

## Is 2011 the Year for an SEC Crackdown on FCPA ‘Gatekeepers?’

*Contributed by Stephen G. Huggard and Mark R. Vernazza, Edwards, Angell, Palmer & Dodge, LLP*

In investigating and penalizing financial crimes, the U.S. Securities and Exchange Commission and the U.S. Department of Justice long have targeted so-called “gatekeepers”—those who stand on the criminal sidelines but who, in the government’s view, are the eyes and ears best positioned to detect and prevent unlawful conduct. For this reason, a myriad of finance, accounting, legal and other professional service providers have found themselves in the perilous middle of government investigations into conduct in which they did not participate, and often did not even know about.

The DOJ sent a chilling reminder to “gatekeepers” in late 2010 when it indicted Lauren Stevens, a former VP-level corporate counsel at GlaxoSmithKline Plc. The DOJ accused her of lying to obstruct a federal investigation into whether the pharmaceutical company illegally marketed an antidepressant as a weight-loss drug.<sup>1</sup> According to the indictment, Stevens authored a series of 2003 letters to the DOJ denying that the company had promoted a certain drug for off-label uses, and failed to produce potentially inculpatory promotional slides requested by the government. Now that the government allegedly has discovered evidence of off-label promotion, Stevens is defending seven counts of federal charges and facing a maximum sentence of over 20 years in federal prison.

Despite the government’s continuing emphasis on prosecuting “gatekeepers” such as Stevens, the government counts relatively few, if any, true “gatekeeper” prosecutions from one of its most high-profile and big-dollar enforcement fields—the Foreign Corrupt Practices Act (FCPA). While the ever-rising tide of FCPA enforcement actions is more and more fueled by the prosecutions that seek to hold accountable individual actors as opposed to corporate forms, and indeed such prosecutions are fairly viewed as the hallmark of the government’s 2010 FCPA enforcement push, the individuals historically targeted in FCPA investigations are the primary actors (i.e., those who participate in the payment of bribes to foreign officials). Nonetheless, a number of enforcement cases and emerging trends from 2010 hint that the government is moving ever closer to the prosecution of true FCPA “gatekeepers,” and those tea leaves suggest 2011 may be the year.

### *A Prolific Enforcement Year*

By almost every measure, 2010 was another banner year for FCPA prosecutions, one fairly judged as the new high-water mark for enforcement of the anti-bribery statute.

Speaking in November 2010 at the 24th National Conference on the Foreign Corrupt Practices Act, Lanny Breuer, Assistant Attorney General for the

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DOJ's Criminal Division, boasted that the DOJ had just imposed the most criminal penalties in FCPA-related cases in any single 12-month period in history. "I'm proud to say that our FCPA enforcement is stronger than it's ever been—and getting stronger," Breuer said.<sup>2</sup>

Punctuated by civil and criminal penalties of \$365 million against Dutch-based Snamprogetti Netherlands, B.V., \$338 million against French-based Technip, S.A., and, most recently, an aggregate \$236.5 million penalty against seven companies related to the Swiss-based logistics company Panalpina World Transport (Holding) Ltd., an amazing 8 of the top ten largest penalties in the history of the 33-year-old FCPA were assessed in 2010.

The 2010 enforcement boom is reflected not only in these ballooning penalties, but also in the sheer number of prosecutions and enforcement actions. The SEC and DOJ both continued the trend of bringing more FCPA cases in 2010 than in any single prior year. For example, as Breuer explained, the DOJ charged over 50 individuals in the past two years, as compared to just two in 2004. "You can draw your own conclusions from these figures," quipped Breuer.<sup>3</sup>

### *Focus on Individuals*

In part responsible for the continued surge in enforcement numbers during 2010 was the government's much-advertised focus on prosecuting individuals responsible for particular FCPA violations, as opposed to the corporate forms which bear legal liability but whose prosecutions are perceived as lacking a personal deterrence element. The government has made no secret of this focus. Speaking on May 31, 2010 to the Organisation for Economic Co-operation and Development (OECD) in Paris, U.S. Attorney General Eric Holder forewarned, "[I]et me be clear, prosecuting individuals is a cornerstone of our enforcement strategy because, as long as [bribery] remains a tactic, paying large monetary penalties cannot be viewed by the business community as merely 'the cost of doing business.' The risk of

heading to prison for bribery is real, from the boardroom to the warehouse."<sup>4</sup>

Breuer echoed this sentiment in November 2010, saying that he "continue[s] to believe that prosecuting individuals—and levying substantial criminal fines against corporations—are the best ways to capture the attention of the business community."<sup>5</sup>

The government consistently delivered on this promise throughout 2010, but there was no more spectacular example of individual FCPA prosecutions than the undercover sting operation that led to the round-up style arrests of 22 executives from law enforcement and military supply companies at a January 2010 trade show in Las Vegas. As part of the undercover operation, FBI agents posed as intermediaries for a fictitious foreign defense minister in connection with a contract to provide equipment to the purported foreign country's presidential guard. According to the DOJ, a total of 22 individuals from 19 different companies participated in a bribery scheme in connection with the purported contract, each violating the FCPA.<sup>6</sup>

The splashy undercover Las Vegas round-up illustrates the current breadth and intensity of the government's once-sleepy FCPA enforcement efforts, particularly those with respect to individuals, but the mechanics of the DOJ's prosecution demonstrate why deterrence value is not the only reason the government is unlikely to relent in its prosecution of individuals.

Within a week of the Las Vegas arrests, prosecutors filed a criminal information against Richard Bistrong, a former sales executive of Armor Holdings, Inc., a military equipment manufacturer.<sup>7</sup> The information did not charge Bistrong in connection with the Las Vegas conspiracy, but rather with his participation in a conspiracy involving the payment of bribes by third parties in connection with the supply of equipment to United Nations peacekeeping forces in Nigeria and the Netherlands. Nonetheless, prosecutors have since disclosed that Bistrong is the unnamed individual

identified in the sting indictments as having introduced each of the conspirators to the FBI's undercover agent. Connecting these dots, once Bistrong got caught in his own FCPA scheme, he cooperated with the government and ensnared a litany of contacts from an industry whose corruption he knew well. Several weeks later, when the government's charges came under scrutiny from a federal district court judge, the government filed a superseding indictment against another accused conspirator, adding some detail to its charges.<sup>8</sup> Tellingly, the conspirator at issue announced that he intended to plead guilty and cooperate with the government.

The manner in which prosecutors used one potential defendant to bring down a network of conspirators, and then flipped one of those conspirators in order to bolster its charges, likely would not have been possible within the context of a more traditional enforcement action aimed at the corporate form, and it illustrates the government's win-win position when it comes to individual prosecutions.

### *Pushing the FCPA's Scope*

Unlike most other federal statutes, the scope of the FCPA historically has been determined by the charging decisions of government enforcers, not judicial scrutiny. This largely is because the government for many years geared its enforcement efforts towards companies with every incentive to resolve rather than litigate any potential FCPA charges. Such remains true to some extent even for individual prosecutions because *respondeat superior* can render an employer liable for the violations of its individual employees. As a consequence of this scant litigation record, the DOJ and SEC have defined the scope of the FCPA.

The FCPA, of course, has multiple bases for establishing culpability. The most well-known is the statute's anti-bribery provision, which outlaws providing any "thing of value" to any "foreign official" in order to "obtain or retain business."<sup>9</sup> For many years, the government has pushed to extend the scope of this provision. Several prosecutions, for

instance, have made clear the government's view that employees of state-owned or state-controlled foreign businesses fall within the meaning of the term "foreign official." The government reinforced this position in its enforcement actions involving vehicle-maker Daimler AG, which allegedly violated the FCPA by paying bribes, *inter alia*, to individuals working for a state-owned Chinese energy company and a government-owned Moscow purchasing agent.<sup>10</sup> (In April, Daimler announced a global settlement of FCPA charges with the DOJ and SEC for \$185 million, which was at that time the fourth largest combined penalty in FCPA enforcement history.<sup>11</sup>) The government has likewise broadened almost every aspect of the statute, including the meaning of the "obtain or retain business" provision.

### *Accounting Responsibility*

Less frequent have been the government's efforts to push the bounds of the statute's provisions criminalizing the failure to maintain adequate books and records for FCPA purposes. Those violations typically have been charged by the SEC rather than the DOJ because such allows the government more leeway in its accounting charges; a criminal FCPA accounting violation must be both "knowing" and proven beyond a reasonable doubt.<sup>12</sup>

The government, however, departed from its usual pattern of enforcing accounting provisions on several occasions during 2010, indicating a push towards expanding the scope of those provisions much in the same way as it has expanded the anti-bribery provisions. In March 2010, the government announced that U.S. chemical manufacturer Innospec, Inc. had resolved charges stemming from kickbacks paid to Iraqi officials in connection with the sale of a certain type of lead used as an oil additive.<sup>13</sup> As in a number of prior FCPA cases, the kickbacks were paid in connection with the U.N. Oil for Food program. The government alleged that Innospec's bribes were in most instances paid by its Swiss subsidiary Alcor Chemie Vertriebs GmbH, which recorded the kickbacks as "commissions."<sup>14</sup> Curiously, however, Innospec was charged with a criminal violation of the FCPA's accounting

provisions, apparently under the theory that Innospec knew that Alcor's financials masked corrupt payments. Such criminal prosecutions are rare, and this one should not go unnoticed.

The expanding use of the FCPA's accounting provisions as a basis to bring enforcement actions is a trend that may well continue in 2011. Moreover, these prosecutions have taken on an increasing flavor of those traditionally brought against "gatekeepers."

In April 2010, the SEC filed settled charges against four executives of the tobacco company Dimon, Inc. (now Alliance One International, Inc.) in connection with the payment of bribes in Thailand and Kyrgyzstan.<sup>15</sup> Among those charged were the company's regional financial director and international controller. Notably, both were charged by the SEC in spite of the fact that they did not have any direct participation in the payment of bribes, or even any specific knowledge that bribes were being paid. Rather, the SEC alleged that Dimon's regional financial director and international controller should have detected certain FCPA "red flags" based upon their respective responsibilities as to the company's accounting records.<sup>16</sup> With respect to the regional financial director, the SEC alleged that he should have realized and investigated Dimon's FCPA anti-bribery violations because he reviewed, discussed, and had certain accounting responsibilities with respect to the company's "special account" from which cash bribes were paid.

Government enforcers also sounded a "gatekeeper" theme in its prosecutions relating to Snamprogetti, a Dutch company that formed a joint venture with U.S.-based Kellogg Brown & Root Inc., Technip of France, and JGC Corporation of Japan in order to obtain a series of contracts related to the construction of a liquefied natural gas facility on Bonny Island in Nigeria.<sup>17</sup> Among other culpable conduct, the joint venture hired a British attorney to pay bribes to Nigerian government officials. Although the DOJ and SEC targeted the attorney as a primary actor, not a responsible bystander, the prosecution of a company's outside counsel is

unusual, and underscores the point that FCPA liability is no longer just for the on-the-ground sales executives in far-flung lands.

### *Aiding and Abetting*

Also swirling in 2010's enforcement winds is the notion that particularly DOJ will endeavor to implicate more and more entities and individuals in FCPA cases by relying on a broader concept of aiding and abetting law. Such would be useful to prosecutors because federal law provides that anyone guilty of aiding and abetting an FCPA violation bears the same liability as a principal, and can be penalized in the same fashion.<sup>18</sup>

A broad aiding and abetting approach portends to help the government overcome a number of jurisdictional and other prosecutorial limitations. For example, in the Panalpina case, for which the government exacted a combined fine of more than \$236 million from seven companies in November 2010, the SEC charged Panalpina itself, despite the fact that the company is not a U.S. issuer (and thus not typically subject to the FCPA).<sup>19</sup> However, the SEC charged Panalpina with aiding and abetting FCPA violations it caused to be committed by its customers, U.S. issuers who paid money to Panalpina.

According to Sheryl Scarboro, Chief of the SEC's Foreign Corrupt Practices Act Unit, Panalpina is the first non-U.S. issuer to be charged by the SEC.<sup>20</sup> Under such a broad reading of aiding and abetting in the context of the FCPA, the government could push its prosecutions to target those typically beyond reach, and expose a variety of additional actors to potential liability.

### *Enter Dodd-Frank*

Also promising to ratchet up FCPA enforcement activity is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), enacted into law in July 2010. While the Dodd-Frank Act otherwise implements a sweeping overhaul of the country's financial regulatory system, the key provision impacting FCPA enforcement is its

guarantee of certain monetary rewards to whistleblowers. Specifically, section 922 of the Dodd-Frank Act adds a new Section 21F to the Securities Exchange Act of 1934 entitled “Securities Whistleblower Incentives and Protection.” Pursuant to that provision, where a whistleblower supplies so-called “original information” leading to the imposition of an SEC penalty, the Act requires the government to pay the whistleblower between 10 and 30 percent of that and any related penalties, including criminal fines. Considering the magnitude of recent combined penalties, these whistleblower payments could be staggeringly large (e.g., at least \$36.5 and as much as \$109.5 million in the Snamprogetti case).

One need not strain to conjure up a scenario in which a whistleblower could tip the SEC to a potential FCPA violation. The Daimler investigations, resolved in April 2010 for a combined penalty of \$185 million, were initiated by a former employee who sued the company in 2004, alleging he had been terminated after challenging secret accounts and bribes.<sup>21</sup> If the Daimler whistleblower had brought his information directly to the SEC in the Dodd-Frank era, he would be compensated to the tune of at least \$18.5 million.

#### *Early Disclosure Incentives*

The incentives for whistleblowers surely will be tantalizing, and the number of prosecutions may proliferate for this reason. The whistleblower rewards, however, stand to have another impact: Although companies often prefer to investigate bribery allegations internally to determine whether they have merit before going public and bringing them to the attention of government enforcers, the Dodd-Frank Act in many cases incentivizes companies essentially to race whistleblowers to the SEC’s front door. If the whistleblower wins the footrace, he or she stands to be paid a potentially vast fortune, and leaves the company without the full benefit of the sentencing reduction associated with cooperating, even if it does so for the remainder of the investigation. This is exactly what happened in the Daimler case, where the company’s culpability score was reduced only

partially because it reported its FCPA matter after the filing of the whistleblower claim.<sup>22</sup> However, if the company gets to the SEC first, it wins the government’s good graces and sentencing reductions, and the whistleblower gets nothing.

Further, it seems that the government would like to increasingly incentivize early reporting in all cases, not just those initiated by whistleblowers. In November 2010, Breuer said “I can assure you that if you do not voluntarily disclose your organization’s conduct, and we discover it on our own, or through a competitor or a customer of yours, the result will not be the same . . . there is no doubt that a company that comes forward on its own will see a more favorable resolution than one that doesn’t.”<sup>23</sup>

Breuer cited the Panalpina cases as an example of the types of government treatment that can flow from various methods of reporting. Most notably, Breuer spoke about the oil and gas services company Noble Corporation, which Breuer said self-disclosed and provided significant cooperation to the government. “In part for those reasons,” remarked Breuer, “we entered into a non-prosecution agreement with the company, and Noble paid a criminal penalty substantially below the bottom of the guidelines range.”<sup>24</sup>

#### *A Little Friendly Competition?*

Another factor suggesting even more FCPA enforcement cases in 2011, and in particular those involving “gatekeepers,” is the newly enacted U.K. Bribery Act. Although the U.K.’s anti-bribery legislation had long been criticized as out of step with the OECD convention, the new Bribery Act represents the state of the art of anti-bribery statutes, and in many respects reaches further than the FCPA. For example, the Bribery Act criminalizes both the payment and receipt of bribes (as opposed to the FCPA, which prohibits only the payment of bribes) and does so with respect to both the public and private sectors (the FCPA only concerns payments to foreign government officials). Moreover, where anyone “associated” with a particular corporation violates the statute, the corporation is strictly liable unless it can prove that

it had “adequate procedures” to prevent the bribery.

The Bribery Act also puts “gatekeepers” in the sights of government enforcers in that the U.K. requires those professionals who learn of criminal conduct in a non-privileged setting to report the offense or risk prosecution themselves. Thus, your accountant can well be your informant. The Bribery Act—in many ways even stronger than the FCPA—will likely place gatekeepers on the horns of a reporting dilemma and in the sights of prosecutors who do not agree with their choices.

This expansive new U.K. statute will no doubt result in a number of significant prosecutions, including those of “gatekeepers,” and the U.S. is likely to tag along, if not become a bit jealous of the shiny new tools available to U.K. enforcers. As Breuer explained in November 2010, “[p]artnerships like the one we have with the Serious Fraud Office are critical to our transnational approach to combating foreign bribery, and we intend increasingly to rely on our foreign partners in future cases.”<sup>25</sup> If the new Bribery Act leads to the prosecution of lawyers, accountants, and other professional service providers in the U.K., look for U.S. enforcers to match those efforts with similar prosecutions under the FCPA.

*Stephen G. Huggard is a partner in the Boston office of Edwards, Angell, Palmer & Dodge, LLP. A former federal prosecutor, Mr. Huggard is co-chair of the firm’s Securities and Government Enforcement practice group. Mark R. Vernazza is an associate in the firm’s Boston office.*

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<sup>1</sup> *U.S. v. Stevens*, No. 10-cr-00694, Indictment (filed D. Md. Nov. 9, 2010).

<sup>2</sup> DOJ, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act, Speech (Nov. 16, 2010).

<sup>3</sup> *Id.*

<sup>4</sup> DOJ, Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development, Speech (May 31, 2010).

<sup>5</sup> See *supra* note 2.

<sup>6</sup> DOJ, *Twenty-two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme*, Press Release No. 10-048 (Jan. 19, 2010).

<sup>7</sup> *U.S. v. Bistrong*, No. 10-cr-00021, Information (filed D.D.C. Jan. 21, 2011).

<sup>8</sup> *U.S. v. Alvarez*, No. 09-00348, Superseding Information (filed D.D.C. Mar. 5, 2010).

<sup>9</sup> 15 U.S.C. §§ 78dd-1, *et seq.*

<sup>10</sup> DOJ, *Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties*, Press Release No. 10-360 (Apr. 1, 2010).

<sup>11</sup> *Id.*

<sup>12</sup> See 15 U.S.C. § 78m.

<sup>13</sup> DOJ, *Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba*, Press Release No. 10-278 (Mar. 18, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> SEC, *SEC Files Anti-Bribery Charges Against Former Finance Executives and Senior Employees Of Global Tobacco Company*, Lit. Rel. No. 21509 (Apr. 29, 2010).

<sup>16</sup> *Id.*

<sup>17</sup> DOJ, *Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty*, Press Release No. 10-780 (July 7, 2010).

<sup>18</sup> See 18 U.S.C. § 2.

<sup>19</sup> *SEC v. Panalpina, Inc.*, No. 10-cv-04334, Complaint (filed S.D. Tex. Nov. 4, 2010).

<sup>20</sup> See The Wall Street Journal Law Blog, *With Panalpina Case, SEC Spreading its Wings on Foreign Corruption*, November 5, 2010, available at <http://blogs.wsj.com/law/2010/11/05/with-panalpina-case-sec-spreading-its-wings-on-foreign-corruption>.

<sup>21</sup> *U.S. v. Daimler AG*, No. 10-cr-00063, Sentencing Memorandum (filed D.D.C. Mar. 22, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> See *supra* note 2.

<sup>24</sup> See *supra* note 2.

<sup>25</sup> See *supra* note 2.