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Anti-Corruption International Legal Developments

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The year 2001 saw both continuing progress in a number of global anti-corruption initiatives and significant enforcement actions by the U.S. government. The most important developments worldwide included work on a proposed United Nations Convention Against Corruption; additional ratifications of, accessions to, and entries into force of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; additional signatures and ratifications of the Organization of American States' Inter-American Convention Against Corruption and the creation of a monitoring mechanism; additional signatures and ratifications of both the Council of Europe's Criminal Law Convention on Corruption and its Civil Law Convention on Corruption; and commencement of work on an Organization of African Unity Convention on Combating Corruption. Despite these recent efforts, there have not been any significant international enforcement actions other than by the U.S. government, although the World Bank debarred a number of companies for violations of its Procurement and/or Consultant Guidelines.

On the other hand, the United States continued its aggressive prosecution and monitoring under the Foreign Corrupt Practices Act (FCPA), by both the Department of Justice

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(DOJ) and the Securities and Exchange Commission (SEC). Additional U.S.-based anti-corruption developments included prosecutions in connection with the scandal involving influence peddling in the Olympic Committee's selection of Salt Lake City as the site for the 2002 Winter Olympics. In addition, the events of September 11 led to new interest in anti-money laundering efforts as a tool to restrict and identify funds being used for terrorist activities. Specifically, in October 2001, Congress proposed a number of anti-money laundering measures as part of a comprehensive package of anti-terrorism legislation under the new USA PATRIOT Act.

I. International Developments

A. International Conventions

1. *Negotiation of a U.N. Convention against Corruption*

On December 4, 2000, the United Nations General Assembly approved a resolution calling for a United Nations Convention Against Corruption (U.N. Convention).[1] The work on the U.N. Convention commenced when representatives of interested governments met in Vienna from July 30 to August 3, 2001 to develop Terms of Reference for the Convention.

In December of 2001, representatives from fifty-eight countries met in Buenos Aires for a preparatory meeting in advance of negotiations on the U.N. Convention. The purpose of the meeting was for countries to submit proposals for sections to be included in the Convention. U.N. staff will now compile the proposals into a single text that will be used as a basis for negotiations. Throughout the negotiating period, participating Member States will be able to submit additional proposals.

Country proposals ranged from text on a single issue—the United States, for example, submitted text regarding asset recovery only—to text on almost all matters covered in the Terms of Reference (the proposal submitted by Austria and the Netherlands is thirty pages and comprehensive). The major issues, reflected in discussions at the meeting, appear to be preventive measures, criminal liability, and international cooperation. An *ad hoc* committee of interested nations planned to meet in Vienna in January 2002 for two weeks, and at four two-week negotiation sessions per year.

The committee will elect an administrative bureau of two representatives from each of the five geographic regions, and will complete its work on the Convention by the end of 2003. The Secretary-General will provide facilities and resources to support the work of the *ad hoc* committee, but donor countries are invited to help cover travel and *per diem* costs of developing countries participating in the meetings. According to the draft Terms of Reference, the *ad hoc* committee is to submit two annual status reports to the Commission on Crime Prevention and Criminal Justice.

The draft Terms of Reference authorize the *ad hoc* committee to negotiate a "broad and effective convention" tentatively to be referred to as the United Nations Convention Against Corruption.[2] The following are among the "indicative elements" to be considered by the committee: preventive measures; preventing and combating the transfer of funds of

1. *See* Intergovernmental Open-Ended Expert Group Meeting on Corruption, *available at* http://www.undcp.org/crime_cicp_expertgroup_corruption.html (last visited June 26, 2002).

2. *See id.*

illicit origin derived from acts of corruption, including the laundering of funds and returning such funds; criminalization; confiscation and seizure; promoting and strengthening international cooperation; and mechanisms for monitoring implementation.

2. *OECD Convention*

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)[3] entered into force on February 15, 1999, and obligates each signatory country that has not already done so to criminalize the bribery of foreign government officials, and take related steps. By the end of 2001, the OECD Convention was in force for all thirty OECD Member Countries except Ireland, plus five non-Member Countries—Argentina, Brazil, Bulgaria, Chile, and Slovenia (which acceded to the convention in 2001).[4] During the year 2001, the OECD Convention entered into force for the following countries: Argentina, Chile, Italy, Luxembourg, the Netherlands, New Zealand, Portugal, and Slovenia. Implementing legislation entered into force for Luxembourg, the Netherlands, New Zealand, Poland, Portugal, and Ireland.

Monitoring efforts under the Convention continued to advance during 2001. The monitoring procedures consist of two phases, for self-evaluation and mutual evaluation, respectively. The objective of Phase One is to evaluate: (1) whether implementing legislation meets the Convention's standards; and (2) initial actions to implement the Revised Recommendation on Combating Bribery in International Business Transactions, a call for effective measures to deter, prevent, and combat bribery of foreign public officials issued by the OECD Council in 1997. Argentina, Italy, Luxembourg, the Netherlands, New Zealand, Poland, and Portugal underwent Phase One examinations in 2001. The purpose of Phase Two is to study the structures each country puts in place to enforce the laws and rules implementing the convention and to assess their application in practice, with the goal of improving the parties' capacities to fight bribery. Finland was the only country to undergo a Phase Two country visit and examination in 2001.

3. *OAS Convention*

The Organization of American States adopted the Inter-American Convention Against Corruption (OAS Convention)[5] on March 29, 1996, and the OAS Convention entered into force on March 6, 1997. The OAS Convention calls for parties to adopt laws prohibiting certain "acts of corruption," including transnational public bribery, and has been ratified or acceded to by twenty-five Member Countries. During the year 2001, the following actions were taken under the OAS Convention: Barbados and Belize added their signatures to the convention; Guatemala, Jamaica and St. Vincent & Grenadines ratified, acceded to, or accepted the OAS Convention; Guatemala, Guyana, Jamaica and St. Vincent & Gren-

3. Argentina-Brazil-Bulgaria-Chile-Slovak Republic Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1.

4. *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *available at* http://oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-31-nodirectorate-no-6-7198-31,FF.html (last visited June 25, 2002).

5. Organization of American States: Inter-American Convention Against Corruption, March 29, 1996, 35 I.L.M. 724.

adines deposited their instruments of ratification, accession or acceptance; and Guyana and Uruguay posted reservations to the OAS Convention.[6]

In addition, the Third Summit of the Americas, held in Quebec City from April 20–22, adopted a Plan of Action for fighting corruption.[7] The Plan of Action called for a follow-up mechanism for implementation of the OAS Convention. In accordance with the Plan of Action, the Conference of States Parties to the OAS Convention, which met in Buenos Aires from May 2–4, issued a report on follow-up mechanisms. The report outlined a follow-up mechanism to be comprised of a Conference of States Parties (Conference) composed of representatives of each State Party, and a Committee of Experts (Committee) comprised of experts appointed by each of the States Parties. The principal monitoring activity would be through rounds of "country reports." The country reports would be issued through the following process: (1) the Committee would prepare questionnaires on selected provisions of the OAS Convention; (2) the States Parties would each complete the questionnaire; (3) a subgroup of the Committee would review each completed questionnaire and prepare a confidential preliminary report to be made available to the State Party concerned for its observations; (4) the subgroup would then prepare a revised version of the preliminary report taking into account the observations provided by the State Party concerned, and present it to a plenary meeting of the Committee; (5) the Committee would prepare the conclusions and make recommendations; and (6) the Committee would concurrently publish final reports for each State Party, after forwarding the reports to the Conference.

4. *Council of Europe Criminal and Civil Law Conventions; GRECO Monitoring*

The Council of Europe Criminal Law Convention on Corruption (Criminal Law Convention) is an ambitious instrument aimed at the coordinated criminalization of a number of corrupt practices, including public bribery of either national or foreign officials and bribery in the private sector, whether active or passive.[8] The Criminal Law Convention was adopted on January 27, 1999, and will enter into force when fourteen countries ratify it. At the end of 2001, twelve countries had ratified the Criminal Law Convention. During 2001 the Criminal Law Convention was ratified by five of those twelve countries—Albania, Bulgaria, Cyprus, Estonia, and Latvia.[9] Andorra, Belarus, Switzerland and Turkey added their signatures to the Criminal Law Convention.

The Council of Europe Civil Law Convention on Corruption (Civil Law Convention) was adopted on November 4, 1999.[10] It requires Contracting Parties to provide in their domestic law "for effective remedies for persons who have suffered damage as a result of acts of corruption, and to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage."[11] The Civil Law Convention will also

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6. *See* Inter-American Convention Against Corruption, *available at* http://www.oas.org/juridico/english/sigs/b-58.html (last visited June 25, 2002).

7. *See* Third Summit of the Americas: Plan of Action, *available at* http://www.oas.org/juridico/english/SumcorIII.htm (last visited June 25, 2002).

8. Criminal Law Convention on Corruption, Europ. T.S. No. 173 (1999), *available at* http://conventions.coe.int/treaty/EN/searchsig.asp?NT=174&CM=8&DF= (last visited June 25, 2002) [hereinafter Criminal Law Convention].

9. *See* Criminal Law Convention, *supra* note 8.

10. Criminal Law Convention, *supra* note 8.

11. *Id.*

enter into force when fourteen countries ratify it. At the end of 2001, four countries had ratified the Civil Law Convention. During 2001, the Civil Law Convention was ratified by Finland and signed by Andorra, Croatia, Poland, Slovenia, and Turkey.[12]

Monitoring under both the Criminal Law and the Civil Law Conventions is implemented by the Group of States Against Corruption (GRECO). In 2001, GRECO visited and evaluated Bulgaria, Croatia, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Latvia, Lithuania, Poland, Romania, and the United Kingdom.[13]

5. *OAU Convention*

On November 26, 2001, members of the Organization of African Unity convened in Addis Ababa, Ethiopia to consider a draft Convention on Combating Corruption (OAU Convention).[14] The agreed draft will be submitted to the Council of Foreign Ministers (Council), then to the Assembly of Heads of State and Government for approval. The proposed OAU Convention sets out to promote and strengthen the development of anti-corruption mechanisms, facilitate cooperation among OAU countries, and coordinate and harmonize policies and legislation of the Member States.

The draft OAU Convention would require each State Party to adopt legislative measures to criminalize "acts of corruption." "Acts of corruption" would be defined to include both active and passive bribery of both public officials and individuals working in the private sector. Going beyond the express terms of the other international agreements discussed above, the current draft of the OAU Convention would also prohibit "offering . . . or acceptance . . . of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof"[15] as well as the use or concealment of proceeds derived from acts of corruption. To assist in the detection and punishment of corruption, the current draft of the OAU Convention would commit State Parties to require public officials to declare their assets and to provide that immunity granted to public officials shall not be an obstacle against the investigation and prosecution of such officials for acts of corruption. The draft OAU Convention includes a further provision requiring State Parties to establish measures making it an offense for a public official to enjoy a "significant increase in assets" that he or she "cannot reasonably explain in relation to his or her earnings."[16] The OAU Convention would also commit State Parties to establish and maintain independent national anti-corruption agencies and to adopt legislative and other measures to strengthen internal accounting and controls systems in the public sector. The draft OAU Convention also includes sections regarding jurisdiction, extradition, confiscation and seizure, bank secrecy, and international cooperation.

B. World Bank Enforcement of Anti-Corruption Policies

In 2001, the World Bank permanently debarred fourteen companies and four individuals for violations of its Procurement Guidelines, Consultant Guidelines, or both. It also tem-

12. *See* Criminal Law Convention, *supra* note 8.

13. *See* Evaluations Group/Group B (2001), *available at* http://www.greco.coe.int/evaluations/cycle1/Eval1GroupeB(2001).htm (last visited June 26, 2002).

14. *See* OAU Convention on Combating Corruption, *available at* http://www.oau-oua.org/Corruption/index.htm (last visited June 26, 2002).

15. *Id.*

16. *Id.*

porarily debarred one company for a term of three years and reprimanded two others. The 2001 actions bring the total number of sanctions for corrupt or fraudulent practices imposed by the World Bank since 1999 to sixty-one company debarments, fourteen individual debarments, and three reprimands.[17] At present, no other international financial institution cross-debars based on World Bank actions, although some non-governmental organizations have proposed such cross-debarment.

The Bank's 1996 Guidelines for Procurement under IBRD Loans and IDA Credits, and its 1997 Guidelines for the Selection and Employment of Consultants under IBRD Loans and IDA Credits contain virtually identical statements of policy that bidders/suppliers/ contractors and consultants under bank-financed contracts observe the highest standard of ethics during contract execution and performance. They define the terms "corrupt practice" and "fraudulent practice" in extremely broad terms. The Guidelines define "corrupt practice[s]" as "the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution."[18]

The Bank president, acting under recommendations from an internally constituted sanctions committee, makes sanctions decisions. Investigations are handled by the Bank's Anti-Corruption and Fraud Investigations Unit, which now resides in a Department of Institutional Integrity, created in April 2001. If the investigative unit finds "reasonably sufficient" evidence of fraudulent or corrupt practices, the matter is referred to the Sanctions Committee for its review and recommendations.

The process is thus substantially different from that followed where allegations of employee misconduct (including corruption) are involved. The latter, although internally investigated, are ultimately subject to review by the World Bank Administrative Tribunal, an independent body. The Administrative Tribunal has found due process defects in the Bank's internal investigative processes in several employee-related cases decided this year.[19] At the end of 2001, the Sanctions Committee had before it several additional cases on which action is expected in 2002.

II. U.S. Developments

A. FCPA Enforcement Actions

The year 2001 was an active year for FCPA enforcement. Both the DOJ and the SEC initiated a number of actions. The DOJ cases, although predominately criminal, included one unprecedented joint civil enforcement action (with the SEC) against two foreign entities, involving aggressive theories of jurisdiction. The SEC cases reflected the Commis-

17. *See* World Bank Listing of Ineligible Firms: Fraud and Corruption, *available at* http://www.worldbank.org/html/opr/procure/debarr.html (last visited June 26, 2002).

18. *See* 1996 Guidelines for Procurement under IBRD Loans and IDA Credits, *available at* http://www.worldbank.org/html/opr/procure/guidelin.html (last visited June 26, 2002).

19. *See, e.g.*, Koudogbo v. IBRD, World Bank Admin. Tribunal Decision No. 246, July 23, 2001, *available at* http://wbln1018.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/11E56F3E45B53EC785256AAB007 44621 (last visited June 25, 2002); Dambita v. IBRD, World Bank Admin. Tribunal Decision No. 243, Apr. 26, 2001, *available at* http://wbln1018.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/77C192D3B54C F64585256A4E00721162 (last visited June 25, 2002); Cissé v. IBRD, World Bank Admin. Tribunal Decision No. 242, Apr. 26, 2001, *available at* http://wbln1018.worldbank.org/crn/wbt/wbtwebsite.nsf/(resultsweb)/ FC76F46F50B6340A85256A5400492BC (last visited June 25, 2002).

sion's renewed interest in the anti-bribery area, and maintained the trend of holding U.S. issuers effectively strictly liable for the accuracy of the books and records of their foreign subsidiaries, even for financially immaterial transactions. As in prior years, most cases initiated by the enforcement authorities were settled rather than litigated. One of the actions related to the Baker Hughes case discussed below, however, is currently in litigation.

1. *DOJ and SEC Enforcement Actions against Baker Hughes and Related Persons*

Baker Hughes, a Texas oilfield services company, two former officers of Baker Hughes, an Indonesian affiliate of a "Big Five" accounting firm (KPMG), and an Indonesian national who is a partner in the affiliate accounting firm have either settled, or been charged with, violations of the FCPA. The government has settled the cases against the company, the outside accounting firm, and its partner; charges are pending in the individual cases, which will likely be litigated.

As described below, the pleadings in these cases, filed in Houston on September 11, 2001, allege jurisdiction in one of the cases on the grounds that a foreign national is an "agent" of an "issuer," even though there is no evident nexus to U.S. commerce. Also invoked was a new provision of the FCPA, adopted in 1998, that covers non-U.S. persons who take actions within U.S. territory (15 U.S.C. § 78dd-3). On the facts in the public record, both the Indonesian accounting firm and its individual partner appear to have acted entirely outside the jurisdiction of the United States in connection with their work for Baker Hughes. Additionally, in two instances cited in the complaint against the company, involving payments to third-party intermediaries, the language of the pleadings suggest that the government may have imposed something close to strict liability for third-party actions. The actions against the two former company officials are in litigation, which may offer a rare opportunity to test enforcement officials' longstanding and expansive interpretation of a key element of the statute.

a. Facts Alleged by the SEC

The cases arose out of a single set of facts. In its pleadings, the SEC and DOJ have alleged the following: Baker Hughes, an "issuer" under the FCPA, controls PT Eastman Christiensen (PTEC), an Indonesian corporation headquartered in Jakarta, Indonesia. In February 1999, the Indonesian tax authority notified PTEC that the company owed $3.2 million in taxes to the Indonesian government. Soon after, PTEC retained KPMG Siddharta Siddharta & Harsono (KPMG-SSH) to represent PTEC before the authority.

During KPMG-SSH's meetings with an Indonesian tax official to discuss the merits of the tax assessment, the tax official repeatedly requested that PTEC make a payment to the official. In exchange for the payment, the tax official stated that he would reduce PTEC's tax assessment. The KPMG-SSH employee (an Australian citizen) responsible for the PTEC case (KPMG-SSH Manager) met with Sonny Harsono (Harsono), a KPMG-SSH partner, to discuss the tax official's request for payment. Harsono suggested that if Baker Hughes wished to make the payment, KPMG-SSH would make the payment, and they discussed generating a false invoice for KPMG-SSH's services that would cover money for the improper payment.

The KPMG-SSH Manager subsequently informed Baker Hughes' Asia-Pacific Tax Manager (the "BH Tax Manager") of Harsono's suggestion and noted that the Indonesian tax official was willing to reduce the assessment from $3.2 million to $270,000 in exchange for payment of $75,000. The BH Tax Manager allegedly relayed that information to James W. Harris (Harris), Controller of Baker Hughes, and to Baker Hughes' unnamed FCPA ad-

visor. The FCPA advisor informed Harris and the BH Tax Manager that the payment would violate the FCPA and that KPMG-SSH must provide written assurances that it would not make illegal payments. Subsequently, Harris informed Baker Hughes' General Counsel and Eric L. Mattson (Mattson), Baker Hughes' Chief Financial Officer, about the situation. The General Counsel instructed Mattson and Harris not to enter into the transaction, and to work with the FCPA advisor to resolve the issue.

Contrary to the instruction, Mattson and Harris allegedly subsequently authorized the BH Tax Manager to proceed with the payment to the Indonesian official. Under the direction of Harsono, KPMG-SSH created and sent a false invoice to PTEC for $143,000, which comprised the $75,000 to be paid to the tax official and the remainder for KPMG-SSH's actual fees. PTEC paid KPMG-SSH the $143,000 and improperly recorded the transaction on its books and records as payment for professional services rendered. Soon thereafter, PTEC received a tax assessment of approximately $270,000 from the Indonesian tax authority.

Upon discovering the payment to the Indonesian tax official, Baker Hughes' General Counsel and its FCPA advisor undertook corrective action, including the following steps cited by the SEC: attempting to stop the payment; reporting to the audit committee; voluntarily disclosing the payment to the SEC and the DOJ; correcting Baker Hughes' books and records; firing KPMG-SSH; obtaining resignation of senior management officials responsible for the action; challenging the $270,000 tax assessment as erroneous and paying $2.1 million, which it believed to be the correct tax assessment, to the Indonesian government; and implementing more comprehensive FCPA procedures. Baker Hughes also cooperated with the SEC's investigation, including declining to assert attorney-client privilege with regard to its communications during the period of the Indonesian transaction.

In investigating the Indonesian payments, Baker Hughes discovered that it also had made payments to agents in India and Brazil without ensuring that money would not pass to foreign officials. The transaction in India related to the activities of a wholly owned subsidiary of a company, Western Geophysical Corporation, which Baker Hughes acquired in August 1998. In October 1998, an agent of the subsidiary paid $15,000 to obtain shipping permits in India that would normally require a "no objection certificate" from the Indian Coastal Commission and later sought reimbursement from the company. The subsidiary paid the agent and recorded the payment without determining to whom the money ultimately would be paid, inaccurately describing it as payment for a "Shipping Permit."

In Brazil, Baker Hughes approved a $10,000 payment made by its Brazilian agent to obtain approval from the Brazilian Commercial Registry for the restructuring of Baker Hughes entities in Brazil. Baker Hughes recorded this $10,000 payment without determining to whom the money ultimately would be paid and inaccurately described it as an "advance payment for expenses related to the commercial registry board of Rio de Janeiro."[20]

b. The Baker Hughes Consent Decree

The SEC found that Baker Hughes violated the books and records and internal controls provisions of the FCPA. As a result of the settlement, the SEC ordered Baker Hughes to cease and desist from committing or causing any violation of the FCPA, but imposed no fine. The settlement terms highlight the mitigating effects of Baker Hughes' aggressive

20. *In re* Baker Hughes Inc., Release No. 34,44784 (Sept. 12, 2001), *at* http://www.sec.gov/litigation/admin/34-44784.htm (last visited Aug. 22, 2002).

internal investigation and remedial action, including termination of senior management officials responsible for the payments and the company's cooperation with U.S. enforcement authorities.[21] Cooperation included the waiver of attorney-client privilege regarding advice during the time period under investigation, a requirement being asserted with increasing frequency by the DOJ and the SEC. Possibly because, as part of its response to the payments, Baker Hughes implemented "enhanced FCPA policies and procedures,"[22] the consent decree imposed no additional compliance obligations on the company. In cases dating from the *Lockheed* settlement in 1995[23] to the 1999 *Metcalf & Eddy* case,[24] enforcement officials have often imposed burdensome compliance requirements.

The consent decree also reinforces the SEC's position that an accounting violation can be based on qualitative (as opposed to quantitative) materiality. The amount of the payments at issue in all three countries may very well not meet purely quantitative thresholds of materiality for the company. In addition, the public documents do not explicitly say that the payments in India and Brazil were actual bribes. The violation seems to be based on the company's failure to perform due diligence sufficient to ensure that the payments, whatever their size, were *not* bribes. In public statements, SEC officials have suggested that the payments may not have been accompanied by back-up documentation sufficient under generally accepted accounting principles. The consent decree includes a specific requirement that due diligence be conducted in the future.

Finally, the payment in India highlights the potential risks that arise in the wake of an acquisition. The payment occurred only two months after Baker Hughes acquired Western Geophysical, and was not discovered until much later, a circumstance that underscores the importance of implementing FCPA compliance controls on acquirees' operations as quickly as possible.

c. Action against KPMG-SSH and Harsono

The combined action by the SEC and DOJ against KPMG-SSH and Harsono has several striking features. It is an unprecedented joint action by the two enforcement authorities. Without admitting or denying the allegations against them, KPMG-SSH and Harsono consented to an order that enjoins them from violating and aiding and abetting the violation of the anti-bribery provisions, the internal controls provisions, and the books and records provisions of the FCPA. Significantly, the decree imposes no financial penalty against the firm or Harsono.

This case raises interesting jurisdictional issues because of the nationality of the defendants. Harsono is an Indonesian citizen, and KPMG-SSH is an Indonesian firm and an affiliate of KPMG International, a Swiss association with member firms in 159 countries.

21. The SEC has recently issued guidance encouraging issuers, and other persons subject to its jurisdiction, to cooperate in return for favorable consideration in connection with enforcement actions. The SEC cited various factors that it would consider in connection with its determination of whether to undertake an enforcement action, and if so, what specific actions to take. The factors include such things as voluntary reporting, cooperation with enforcement authorities, production of materials including attorney work product, and waiver of attorney client privilege. *See* Section 21(a) Report cited *supra* at section II.C.

22. Baker Hughes, *supra* note 20.

23. *See* United States v. Lockheed Corp., Suleiman A. Anssar and Allen R. Love (Cr. No. 1:94-Cr-22-016), N.D. Ga., Atlanta Division, June 1994.

24. United States v. Metcalf & Eddy (D. Mass. 1999).

The jurisdictional issue is also complicated by the decision of the SEC and DOJ to file a joint civil action.

With respect to the jurisdiction of the SEC, the complaint alleges that Harsono violated 15 U.S.C. § 78dd-1(a) and that KPMG-SSH and Harsono aided and abetted Baker Hughes' violation of the books and records and internal controls provisions of the FCPA. Section 78dd-1(a) prohibits issuers and their "agents" from using the means or instrumentalities of interstate commerce in furtherance of an improper payment to a foreign official. This provision is facially broad enough to prohibit the activities of non-U.S. nationals that use interstate commerce. Rather than citing any facts implicating such activities, however, the consent decree merely alleges that Harsono and KPMG-SSH "directly or indirectly" used the instrumentalities of interstate commerce. The complaint only describes KPMG-SSH's contacts with the Baker Hughes' Asia-Pacific Tax Manager, who was based in Australia. Further, even if the requirements of Section 78dd-1(a) are met, the SEC must still establish personal jurisdiction over a defendant. It is unclear from the complaint what leverage was brought to bear to encourage Harsono and KPMG-SSH to submit to U.S. jurisdiction.

With respect to the jurisdiction of the DOJ, the complaint alleges KPMG-SSH and Harsono violated 15 U.S.C. § 78dd-3(a) of the FCPA. Section 78dd-3(a) prohibits "any person" from using the instrumentalities of interstate commerce in furtherance of an improper payment to a foreign official "*while in the territory of the United States*" (emphasis added).[25] The complaint alleges no facts that indicate that Harsono or KPMG-SSH officials engaged in any activities within the territory of the United States; indeed, the public papers do not make clear why the DOJ chose this section as the basis for jurisdiction. One possibility is that the DOJ is building a case for interpreting Section 78dd-3 broadly to include acts that have effects on the "territory of the United States." Such a reading would go beyond the plain meaning of Section 78dd-3's text. Although from a purely legal perspective KPMG-SSH and Harsono may have had strong arguments against the assertion of both subject matter and personal jurisdiction, their consent to jurisdiction ensured a quick settlement without risking financial or criminal penalties or a protracted legal struggle.

The case is also noteworthy because it is one of the first FCPA cases against an outside accounting firm. Such cases are common in the general securities fraud area, and their appearance in the FCPA arena reinforces the view from recent cases that enforcement agencies are willing to target outside professional advisors.

d. Action against Former Company Officers

The SEC's complaint against Mattson, former Chief Financial Officer of Baker Hughes, and Harris, former Controller of Baker Hughes, for their activities related to the Indonesian payment alleges that they violated both the anti-bribery and accounting provisions of the FCPA. The two are also charged with aiding and abetting the Baker Hughes accounting violations. Although the allegations suggest willful disregard or intent on the part of the individuals, to date no criminal proceedings have been instituted against them.

Attorneys for both men have publicly stated that they will contest the charges in court by testing the scope of the "obtain or retain business" element of an anti-bribery violation under the FCPA. The scope of the phrase "in order to obtain or retain business" has been expansively construed by enforcement officials to include any financial benefit resulting

25. 15 U.S.C. § 78dd-3(a).

from a discretionary government decision, but, like many aspects of the statute, has never fully been litigated. Statements in the press by Harris' attorney also suggest a potential argument that the defendants relied on KPMG-SSH, another possible issue for litigation.

Coincidentally, Baker Hughes recently has also been sued in connection with another issue of payments. According to press accounts, a former Colombian employee of a company acquired by Baker Hughes has filed suit against Baker Hughes alleging that the company put him and his family in danger by failing to honor its commitment to pay bribes to guerrilla groups in Colombia. The former employee claimed that Western Atlas (acquired by Baker Hughes in 1998, as discussed above) paid at least $500,000 to $1 million in protection money to the guerrilla groups. The suit further alleged that after the takeover, Baker Hughes initially condoned the payments until its accountants objected. Although extortionist guerrillas may not be "foreign officials" under the FCPA, press reports have failed to note that distinction, and the plaintiff has characterized the payments as "illegal." This case is another illustration of the risks of private litigation that companies can face in connection with illicit or extortionate payments.

2. *Other DOJ Enforcement Actions*

a. *United States v. Cantor*

In June, the United States Attorney for the Southern District of New York charged Joshua C. Cantor, former president of American Banknote Holographics, Inc. (ABNH), with conspiracy to violate the accounting and record-keeping provisions of the FCPA, and on unrelated facts, conspiracy to violate the anti-bribery provisions of the FCPA.

ABNH and its parent company American Banknote Corporation (ABN) design and manufacture products that include counterfeit-resistant technology. In an effort to boost the price of ABNH stock prior to a public offering of the company, Cantor and unnamed co-conspirators devised and put into effect a scheme to inflate the revenue and earnings of ABNH. The increased revenues and earnings were then reported to the public and the SEC. By including sales to customers that did not occur or that were incomplete as of the time they were recorded, ABNH showed an upward trend in its revenue and earnings when in fact revenue and earnings were in decline.

The government separately alleged that Cantor conspired with unnamed individuals to violate the anti-bribery provision of the FCPA, in making payments through its U.K. sales agent to a Swiss bank account for the benefit of the Director of Issues and Vaults, a department of the Saudi Arabian Monetary Agency (SAMA), an agency of the Kingdom of Saudi Arabia. Cantor allegedly paid the official $239,000 to obtain a contract to supply holograms for commemorative banknotes, and SAMA ultimately awarded the bid to ABNH.

The case alleges only a conspiracy to violate the FCPA anti-bribery provisions, even though the information states that the government official in question did receive at least a portion of the amount intended for him. The conspiracy charge may reflect potential problems of proving the second-leg payment to the foreign official. An issue to watch is whether the British government will take any action against the U.K. resident who is identified as an unindicted co-conspirator and who served as apparent intermediary for the illicit payment. This case is one of the few cases in recent years involving Saudi Arabia, which has put in place significant anti-corruption measures.

b. *United Satets v. Rothrock*

On June 13, 2001, the DOJ entered into a plea agreement with another corporate executive, Daniel Rothrock (Rothrock), in District Court for the Western District of Texas for criminal violations of the accounting provisions of the FCPA. Rothrock agreed to plead guilty to one count of knowingly and willfully falsifying and causing to be falsified, books, records, and accounts of his former employer, Allied Products Corporation (Allied) in violation of 15 U.S.C. § 78m(b)(2)(A).

Cooper Division, an operating division of Allied (an issuer within the meaning of the Securities Exchange Act), manufactured and sold workover rigs and other oilfield well serving equipment. Rothrock served as Vice-President of Cooper Division and was an officer, employee and agent of Allied. In August 1991, Cooper entered into a contract to sell approximately 20 workover rigs for $5.5 million to RVO Zarubezhneftestroy (Nestro), an entity owned by the Government of the USSR and later by the Government of the Russian Republic and therefore an "instrumentality" of a foreign government under the FCPA.

The Director General of the Russian buyer, Nestro, also served as a director of Trading & Business Services, Ltd. (TBS), an entity owned equally by Nestro and Comco, a Swiss company. Cooper Division agreed to pay a sales commission of $300,000 to TBS for the Director General of Nestro's ultimate benefit to obtain the contract for the sale of workover rigs. To facilitate the payment, Rothrock and TBS created a false invoice for a company called "Educa," and Rothrock labeled the payment to Educa as a "consultation fee and market study" in Allied's books.

As part of the plea agreement, Rothrock agreed to cooperate fully with United States law enforcement agencies. The government agreed to concur with Rothrock's request for probation. A criminal violation of the accounting and internal controls provision of the FCPA carries a maximum sentence of imprisonment of five years, a $250,000 fine, and a mandatory assessment of $100.

The terms of the plea agreement suggest that the government's likely strategy is to obtain the cooperation of a corporate officer to facilitate prosecution of the company or other corporate executives. If so, there may be future cases involving this matter.

c. *United States v. King and Barquero*

On June 27, 2001, the United States Attorney for the Western District of Missouri indicted Robert King and Pablo Barquero Hernandez (Barquero) on charges of FCPA antibribery violations, conspiracy, and acts in interstate and foreign commerce in aid of racketeering. King, a U.S. citizen and stockholder in Owl Securities & Investments, Ltd. (OSI) (a "domestic concern" incorporated in Nevada with its principal place of business in Kansas City, Missouri), and Barquero, a Costa Rican national and "agent" of OSI, allegedly made payments to Costa Rican officials, political parties, party officials, and candidates for public office to obtain a land concession to develop new port facilities in Costa Rica. The defendants attempted to acquire the land concession on behalf of OSI Proyectos, a Costa Rican affiliate of OSI.

The indictment hints at some interesting jurisdictional issues. The government describes Barquero as "an agent of OSI" and cites instances when he apparently used the mails or instrumentalities of interstate commerce in furtherance of the scheme. The indictment indicates that the assertion of jurisdiction over Barquero is based on Sections 78dd-2(a) and (g) of the FCPA, but not Section 78dd-3, which targets foreign nationals based on a territorial nexus. Prior to the 1998 amendments, the FCPA did not permit the imposition of

criminal penalties on foreign agents of domestic concerns. This case appears to be the first time criminal liability has been asserted against a foreign national under Section 78dd-2(a) and the expanded penalty provisions of Section 78dd-2(g).

King and Barquero is also one of the few FCPA cases to involve political contributions. The prohibition against illicit payments to candidates and political parties has been problematic because the line between legitimate and illicit political contributions is often not clear and the defense that such payments were in compliance with local law may be available.

d. *United States v. Halford; United States v. Reitz*

In addition to *King and Barquero*, the DOJ also targeted other officers of OSI. On August 3, 2001, Richard Halford, former Chief Financial Officer of OSI, agreed to plead guilty to conspiracy to violate the FCPA and three counts of tax evasion for his participation in raising funds for the payment of the Costa Rican officials. Also on August 3, Albert Reitz, a former officer and director of OSI, agreed to plead guilty to conspiracy to violate the FCPA, mail fraud, making of a false statement, and filing a false tax return, for his participation in raising funds for the Costa Rican officials.

e. *United States v. Kay*

On December 12, 2001, a Grand Jury in the U.S. District Court for the Southern District of Texas handed down an indictment in the case of *United States v. Kay*. David Kay (Kay) was a vice-president of marketing for American Rice, Inc. (ARI), a publicly traded Texas trading company, which conducted its rice importing business in the Republic of Haiti. Kay, along with other employees and officers of ARI, had paid bribes to Haitian officials to induce them to accept falsified bills of lading, import documents, and other documents in order to reduce the amount of customs duties and sales taxes that ARI was required to pay to the Haitian government. As a result of the bribes and the consequent acceptance of false shipping documents by the Haitian officials, ARI reported only 66 percent of the rice it imported into Haiti between January 1998 and August 1999, thereby significantly reducing its customs duties and tax liability.

Kay, as a domestic concern and as an officer of American Rice, an issuer, was indicted for twelve counts of violating the FCPA's anti-bribery provisions. The indictment lists numerous uses of the instrumentalities of interstate commerce, and provides dates of twelve ocean-going barge shipments between January 6, 1998 and August 3, 1999 to support the twelve counts.

3. *The SEC Enforcement Action against Chiquita Brands International*

The SEC announced on October 3, 2001, that Chiquita Brands International Inc. had consented to the entry of a cease-and-desist order for a books and records and internal controls violation. The violation related to two improper payments totaling $30,000 allegedly made by employees of Chiquita's wholly owned subsidiary located in Colombia to customs officials in exchange for a license renewal. In addition to agreeing to a cease-and-desist order, Chiquita has assented to pay a fine of $100,000. This case is an example of the SEC's renewed interest in pursuing FCPA cases and of the effective strict liability the accounting provisions create for issuers with respect to the acts of their foreign subsidiaries.

B. DOJ FCPA Opinion Procedure Releases

1. *Opinion Procedure Release 2001-1*

Two opinions were issued this past year under the DOJ's Opinion Procedure, pursuant to which a requestor can obtain a binding opinion from DOJ as to its enforcement inten-

tions with respect to a specific proposed transaction.[26] On May 24, 2001, the DOJ addressed the issue of the potential liability of a U.S. co-venturer for past payments by a foreign joint venture partner in Opinion Procedure Release 2001-01. In this release, a U.S. company requested clarification of how the DOJ would view a fifty-fifty joint venture with a French company and, in particular, how the Department would view certain provisions of the joint venture that address contracts entered into by the French company prior to the enactment of French Law No. 2000-595 Against Corrupt Practices (FLAC). FLAC was adopted to implement in France the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions.

The U.S. company's representations to the DOJ included assurances by the French company that: (1) none of the contracts were originally procured in violation of any anti-bribery laws; (2) all agent agreements entered into prior to January 1, 2000 had been terminated, and a compliance program for all future agency relationships had been adopted; and (3) the U.S. company retained the right to terminate the joint venture if the French company were convicted of, or admitted, violating the FLAC or if, in the opinion of the U.S. company, the French company violated anti-bribery laws in such a manner as to have a "materially adverse effect" on the joint venture. While the DOJ agreed not to pursue enforcement action at this time, it qualified its decision in a number of respects.

The DOJ first noted that, even if the French company did not violate the FLAC or previous French anti-bribery laws but did contribute contracts that were in violation of another anti-bribery law (such as the domestic law of the country of a foreign official who may have received a bribe), the U.S. company could face FCPA liability for any continuing payments to those foreign officials. The DOJ also specifically declined to endorse the "materially adverse effect" standard because it may not be sufficient to allow the U.S. company to remove itself from the joint venture in the case of continuing bribes, which would expose it to FCPA liability. Finally, the DOJ commented favorably on the U.S. company's compliance program; however, it refused to endorse any specific parts of the program, and, in fact, the release did not discuss any of the program's details.

This release confirms the value of measures designed to avoid an allegation that a current payment to a joint venture may be viewed as reimbursement of a party's past illicit payment. The DOJ caveats highlight DOJ's aggressive views regarding withdrawal obligations in transactions where corruption issues have arisen.

2. *Opinion Procedure Release 2001-02*

Opinion Procedure Release 2001-02, dated July 18, 2001, addressed a proposed consortium between an offshore subsidiary of a U.S. company and a foreign company, where the chairman and shareholder of the foreign company (the "Chairman") acted as an advisor to one of his country's senior government officials and was a senior official in public education in that country, and therefore a "foreign official" under the FCPA. The consortium planned to bid on prospective business with the government of the foreign company's home country.

The DOJ indicated that, based on the facts as represented by the requestors, the Department would take no enforcement action with respect to the proposed contractual re-

26. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Commission Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001), *available at* http://www.usdoj.gov/criminal/fraud/fcpa.htm (last visited June 25, 2002) [hereinafter SEC Release].

lationship at this time. Among the relevant facts cited in this release was the fact that the requestors and the Chairman had all signed the FCPA opinion request. In the request, the requestors represented, among other things, that the Chairman's government duties did not involve him in the award of the proposed consortium's business, and the agencies issuing the tender for the business in question were not under the charge of the Chairman in his official duties. The request also stated that the Chairman would not meet with his country's government officials on behalf of the consortium, and would recuse himself in his official capacity from any discussion or consideration of the award of the business in question or other business of the consortium or its affiliated companies. The requestors had obtained an opinion of local counsel in the foreign country that the consortium's formation and contemplated activities did not violate local law, despite the Chairman's official positions. In addition, in the consortium agreement, each member would acknowledge that the FCPA applied to the consortium with respect to the proposed bid and project, and agree to comply with the FCPA. Failure to do so would automatically grant the non-breaching member the right to terminate the consortium agreement.

This opinion release serves as a useful "checklist" of preventive compliance steps for companies proposing to enter into a contractual relationship with a foreign official or his company.

C. SEC Enforcement Policies

On October 23, 2001, the SEC issued a *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* (Section 21(a) Report).[27] The report was issued in the context of an enforcement action, *In the Matter of Gisela de Leon-Meredith*,[28] against the former controller of a public company who was ordered to cease and desist from violations of the books and records provisions of the FCPA, among other violations of the Securities Exchange Act of 1934. The SEC did not sue the public company itself; its conduct both before and after the controller's actions were discovered was apparently the basis for the SEC's decision to forgo enforcement action against it.

The Section 21(a) Report sets forth a number of (non-exclusive) factors that the SEC will consider in determining whether to take enforcement action. While this report is not written in the specific context of bribery, FCPA officials in this context have cited it,[29] and most of the enumerated relevant factors are, on their face, relevant to the foreign bribery context. The factors focus not only on the public company's actions when an SEC investigation is initiated, but also on the corporate response to allegations of potential wrongdoing from the time they first come to the attention of the company, including investigation, mitigation of harm, cooperation, and remediation. The report thus continues to underscore the importance of functioning internal corporate compliance programs, as well as cooperation with enforcement officials.

27. SEC Release, *supra* note 26.

28. In the Matter of Gisela de Leon-Merideth, Exchange Act Release No. 44970 (Oct. 23, 2001).

29. Lucinda Low, one of the authors of this section, participated in a teleconference program at the SEC on the FCPA on October 23, 2001, the day the 21(a) report was released. During that program, the applicability of this report to FCPA bribery as well as books and records cases was discussed.

D. Other

1. *Olympic Committee Prosecutions*

The FCPA began the year in the spotlight of public attention when the image of the Olympic Games, the touchstone of a civil society and fair international competition, became entangled in rings of gifts. The Department of Justice's indictment alleged that the International Olympic Committee's (IOC) selection of Salt Lake City as the host city of the 2002 Winter Olympics had been swayed as a result of gifts. The indictment named two defendants and a supporting cast of recipients who received slightly more than $1 million[30] including several questionable items such as: for one member, funding an employment arrangement for a "green card;"[31] for another member, payment of a child's college tuition bill[32] and a luxury apartment near campus;[33] and for yet another, plain-old cash in an envelope.[34] While observers assured the public of the FCPA's broad reach,[35] the DOJ realized that the IOC was missing from the FCPA's list of "public international institutions" and rested the indictment upon other federal statutes, specifically, conspiracy (to commit state law bribery), 18 U.S.C. § 371; Travel Act violations, based on state law bribery, 18 U.S.C. § 1952; and mail, wire and honest service fraud, 18 U.S.C. §§ 1341, 1343 and 1346.

By year's end, however, the government's case was dismissed for lack of standing on the ground that the *private gifts* were indeed not illegal. In his memorandum opinion, Judge David Sam found that "wire and mail fraud charges were based upon the presumption that defendants bribed IOC members unlawfully" and that Utah's anti-corruption law did not apply to foreign groups like the IOC.[36] The memorandum opinion did more to enumerate the shortcomings of current anti-corruption legislation with respect to private actors than to absolve the defendants of possible dereliction in fiduciary duties. The Justice Department has until January 23, 2002, to appeal Judge Sam's ruling.[37] Neither the Congress nor the President has yet to list the IOC as a public international institution, which would bring future IOC bribery issues firmly under the purview of the FCPA. However, the scandal perhaps may have had the effect of unifying the OECD member nations for the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business.

2. *Patriot Act*

The year concluded with the passage of *Title III—International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001* within the USA PATRIOT Act, 115 Stat. 272 (2001) (the "USA PATRIOT Act"). With respect to anti-corruption enforcement, Section 315 of the USA PATRIOT Act encompasses "bribery of a public official, or misappropriation, theft, or embezzlement of public funds for the benefit of a public official," which are

30. United States v. Welch, No. 2:00 CR-0324S (D. Utah, filed July 20, 2000).
31. *Id.* at 10–11.
32. *Id.* at 32.
33. *Id.* at 23.
34. *Id.*
35. Terry Carter, *Wide World of Payola: United States Pushes Action on Bribery Convention*, 85 A.B.A.J. 18 (1999).
36. Karen Rosen, *Salt Lake Bribery Charges Dropped*, Cox News Serv., Nov. 15, 2001; *Welch*, No. 2:00 CR-0324S, at 5.
37. *Deadline is Jan. 23 for Games Charges*, Desert News, Dec. 26, 2001.

considered a money laundering violation.[38] The USA PATRIOT Act in effect expands the universe of companies covered by money laundering rules beyond banks to other financial institutions possibly including even investment companies and private holding companies, and obliges them to report suspect transactions to the U.S. Treasury Department.[39] Additionally, financial institutions are required to share information regarding such suspect transactions with each other.[40] Safe harbor from these reporting requirements exists for transactions carried on by registered public companies or regulated foreign banks and for any institution complying with the obligation to share information.[41]

Investigation of suspect transactions under the USA PATRIOT Act is at the ultimate discretion of the Secretary of Treasury, who must balance the cost burden of compliance with competitive advantages of the American financial services industry.[42] The USA PATRIOT Act requires that financial institutions know their clients and confirm through due diligence and auditing procedures (1) their clients' identity, their relationship to participants, and the origin of the funds; (2) the legal capacity of the participants; (3) identities of any beneficial owners; and lastly, (4) a description of the transaction.[43] Furthermore, there is a heightened standard of scrutiny for private banking accounts with respect to accounts maintained by or on behalf of senior foreign political figures, their family members, and close associates.[44]

This new, intensified investigatory ability to gather shared information will present a composite picture to law enforcement officials of foreign corruption. By making a financial institution's compliance officers responsible for the collection and dissemination of information, the USA PATRIOT Act greatly enhances the monitoring of the movement of funds to listed political officials and their associates.

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38. USA PATRIOT Act, 18 U.S.C.A. § 1956(c)(7)(iv) (2002).
39. USA PATRIOT Act, 18 U.S.C.A. § 325 (2002).
40. *Id.* at 308.
41. *Id.* at 308, 327.
42. *Id.* at 299.
43. *Id.* at 300, 321.
44. *Id.* at 304–05.