also face criminal charges; a class action suit has been initiated against GTech in connection with the matter.⁵³

48. Terrence R.H. Cole, Report of the Inquiry into Certain Australian Companies in Relation to the U.N. Oil-for-Food Programme (Nov. 24, 2006), available at <http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report>.

49. *Id.* at lxxxiii. Andrew Lindberg, AWB's managing director, resigned in early February 2006 over the allegations. See *AWB Boss Quits*, ABC NEWS ONLINE (Feb. 9, 2006), <http://www.abc.net.au/news/newsitems/200602/s1566292.htm>. In addition, a \$1 billion class action suit in the United States alleges that the company and its U.S. subsidiary engaged in illicit conduct including bribery, racketeering, money laundering, and fraud intended to exclude U.S. farmers from certain wheat markets. See Nick McKenzie & Richard Baker, *U.S. Farmers Seek Millions in Class Suit against AWB*, SYDNEY MORNING HERALD, July 11, 2006, available at <http://www.smh.com.au/news/world/us-farmers-see-millions-in-class-suit-against-awb/2006/07/10/1152383678538.html>.

50. See Massimo Prandi, *Pétrole contre nourriture: AWB jugé sévèrement, BHP Billiton épargné*, LES ECHOS Nov. 30, 2006, at 40; *New Director to Sort Out Tarnished AWB*, THE NEW ZEALAND HERALD, Aug. 4, 2006, at Business section.

51. See Mandi Zonneveldt, *Full Investigation Launched into Mauritania Claims*, THE HERALD SUN (Austl.), Oct. 12, 2006, at Business 37; Kate Askew & Violeta Ayala, *Police Start Woodside Probe over Bribery Claim*, THE AGE (Melbourne, Austl.), Oct. 13, 2006, at B3.

52. See Juliette Kerr, *Bolivia Wants to Prosecute Business Executives and Former Government Officials over Pipeline Deal*, GLOBAL INSIGHT, June 26, 2006.

53. See GTech Holdings (Form 10-K) (Apr. 20, 2006); GTech Holdings (Form 8-K) (Aug. 8, 2006).

The Federal Attorney's Office for the Federal District filed a civil action in Brazil against, among others, a subsidiary of McDonald's and three of the subsidiary's former employees.⁵⁴ The complaint alleges that the subsidiary and its former employees made an improper payment to obtain tax guidance relating to the deductibility of franchisee royalty payments in Brazil. McDonald's has reported the allegations to the DOJ and the SEC.

China. Due to concerns that hospital staffs are accepting bribes and kickbacks in exchange for purchasing medical equipment, Beijing has initiated a campaign against corruption in the medical equipment market and plans to increase its regulation of hospital purchases of big-ticket devices.⁵⁵ As a result, many such purchases have been stopped or delayed. The campaign is said to affect both local equipment producers and international suppliers. In another development, IBM, NCR and Hitachi were named (although not prosecuted) in the Chinese court verdict that sentenced the former head of China Construction Bank to fifteen years in prison for accepting over \$500,000 in bribes.⁵⁶ An agent for IBM and NCR reportedly gave the former bank chairman lavish gifts while assisting the companies in their efforts to sell information technology.

Costa Rica. Costa Rican prosecutors are investigating Alcatel Central America for bribes to secure contracts, including a \$149 million contract awarded in 2001 for network equipment and services.⁵⁷ The investigation of Alcatel is reportedly part of a larger group of lawsuits targeting twenty other firms and individuals, including former Costa Rican President Jose Figueres.⁵⁸ Alcatel has reported the Costa Rican investigation to the SEC and DOJ.⁵⁹

Dominican Republic. In March 2006, the Government of the Dominican Republic (DR) filed suit in the U.S. District Court for the Eastern District of Virginia seeking \$800 million from AES, the Virginia-based electric power company, and several of its subsidiaries claiming, among other things, a civil conspiracy to violate the FCPA, aiding and abetting violation of the FCPA, and violation of the Alien Tort Statute.⁶⁰ The complaint alleges that AES improperly disposed of waste in the DR generated by AES's Puerto Rican power plant. The DR seeks compensatory damages, punitive damages, and treble damages under the RICO Act as well as attorneys' fees and costs. AES stated that it believes it has meritorious defenses and will defend itself vigorously.

54. See McDonald's (Form 10-K) (Dec. 31, 2005).

55. See Mure Dickie, *Beijing in Campaign to Stop Medical Kickbacks*, FINANCIAL TIMES (London), July 21, 2006, at 5.

56. See David Barboza, *IBM, NCR and Hitachi Cited in Bribery Verdict*, INTERNATIONAL HERALD TRIBUNE, Dec. 1, 2006, at Finance, 10.

57. See FinanzNachrichten.de, *In Costa Rica, Charges in Alcatel Case* (Feb. 2, 2007), available at <http://www.finanznachrichten.de/nachrichten-2007-02/artikel-7689619.asp>.

58. Press Release, Council on Hemispheric Affairs, *Costa Rica's Continued Fall From Grace* (July 5, 2005), available at <http://www.coha.org/2005/07/05/costa-rica%E2%80%99s-continued-fall-from-grace/>. Figueres, now living in Switzerland, has reportedly admitted receiving US\$900,000 from Alcatel, but claims the payments were legitimate consulting fees.

59. See Alcatel (Form 6-K Report) (Sept. 30, 2005); *Sums in ALCATEL COSTA RICA Bribery Probe Twice Earlier Estimates—Prosecutor*, AFX INTERNATIONAL FOCUS, Sept. 1, 2006; *Attorney General Doubles Alleged Alcatel Bribery Sum*, BUSINESS NEWS AMERICAS, Sept. 4, 2006.

60. See AES (Form 10-Q) (Aug. 7, 2006); ASSOCIATED PRESS WORLDSTREAM, Mar. 24, 2006.

France. Several current and former executives of Total are under investigation by a French magistrate for paying bribes or kickbacks to foreign officials.⁶¹ More recently, the magistrate placed four Total executives under formal investigation. In October 2006, the French government reportedly placed Total's incoming CEO as well as its former head of trading under forty-eight hour detention—the step before formal charges are filed—in connection with payments under the U.N. Oil-for-Food Program.⁶²

Germany. A number of investigations are ongoing in Germany. Prosecutors in Munich, as well as the SEC, are reportedly investigating the activities of certain Bristol-Myers' German pharmaceutical units.⁶³ The U.S. inquiry and the German investigation reportedly concern potential violations of the FCPA and German law, respectively.

German authorities are also reportedly investigating GlaxoSmithKline for illegal gifts to at least 1,600 doctors in Germany.⁶⁴ In addition, German authorities continue to investigate DaimlerChrysler's Mercedes unit regarding bribes paid in a number of jurisdictions, primarily in Africa, Asia, and Eastern Europe. After an internal investigation, DaimlerChrysler acknowledged that its employees made improper payments and dismissed those involved.⁶⁵

Germany is also investigating over 100 current and former employees of Philips, a Dutch electronics group, for alleged bribery of purchasing officers at retail stores. The investigation, involving expensive gifts, may involve the former CEO of the company's German appliances unit.⁶⁶

German prosecutors, working with Italian and Swiss authorities, are reportedly investigating charges that Siemens AG used secret bank accounts established outside Germany to pay bribes to obtain business contracts. Prosecutors have apparently uncovered US\$257 million in suspicious transactions. Six people, including the head of Siemens' real estate division and the former CFO of the telecommunications unit, have already been incarcerated. Separately, two Siemens officials have also been charged with paying \$6 million in bribes to obtain business in Italy.⁶⁷

India. India's Ministry of Company Affairs (MCA) has completed an investigation into certain improper payments in connection with Xerox's Indian subsidiary and sales to government customers.⁶⁸ The investigator's report alleges that the subsidiary's senior officials and Xerox were aware of the improper payments and calls for further inquiry into potential criminal activities and improper payments alleged in the report. According to

61. The probe began in 2002 into allegations that a Total Bermuda subsidiary laundered money through Teliac, a Geneva-based company, to pay bribes in return for access to oil reserves or other lucrative contracts in Iraq, Russia, and Tanzania.

62. See BBC NEWS, Oct. 20, 2006; *France: Total's Heir-Apparent in the Spotlight*, ENERGY COMPASS, Oct. 27, 2006, at Features; INDEPENDENT PRESS, Oct. 5, 2004; Antony Barnett & Martin Bright, *Evidence Grows of Illegal French Oil Deals with Saddam*, THE OBSERVER, Oct. 10, 2004, at 2.

63. See Bristol-Myers Squibb (Form 10-K) (Mar. 14, 2006).

64. See *Drug Firms A Danger to Health*, THE GUARDIAN (London), June 26, 2006, at 1.

65. See DaimlerChrysler (Form 20-F) (Dec. 31, 2005); Stephen Power, *Daimler Fires Workers Following Its Bribery Probe—Car Maker Finds Evidence of "Improper Payments" as Investigations Continue*, WALL ST. J., Mar. 7, 2006, at A3.

66. See LAW DAY, Aug. 28, 2006; Mark Krumpel & Hugh Williamson, *Philips Embroiled in Bribery Scandal*, FINANCIAL TIMES, Aug. 28, 2006, at 16.

67. See *Siemens Bribery Scandal Escalates*, FINANCIAL TIMES, Dec. 16, 2006, at 14.

68. See Xerox Corporation (Form 10-Q) (Oct. 27, 2006).

Xerox, the payments occurred over several years and most took place before Xerox acquired a majority stake in the company. The company reports that the matter is currently pending at the MCA and that it has forwarded the investigator's report and its reply to the report to the DOJ and SEC.

Italy. Among the major investigations in Italy, Italian officials have charged the former president of Immucor's Italian subsidiary and the subsidiary itself with making improper cash payments to two physicians in exchange for favorable contract awards by hospitals in Italy. Immucor and the Italian prosecutor have recently begun settlement discussions. The former president of Immucor's subsidiary vigorously denies any wrongdoing and has said that he intends to contest any charges against him. The company is cooperating with the SEC's formal investigation.⁶⁹

Italian authorities are also conducting an investigation of numerous pharmaceutical companies on charges that they provided gifts to doctors to prescribe company products. Companies under investigation include GlaxoSmithKline, Pfizer, Novartis, AstraZeneca, and Recordati. Three executives of Recordati were reportedly arrested in June on charges of bribing doctors with money, mobile phones, and other gifts.⁷⁰

Namibia. National Liquid Fuels, an entity 49 percent owned by Sasol, the South African fuel giant, is reportedly under "preliminary inquiry" by Namibia's Anti-Corruption Commission for alleged bribes to senior Namibian government officials in connection with a contract to supply fuel annually to Namibia for three years.⁷¹ If Namibia begins an investigation of Sasol itself, as Namibian officials have indicated they will, South Africa could also begin an investigation of its own under its new anti-corruption statute, signed into law in April of 2004.

Sweden. The chief executive of TeliaSonera AB, a Finnish-Swedish telecommunications firm, and the head of the company's operations in Sweden, were reportedly to be charged with bribery by Swedish prosecutors in June of 2006 after inviting 200 people, including some government officials, to dinner and a musical performance following a product demonstration.⁷² Swedish prosecutors reportedly decided that the performance would constitute "an unwarrantable reward for the recipients in the official discharge of their duties," and the national police commission, an invitee, ordered an investigation which resulted in the event's cancellation.

United Kingdom. The United Kingdom (UK) has undertaken several investigations. Among them, ten leading British businesses are reportedly under investigation by a new anti-corruption force at City of London Police, based on allegations that they have bribed overseas officials to win contracts. The businesses are all said to be well-known and to come from a range of sectors; the bribes are all for "fairly large sums," according to one of the police investigators.

The new unit at the City of London Police, launched on November 1, 2006, has been pledged an additional £3 million through 2009 by the British government to investigate cases of overseas corruption. Separately, the Serious Fraud Office (SFO) stated in Octo-

69. See Immucor, Inc. (Form 10-Q) (Oct. 5, 2006).

70. See THE INTERNATIONAL HERALD TRIBUNE, June 20, 2006.

71. See AFRICA NEWS, June 27, 2006.

72. See David Ivison, *Abba Invitation*, FINANCIAL TIMES, June 1, 2006, at 25.

ber 2006 that it has received eighty tips about UK companies that have allegedly offered bribes to overseas officials.⁷³

The SFO is investigating BAE Systems for alleged bribes in connection with defense equipment sales to Saudi Arabia, South Africa, Tanzania, and Romania. The Saudis are reportedly ready to cancel a contract with BAE for seventy-two jets because of the investigation; reports suggest that the investigation could look at Swiss bank accounts allegedly linked to members of the Saudi royal family. Recently, investigators seized files and computers from the British home and offices of an arms broker who is BAE's agent in southern Africa.⁷⁴

Multiple Jurisdictions. Nigeria is investigating Kellogg Brown & Root, a Halliburton subsidiary, for alleged bribes to Nigerian officials in connection with the construction of a liquid natural gas plant. Various aspects of the case are also under investigation by the SEC and the DOJ, a French magistrate and, most recently by the SFO.⁷⁵ Halliburton has acknowledged that "handwritten meeting minutes . . . show the building consortium 'considered payments to Nigerian officials'"⁷⁶ and that it is cooperating in the investigation.⁷⁷

IV. International Anti-Corruption Treaties and Public International Organizations

Mutual Evaluation Mechanisms. The Committee of Experts of the Follow-Up Mechanism for the Inter-American Convention Against Corruption began the second round of reviews this year. The Committee met again in December 2006 (too late for inclusion in this update) to finalize the first six reports.⁷⁸

The Group of States Against Corruption (GRECO), a peer review organization that monitors the States Parties' compliance with the Council of Europe's anticorruption instruments, issued second round reports on Andorra, Georgia, Moldova, and the Ukraine.⁷⁹

The Organization for Economic Cooperation and Development (OECD) Working Group on Bribery monitors implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 2006, the OECD Working Group issued phase two country reports for Australia, Austria, the Czech Repub-

73. See Robert Watts, *Ten Top UK Businesses in Bribe Inquiry*, SUNDAY TELEGRAPH (London), Oct. 22, 2006, at 1.

74. See David Leigh & Rob Evans, *Arms Broker's Home and Offices Raided in Fraud Investigation: Southern Africa Agent Denies Role in Hawk Sale: Move Marks Switch of Focus in BAE Inquiry*, THE GUARDIAN (London), Oct. 19, 2006, at 6; *Bribery Inquiry Threatens Pounds 76bn Fighter Jets Deal*, DAILY POST (Liverpool), Nov. 28, 2006, at Business, 29; Global News Wire, James Boxell, Jimmy Burns & Michael Peel, *SFP Raids Four Premises as BAE Investigation Widens*, FINANCIAL TIMES, Oct. 19, 2006, at 1.

75. Allegations about the conspiracy surfaced three years ago when a former consortium executive informed a French judge that the consortium had maintained an offshore slush fund for the purpose of obtaining Nigerian contracts.

76. See Michael Peel, *Money, Politics and Oil Make Murky Mix: The Nigerian Case Will Put the UK's Anti-Corruption Pledges to the Test*, FINANCIAL TIMES, Aug. 8, 2006, at 2.

77. See *UK Press: Fraud Office Probing KBR in Nigeria Bribe Case*, DOW JONES INTERNATIONAL NEWS, Aug. 7, 2006.

78. See Organization of American States, *available at* www.oas.org.

79. On October 17, 2006, GRECO approved the second round review of the United States, but as of the writing of this article it was not yet public. See Council of Europe, *available at* www.coe.int.

lic, Denmark, Japan, the Netherlands, New Zealand, and Spain and progress reports for Bulgaria, Canada, Finland, France, Germany, Iceland, and Luxembourg.⁸⁰

The United Nations Convention Against Corruption. The United Nations Convention Against Corruption entered into force on December 14, 2005,⁸¹ and the first Conference of States Parties (COSP) was scheduled for December 2006 in Amman, Jordan. The United States deposited its instrument of ratification on October 30, 2006, and will be an active participant in the COSP.⁸²

United Nations Global Compact's 10th Principle Against Corruption. The U.N. Global Compact is an international multi-stakeholder initiative that brings companies together with U.N. agencies, labor, and civil society to promote responsible corporate citizenship through promotion of ten voluntary universal principles in the areas of human rights, labor, the environment, and anti-corruption.⁸³ In 2006, the Global Compact Office published *Business Against Corruption – Case Stories and Examples*, a collection of case stories illustrating how its participants implemented the 10th Principle Against Corruption.⁸⁴

The World Bank. The World Bank's Department of Institutional Integrity (INT) investigates allegations of fraud, corruption, collusion, and coercion, as well as obstructive practices related to Bank operations.⁸⁵ The Bank is currently enhancing its investigation and sanctioning capabilities with proactive tools that further combat corruption through prevention and deterrence. One of these new tools is the Voluntary Disclosure Program (VDP), which was publicly launched on August 1, 2006.⁸⁶ Under the VDP, participants commit to: (1) not engage in misconduct in the future; (2) disclose to the Bank the results of an internal investigation into past bad acts in Bank-financed or supported projects or contracts; and (3) implement a robust internal compliance program monitored by a Bank-approved compliance monitor.⁸⁷ Participants pay the costs associated with almost every step of the VDP process. In exchange for full cooperation, VDP participants avoid debarment for disclosed past misconduct, their identities are kept confidential, and they may continue to compete for Bank-supported projects.⁸⁸

80. See Organisation for Economic Cooperation and Development, *available at* www.oecd.org.

81. See United Nations Office of Drugs and Crime, http://www.unodc.org/unodc/crime_signatures_corruption.html (last visited Nov. 28, 2006).

82. *Id.*

83. See United Nations Global Compact, <http://www.unglobalcompact.org/>.

84. United Nations Global Compact, 10th Principle, *available at* http://www.unglobalcompact.org/docs/issues_doc/7.7/BACbookFINAL.pdf.

85. The World Bank, <http://web.worldbank.org/> (follow "About" hyperlink; then follow "Organization" hyperlink; then follow "Vice Presidential Units" hyperlink; then follow "Institutional Integrity" hyperlink).

86. Press Release, World Bank, World Bank Launches Voluntary Disclosure Program (Aug. 1, 2006), *available at* <http://siteresources.worldbank.org/INTDOI/Resources/VDPLaunchPressReleaseFINAL.pdf>.

87. See World Bank, VDP Guidelines for Participants (July 20, 2006), *available at* <http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDPOnepagesummaryEnglish.pdf?resourceurlname=VDPOnepagesummaryEnglish.pdf>.

88. All firms and individuals performing under Bank-financed or supported projects or contracts are eligible to participate in the VDP unless they are Bank staff or under active investigation by the Bank. More information is available on the dedicated VDP website for potential participants to review.

V. Non-governmental Organizations and Business Associations

Center for International Private Enterprise. The Center for International Private Enterprise's (CIPE) anti-corruption work targets both supply- and demand-side corruption—those who demand bribes in exchange for services and those who supply bribes and demand preferential treatment.⁸⁹ In 2006, CIPE partnered with TRACE to provide anti-bribery training in seven countries. CIPE worked with Transparency International to promote the implementation of the Business Principles for Countering Bribery and to develop a Small to Medium Enterprise (SME) anti-bribery toolkit. In Lebanon, CIPE and the Lebanese Transparency Association developed and introduced a corporate governance code for SMEs. In Mozambique, CIPE teamed with the Sofala Commercial and Industrial Association to survey the business community, gauge corruption perceptions, and develop policy recommendations to reduce corruption. In Russia, CIPE is working with INDEM foundation to provide businesspeople with tools to resist extortion by government officials.

The Corner House. The Corner House is a U.K.-based research and advocacy group that focuses on how the government can combat corruption, and monitors particular cases of corruption involving U.K. companies and individuals.⁹⁰ In April 2006, the United Kingdom's Export Credits Guarantee Department (ECGD) accepted many of the Corner House's recommendations with regard to tightening its anti-corruption procedures. This followed an extensive consultation that resulted from Corner House's judicial review of the ECGD's earlier weakening of these procedures after industry lobbying. The Corner House also gave evidence to an influential Parliamentary Committee enquiry, the All Party Group on Africa. The U.K. government's response to the Committee's final report in June 2006 included taking up one of the Corner House's key recommendations to the government of setting up a special police unit specifically to investigate overseas corruption offences.

The International Anti-Corruption Conference. On November 15-18, 2006, Guatemala hosted the 12th International Anti-Corruption Convention.⁹¹ The more than 1000 representatives of 115 nations met in plenary and in workshops to discuss a range of issues in anti-corruption efforts, focusing on practical measures to reduce its deleterious effects. The resolution issued at the end of the conference focused on effective implementation of the UNCAC. The plenary also issued an "Action Agenda" to guide future efforts.

TRACE. TRACE is a nonprofit business association working with companies to improve their anti-bribery programs while lowering the cost associated with compliance.⁹² TRACE undertakes benchmarking research and disseminates the results to companies to help them ensure that their policies are squarely within "best practices." In cooperation with partner law firms in seventy countries, TRACE also maintains an online Resource Center with summaries of foreign local law. At the end of 2006, TRACE announced the launch of BRIBeline, a multilingual anonymous hotline that will enable those from whom bribes are demanded to report the demand by country and government ministry. The information will be collated and reported in the aggregate as a new empirical measure of

89. See generally Center for International Private Enterprise, <http://www.cipe.org/>.

90. See generally The Corner House, <http://www.thecornerhouse.org.uk/>.

91. See generally 12th International Anti-Corruption Conference, <http://www.12iac.org/>.

92. See generally TRACE, <http://www.traceinternational.org/>.

corruption. TRACE also held anti-bribery workshops in twelve cities worldwide. The workshops are open to the public and cover the U.S. Foreign Corrupt Practices Act, international conventions, and local law.

Transparency International. Transparency International (TI) and its chapters in ninety-five countries work with governments, civil society, and the private sector to address domestic and international corruption.⁹³ TI has developed a set of corruption assessment tools, including National Integrity Surveys, the Global Corruption Barometer, the Bribe Payers Index, and the Corruption Perceptions Index. The 2006 TI Global Corruption Report provided an overview of the state of corruption around the world with a focus on the health sector. TI also advocates for effective development assistance by promoting anti-corruption and transparency requirements within major donor institutions such as the World Bank, actively promoting the development, implementation, and monitoring of international anti-corruption conventions, promoting transparency requirements in trade agreements, developing tools to enhance anti-bribery standards in the private sector, and publishing an annual Progress Report on Enforcement of the OECD Convention to keep pressure on governments to increase enforcement. TI has also worked to secure U.S. ratification of the UNCAC and developed recommendations for an effective UNCAC monitoring process.

93. See generally Transparency International, <http://www.transparency.org/>.

