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FOREIGN CORRUPT PRACTICES ACT

Regrouping and Refocusing: 2013 FCPA Year-In-Review and Enforcement Trends for 2014



BY T. MARKUS FUNK AND SAMBO "BO" DUL

Following a relatively flat enforcement landscape and some bumps in the 2013 prosecutorial road, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") appear poised to spring back into action on Foreign Corrupt Practices Act ("FCPA") and related anti-corruption enforcement. Other nations have also ramped up activity in this arena by fortifying their laws and enforcement outlooks, including by bringing "carbon copy" actions. Below, we take a look at the major FCPA and anti-corruption de-

velopments of 2013, as well as what may be in store for 2014.

■ U.S. Enforcement Numbers Continue to Trail the Records Set in 2010—But the DOJ and SEC Remain Committed to Aggressive Enforcement.

Calendar year 2010 saw the U.S. DOJ initiate a record-breaking 48 enforcement actions and the SEC bringing 26. But prognostications to the contrary notwithstanding, the intervening years have not witnessed a redoubling of this trend. More specifically, in 2013 the DOJ filed only 16 FCPA and related enforcement actions (and announced 2 non-prosecution agreements, and 6 enforcements actions that were filed in 2012 and 2011),¹ while the SEC for its part brought 8 actions.²

True, the number of FCPA enforcement actions against corporate entities remained low compared to the records set in 2010. But this year not only saw more DOJ actions than 2012, but also was characterized by two of the largest FCPA penalties ever assessed against a company:

T. Markus Funk is a partner at Perkins Coie, Co-Founder and Co-Chair of the firm's Corporate Social Responsibility and Supply Chain Compliance Practice (the first such practice among the AmLaw 100), and Co-Chair of the ABA Criminal Justice Section's Global Anti-Corruption Committee. Markus can be reached at mfunk@perkinscoie.com. Sambo "Bo" Dul is a litigation associate in Perkins Coie's Phoenix Office. Prior to joining the firm, Bo clerked for the Hon. Theodore A. McKee, U.S. Court of Appeals for the Third Circuit. Bo can be reached at sdul@perkinscoie.com.

¹ See DEP'T OF JUSTICE, FCPA & RELATED ENFORCEMENT ACTIONS, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/2013.html> (last visited Jan. 2, 2014).

² See SEC. & EXCH. COMM'N, SEC ENFORCEMENT ACTIONS: FCPA CASES, available at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Jan. 2, 2014).

■ First, in May 2013, French oil giant Total S.A. agreed to pay over \$398 million to settle proceedings before the SEC³ and DOJ⁴ involving bribes to an Iranian official to secure development contracts for oil and gas fields.⁵ To settle the SEC's charges, Total S.A. agreed to pay disgorgement of \$153 million in illicit profits and retain an independent FCPA compliance consultant. In the parallel criminal proceedings, the company agreed to pay a \$245.2 million penalty as part of a deferred prosecution agreement. Total S.A.'s nearly \$400 million combined pay out ranks as the fourth all time largest resolution in U.S. history.

■ Second, in November 2013, the SEC⁶ and DOJ⁷ announced nearly \$153 million in settlements with Weatherford International and its subsidiary, Weatherford Services Ltd., based on a wide array of FCPA violations in the Middle East and Africa, including kickbacks to Iraq to obtain United Nations Oil-for-Food contracts.⁸ In total, Weatherford agreed to pay more than \$250 million in a global resolution that included some \$65 million to the SEC as well as another \$100 million in separate Office of Foreign Assets Control criminal and administrative penalties. At nearly \$153 million, Weatherford's FCPA resolution ranks as the ninth largest of all time.

In contrast, the much-anticipated ramping up of investigations and prosecutions of individual defendants did not fully come to pass in 2013, although such actions by the DOJ experienced a slight increase. The SEC did not announce any actions against individual defendants in 2013. Further, while the DOJ notably announced FCPA and related charges against 14 individuals, six of those actions were filed in 2012 or 2011, but not unsealed until 2013. These criminal enforcement actions against individual defendants included actions against executives of Maxwell Technologies (a California-based manufacturer of energy storage and power delivery products), Alstom (a French power and transportation conglomerate), Direct Access Partners (a New York-based broker-dealer), BSG Resources (a mining company seeking contracts in Guinea) and Bi-

zJet (a Tulsa, Oklahoma-based provider of aircraft maintenance, repair and overhaul services).⁹

Although a number of individuals reached agreed dispositions of their cases, other individual defendants have continued to fight their cases in court, opening the doors for future court decisions that will add to the sparse number of precedents sketching out the constitutional and statutory contours of FCPA enforcement. The year started with a pair of decisions out of the Southern District of New York that provided insight into the scope of personal jurisdiction over foreign defendants residing outside the U.S.:

■ In *SEC v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013), Judge Richard Sullivan agreed with the government's position that the FCPA applies broadly to foreign nationals involved in overseas bribery schemes, regardless of the extent of the individual defendant's direct, physical contacts with the U.S.

■ In contrast, in *SEC v. Sharef*, 924 F. Supp. 2d 539 (S.D.N.Y. 2013), Judge Shira Scheindlin made clear that the extent of the FCPA's application to foreign defendants remains limited by traditional principles of due process. Judge Scheindlin distinguished *Straub* and granted a motion to dismiss the SEC's complaint for lack of personal jurisdiction after noting that the remaining defendant, Herbert Steffen, had not authorized the bribe, directed any follow-up, or played any role in falsifying SEC filings.¹⁰

Though enforcement activities remained dialed back in 2013 while prosecutors entered a regrouping phase, both the DOJ and SEC appear poised to spring back into action on international anti-corruption efforts. At the American Conference Institute's 30th International Conference on the Foreign Corrupt Practices Act in November 2013, both Deputy Attorney General James M. Cole¹¹ and then-Co-Director of the SEC's Enforcement Division Andrew Ceresney¹² affirmed their commitment to aggressively enforcing the FCPA. The same themes were highlighted in the remarks of Charles Duross, deputy chief of the FCPA Unit of the DOJ's Fraud Section, and Kara Brockmeyer, chief of the FCPA Unit of the SEC's Enforcement Division. Thus, despite deceptively low enforcement numbers this year, both the DOJ and SEC have amply put companies and indi-

³ Press Release, Securities and Exchange Commission, *SEC Charges Total S.A. for Illegal Payments to Iranian Official* (May 29, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171575006>.

⁴ Press Release, Department of Justice, *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, (May 29, 2013), available at <http://www.justice.gov/opa/pr/2013/May/13-crm-613.html>.

⁵ *Total Agrees to Pay \$398 Million to Resolve Its FCPA Scrutiny*, FCPA PROFESSOR (May 30, 2013), available at <http://www.fc paprofessor.com/total-agrees-to-pay-398-million-to-resolve-its-fcpa-scrutiny>.

⁶ Press Release, Securities and Exchange Commission, *SEC Charges Weatherford International With FCPA Violations*, (Nov. 26, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694>;

⁷ Press Release, Department of Justice, *Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations*, (Nov. 26, 2013), available at <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>.

⁸ *Of Note From The Weatherford Enforcement Action*, FCPA PROFESSOR (Dec. 3, 2013), available at <http://www.fc paprofessor.com/of-note-from-the-weatherford-enforcement-action>.

⁹ See FCPA & RELATED ENFORCEMENT ACTIONS, *supra* note 1 (last visited Jan. 2, 2014).

¹⁰ This case is commonly referred to as *SEC v. Steffen*. Judge Scheindlin dismissed the SEC's complaint against Steffen after his co-defendant, Uriel Sharef, settled bribery charges with the SEC earlier in 2013. Notably, Sharef agreed to pay a \$275,000 civil penalty, which, according to the SEC, is "the second highest penalty assessed against an individual in an FCPA case." Though the SEC's complaint stated additional contacts with the United States by Sharef that were not alleged as to Steffen, it is left to speculation whether the charges against Sharef would have also been dismissed had he not settled.

¹¹ James M. Cole, Deputy Attorney Gen., Address at the Foreign Corrupt Practices Act Conference (Nov. 19, 2013), available at <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-131119.html>.

¹² Andrew Ceresney, Co-Dir., Sec. & Exch. Comm'n Enforcement Div., Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370540392284>.

viduals on notice that the risks they confront in doing business overseas must be taken seriously.

■ **Anticipation Continues to Mount as Observers Await the U.S. Court of Appeals for the Eleventh Circuit's Landmark Opinion in *United States v. Esquenazi*.**

But as we enter 2014, all eyes will continue to be on the Eleventh Circuit. The court, following oral arguments in October 2013,¹³ is scheduled to deliver the first federal appellate court opinion on the much-debated definition of “foreign official” under the FCPA in *United States v. Esquenazi*.¹⁴ (By way of full disclosure, Mr. Esquenazi is represented on appeal pro bono by Perkins Coie partner and co-author T. Markus Funk, as well as Perkins partner Mike Sink; Perkins was not involved in representing Mr. Esquenazi at the trial level). The case stems from the October 2011 convictions of Joel Esquenazi and Carlos Rodriguez, former executives of Terra Telecommunications Corp., for their involvement in a scheme to bribe officials at Haiti Teleco, a state-owned telecommunications company. The defense is challenging the government’s position that Haiti’s ownership of stock in, and appointment of board members and directors for, Haiti Teleco converted the company into an “instrumentality” of the Haitian government (and, in so doing, turned Haiti Teleco employees into “foreign officials”).

■ **Whistle-blower Complaints: Activity Will Increase Despite Court Decisions Narrowing the Application of Dodd-Frank Wall Street Reform and Consumer Protection Act's Anti-Retaliation Provisions.**

In its 2013 Whistleblower Report, the SEC Office of the Whistleblower announced that the number of whistle-blower tips and complaints the Commission received annually increased from 3,001 in the 2012 fiscal year to 3,238 in the 2013 fiscal year, representing a nearly 8 percent increase.¹⁵ From the establishment of the whistle-blower program in August 2011 until the end of Fiscal Year 2013, the Office reportedly received 6,573 tips and complaints from whistle-blowers. During Fiscal Year 2013, moreover, whistleblower submissions came from individuals in all 50 states, the District of Columbia, and the U.S. territories of Puerto Rico, Guam, and the U.S. Virgin Islands, as well as 55 foreign countries. The office received 149 complaints related to the FCPA in fiscal year 2013; indeed, FCPA-related claims experienced the highest year-over-year percentage growth. As then-SEC Co-Director of Enforcement Andrew Ceresney stated at the 30th International Conference on the Foreign Corrupt Practices Act, we can ex-

¹³ *Oral Arguments Heard in Historic “Foreign Official” Challenge*, FPCA PROFESSOR (Oct. 14, 2013), available at <http://www.fcprofessor.com/oral-arguments-heard-in-historic-foreign-official-challenge>.

¹⁴ The Reply Brief is available at http://www.perkinscoie.com/files/upload/13_10_Esquenazis_Reply_Brief.pdf and their Opening Brief is available at [http://www.perkinscoie.com/files/upload/13_10_5312012_Corrected_Brief_of_Appellant_\(2\).pdf](http://www.perkinscoie.com/files/upload/13_10_5312012_Corrected_Brief_of_Appellant_(2).pdf). The oral argument can be heard at http://www.perkinscoie.com/files/upload/IWCD_13_10_FunkArgument_10.15.2013.mp3.

¹⁵ SEC. & EXCH. COMM’N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

pect “FCPA violations to become an increasingly fertile ground for Dodd-Frank whistleblowing.”¹⁶

Several court decisions issued in 2013, however, could put a damper on what may otherwise be even more robust whistle-blowing activity moving forward. First, on July 17, 2013, the U.S. Court of Appeals for the Fifth Circuit in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 623 (2013), ruled that the Dodd-Frank Act’s whistle-blower protection provision, which prohibits retaliatory action against workers who report misconduct, affords “a private cause of action *only* for those individuals who *provide information* relating to a violation of the securities laws to the SEC.” (Emphasis added). The plaintiff in *Asadi* reported suspicions of FCPA violations through the company’s internal channels, but made no disclosures to the SEC. Based on this fact, the Fifth Circuit affirmed the lower court’s dismissal of the plaintiff’s action. (It must be noted, however, that the Fifth Circuit’s decision stands in contrast to a number of district court decisions holding that the Dodd-Frank Act’s whistle-blower protections apply even if the individual did not make disclosures to the SEC. The Fifth Circuit’s decision also contradicts the SEC’s own regulation, which, according to the court, redefined “whistleblower” to be more broad than provided for under the Act itself.)

Another setback to the SEC’s efforts to stimulate whistle-blower activity came on Oct. 21, 2013, when the U.S. District Court for the Southern District of New York ruled that the Dodd-Frank Act’s whistle-blower protection provision does not apply extraterritorially. In *Liu v. Siemens A.G.*, No. 13-CV-0317 (WHP), 2013 BL 289928 (S.D.N.Y. Oct. 21, 2013), a former compliance officer for Siemens A.G.’s Chinese subsidiary accused the company of firing him after he internally raised concerns of violations of anti-bribery internal controls Siemens had instituted as part of its 2008 plea agreement with the DOJ. Relying heavily on the Supreme Court’s decision in *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010), Judge William Pauley dismissed the suit against Siemens after concluding that nothing in the Dodd-Frank Act’s whistle-blower protection provision evidenced congressional intent for extraterritorial application.

Despite these courts’ narrow interpretations of the reach of the Dodd-Frank Act’s anti-retaliation provision, there will certainly be further litigation on these issues. Moreover, whistle-blower submissions will likely continue to flow to the Commission thanks to the incentives provided by the potentially lucrative Dodd-Frank whistle-blower bounty provisions.¹⁷ In fact, the Office of the Whistleblower in its year-end report said it paid out nearly \$15 million in 2013 to various tipsters, including its largest award to date (\$14 million) announced on Oct. 1, 2013.¹⁸ As SEC Chair Mary Jo White

¹⁶ Keynote Address at the International Conference on the Foreign Corrupt Practices Act, *supra* note 12.

¹⁷ T. Markus Funk & Assad H. Clark, *The SEC Releases Whistleblower Bounty Rules—So Now What?*, 6 BNA WHITE COLLAR CRIME REPORT, No. 15, July 29, 2011, available at http://www.perkinscoie.com/files/upload/LIT_11_07FunkClarkSECArticle.pdf.

¹⁸ Press Release, Securities and Exchange Commission, *SEC Awards More Than \$14 Million to Whistleblower* (Oct. 1, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.Ukx399Lkvnh>.

stated, the hope is that “an award like this encourages more individuals with information to come forward.”

Keeping up with the volume of whistle-blower claims no doubt poses a true challenge for the SEC. But we anticipate that the staff will continue to ramp up its activities in 2014, and actions on attendant self-disclosures can be expected to increase.

■ Non-U.S. Anti-Corruption Enforcement Will Ramp Up

Although much has been said about the fact that the U.S. accounts for some 75 percent of the world’s foreign anti-bribery actions, 2013 has shown that other nations are continuing to ramp up activity in this arena by fortifying enforcement outlooks and anti-corruption laws.¹⁹

The Organisation for Economic Co-operation and Development’s (“OECD”) June 2013 Annual Report, for example, reflects that Germany has the second most total bribery cases since 1999 (88 criminal cases and 9 administrative and civil cases; the U.S., by contrast, pursued 140 criminal cases and 96 administrative and civil cases, and the U.K. pursued only 8 criminal cases).²⁰ Similarly, Transparency International rates Germany as having “active enforcement” of the OECD’s Anti-Bribery Convention.²¹ Germany, in short, appears to be working hard to join the U.S. as the world’s leaders in foreign bribery prosecutions.

Though the U.K. remains a fairly distant third in anti-bribery enforcement actions, developments across the pond in 2013 signal more activity ahead. On Aug. 14, 2013, the U.K.’s Serious Fraud Office (“SFO”) announced its first prosecution under the U.K. Bribery Act, charging three former directors of Sustainable AgroEnergy PLC, and an affiliated financial advisor, in connection with an alleged fraudulent scheme to sell biofuel-related investments in Cambodia to U.K. investors.²² Three of the defendants were also charged with “making and accepting a financial advantage” in violation of the Bribery Act. Also notable was the Dec. 23, 2013 announcement of the SFO’s criminal investigation into allegations of bribery and corruption at Rolls Royce.²³ The U.K.’s commitment to active anti-bribery enforcement is also evidenced by action taken against companies *before* bribery takes place, penalizing those with weak controls that may not be capable of detecting and preventing bribery. On Dec. 19, 2013, the U.K.’s Financial Conduct Authority (“FCA”) fined JLT Specialty

Limited over £1.8 million for its failure to impose appropriate checks and controls to protect against the risk of corruption or bribery in connection with payments to third parties abroad.²⁴

Calendar year 2013 also saw noteworthy anti-corruption investigations against GlaxoSmithKline plc in China. Although pharmaceutical companies have been the target of much scrutiny over the last several years, including for conduct in China, what is notable here is that it is the Chinese government investigating the alleged misconduct. Chinese authorities accused the company of bribing doctors to prescribe their drugs and on July 22, 2013, the company admitted that some of its senior executives may have bribed doctors and hospitals to gain drug sales. By year end, it appeared that, though Chinese executives would face charges, the company itself may avoid bribery charges.²⁵ In any case, the accusations are among the most serious made against a multinational corporation in China and appear to be part of a broad government crackdown on fraud and corruption involving foreign companies.

In addition to ramped up enforcement efforts, 2013 also saw more countries enacting new or enhanced anti-corruption laws. For example, passed in the wake of sweeping protests fueled by public anger over corruption, Brazil’s new anti-corruption law, known as the Brazilian Clean Companies Act, increases fines that can be levied against companies involved in bid-rigging and bribing public officials to as much as 20 percent of a company’s annual revenue. Signed by President Dilma Rousseff on Aug. 1, 2013, the law takes effect on Jan. 29, 2014 and applies to businesses with an office, branch or subsidiary in Brazilian territory.²⁶ The Ukraine also revamped its anti-corruption laws to enhance the government’s ability to fight corruption and usher in a more transparent business environment. Notable aspects of the Ukrainian law include the imposition of corporate criminal liability for both public and commercial bribery, whistle-blower protections, and asset forfeiture as a penalty for certain corrupt offenses.²⁷ Developments in anti-corruption legislation also occurred in a number of other countries, including South Korea, Russia, India and Canada.

[See the Appendix for a comparative chart of anti-bribery laws.]

As they have done in 2013, there is every reason to believe that foreign enforcers will continue to step up their enforcement game, which in turn will require

¹⁹ See generally T. Markus Funk & Jess A. Dance, *Anti-Bribery Chart*, PERKINS COIE, available at http://www.perkinscoie.com/files/upload/LIT_12_29_AntiBriberyChart_JDance.pdf.

²⁰ OECD WORKING GRP. ON BRIBERY, ANNUAL REPORT 2013, available at <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf>

²¹ TRANSPARENCY INT’L, EXPORTING CORRUPTION PROGRESS REPORT 2013: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY, available at http://issuu.com/transparencyinternational/docs/2013_exportingcorruption_oecdprogre.

²² Press Release, Serious Fraud Office, *Four Charged in ‘Bio Fuel’ Investigation* (Aug. 14, 2013), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/four-charged-in-‘bio-fuel’-investigation.aspx>.

²³ Press Release, Serious Fraud Office, *Statement - Rolls Royce*, (Dec. 23, 2013), available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/statement—rolls-royce.aspx>.

²⁴ FIN. CONDUCT AUTH., FCA FINAL NOTICE 2013: JLT SPECIALTY LIMITED, Dec. 19, 2013, available at <http://www.fca.org.uk/your-fca/documents/final-notices/2013/jlt-specialty-limited>.

²⁵ Denise Roland, *GSK Likely to Avoid Company-Wide Bribery Charge in China*, *The Telegraph*, Nov. 4, 2013, available at <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10424869/GSK-likely-to-avoid-company-wide-bribery-charge-in-China.html>.

²⁶ Kevin M. LaCroix, *The Brazilian Clean Companies Act*, LEXISNEXIS LEGAL NEWSROOM, Dec. 11, 2013, available at <http://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2013/12/11/the-brazilian-clean-companies-act.aspx>.

²⁷ Thomas Firestone & Yuliya Kuchma, *Ukraine Enacts Sweeping New Anti-Corruption Legislation*, FCPA BLOG (July 30, 2013), available at <http://www.fcpablog.com/blog/2013/7/30/ukraine-enacts-sweeping-new-anti-corruption-legislation.html>.

compliance professionals to start thinking “beyond the FCPA” in the years ahead.

■ **“Carbon Copy” Prosecutions Continue To Be a Growing Global Trend.**

“Carbon copy prosecutions,” a term coined by federal prosecutor Andrew S. Boutros and first fully developed by Assistant U.S. Attorney Boutros and co-author Funk in a 2012 University of Chicago Legal Forum article, and which has since been adopted by others as part of the international law vernacular, refers to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of facts.²⁸

The four elements of a carbon copy prosecution are:

- Jurisdiction B
- Files an enforcement action
- Based on the charging document, guilty plea or admissions
- From Jurisdiction A.

If a corporation reaches a negotiated resolution with U.S. or foreign authorities on international bribery-related charges—whether through a non-prosecution agreement, a deferred prosecution agreement or a guilty plea—there is a bona fide risk that other countries will initiate prosecutions based on the same facts as, and admissions arising out of, the initial case.

As predicated, increasing international cooperation makes such enforcement actions ever more likely:

■ A prime example from 2013 is the Total S.A. case. In its press release, the DOJ heralded the case as “the first coordinated action by French and U.S. law enforcement in a major foreign bribery case.”²⁹ As Acting Assistant Attorney General Mythili Raman stated, the two countries “are working [together] more closely today than ever before to combat corporate corruption, and Total, which bought business through bribes, now faces the criminal consequences across two continents.” The SEC’s press release on the Total S.A. settlement also expressed its appreciation for the “assistance of French regulatory authorities” and noted that “[c]harges also were recommended. . . by the prosecutor of Paris. . . of the Tribunal de Grande Instance de Paris for violations of French laws.” But, after a French Court acquitted To-

²⁸ Andrew S. Boutros & T. Markus Funk, “Carbon Copy” Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World, 2012 U. CHI. LEGAL F. 259 (2012), available at http://www.perkinscoie.com/files/upload/12_10_Boutros_Funk_Final.pdf.

²⁹ Press Release, Department of Justice, *French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme*, (May 29, 2013), available at <http://www.justice.gov/opa/pr/2013/May/13-crm-613.html>.

tal S.A., its chief executive and a number of former French officials of the corruption charges on July 8, 2013,³⁰ Paris prosecutors filed an appeal on July 18, 2013,³¹ which remains pending.

■ In another example—this time with the U.S. as the follower—GlaxoSmithKline confirmed in September 2013 that U.S. authorities, who were already investigating the company for alleged FCPA violations in other countries, initiated inquiry into the Chinese bribery allegations after Chinese officials launched probes into allegations that the company bribed doctors to win business.³²

■ In yet another instance of carbon copy prosecutions, the investigation into the activities of BSG Resources, relating to a multibillion dollar mining deal with the government of Guinea, also involved multi-jurisdictional cooperation resulting in the company facing scrutiny from up to six different countries, including the U.S., the U.K., and Guinea.³³

Given the continuing trend of international cooperation, the globalization of anti-corruption enforcement, and the relative ease with which enforcers can bring such actions (as recent examples demonstrate), we believe that carbon copy prosecutions and investigations, such as those brought against Total S.A., GlaxoSmithKline and BSG Resources, will soon become the norm and must be factored into the equation when conducting and resolving international anti-corruption investigations.

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Although the number of new enforcement actions and resolutions continue to trail the records set in 2010, all signs point to continued commitment to aggressive anti-corruption enforcement both in the U.S. and abroad. As such, businesses cannot afford to let down their guards or relax efforts at robust compliance in the years ahead.

³⁰ Associated Press, *Total and French Officials Cleared in Iraq Oil-for-Food Case*, N.Y. TIMES, July 8, 2013, available at http://www.nytimes.com/2013/07/09/business/global/total-and-french-officials-cleared-in-iraq-oil-for-food-case.html?_r=1&:

³¹ *Total to Face French Appeals Court in Oil-for-Food Case*, REUTERS, July 18, 2013, available at <http://www.reuters.com/article/2013/07/18/france-total-idUSL6N0FO32E20130718>.

³² Jeff Sistrunk, *US Investigates GSK Following Chinese Bribery Claims*, LAW360, Sept. 6, 2013, available at <http://www.law360.com/articles/470817/us-investigates-gsk-following-chinese-bribery-claims>.

³³ Ian Cobain, *Inquiry Over Steinmetz Guinea Mining Deal Extends to UK and Guernsey*, THE GUARDIAN, Sept. 4, 2013, available at <http://www.theguardian.com/world/2013/sep/04/inquiry-steinmetz-guinea-mining-deal-uk>.

Appendix

ISSUE	U.K. BRIBERY ACT (2010)	U.S. FCPA (1977)	GERMAN ANTI-BRIBERY LAWS (1998, 2002)	CHINESE ANTI-BRIBERY LAWS (1979, AMENDED 2011)	INDIA'S PREVENTION OF CORRUPTION ACT (1988)
Is bribery of foreign public officials illegal?	Yes, but unlike FCPA excludes political parties, party officials, and candidates for office from definition of "foreign public official."	Yes	Yes, under the EU Anti-Bribery Law ("EUBestG") and the Act on Combating International Bribery ("IntBestG"). However, the EUBestG only applies to member states of the EU, while the IntBestG covers only active bribery in international business transactions.	Yes	No
Is commercial bribery and bribery of domestic officials illegal?	Yes	No ¹	Yes	Yes	Yes, but the PCA only prohibits bribery of domestic officials. ²
Can the receipt of a bribe be prosecuted?	Yes	No	Yes	Yes	Yes
What is the requisite intent for liability to attach?	<p>Bribing another person (Section 1) and offenses relating to being bribed (Section 2) require basic knowledge and the intent to "bring about improper performance."³</p> <p>Bribery of a foreign public official (Section 6) requires the intent to influence the official so as to obtain/retain a business or a business advantage.</p> <p>The "Corporate Offense" of failing to prevent bribery (Section 7) is a strict liability offense not requiring any mens rea. The only statutory defense is to prove the existence of "adequate systems and controls." The burden of proof for the defense is the "balance of probabilities."⁴</p>	The FCPA requires the accused to have acted "willfully," "knowingly," and "corruptly." Knowledge, moreover, is defined to include "conscious disregard" or "willful blindness."	<p>Official Bribery: German criminal law requires that the bribe was offered or accepted in connection with the official's discharge of an official duty or the past or future performance of an official act that violates his official duties.</p> <p>Commercial Bribery: To be guilty of active commercial bribery, the defendant must have acted "for competitive purposes" to obtain "an unfair preference in the purchase of goods or commercial services." Passive commercial bribery requires the recipient to accept (or allow to be promised) a bribe "as consideration for accord[ing] an unfair preference to another in the competitive purchase of goods or commercial services." Finally, active commercial bribery of foreign officials requires the defendant to act "in order to obtain or retain . . . business or an unfair advantage in international business transactions."</p>	Under Chinese criminal law, the party giving a bribe must be seeking "improper benefits" (or "improper commercial benefits" for bribes of foreign officials), whereas the recipient must intend to use his or her power, authority, or position to seek a benefit for the briber. However, as a practical matter, intent is often presumed, especially if the bribe at issue is "relatively large" (generally over RMB10,000, or about US \$1,500) or can be characterized as a "kickback" to a State entity or personnel.	The PCA requires that the "gratification" or valuable thing be offered or given as a motive or reward for performance or non-performance of an official act. Motive is presumed upon proof that the defendant offered or received any gratification or valuable thing.

¹ That said, acts of commercial bribery may trigger U.S. Travel Act liability, as well as books and records liability under the FCPA if there are record-keeping problems.

² Indian law focuses on the recipient of a bribe. A briber, however, can be held criminally liable as an abettor to a public official's criminal acceptance of a bribe.

³ The test of whether a person intended to induce another to perform improperly is what a reasonable person in the UK would expect another to do in relation to the performance of that particular function or activity. See UK Ministry of Justice 2011 Bribery Act Guidance ("Guidance") at 10.

⁴ Guidance at 15.

ISSUE	U.K. BRIBERY ACT (2010)	U.S. FCPA (1977)	GERMAN ANTI-BRIBERY LAWS (1998, 2002)	CHINESE ANTI-BRIBERY LAWS (1979, AMENDED 2011)	INDIA'S PREVENTION OF CORRUPTION ACT (1988)
Can companies be held criminally liable?	Yes	Yes	No, but legal entities can be subject to administrative fines under the Administrative Offenses Act ("OWiG"). In addition, individual corporate officers can be subject to criminal investigation and prosecution for their corporate related behavior.	Yes	Yes
Is there a "facilitation/grease payments" exception?	No	Yes, the FCPA exempts small facilitation payments made to expedite or secure the performance of "routine governmental action." That said, the exception is extremely narrow.	No	No	No
Is failure to keep accurate books and records an offense?	Although there is no such specific offense, the failure to keep accurate books and records could be interpreted as signifying a failure to have "adequate procedures" in place.	Yes, public companies and other "issuers" are required to file periodic reports with the SEC and to maintain accurate books and records.	No	No	No
Are "promotional expenses" exempt?	No, but the UK Ministry of Justice's Guidance announced that "[t]he Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes." ⁵	Yes, the FCPA provides an affirmative defense for payments that are reasonable and bona fide business expenses (1) directly related to the promotion, demonstration or explanation of products or services, or (2) incurred in connection with the execution or performance of a contract with a foreign government or agency.	No	No, but there is a monetary threshold for criminal prosecution: RMB10,000 (approximately US \$1,500) for an individual or at least RMB200,000 (approximately \$30,000) for an entity.	No
Is the law applied extraterritorially?	Yes, both individuals and companies may be liable under Section 1 and 2's "general offenses" committed outside the UK, provided the company or individual has a "close connection" with the UK (that is, if they are UK citizens, ordinarily residents, or incorporated in the UK). Section 7's corporate offense of failing to prevent bribery applies to UK entities and anybody who "carries on a business, or any part of a business" in the UK.	Yes, the FCPA applies to acts by US issuers, domestic concerns and their agents and employees that occur wholly outside the US, and to acts by US citizens or residents wherever they occur.	Yes, German criminal law applies to offenses committed "against a German" outside of Germany, and to offenses committed outside of Germany by a German individual. In addition, German companies can be held administratively liable for violations committed abroad by the company or its subsidiary.	Yes, Chinese criminal law applies to all PRC citizens (wherever located), all individuals in China, foreign nationals who commit crimes outside of China against the state or its citizen, and all companies, enterprises, and institutions organized under PRC law, including PRC domestic companies, joint ventures (including ones involving non-PRC companies), wholly foreign-owned enterprises, and non-PRC companies who have representative offices in China.	Yes, the PCA applies to offenses committed in India and by Indian citizens outside India.

⁵ Guidance at 12.

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Is having robust corporate compliance program a defense?	Yes, if the company can show that it had adequate procedures to promote compliance in place.	No, having a robust compliance programs do not provide a defense to liability. That said, having such a compliance program in place can result in a reduced fine under the amended Federal Sentencing Guidelines.	No	No	No
Is there a "local law" exception/defense?	Yes, there is a defense if the foreign official is permitted or required under written local law to be influenced in his capacity as a foreign public official by the offer, promise, or gift.	Yes, an affirmative defense is available if payment to foreign official is lawful under written laws and regulations of foreign country.	Yes, as long as the case does not involve a violation of the public official's duty the offering or acceptance of a benefit is not punishable if the competent public authority previously authorized the benefit at issue or authorizes it upon prompt report by the recipient.	No	No
What are the potential penalties?	Unlimited fines for individuals and companies. Individuals may be imprisoned for up to 10 years.	<p>Anti-Bribery Provision:</p> <p>For corporations, a fine per violation of up to \$2M or up to twice the bribe paid or benefit sought or received, whichever is greater; for individuals, a fine of up to \$250,000 or up to twice the bribe paid or benefit sought or received, whichever is greater, and up to 5 years in prison per violation.</p> <p>Books and Records Provisions:</p> <p>For civil violations, up to \$150,000 for individuals and up to \$725,000 for corporations, depending on the circumstances, and subject to regulatory inflation factors; for criminal violations, up to \$25 million for corporations, and up to \$5 million and up to 20 years in prison for individuals.</p>	<p>Depending on the specific violation, individuals may be imprisoned for up to 5 years or up to 10 years for especially serious cases. Fines and/or confiscations or disgorgement may also be ordered.</p> <p>Under the OWIG, violators, including companies, can be fined up to 1 million Euros, and confiscation or disgorgement may also be ordered.</p>	<p>Commercial Bribery:</p> <p>The criminal penalty for commercial bribery is criminal detention or up to 3 years in prison if the amount involved is "relatively large"; however, if the amount involved is "huge," the punishment is 3 to 10 years in prison and a fine. Entities that commit commercial bribery can be fined, and the responsible individuals can be imprisoned up to 5 years. Asset confiscation and civil liability is also possible.</p> <p>Official Bribery:</p> <p>The penalties for official bribery include fines, confiscation of property, and up to life imprisonment, depending on the amount involved. Business licenses may be revoked. In addition, State personnel who accept bribes can be sentenced to death.</p>	<p>The possible penalty for most offenses is 6 months to 5 years in prison, plus a fine.</p> <p>For "habitual" or "particularly corrupt or dishonest misconduct," the potential punishment is up to 7 years in prison, plus a fine.</p>