

**FIRST QUARTER OF 2010 SHOWS SHARP INCREASE IN FCPA ENFORCEMENT**

Although enforcement of the Foreign Corrupt Practices Act (“FCPA”) has been trending upward for several years, the first quarter of 2010 saw unprecedented developments in the enforcement of the statute. In the first three months of 2010 alone, the U.S. government brought or resolved FCPA charges against thirty-six companies and individuals—thirty more than in the first quarter of 2009 and thirty-two more than in the first quarter of 2008. The U.S. Department of Justice (the “DOJ”) and the U.S. Securities and Exchange Commission (the “SEC”) settled five cases against corporations, including two settlements of long-term investigations of major non-U.S. corporations, BAE Systems plc and Daimler AG, involving hundreds of millions of dollars in fines and penalties. The DOJ also unveiled a multi-year FCPA undercover investigation with the simultaneous indictment and arrest of twenty-two individuals who allegedly agreed to pay bribes overseas while dealing with an undercover FBI agent and a cooperating witness.

This unprecedented level of enforcement activity has been accompanied by significant legislative developments and increased anticorruption enforcement overseas. In the U.S., proposed financial reform legislation in the House and Senate contains provisions that would reward FCPA whistleblowers with a share of any fines or penalties collected by the DOJ or SEC in FCPA prosecutions. Overseas, Britain’s Serious Fraud Office (“SFO”) has brought several anticorruption enforcement actions in the past several months, and Parliament recently passed a tough new comprehensive antibribery law. This will likely add momentum to the trend toward increased bilateral and multilateral anticorruption cooperation and enforcement.

***U.S. enforcement authorities continue to target non-U.S. corporations***

On March 1, 2010, BAE Systems plc (“BAE”) pleaded guilty to, among other things, conspiring to make false statements about its FCPA compliance program. The charges arose from BAE’s representations to various U.S. government agencies, including the Department of Defense and the DOJ, that it would implement policies and procedures to ensure its compliance with antibribery laws, including the FCPA. In fact, according to court documents, BAE knowingly and willfully failed to create sufficient compliance mechanisms and to make required disclosures to the U.S. government. As a result, BAE “made a series of substantial payments to shell companies and third party intermediaries,” including “marketing advisors.”<sup>1</sup> BAE actively concealed the identity of these marketing advisors from the U.S. government and failed to disclose some of the payments, which allegedly resulted in a gain to the company of more than \$200 million. BAE’s settlement with the DOJ also resolves allegations surrounding the Al-Yamanah contract, an \$80 billion deal that BAE signed in the mid-1980s for the sale of jet

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<sup>1</sup> <http://www.justice.gov/opa/pr/2010/March/10-crm-209.html>.

fighters to Saudi Arabia. As part of its guilty plea, BAE agreed to pay a \$400 million criminal fine and retain a DOJ-approved “ethics monitor” to serve on its marketing advisor panel. At the same time, BAE resolved a long-running bribery investigation in the U.K. by pleading guilty to failing to keep reasonably accurate accounting records in relation to its activities in Tanzania and paid a £30 million penalty.

Another major non-U.S. corporation, Daimler AG (“Daimler”), also resolved a long-running FCPA case. On April 1, 2010, Daimler and a Chinese subsidiary entered into deferred prosecution agreements with the DOJ, while two other Daimler subsidiaries, one based in Germany and the other in Russia, each entered guilty pleas to FCPA charges. Daimler also entered into a consent decree to resolve FCPA allegations brought by the SEC. According to court documents, Daimler and its subsidiaries made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries to assist in securing contracts with government customers valued at hundreds of millions of dollars. Daimler and its subsidiaries agreed to pay a total of \$93.6 million in criminal fines and penalties and, under its settlement with the SEC, Daimler AG agreed to pay another \$91.4 million in disgorgement of profits. As part of the settlements, Daimler AG agreed to appoint former FBI Director Louis Freeh to act as an independent monitor for Daimler for a three-year period.

***The SEC brings civil FCPA charges for payments extorted under the threat of prison***

On January 11, 2010, the SEC filed a settled civil enforcement action against NATCO Group Inc. (“NATCO”), charging NATCO with violating the books and records and internal controls provisions of the FCPA in connection with payments to immigration officials in Kazakhstan. Although this action involved a relatively modest civil penalty of \$65,000, it is noteworthy because the SEC brought charges against NATCO despite acknowledging that the payments had been extorted by Kazakh officials under threats of imprisonment and deportation.

***Judge Ellen Huvelle calls into question the propriety of compliance monitors***

On March 18, 2010, Innospec Inc. pleaded guilty to a 12-count information charging, among other things, FCPA violations in connection with the payment of kickbacks to the former Iraqi government in connection with the UN Oil for Food Program, as well as bribe payments made to officials in the Iraqi Ministry of Oil. As part of its guilty plea, Innospec agreed to pay a \$14.1 million criminal fine. The company also settled a related civil enforcement action brought by the SEC and agreed to disgorge \$11.2 million in profits. Notably, during the plea hearing, U.S. District Judge Ellen Segal Huvelle harshly criticized independent compliance monitors. Commenting on the fact that the monitor was not named in the Innospec plea agreement, Judge Huvelle stated: “It’s an outrage, that people get \$50 million to be a monitor. . . . I’m not comfortable, frankly, signing off on something that becomes a vehicle for someone to make lots

of money.” Ultimately, Judge Huvelle accepted Innospec’s guilty plea on the condition that the DOJ inform her once a monitor had been selected.<sup>2</sup>

***For the first time, the DOJ brings charges against corrupt foreign officials***

The FCPA does not provide a mechanism to prosecute foreign officials for receiving bribes. Presumably for reasons of international comity, Congress elected not to craft the statute to permit the prosecution of corrupt foreign officials in the United States. Nevertheless, the DOJ has previously stated its intention to prosecute corrupt foreign officials under other available federal statutes and did so recently in a case involving bribes paid to Haitian government officials. In December 2009, the DOJ charged five individuals, including two officials of the state-owned Telecommunications D’Haiti, with money-laundering in connection with bribes received from three U.S. telecommunications companies. On March 12, 2010, Robert Antoine, one of the Telecommunications D’Haiti officials, pleaded guilty to the money-laundering charges. Antoine is awaiting sentencing, and the charges against the other former Haitian official and additional codefendants are pending.

***The DOJ continues its focus on the prosecution of individuals***

In January 2010, twenty-two executives and employees of companies in the military and law enforcement products industry were indicted in a long-running undercover investigation. In addition to the coordinated arrests at a Las Vegas convention, as many as 150 FBI agents simultaneously executed fourteen search warrants in at least five states. The defendants were charged with FCPA and money-laundering charges based on an alleged scheme to pay “commissions” to a sales agent believed represented the minister of defense of an African country. In fact, the scheme was part of an undercover operation in which the defendants dealt with an FBI cooperating witness and undercover FBI agent. The defendants are awaiting trial.

Aside from its sensational nature, this case demonstrates the resources—and resourcefulness—that the DOJ will employ in FCPA cases. The time, effort, and resources necessary to conduct a multi-year sting operation, fourteen simultaneous searches, and a coordinated “takedown” demonstrate the DOJ’s commitment to vigorous FCPA enforcement. Indeed, in the first three months of 2010, the DOJ has already indicted nearly as many individuals as it did in all of 2009, when a total of twenty-four individuals were charged with FCPA violations, and more than all of 2008, when seventeen individuals were charged.

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<sup>2</sup> Christopher M. Matthew, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, CORRUPTION & COMPLIANCE, Mar. 18, 2010, <http://www.mainjustice.com/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/>.

***Expect FCPA enforcement activity to increase throughout 2010 and beyond***

A large number of pending cases, along with several significant enforcement initiatives, indicate that FCPA enforcement will continue to be busy for the foreseeable future. During the first quarter of 2010, four companies announced reserves of over \$100 million each, some significantly higher, in anticipation of upcoming FCPA settlements. Based on other reserve announcements, other, smaller settlements also appear on the horizon.

Additionally, a number of new enforcement initiatives and prosecutorial tools recently announced or implemented in the U.S. and abroad will likely continue this enforcement trend. On the civil enforcement side, the SEC recently announced the reorganization of its Enforcement Division, which includes the creation of a new unit to focus on FCPA enforcement. This new FCPA Unit will be led by Cheryl J. Scarboro, who, in a speech following her new appointment, indicated that the unit's primary mission will be to make the SEC more proactive in enforcing the FCPA, for instance through "targeted sweeps and sector-wide investigations, alone and with other regulatory counterparts both here and abroad."<sup>3</sup>

In addition, anticorruption enforcement is likely to rise in the U.K., which recently enacted its long-awaited, comprehensive Bribery Act, which creates a specific statutory offense for bribery of foreign public officials. The Bribery Act is similar to, but in some respects even broader than, the FCPA. Unlike the FCPA, the Bribery Act criminalizes the receipt of bribes, in addition to the payment of bribes, if the bribe was intended to induce or reward "improper performance" of an official function. Significantly, the Act also creates a new strict liability offense for failure of a commercial organization to prevent bribery. Under this provision, a commercial organization can be prosecuted for failure to prevent bribery regardless of the knowledge or intent of its management, unless the organization can show that it had appropriate anticorruption compliance procedures in place at the time that the bribery occurred.

Finally, garnering relatively little attention amid a flurry of U.S. Congressional action related to financial reform, a bill released on March 15 by Senator Christopher Dodd, Chairman of the Senate Banking Committee, would establish a new program to reward whistleblowers who assist the SEC in investigating securities violations, including violations of the FCPA. Under the bill, whistleblowers providing "original information" leading to a successful enforcement action resulting in monetary sanctions exceeding \$1,000,000 will be paid between 10 and 30 percent of any money the government collects as a result of the provided information. The calculation of "monetary sanctions" would include not only fines and disgorgement collected by the SEC, but also any fines assessed in related actions brought by the DOJ and foreign law enforcement agencies. The precise amount of the award would be decided by the SEC after consideration of criteria such as the significance of the information to the success of the action and the degree of assistance provided by the whistleblower.

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<sup>3</sup> Cheryl J. Scarboro, Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), available at <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm#scarboro>.

Based on fines imposed in recent FCPA enforcement actions, the potential monetary rewards for whistleblowers would provide enormous incentives to blow the whistle on potential corruption. For example, a whistleblower in the Halliburton matter, settled in February 2009, could have received between \$57.9 and \$173.7 million based on the combined DOJ and SEC settlement amount paid by the company. Even in an FCPA action with more moderate fines and disgorgement, the monetary rewards for a whistleblower would be significant. For instance, a potential whistleblower in the Innospec matter, described above, could receive between \$2.5 and \$7.5 million.

Such significant financial rewards for whistleblowers would underscore the need for effective compliance programs to prevent, or detect in a timely way, potential FCPA violations. It would also create a significant new variable in the difficult calculus whether to make a voluntary disclosure: potential whistleblower claims by financially self-interested employees.

Dodd's bill is likely to be voted on in the Senate this month. It is probable that the bill will be passed in some form, particularly in light of the current pressure to implement some form of financial reform prior to the November 2010 elections. Additionally, the House of Representatives recently passed its own financial reform bill, which contains whistleblower provisions similar to those in the Senate bill.<sup>4</sup> The presence of substantially similar whistleblower provisions in the Senate and House bills makes it highly likely that some form of a whistleblower reward provision will be included in the final legislation. Although aspects of the Senate's financial reform bill have been controversial, there has been no significant opposition to the whistleblower provisions.

All of these developments suggest that FCPA enforcement is likely to increase in both the short and long term. The recent DOJ-FBI sting operation and the formation of the SEC's new FCPA Unit indicate that both criminal and civil enforcement authorities are making FCPA enforcement a top priority. Similarly, the U.K. Bribery Act provides the SFO with a powerful tool to prosecute corruption involving U.K. companies or otherwise linked to the U.K. Finally, if a financial reform bill passes with a whistleblower provision, as is likely to occur, corporate employees will have a strong incentive to disclose potential misconduct to the government. Companies must maintain rigorous systems to prevent and detect potential violations and proactively address—through investigation and remediation—any issues that do arise.

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If you have any questions concerning the foregoing or would like additional information, please contact Martin J. Weinstein (202-303-1122, mweinstein@willkie.com), Robert J. Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey D. Clark (202-303-1139, jdclark@willkie.com), or the attorney with whom you regularly work.

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<sup>4</sup> Unlike the Senate bill, the House bill does not impose a 10% minimum on the whistleblower's monetary reward.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, D.C. 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, D.C. telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at [www.willkie.com](http://www.willkie.com).

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