2008: Another Banner Year for FCPA Enforcement

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As this article goes to press, the curtains are closing on another banner year in enforcement actions under the Foreign Corrupt Practices Act (“FCPA”)—with quite a grand finale, as Siemens AG settles with the DOJ, SEC, and German prosecutors and agrees to pay the largest FCPA fines in history, and Fiat offers up an encore performance in yet another UN Oil for Food investigation. In 2007, corporate enforcement actions under the FCPA netted fines and penalties totaling more than $130 million. Along with heavy jail sentences and individual fines, the record level of corporate enforcement activities in 2007 led to widespread predictions that the trend would continue, with enforcement actions continuing to soar in 2008. Would 2008 be another banner year, meeting or exceeding last year’s unprecedented level of enforcement? The Siemens settlement seals 2008 as another record year in FCPA enforcement actions, with fines for the Siemens case alone totaling nearly $1.6 billion—yes, billion. And, as we discuss below, all of this year’s enforcement actions confirm the FCPA’s increasing prominence in compliance programs for companies doing business around the world in a variety of industries. This article reviews FCPA enforcement activities as of December 31, 2008 and discusses notable developments that may impact FCPA enforcement in the years to come.

Under current law, FCPA enforcement actions can include criminal prosecutions by the Department of Justice (“DOJ”), civil actions initiated by either the DOJ or the Securities Exchange Commission (“SEC”) (or filed jointly) and administrative actions filed before the SEC. Enforcement actions are pursued against both companies and individual executives.

The FCPA was first enacted in 1977. There were a number of enforcement actions over the first two decades, but the level of enforcement activity has increased since the 1998 amendment of the statute, which expanded the jurisdiction of the FCPA. For example, in the statute’s first twenty years, between 1977 and 1997, a total of seventeen companies and thirty-three individuals were named as defendants in enforcement actions. In 2008 alone, there were enforcement actions against eleven companies and twenty-six individuals. In addition to enforcement actions that have already been taken against corporations and individuals, we have observed numerous media reports and disclosures in the filings of publicly traded companies regarding pending FCPA investigations, and private parties have pursued actions against companies based on allegations of activities that, if true, would violate the FCPA. Mark F. Mendelsohn, Deputy Chief of the Fraud Section of the Criminal Division at DOJ stated at an industry conference that the Fraud Section has some eighty to one hundred matters currently under investigation. There is no question that the pace of FCPA enforcement actions—and the magnitude of the fines and
sentences imposed—continues to drive concerns about this area of compliance among corporate executives from the legal department right up to the boardroom. The FCPA has become a focus in industries ranging from those that have long been the object of government oversight, such as defense and oil and gas, to newer enforcement targets, such as pharmaceutical and medical device companies, freight forwarders, and, increasingly, financial services companies.

Over the thirty-two-year history of the FCPA review procedure there have been only forty-nine review releases. In 2008, the DOJ issued three review releases regarding a DOJ interpretation of the FCPA, and those releases have received much attention from companies and their advisors who seek some insight on the direction in which DOJ enforcement is heading.

In October 2006, Alice Fisher, then Deputy Attorney General for the Criminal Division of the DOJ, encouraged companies to make use of this tool. FCPA personnel at the DOJ have continued to promote the opinion procedure, and have demonstrated their regard for the opinion procedure by quickly analyzing issues and releasing opinions in response to inquiries.

Below we discuss the key enforcement actions against corporations in 2008, DOJ opinion releases from 2008, and various trends in FCPA enforcement.

I. Key 2008 Enforcement Actions

A. SEC v. Westinghouse Air Brake Techs. Corp. ("WABTEC") (Civil Action No. 08-CV-706) (E.D.Pa.) February 14, 2008

WABTEC, headquartered in Wilmerding, Pennsylvania, manufactures brake subsystems and related products for locomotives, freight cars, and passenger transit vehicles, among other things. WABTEC’s wholly owned, fourth-tier subsidiary, Pioneer Friction Limited, is based in Calcutta, India, and manufactures low and high friction brake blocks for rail operations in India. From 2001 through 2005, Pioneer made various payments to officials of the Indian Railway Board ("IRB"), in order to: (1) assist Pioneer in obtaining and retaining business with the IRB; (2) schedule pre-shipping product inspections; (3) obtain issuance of product delivery certificates; and (4) curb what Pioneer considered to be excessive tax audits.

The IRB and Zonal Railways are Indian government entities. To procure low friction products, the IRB and Zonal Railways solicit sealed bids, awarding the bid to the lowest bidder to the extent they can produce, and then moving up the bid-scale, paying each subsequent bidder the lowest bidder’s price. According to the settlement, employees of the IRB and Zonal Railways solicited cash payments from Pioneer in connection with a sealed-bid process for materials to be used on Indian government-owned railways. These payments came in two forms: “IRB payments,” which secured IRB’s approval of Pioneer’s contract price, and “ordering payments,” which were paid in exchange for assurance that the IRB and Zonal Railways would consider Pioneer’s bids in the auction and that Pioneer would be given the opportunity to sell additional quantities at the awarded price without going through a new auction. Pioneer’s Chairman, who is also a Vice President of WABTEC, is alleged to have known about the bribes and done nothing. In all, Pioneer paid approximately $105,000 in IRB payments, and another $31,250 in ordering payments.

In addition, Pioneer covered up the payments in its books and records by issuing checks to a “marketing agent,” who then returned cash to Pioneer, less a service commission. No services
were provided for the cash given to the marketing agent, and Pioneer maintained the cash generated from the marketing agents in a metal box, documenting each unlawful payment on a voucher maintained with the cash. Then, in violation of local recordkeeping laws, Pioneer destroyed all documents relating to the bribes after a year, so that there were no records of payments prior to 2005. To complete the fraudulent activity, Pioneer recorded the unlawful payments derived from the marketing agents in its books and records as “consulting” expenses.

The WABTEC case brings up the following key issues. First, the actions of a subsidiary created substantial liability for a parent company. The settlement attached liability for the actions of Pioneer—a wholly owned, foreign, fourth-tier subsidiary—to the parent, WABTEC. The matter also reminds us that “books and records” violations are equally as important as flat-out bribes. Here, Pioneer covered up the payments to an agent who provided no services by fraudulently recording them as “consulting” expenses. Finally, this is a classic “Obtain or Retain” case, where the bribes were used to obtain and retain business, obtain delivery certificates, and cut back on tax audits.

**B. SEC v. Flowserv Corp. (Civil Action No. 08 CV 00294 (D.D.C.)) February 21, 2008**

Flowserv consented to the SEC’s entry of a final judgment on books and records and internal controls charges and agreed to pay $6.5 million. The SEC considered Flowserv’s cooperation and remedial efforts in determining an appropriate penalty. Flowserv also agreed to pay a $4,000,000 fine pursuant to a three-year deferred prosecution agreement (“DPA”) with DOJ.

Flowserv is a Texas-based manufacturer of pumps, valves, seals, and related automation and services to the power, oil, gas, and chemical industries. From 2001 through 2003, two of Flowserv’s subsidiaries entered into a total of twenty contracts in which $646,488 in kickback payments were made and another $173,758 were authorized in connection with sales of industrial equipment to Iraqi government entities under the U.N. Oil for Food Program. The kickbacks were characterized as “after-sales service fees” (“ASSF”), but no services were performed. The kickbacks paid by Flowserv’s subsidiaries diverted funds out of the U.N. escrow account and into an Iraqi slush fund.

Flowserv’s French subsidiary, Flowserv Pompes, entered into fifteen Oil for Food contracts involving kickback payments of $604,651. Flowserv Pompes agreed to, but did not ultimately make, an additional $173,758 in improper ASSF payments under four additional contracts. Delivery under these four contracts had not been completed by the time of the U.S. invasion of Iraq in March 2003. Senior officials at Flowserv Pompes, including the subsidiary’s President, developed two different false cover stories to conceal the ASSF kickback payments. The company’s internal accounting records falsely indicated that Flowserv Pompes paid a Jordanian agent a ten percent fee on each contract to cover the cost of installing and commissioning the equipment, where the agent provided no such services. The second false story, as described in the contract documents sent to the U.N. for approval, involved the omission of any reference to after-sales services or related installation fees. Instead, to cover the cost of the illicit ASSF payments, the company’s U.N. contracts inflated the unit price of each piece of equipment without disclosing the price increases, or the reason for them, to the U.N. Flowserv Pompes also signed a side letter to the Iraqi ministry to pay the ten percent, and failed to disclose the letter to the U.N.

Flowserv’s Dutch subsidiary, Flowserv B.V., entered into one contract involving an ASSF kickback payment of $41,836 on water pump spare parts supplied to the Iraqi government-owned South Gas Company. In August 2001, officials of Flowserv B.V. met with the company’s agent and were asked to pay the
agent for a ten percent kickback on the transaction. Flowserve’s controller concealed the payment by increasing the cost of the purchase order by ten percent and passing the difference back to the agent.

The Flowserve matter raises several important issues, beginning with the expansive Oil for Food investigation. As has been widely recognized, there have been a number of enforcement actions against companies participating in the OFFP, and Flowserve is assuredly just one of many (see, for example, the next case we discuss—AB Volvo). Flowserve also provides another instance of a books-and-records violation, this time, in the form of characterizing the kickbacks as "after-sales service fees." Finally, Flowserve is an instance in which some liability attaches to the mere promise to pay. As discussed above, Flowserve had agreed to pay certain bribes, but the U.S. Iraq invasion prevented delivery under the contracts. Nonetheless, the ASSF payments that had been promised but not actually paid certainly factored into the settlement calculus.


AB Volvo agreed with DOJ to pay a $7 million penalty for bribes made to Iraqi officials under the U.N. Oil for Food Program. As part of the agreement, AB Volvo agreed to cooperate with DOJ’s continuing investigation into the Oil for Food Program. DOJ recognized AB Volvo’s thorough investigation and remedial measures in agreeing to a three-year DPA with AB Volvo and its subsidiaries. AB Volvo also agreed with the SEC to pay a $4 million penalty and disgorgement of profits and interest of $8.6 million.

The agreement involved allegations regarding bribes by two AB Volvo subsidiaries, Renault Trucks SAS and Volvo Construction Equipment AB (“VCE”). Renault Trucks and VCE engaged in separate conspiracies to commit wire fraud and to violate the books and records provisions of the FCPA. These subsidiaries’ employees, agents and distributors paid kickbacks to the Iraqi government in order to obtain contracts for the sale of trucks and heavy commercial construction equipment. A Jordanian agent or a Tunisian distributor was used to make the payments, with a "spread" to allow the agent/distributor to recoup the bribes paid.

Between November 2000 and April 2003, employees and agents of Renault Trucks paid $5 million in kickbacks to the Iraqi government for a total of approximately 61 million euros worth of contracts with various Iraqi ministries. To pay the kickbacks, Renault Trucks inflated the price of contracts by 10 percent before submitting them to the United Nations for approval. In some cases, Renault Trucks paid inflated prices to companies that outfitted the chassis and cabs produced by Renault Trucks. Those companies then used the excess funds to pay the kickbacks to the Iraqi government on behalf of Renault Trucks.

Between December 2000 and January 2003, the predecessor to VCE, Volvo Construction Equipment International AB (“VCEI”), and VCEI’s distributors were awarded a total of approximately $13.8 million worth of contracts. During the same time period, employees, agents and distributors of VCEI paid a total of approximately $1.3 million in kickbacks to the Iraqi government by inflating the price of contracts by approximately 10 percent before submitting them to the United Nations for approval.

Beginning in 2000, the Iraqi government began requiring companies wishing to sell humanitarian goods to government ministries to pay a "spread" to the government in order to be granted a contract. The amount of that fee was usually 10 percent of the contract price. The two subsidiaries authorized $2.3 million in
connection with their sales of humanitarian goods to Iraq under the Oil for Food Program.

In addition to the continued investigation of OFFP participants, the Volvo case brings to the fore an FCPA enforcement action against a non-U.S. company—Volvo, of course, is a world-wide company based in Sweden. Moreover, this is another instance of a books-and-records violation, where “after-sales service fees,” were coined to cover up the inflated contract price.

**D. SEC v. Willbros (Civil Action No. 4:08-CV-01494 (S.D. Tex. (Houston))) May 14, 2008**

Willbros agreed with the SEC to entry of judgment and to pay disgorgement of $8.9 million, plus prejudgment interest of $1.4 million, for violations of the anti-bribery provisions of the FCPA and the antifraud provisions of the federal securities laws. The SEC acknowledged Willbros’ cooperation in investigating the claims. Willbros agreed with the DOJ to pay a criminal penalty of $22 million. Willbros and Willbros International Inc. (“WII”) also entered a three-year DPA with DOJ that requires the retention of an independent compliance monitor. The DOJ acknowledged Willbros’ thorough investigation, “exemplary cooperation,” enhanced compliance policies and procedures, and engagement of an independent corporate monitor.

Willbros, a Panamanian corporation with its administrative headquarters in the United States, is an international contractor providing oil and gas and construction services through its wholly owned subsidiary WII (also a Panamanian corporation). In Nigeria, WII conducted business through three affiliates: (1) its wholly owned subsidiary Willbros West Africa, Inc. (“WWAI”); (2) WWAI’s majority-owned subsidiary Willbros Nigeria, Ltd.; and (3) WWAI’s majority-owned subsidiary Willbros Offshore Nigeria, Inc.

From late 2003 through March 2005, Willbros employees paid more than $6.3 million in bribes to the Nigerian National Petroleum Corporation and the National Petroleum Investment Management Services officials to obtain a $387 million contract for engineering, procurement, and construction work on the Eastern Gas Gathering System (“EGGS”) gas pipeline project.

To obtain the EGGS business, Willbros entered into sham “consultancy agreements” with an outside consultant in Nigeria for 3% of the contract revenue for certain projects, including EGGS. The money was then wired from Willbros’ U.S. administrative office as directed by the invoice, and used by the consultant to bribe officials during negotiations with the foreign consortium to obtain the EGGS work. In 2005, as a result of the company’s internal investigation, the “consulting” agreements were terminated. Willbros executives and employees of their JV partner (1) agreed to borrow $1 million from WWAI’s JV partner; (2) agreed to borrow $500,000 from another individual; and (3) agreed to falsify invoices to obtain an additional $350,000, all of which were then in turn given to another consultant to be passed along to Nigerian officials.

Willbros also bribed Nigerian tax officials to reduce payroll taxes and bribed judicial officials for favorable treatment in pending cases. These bribes were also paid mostly through inflated or fictitious invoices funded by Willbros’ U.S. administrative office.

In Ecuador, WII conducted business through its subsidiary Willbros Ecuador. In Bolivia, WII conducted business through its subsidiary Willbros Transandina. Willbros employees in South America made $300,000 in corrupt payments to Ecuadorian officials of PetroEcuador and its subsidiary PetroComercial to obtain the contract for the Santo Domingo gas pipeline rehabilitation project. The emails arranging the payments were sent through Willbros’ server in the U.S.

Finally, Willbros employees implemented fraudulent tax avoidance schemes in Bolivia. Willbros and its subsidiaries used fabricated invoices to Bolivian vendors to show false
overpayment of value added tax ("VAT"). Willbros also avoided withholding taxes by misreporting the amount of tax withheld to Bolivian tax authorities. These fraudulent schemes resulted in material misstatements in Willbros Group’s financial statements. No payments to foreign officials were made in these schemes.

The SEC complaint also named Jason Steph, a U.S. citizen and former supervisory employee in Nigeria, Gerald Jansen, a Canadian citizen and former administrative supervisor in Nigeria, Lloyd Biggers, a U.S. citizen and former employee in Nigeria, and Carlos Galvez, a U.S. citizen and former accounting employee in Bolivia. Willbros Group, Steph, Jansen, Biggers and Galvez agreed to settle the SEC charges against them, without admitting or denying guilt. For Steph’s agreement, a court would later decide on whether Steph will pay a civil penalty and what the amount of such penalty will be. Jansen agreed to pay a civil penalty of $30,000. Biggers may not have had to pay a fine. Galvez agreed to pay a civil penalty of $35,000.

The Willbros matter raises a few familiar questions in the FCPA enforcement arena: first, this is yet another “books and records” case, where the company fabricated invoices to show overpayment of VAT, which resulted in material misstatements in financial statements. Another recurrent FCPA theme that we see in Willbros is the use of consultancy agreements with commissions that were used to cover bribes to Nigerian officials. Likewise, Willbros is also another “obtain or retain” case, in which bribes were used over time to win contracts, reduce payroll taxes, and receive favorable treatment in court cases. A novelty in Willbros was the application of the FCPA’s jurisdictional reach. One jurisdictional hook, for example, was the use of a U.S. server to transmit emails arranging the payments in Ecuador.

E. United States v. AGA Medical Corp. (D. Minn.) June 3, 2008

AGA Medical Corporation (AGA), a privately held medical device manufacturer, agreed to pay a $2 million criminal penalty for corrupt payments to Chinese government officials. AGA entered into a three-year DPA with DOJ, and in reaching the settlement, DOJ recognized AGA’s voluntary disclosure, thorough investigation, cooperation, remedial measures, and engagement of an independent corporate monitor.

AGA is incorporated and headquartered in Minnesota, and specializes in the manufacture of products designed for the minimally invasive treatment of congenital heart defects. Between 1997 and 2005, AGA, a high-ranking officer of AGA and other AGA employees agreed to make corrupt payments to doctors in China who were employed by government-owned hospitals and caused those payments to be made through AGA’s local Chinese distributor. In exchange for these payments, the Chinese doctors directed the government-owned hospitals to purchase AGA’s products rather than those of the company’s competitors. The distributor described the payments as being a “discount” to the hospital and physicians then asked for a “commission” on products sold, and informed AGA that AGA would not receive the business if AGA did not make the payments. The Chinese distributor traveled to Minnesota to discuss these kickbacks, and emails were exchanged between the Chinese distributor and AGA.

In addition, from 2000 through 2002, AGA sought patents on several AGA products from the State Intellectual Property Office. As a part of this effort, AGA and a high-ranking officer of AGA agreed to make payments through their local Chinese distributor to government officials employed by the State Intellectual Property Office in order to have the patents approved.

AGA is one in a string of cases to raise a concern unique to medical device and pharmaceutical companies. In ordinary circumstances, bribes paid to doctors or other healthcare professionals
would certainly raise legal or ethical concerns, but would not amount to violations of the FCPA. However, in this case, because the hospitals that employ the doctors who sought bribes are government-owned entities, the bribes are characterized, under the FCPA, as payments to government officials.

**F. SEC v. Faro Techs. Inc. (File No. 3-13059) June 5, 2008**

Faro Technologies Inc. agreed to pay a $1.1 million criminal penalty to DOJ in connection with corrupt payments to Chinese government officials, and an additional $1.85 million in disgorged profits and interest per an agreement with the SEC. DOJ recognized Faro’s voluntary disclosure, thorough investigation, remedial measures, and engagement of a corporate monitor. The DOJ entered a two-year DPA with Faro.

Faro is a public company that specializes in computerized measurement devices and software and is headquartered in Florida. Faro develops and markets portable computerized measurement devices and software to perform three-dimensional inspections of parts, assemblies, and machines for the manufacturing sector, including the automotive, aerospace, and consumer goods industries. Faro began direct sales of its products in China in 2003 through its subsidiary, Faro China, which is based in Shanghai. On several occasions in 2004 and 2005, a Faro employee authorized other Faro employees to make “referral fees” directly to employees of state-owned or -controlled entities to secure business for Faro. Through these “referral fees,” Faro secured contracts worth approximately $4.9 million from the Chinese government.

As for the method of the payments, Faro employees decided in 2005 to route the corrupt payments to Chinese government officials through a shell company to “avoid exposure,” according to internal e-mails. As a result, in January 2005 Faro China entered into a fake services contract with an intermediary and used it to pay bribes on behalf of Faro. The intermediary sent regular invoices to Faro for payment based on its services contract.

Faro stands out from other cases in that a shell company was explicitly created to avoid exposure for illegal activities. In order to make improper payments, the intermediary that charged “referral fees” through invoices from a fake services contract was created to route the payments used to secure contracts from the Chinese government.


Con-way Inc. consented to the SEC’s entry of judgment regarding books and records and internal controls charges, and agreed to pay a $300,000 civil penalty.

Con-way Inc. is a San Mateo, California international freight transportation company. Con-way’s wholly owned U.S. subsidiary controlled Emery Transnational, a Philippines-based firm engaged in shipping and freight operations in the Philippines. Between 2000 and 2003, Emery Transnational made approximately $244,000 in improper payments to foreign officials at the Philippines Bureau of Customs and the Philippine Economic Zone Area. These payments were made to induce these foreign officials to violate customs regulations, settle customs disputes, and reduce or not enforce otherwise legitimate fines for administrative violations.

Emery Transnational also made approximately $173,000 in improper payments to foreign officials at fourteen state-owned airlines that conducted business in the Philippines. The payments induced airline officials to improperly reserve space for Emery Transnational on the airplanes, to falsely under-weigh shipments, and to improperly consolidate multiple shipments into a single shipment, resulting in lower shipping charges.
Con-way brings up an issue that was not a focus of most other enforcement actions in the past year: cumulative payments. In this case, the bribes paid to customs officials consisted of hundreds of small payments that became almost a routine matter of business. These payments are distinguished from “grease payments” of facilitating payments in that they were used to obtain illegal actions that violated the customs rules. (In contrast, a grease payment to a customs official might be used to facilitate or speed up a legal customs decision.) Moreover, in Con-Way, we have an example of avoidance of successor liability. Here, the improper conduct occurred in 2000-2003, when Emery was owned by Con-Way. When Con-Way sold Emery to UPS in 2004, UPS assumed no liability.


According to the indictment, Nexus Technologies Inc., a privately held Delaware company with offices in Philadelphia, New Jersey and Vietnam, sold third-party underwater mapping and bomb containment equipment, helicopter parts, chemical detectors, satellite communication parts and air tracking systems to the government of Vietnam. From about 1999 through 2008, the defendants paid at least $150,000 to officials at Vietnam’s Ministries of Transport, Industry and Public Safety to secure supply contracts. According to the indictment, one principal of the company negotiated contracts and bribes with Vietnamese government officials while another negotiated with vendors in the United States. Two others allegedly arranged for the transfer of funds. If convicted, Nexus Technologies, Inc. faces a maximum $2 million fine per count. Although the ultimate outcome of the Nexus action remains unknown, we expect that this case may raise unique issues in export and commerce laws.


Aibel Group Ltd., a U.K. corporation, agreed to plead guilty to anti-bribery violations of the FCPA and failure to comply with the terms of its prior DPA. Aibel admitted making previously undisclosed illegal payments to Nigerian customs officials through its freight forwarder in return for preferential treatment. From 2002 to 2005, Aibel arranged at least 378 corrupt payments to Nigerian officials totaling about $2.1 million. The payments were coordinated largely through an affiliate’s office in Houston and were paid through a freight forwarding company. Aibel’s work in Nigeria involved a deepwater oil drilling operation known as the Bonga Project, for which the company provided engineering, procurement and subsea construction equipment.

In the plea agreement, Aibel admitted to both conspiracy and substantive counts of violating the FCPA, and Aibel also admitted that it had not complied with a deferred prosecution agreement it had entered into with the DOJ in February 2007 regarding the same underlying conduct. As part of the plea agreement, it will pay a $4.2 million criminal fine and serve two years on organizational probation. Among other things, it is required to report periodically its progress in implementing anti-bribery compliance measures.

Aibel is owned by Herkules Private Equity Fund and Ferd Capital, both of Norway. They acquired the company in June 2007 from a private equity group led by Candover, 3i and JPMorgan Partners, which bought Vetco Gray UK Ltd. and its affiliate Aibel in July 2004 from ABB Oil & Gas. When its current Norwegian owners acquired Aibel, it was already subject to the January 2007 deferred prosecution agreement. The new owners were required by the DOJ to ensure the company’s compliance with the terms of the deferred prosecution agreement after the acquisition.

The DOJ did not name the “major international freight forwarding and customs clearance company” Aibel used to make the illegal payments, but the DOJ did offer that this is the third time since July 2004 that entities affiliated with Aibel have pleaded guilty to violating the FCPA. (As we have discussed elsewhere, in July
2004, Vetco Gray UK Ltd. pleaded guilty to violating the FCPA’s anti-bribery provisions by paying more than $1 million in bribes to Nigerian officials, and in February 2007, three wholly owned subsidiaries of Vetco pleaded guilty to violating the anti-bribery provisions of the FCPA. As part of the February 2007 plea, the Vetco companies agreed to pay a combined $26 million criminal fine. Although Aibel, which was then also wholly owned by Vetco, was not fined in 2007, it was required to enter into a deferred prosecution agreement whereby it accepted responsibility for similar conduct by its employees. In the November 2008 plea agreement, Aibel admitted that it was not in compliance with the DPA.

Aibel demonstrates the gravity of compliance with enforcement action settlements and agreements. Here, Aibel was a party to its prior parent’s DPA, and the current matter brings Aibel to task for failing to comply with that agreement. Additionally, Aibel may be part of a much-larger investigation into payments paid to customs officials through a “major international freight forwarding and customs clearance company.” Since February 2007, about a dozen leading oil and gas-related companies have received letters from the DOJ and SEC asking for details about their relationship with Swiss logistics giant, Panalpina. Companies that have said they received requests include Shell, Schlumberger, Tidewater, Nabors Industries, Transocean, GlobalSantaFe Corp., Noble Corp., Pride International and Global Industries.

Panalpina said in its 2008 half-yearly report that it would divest its domestic operations in Nigeria to a local investment group and retain no ownership or operating interest. It completed the transaction in early December. It also said it was cooperating with an investigation by the DOJ and SEC and that its U.S. subsidiary had been instructed to produce documents and other information about services to certain customers in Nigeria, Kazakhstan and Saudi Arabia. Although there has been no explicit link between Aibel and the broader Panalpina investigation, we expect that there will be more fallout from the Panalpina matter in the near future.


In a landmark settlement, Siemens AG pleaded guilty to violating the internal controls and books and records provisions of the FCPA, reaching settlements with the DOJ and the SEC. It will pay a criminal fine of $450 million in the DOJ settlement and $350 million in disgorgement of profits under its agreement with the SEC. On the same day, officials from the Munich Public Prosecutor’s Office announced a settlement with Siemens on similar charges. In the German case, Siemens will pay €395 million (about $569 million), on top of the €201 million it paid in October 2007 to settle a related action brought by the Munich Public Prosecutor. In total, the Siemens case will bring in nearly $1.6 billion in fines, an amount that dwarfs any previous FCPA penalties by a longshot.

In the plea agreement, Siemens AG pleaded guilty to one count each of violating the FCPA’s internal controls and books and records provisions. Its Argentina subsidiary also pleaded guilty to conspiracy to violate the books and records provisions of the FCPA, and its Bangladesh and Venezuela subsidiaries pleaded guilty to conspiracy to violate the anti-bribery and books and records provisions. Under the plea agreement, an independent monitor will review and report on Siemens’ compliance over the next four years.

According to the court filings, bribery and corruption were a part of corporate culture at Siemens for years. For example, Siemens and its subsidiaries made illicit payments through intermediaries to secure lucrative government contracts around the world, using false documentation, slush funds, and cash desks, and even the old “cash-in-a-suitcase” trick. Bribes totaling over $1.36 billion were paid in connection with building transit lines in Venezuela, power plants in Israel, trains, signaling devices, and transmission lines in
China, mobile networks in Bangladesh, telecommunications projects in Nigeria, medical devices in Vietnam, China, and Russia, traffic control systems in Russia, national identity cards in Argentina, refineries in Mexico, and mobile networks in Vietnam. Siemens was also a player in the UN Oil for Food Program, paying kickbacks to Iraqi ministries in the form of “after-sales service fees” that inflated the value of contracts for power stations and equipment. What’s more, top-level executives were aware of the activities and failed to take action to correct them for years. Finally, by 2006, mounting concerns about possible prosecutions related to Siemens’ business practices prompted the company’s management to undertake a massive internal investigation and amnesty program that yielded unprecedented levels of information for the various government investigations. In releasing news of the Siemens settlement, DOJ and SEC authorities acknowledged that although the level of corruption in the case was egregious, Siemens’ cooperation with government investigators was exceptional, and Siemens was given substantial credit for this cooperation under the plea agreement, as well as for undertaking “extraordinary steps” to fundamentally restructure the company’s operations to make them transparent and honest.

The most salient feature of the Siemens case is the record-setting level of fines. No other enforcement action in the history of the FCPA has resulted in the kinds of fines that will come out of the Siemens matter. And, as the DOJ noted in the sentencing memorandum, without the exceptional level of government cooperation that Siemens displayed throughout the investigation, Siemens would likely have faced even higher fines. Setting the magnitude of the fines aside, however, the Siemens case brings up some other important issues in FCPA enforcements. For example, the settlement here is not an explicit deferred prosecution agreement, as we have seen in many other cases. It is a plea agreement, with specific terms precluding the DOJ from requiring the production of certain privileged materials as the company continues to cooperate with the investigation of Siemens operations (presumably, with the possibility that charges will be brought against individual officers and employees). In addition, the specific charges in the plea are to the FCPA’s reporting provisions, rather than to the bribery provisions. Despite the massive fines, this will allow Siemens to continue its business and move forward without fear of debarment from important U.S. government work.

K. SEC v. Fiat S.p.A. and CNH Global N.V.,
Civil Action No. 08 CV 0221 (D.D.C.)
December 22, 2008

Just when it looked like enforcement action in 2008 was over, the Italian automotive manufacturer Fiat S.p.A. settled FCPA charges with both the DOJ and SEC, agreeing to pay a $7 million penalty for a scheme involving illegal kickbacks in the UN Oil for Food scandal, and also agreeing to pay civil penalties of $3.6 million to SEC, as well as disgorging $7.2 million. Under criminal informations filed against three of Fiat’s subsidiaries—but not against Fiat itself—, the DOJ alleged that Fiat’s Iveco S.p.A. and CNH Italia S.p.A. subsidiaries participated in a conspiracy to commit wire fraud and violate the FCPA’s books and records provisions, and that Fiat’s CNH France S.A. subsidiary participated in a conspiracy to commit wire fraud. Although the parent company was not charged in the DOJ papers, Fiat and its subsidiaries agreed to be bound by a three-year deferred-prosecution agreement under which Fiat acknowledged responsibility for violations perpetrated by the subsidiaries, and under which Fiat and the subsidiaries agreed to implement a new compliance program and cooperate with authorities in the U.S. and abroad. In the SEC’s civil complaint, the agency charged Fiat and CNH Global (a majority-owned subsidiary headquartered in Amsterdam) with failing to maintain adequate systems of internal controls to detect and prevent the corrupt payments and failing to properly record them. In addition to the civil penalties and disgorgement of profits and
interest, both companies were permanently enjoined from future violations of the internal controls and books and records provisions. We noted, however, that neither the SEC nor DOJ required the appointment of a compliance monitor at Fiat or its subsidiaries. We suspect that, unlike many other deferred-prosecution agreements we have reviewed, the omission of a compliance monitor may be, in part, a result of both agencies’ acknowledgement of the remediative steps Fiat has already undertaken in light of the violations.

The Fiat investigation was another case of illegal kickbacks that occurred during the U.N. Oil for Food scandal. According to the DOJ and SEC filings, Fiat’s subsidiaries Iveco, CNH Italia, and CNH France handed over about $4.4 million in bribes to Iraqi officials to win lucrative contracts for construction vehicles and industrial pumps, gears, and other equipment. As in other Oil for Food cases, the companies inflated contract prices by approximately 10 percent and hid the kickbacks by recording them as “after sale service fees” and “commissions” to agents and distributors. Similar to other cases that developed in 2008, this matter underscored the potential for parent corporations to face liability for the actions of subsidiaries. Even though Fiat itself was not charged in the criminal counts, the deferred-prosecution agreement requires the parent company to post fines and take on the obligations of a new ethics and compliance program subject to oversight by the DOJ and SEC.

II. FCPA Opinion Releases

The DOJ’s opinion procedure was established by statute and allows companies and individuals to request the DOJ’s opinion as to whether a proposed transaction or conduct violates the FCPA. DOJ officials have publicly encouraged the use of the opinion review procedure. As discussed below, the DOJ issued releases on January 15, 2008, June 13, 2008, and July 11, 2008, stating that it would not seek enforcement actions with respect to proposals by the three requestors.

A. Release No. 08-01, January 15, 2008

The requesting corporation was interested in obtaining a controlling interest in a target owned by a government-owned entity (the majority owner) and a foreign private company. The foreign private company planned to create a new company, “Private Company 2,” to purchase 100% of the target’s shares. The requesting corporation then planned to purchase a controlling interest from Private Company 2 at a premium.

The DOJ agreed not to take any enforcement action in relation to the transaction, so long as:

- due diligence was conducted to monitor for violations of the FCPA and local laws;
- the requesting corporation made adequate disclosures to the foreign government;
- the private citizen will provide “representations and warranties regarding past and future anti-corruption compliance;” and
- the requesting corporation is able to dissolve the joint venture if the parties’ agreement is breached.

B. Release 08-02, June 13, 2008

Halliburton planned to submit a bid to acquire a U.K. company. Halliburton was bidding against a consortium which had already submitted an unconditional bid, and because of British legal restrictions, Halliburton had neither enough time nor adequate access to information to thoroughly perform due diligence. While it had been granted access to limited information regarding the target corporation, Halliburton was unable to disclose this information to the DOJ because of a confidentiality agreement it had entered into with the target company. The DOJ accepted a comprehensive due diligence plan
and agreed not to take any enforcement action in relation:

- to the acquisition as it does not violate the FCPA.
- to any violations of the FCPA which occurred prior to acquisition, provided such violations are disclosed within 180 days of closing; or
- to post-acquisition violations, provided Halliburton follows its plans for post-closing and remediation

C. Release 08-03, July 11, 2008

TRACE International proposed to pay certain expenses for approximately twenty journalists employed by media outlets based in China to enable them to attend a press conference being held by TRACE in Shanghai. Most of the media outlets are wholly owned by the government of China.

The DOJ indicated that it does not intend to take any enforcement action with respect to the planned provision of stipends and payment of transportation and lodging costs described in the request. Based on TRACE's representations, the stipend and expenses TRACE intended to pay on behalf of foreign officials fell within the FCPAs promotional expenses affirmative defense in that the expenses were reasonable under the circumstances and directly related to “the promotion, demonstration, or explanation of [TRACE’s] products or services.”

III. Enforcement Trends

The cases and opinion releases we have discussed above set forth some interesting trends in FCPA enforcement. Given the flurry of enforcement activity in recent years, it appears that pursuing FCPA violations perpetrated both by corporations and individuals will continue to be a priority for the DOJ and the SEC. In light of the heightened level of surveillance and enforcement, many corporations find themselves asking whether or not possible amnesty or reduced fines that might be obtained as a result of voluntary disclosure of violations is outweighed by the likelihood that violations will go undetected. In addition, we have observed that FCPA and other anti-corruption enforcement actions are receiving more attention abroad, from regulatory authorities as well as business partners. With greater attention to the impact of FCPA enforcement actions, companies are increasingly demonstrating concern for mitigating FCPA risks through acquisition-related due diligence practices.

A. Voluntary Disclosures

The enforcement divisions of the DOJ and SEC have indicated an increase in voluntary disclosures and resulting enforcement actions. These voluntary disclosures frequently arise from merger and acquisition activities and from the internal controls requirements found in Section 404 of the Sarbanes-Oxley Act. In remarks at industry conferences, SEC and DOJ officials have explained that corporations should be good corporate citizens and that if a company finds out there are problems, it is fundamental that the company clean up its act. Voluntary disclosure and subsequent cooperation can sometimes avoid an enforcement action altogether, or might lead to lesser charges, shorter monitor terms, or smaller fines. This was the case in the AGA Medical action discussed above, where authorities indicated that AGA Medical’s voluntary disclosure was taken into account in reaching a favorable disposition. Authorities have noted that a company may get away with a violation without the regulators ever discovering the violation, but if there is a problem and the government finds out that the company knew about the problem and did nothing, it is not a good way to start an investigation. Consider, for example, the Siemens matter, where the company actively undertook to hide known violations from authorities, which resulted in the largest fine ever imposed under the FCPA.
It is difficult to ascertain exactly what the enforcement authorities seek in terms of voluntary disclosures, although they have stated that they are more likely to want to hear disclosures if the value gained from the prohibited activity is of considerable value, involves high level executives or officers, or includes small bribes that, in the aggregate, amount to a large value. At a conference, Fraud Section Chief Mark Mendelsohn explained that companies do not have to self report every bribe they find, but need to implement systematic changes when violations are detected to ensure better compliance in the future. Again, we reference the Siemens matter, in which the company refused to institute changes until FCPA violations had already been detected. However, as the DOJ noted in the plea agreement in that case, the company was credited for overhauling its practices as the investigations proceeded. We can only imagine that Siemens may have fared better if it had implemented tighter controls in place before it was forced to do so in the face of mounting enforcement actions.

Moreover, as we noted above, various public filings are increasingly reflecting voluntary disclosures of FCPA investigations. And given the number of cases DOJ and SEC have indicated are under current review, we predict that numerous cases in 2009 will be based on voluntary disclosure.

B. Significant Increase in International Cooperation

Foreign regulators are increasingly moving over to the American model. More countries are involved now. For years, international anti-corruption agencies such as TRACE International and the OECD have urged foreign officials to step up their investigations into bribery and corruption in tandem with U.S. regulators. No country has matched the level of action in the U.S., but foreign regulators and press have increasingly taken notice of some recent cases—especially the investigations of the U.N. Oil for Food Program—and the U.S. process is viewed as a model for other countries. Parallel foreign enforcement actions and investigations are ongoing in countries such as Ireland, Italy, the Netherlands, France, and the U.K., and we expect that they will only increase. Notably, U.S. enforcement agencies have stated that they will take into account what foreign regulators are doing—see, for example, the DOJ’s decision to forgo criminal sanctions against one Flowserve subsidiary on the grounds that the subsidiary would enter a criminal plea with Dutch authorities. And the late-breaking developments in the Siemens case illustrate a new level of international collaboration. At a press conference announcing the Siemens settlement, the U.S. Attorney for the District of Columbia praised the working relationship established among enforcement authorities in the U.S. and Germany, stating that “the coordinated efforts...in this case set the standard for multinational cooperation in the fight against corrupt business practices.” Acting Assistant Attorney General Matthew Friedrich stated that, “[t]hrough international instruments like the OECD convention and the U.N. convention against corruption, we have seen our international partners significantly step up their anti-corruption efforts. Everything we’re seeing suggests that this trend will continue.” U.S. authorities have cautioned, however, that parallel foreign proceedings do not necessarily mean that a company will get a pass when it comes to U.S. enforcement actions.

C. Collateral Civil Litigation

As indicated in the introduction to this article, we have observed an increasing number of disclosures of pending FCPA investigations in the filings of publicly traded companies. This pattern points to a related concern about civil litigation collateral to FCPA enforcement actions. As soon as an indictment or settlement becomes public, a company is likely to face a barrage of lawsuits related to the facts and allegations underlying the FCPA enforcement action, including lawsuits by other companies seeking to demonstrate “clean hands” in the suspect transactions,
securities fraud claims, and shareholder derivative suits.

For example, in the Faro Technologies case discussed above, Faro entered into both civil and criminal settlements with the government, totaling close to $3 million. However, at the same time Faro was negotiating with the government, it was facing private civil suits under securities laws and a shareholder derivative suit. Indeed, contemporaneous to the government settlements, Faro agreed to settle an Exchange Act §10(b) suit filed on behalf of purchasers of Faro stock for $6.875 million, and was also in settlement negotiations with a plaintiff shareholder who filed a derivative suit on January 11, 2008.

In addition to lawsuits brought by investors, business partners also seem to be increasingly considering civil litigation stemming from FCPA investigations. The best example of this type of litigation is the case of Grynberg v. BP plc and Statoil ASA (filed February 12, 2008). The suit was filed in the U.S. District Court for the District of Columbia by Grynberg Production Corporation, a Denver-based oil company owned and run by chairman Jack Grynberg, who accuses the defendants of violating the United States’ Racketeer Influenced and Corrupt Organisations (RICO) Act. The basic allegation is that the defendants, with whom Grynberg had partnership agreements on Kazakh oil resources, bribed Kazakh officials without Grynberg’s knowledge. Although no formal government action has been brought against BP or Statoil in connection with the same allegations, Grynberg’s suit was an explicit preemptive move to protect himself against any FCPA charges that might eventually attach to his business partners. He stated in the Daily Telegraph that, “Unless I assert that I was an unwilling participant in this, my neck could be on the line. I’m too old to go to prison.” We have observed other similar preemptive strikes against business partners in connection with FCPA charges this year, and we expect this type of litigation to increase, especially in connection with improved understanding of the government’s voluntary disclosure and amnesty programs.

D. Acquisition-Related Due Diligence

Although we stress that opinion releases are binding for the requesting party only, they should be looked at by other companies only for guidance. Along with the many enforcement actions this year that raised successor liability for pre-acquisition violations by a target company, the Opinion Releases from January and June flagged the increasing importance of FCPA concerns in mergers and acquisitions. While imposing successor liability is legally in the hands of the government, it is clear that the DOJ recognizes the value of providing safe harbors for acquisition-related due diligence. In Opinion Release 08-02, the DOJ acknowledged that a policy that allows companies to engage in some degree of post-acquisition compliance integration without fear of prosecution for FCPA violations that may be uncovered during the course of such integration “advances the interests of the Department in enforcing the FCPA and promoting FCPA due diligence in connection with corporate transactions.” In other words, providing a safe harbor—while still setting forth precise requirements for acquisition-related due diligence “best practices” that a company should utilize to stay within that safe harbor—can encourage corporations with robust and effective compliance programs to bring other companies into the fold through post-acquisition integration and diligence. As a result, the overall level of compliance increases and better practices spread throughout affected industries.

IV. Conclusion

As we have discussed here, 2008 was another record-setting year in the world of FCPA enforcement actions. In addition to continued stiff fines and sentences, the cases we have described demonstrate the rising importance of FCPA due diligence and compliance practices, as well as voluntary disclosures, to mitigate the occurrence and impact of FCPA enforcement actions, tandem international prosecutions, and
costly collateral civil litigation. There are no signs that FCPA enforcement is waning—and if anything, the landmark Siemens agreement reached near the end of 2008 underscores our expectations that the period ahead will yield additional investigations, prosecutions, and enforcement actions.


If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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