

## Another Landmark Year: 2010 FCPA Year-In-Review and Enforcement Trends For 2011

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It was barely one year ago—on November 17, 2009—that Assistant Attorney General Lanny Breuer recapped 2009's Foreign Corrupt Practices Act ("FCPA")<sup>1</sup> enforcement efforts. Breuer, with palpable confidence, commented: "One can say without exaggeration that this past year was probably the most dynamic single year in the more than thirty years since the FCPA was enacted."<sup>2</sup>

And the intervening year has only improved the increasingly sanguine outlook for Breuer and his federal law enforcement troops. On November 16, 2010, offering his follow-on FCPA retrospective, Breuer announced a prosecutorial sea change: "We are in a new era of FCPA enforcement."<sup>3</sup>

Some observers were left unsettled by the disciplinarian tone of Breuer's remarks.<sup>4</sup> The 2010 FCPA statistics, however, bear him out. Twin FCPA enforcers, the U.S. Department of Justice and the Securities and Exchange Commission, have in fact breezily lapped their record-setting 2009 totals. Breuer's new era, indeed, appears to be upon us.

But the gross 2010 prosecution figures are not the only cause of the growing sense of concern creeping into the world's corporate boardrooms. A number of steadily-developing trends presage that, while 2010 was certainly a milestone year for FCPA enforcement, if the current trajectory of FCPA actions holds, 2011 will almost certainly eclipse 2010's considerable achievements. Providing a solid foundation for this bit of FCPA fortune-telling are a number of key developing trends:

- Investigative approaches and techniques are growing increasingly proactive and aggressive and will result in more indictments and more trials.
- Whistleblower bounty provisions were recently fine-tuned to lure in additional tipsters.
- The prosecution of individual defendants is now a top enforcement priority.
- Law enforcement agent specialization will permit effective industry-specific enforcement.
- A widening of the demand side of the enforcement net to also catch bribe recipients and those middlemen who assist them.
- A congressional push to mandate debarment of governmental contractors found to be FCPA violators.
- Policies aim to encourage compliance by offering meaningful consideration to companies with robust compliance and ethics programs.
- Multi-jurisdictional cooperation is expanding.

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## *The Numbers Tell the Tale*

Historical context gives the extraordinary 2010 FCPA enforcement numbers added punch. Consider that in 2004, DOJ charged only two persons under the FCPA, collecting criminal fines of roughly \$11 million.<sup>5</sup> In 2005, five individuals were charged, and about \$16.5 million in criminal fines trickled into government coffers.<sup>6</sup>

What a difference five years make. As of this writing, in 2010 the government resolved more than 50 FCPA enforcement actions, with some additional 35 defendants awaiting trial on FCPA charges.<sup>7</sup> Cases against individuals have more than doubled since 2009, and by the summer of 2010, the government had already reeled in more than \$1 billion in corporate fines and disgorgements. Indeed, the corporate fines/disgorgements in the largest eight 2010 FCPA enforcement cases *alone* amounted to just over \$1.53 billion.

A glance beyond U.S. borders makes these figures even more remarkable. In 2010, while other countries earnestly strived to narrow the gap, the U.S. again outpaced the rest of the world's collective enforcement efforts by a 3:1 ratio. The U.S. continues to file more than 70% of the world's foreign anti-bribery charges.<sup>8</sup> In (a far distant) second place is the U.K., with 4.3% of world-wide foreign anti-bribery prosecutions.<sup>9</sup> These raw numbers should erase any doubt as to whether the quotidian pronouncements of U.S. enforcement earnestness are more pivot than carousel.

## *Sarbanes-Oxley Voluntary Disclosure Channels Far From Dry*

Observers in late 2009 questioned whether the U.S. government may have begun to exhaust its post-Sarbanes-Oxley voluntary disclosure channels, as major corporate players established professionally-run compliance and ethics programs and increasingly adopted a strict-compliance approach. But, to the extent 2010's unenviable entrants to the all-time corporate "Top Ten Fine & Disgorgement List" are any indication, major multinational corporations will continue to provide the government with significant untapped and exploitable compliance problems.

Consider that no fewer than *eight* of the ten current all-time FCPA violator scoreboard leaders earned the dubious distinction this year. And, demonstrating that the U.S. government does not only pick on its own, the Top Ten list includes plenty of foreign companies:<sup>10</sup>

### **1. Siemens (Germany)**

Judgment entered January 6, 2009: \$448.5 million criminal fine; SEC disgorged \$350 million in profits.

### **2. KBR / Halliburton (USA)**

Judgment entered February 12, 2009: \$402 million criminal fine; SEC disgorged \$177 million in profits.

### **3. BAE (U.K.)**

Pleaded guilty March 1, 2010: \$400 million criminal fine.

### **4. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy)**

Deferred prosecution filed July 7, 2010: \$240 million criminal fine; SEC disgorged \$125 million in profits.

## 5. Technip S.A. (France)

Part of "Bonny Island Settlements."<sup>11</sup> Deferred prosecution agreement filed in June 2010: \$240 million criminal fine; SEC disgorged \$98 million in profits.

## 6. Daimler AG (Germany)

Deferred prosecution agreement placed in the record April 1, 2010: \$29.1 million criminal fine (in total, Daimler AG and its subsidiaries liable for \$93.6 million in criminal fines and penalties); SEC disgorged \$91.4 million in profits.

## 7. Panalpina (Switzerland)

Deferred prosecution agreement placed in the record November 4, 2010: \$70.5 criminal fine; SEC disgorged \$11.3 million in profits.

## 8. ABB Ltd. (Switzerland)

Deferred prosecution agreement placed in record September 29, 2010: \$17.1 fine; \$16.5 civil penalty; SEC disgorged \$22.8 million in profits.

## 9. Pride International, Inc. (USA)

Deferred prosecution agreement placed in the record November 4, 2010: \$32.6 million criminal fine; SEC disgorged \$23.5 million in profits.

## 10. Shell Nigeria Exploration and Production Company (U.K./Holland)

Deferred prosecution agreement placed in the record November 4, 2010: \$30 million criminal fine; SEC disgorged \$18.1 million in profits. (And, as a follow-on effect of the investigation, the Nigerian government on December 7, 2010, filed its own set of charges which, as of this writing, are reported to be close to settlement).

In short, this year has been a record-shattering one for DOJ and the SEC. If there is any truth to the old saw about success breeding success, those in today's Top Ten will soon be displaced.

*OECD Cheers While U.S. Chamber of Commerce Jeers*

2010 has vividly demonstrated that U.S. anti-bribery enforcement is hardly a consensus-generating topic. While the Organization for Economic Cooperation and Development ("OECD"), for example, eagerly applauded U.S. anti-bribery efforts as a model the world should emulate, the U.S. Chamber of Commerce depicted these same efforts as anti-competitive and destructive to U.S. business.

We turn first to the OECD's more flattering take on things. Its 1997 Anti-Bribery Convention, by now adopted by some 38 countries, sets forth standards for criminalizing bribery of foreign public officials in international business transactions.<sup>12</sup> On October 21, 2010, the OECD Working Group, tasked with evaluating whether the U.S. is complying with its obligations, issued the much-anticipated "Phase 3 Report."<sup>13</sup> The Report concluded

that U.S. enforcement efforts resulted in (1) dramatically stepped-up prosecutions of companies and individuals, and (2) vastly increased fines and disgorgements. This, predictably, was music to the enforcers' ears.

However, following hot on the heels of the generally glowing OECD Phase 3 Report came a leveling blow courtesy of a U.S. Chamber of Commerce paper tellingly titled "Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act."<sup>14</sup> The Chamber's list of grievances is long,<sup>15</sup> but its chief complaints inform virtually all others:

- Judicial oversight over deferred prosecution agreements has not kept pace with the explosive rise in FCPA enforcement, resulting in overly-broad government interpretations of the FCPA's vaguely-defined term "foreign official"<sup>16</sup> and an ever-expanding view regarding payments intended to "obtain and retain business."<sup>17</sup>
- Lack of judicial management<sup>18</sup> and opaque settlement agreements leave the business community with little guidance as to what conduct runs afoul of the law; DOJ and the SEC have inappropriately assumed the role of both *de facto* prosecutor and judge, creating the danger of possible prosecutorial overreach, and leaving U.S. business interests damaged in the process.

If nothing else, the increasingly rancorous debate over the future direction of FCPA enforcement signals that all sides of the political and legal divide share the understanding that FCPA is here to stay. On the other hand, how to best enforce it from a legal and public policy perspective is another matter entirely.

### *FCPA Cases Investigated Like "Real" Crimes (and by Agents Cooperating Across Borders)*

U.S. federal law enforcement in 2010 has reached deep into its tool box of traditional law enforcement tactics and techniques. For the first time in the FCPA context, enforcers are using old stand-by's such as undercover agents and informants, electronic surveillance, and court-authorized searches and seizures. Enforcement of the FCPA in the past has been notably reactive, dominated by self-reporting, non-prosecution and deferred-prosecution agreements, and advisory DOJ opinions. This passive mode of operation—simply waiting for the phone to ring—is not an approach favored by most dedicated federal law enforcers. 2010 has seen agents and prosecutors reach for tried and true proactive investigatory techniques to build landmark cases against suspected FCPA violators.

The benefits of proactive investigation and trans-national collaboration were displayed during the groundbreaking January 19, 2010 arrests of 22 corporate executives and employees of the military and law enforcement product industry (alternatively dubbed the "Catch 22 Sting" and the "Africa Sting"). The basic script was tried and true: a confidential informant introduced the FBI agents, posing as representatives of Gabon's Defense Ministry, to the targets of the investigation, yielding solid evidence against scores of potential defendants.

Simultaneously with the synchronized arrests, roughly 150 FBI agents, as well as their foreign counterparts, executed over a dozen search warrants in locations throughout the U.S. and U.K. The Catch 22 Sting marks a historic first in highly-coordinated international multi-jurisdictional operations, and its success signals the dawn of a long-overdue enforcement reality.<sup>19</sup>

In fact, the Catch 22 Sting was not 2010's only multi-jurisdictional investigation. There were also the investigations of London-based BAE Systems Plc and Delaware-based Innospec. These cases were investigated by DOJ, SEC and U.K. authorities, with the assistance from German law enforcement. Such multi-jurisdictional

collaboration is certainly one of 2010's most notable emerging trends, for more proactive investigation methods are sure to translate into more individual and corporate defendants, more trials, and more judicial rulings on the proper scope of the FCPA.

## *Catching More Mice with Bigger Chunks of Cheese? Enter the Dodd-Frank Act's Landmark Whistleblower Bounty Provisions*

The historic Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>20</sup> ("Dodd-Frank Act") sent the unmistakable signal that the U.S. government has every intention of dramatically ramping up its already intensified FCPA enforcement efforts. SEC Chair Mary L. Schapiro recently described the fundamental "quality-enhancing" logic driving the Act and the November 3, 2010 proposed rules:<sup>21</sup> "We get thousands of tips every year, yet very few of these tips come from those closest to an ongoing fraud. . . . Whistleblowers can be a source of valuable firsthand information that may otherwise not come to light. These high-quality leads can be crucial to protecting investors and recovering ill-gotten gains from wrongdoers."<sup>22</sup>

Dodd-Frank Act's substantial pecuniary incentives, combined with a promise of pre-award anonymity and fortified whistleblower protections for those with "inside" FCPA-related information, are undoubtedly unparalleled. The Act, summarized simply, offers percentage-based cash rewards to transform corporate employees (or almost anyone else with relevant information)<sup>23</sup> into potential FBI or SEC informants.

Under the proposed rules:

- To be considered for an award, the whistleblower must (1) voluntarily provide original information that (2) leads to the successful SEC enforcement of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1 million.<sup>24</sup>
- Culpable whistleblowers are more limited in their ability to receive the cash incentive.
- Employees are discouraged from bypassing their own company's internal compliance programs.<sup>25</sup>

The details are still works-in-progress, but it is clear that, virtually overnight, the Dodd-Frank Act has provided federal law enforcement with a commanding army of newly "recruited" (or, perhaps more aptly, "newly-incentivized") investigators and informants. And while the final verdict on the Act's effectiveness is still out, early reports indicate that the Dodd-Frank Act is indeed having its intended tip-generating effect. And in the process, the Act is fundamentally altering a corporation's self-disclosure calculus<sup>26</sup>—after all, no company wants to end up drinking downstream from the herd.

## *Going It Alone—Surging Prosecutions of Individuals*

Another trend that surfaced in 2010 was a notable uptick in the prosecution of individuals, which many view as the key to maximizing the FCPA's deterrent impact. After all, the threat of prison time for executives is a powerful motivation for corporate compliance.

Even as far back as 1986, Criminal Division Deputy Attorney General John Keeney, in a Senate hearing, grasped this readily-understood dynamic, and, accordingly, urged the prosecution of individual corporate executives: "Absent the threat of incarceration [of business executives], there may no longer be any compelling need to resist the urge to acquire business in any way possible."<sup>27</sup> Breuer, albeit almost a quarter century later, confirmed that prosecuting individuals is an integral part of the government's FCPA enforcement plan: "I continue to believe that prosecuting individuals—and levying substantial criminal fines against corporations—

are the best ways to capture the attention of the business community." Senator Arlen Specter agreed, commenting during the November 30, 2010 Senate hearing on the FCPA, that the "[f]ines come out of the corporation . . . but that doesn't deal with the individual conduct violating the law . . . . The only way to deal with the bad actors and deter this behavior is jail sentences."<sup>28</sup> Without a doubt, 2010 will be viewed as the year in which individuals turned into enforcement enemy #1.

Indeed, cases against individuals have more than doubled since 2009. The high-profile 2010 FCPA prosecutions of the Catch 22 Sting defendants, Willbros International Inc.'s executive Jason Edward Steph, PECC President John Warwick, the Nexus Technologies defendants, Miami businessman Juan Diaz, husband-wife team Gerald and Patricia Green, and tobacco company Dimon Inc.'s Bobby Jay Elkin, Jr. all demonstrate the government's new strategy in action. With the anticipated wave of undercover investigations, and the use of electronic surveillance and search warrants, prosecutors will likely begin to amass the more difficult-to-come-by evidence of individual criminal culpability justifying formal criminal charges expected to result in a greater number of trials (as opposed to more "gentlemanly" negotiated deferred and non-prosecution settlements). In short, the trend of prosecuting individuals is only beginning to emerge.

### *Industry-Wide Enforcement*

As laws and regulations have been added and tweaked, 2010 also witnessed the creation of specialized units within the SEC's Enforcement Division. These bespoke units are built to promote the development of in-depth knowledge of industries and regional practices.

In her first speech as Unit Chief of the SEC's new national specialized FCPA unit, Cheryl J. Scarboro set the tone. She emphasized the SEC's intention to proactively initiate sector-wide investigations, both in the U.S. and with the cooperation of foreign regulators, and in so doing, to "uncover corrupt practices that might otherwise go undetected."<sup>29</sup> Reading the available tea leaves, at the top of the SEC's investigative list appears to be bribery in the pharmaceutical and life sciences industries, the military and law enforcement products sector, and the oil and gas services sector.

### *DOJ's Nascent Pursuit of Bribe Recipient*

In a recent twist further demonstrating the government's creativity and aggressive commitment to the fight against foreign corruption, even overseas officials *receiving* the bribes are now squarely within the government's sights. Foreign officials, after all, do not qualify for criminal liability under the FCPA, which has traditionally been focused on the *supply* side of the problem.<sup>30</sup> But the government is pressing other prosecutorial tools into service with the goal of also disrupting the *demand* side of the equation. And money laundering has emerged as the charge *du jure*.

Consider the high-profile January 28, 2010 charges brought against Juthamas Siriwan, the former Thailand Governor of the Tourism Authority ("TAT").<sup>31</sup> This case, involving some \$1.8 million in bribes paid to influence the award of \$14 million of TAT funds for Thai government media and entertainment projects, is the government's first attempt to charge a bribe recipient since the ill-fated 1994 *GE* case.<sup>32</sup>

Demonstrating that the Siriwan case was not an anomaly, on March 12, 2010, one-time Director of International Affairs for Haiti's state-owned telecommunications company "Haiti Telco," Robert Antoine, pleaded guilty to 2009 money laundering conspiracy charges relating to his receipt of some \$800,000 in bribes from U.S. telecommunication companies.<sup>33</sup> Jean Fourcand, the third-party "consultant" who functioned as the bag-man

between Antoine and the U.S. companies, was likewise successfully prosecuted on money laundering charges.<sup>34</sup> The long arm of U.S. foreign bribery law, it seems, is stretching ever farther.

### *Next Up: Mandatory Debarment for FCPA Violators*

One of the OECD Phase 3 Report's few criticisms will likely be addressed by the pending "Overseas Contractor Reform Act," passed this summer by the House Oversight and Government Reform Committee.<sup>35</sup> The bill, received in the Senate on September 16, 2010, after a unanimous House vote, mandates that any individual or company found "to be in violation" of the FCPA "shall be proposed for debarment from any contract or grant awarded by the Federal Government."<sup>36</sup> The bill emphasizes governmental policy that "no Government contracts or grants should be awarded to individuals or companies who violate the [FCPA]."<sup>37</sup>

The bill, however, needs some work. For example, the bill's "found to be in violation" language fails to expressly provide that debarment should also be triggered by the entry into non- or deferred-prosecution agreements. Still, this tidy bit of legislation represents the latest skirmish line in the government's foreign bribery war.<sup>38</sup>

### *Favorable Corporate Sentencing Guideline Amendments*

As of November 1, 2010, the U.S. Sentencing Commission for the first time in some 20 years changed how the Federal Sentencing Guidelines calculate fines for certain defendant companies, including companies charged with FCPA violations.<sup>39</sup> The amendments make more readily available a long-standing three-level total penalty reduction and shift the inquiry away from the (mis)conduct of the company's high-level personnel towards the effectiveness of the company's compliance and ethics program—a move that will surely benefit those corporate defendants who invest in such programs.

For a company that finds itself in the unenviable position of having to calculate its guidelines range, a three-level offense reduction translates into significant real-world results—effectively reducing the applicable fine by at least 50%. Under new Section 8C2.5(f)(3)(C), a company with an effective compliance program, as defined in Section 8B2.1, can benefit from the three-level reduction if it meets four criteria:

1. The individual or individuals with operational responsibility for the compliance and ethics program have *direct reporting obligations* to the company's governing authority or appropriate subgroup thereof;
2. The compliance and ethics program detected the offense *before* discovery outside the company or before such discovery was *reasonably likely*;
3. The company promptly *reported* the offense to the appropriate governmental authorities; and
4. No individual with *operational responsibility* for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

Though complaints about potentially being held criminally accountable for the isolated conduct of rogue employees may persist, the sentencing amendments should be warmly received by companies making a significant effort to develop and implement effective internal compliance and ethics programs.

### *Do the U.K. Anti-Bribery Act's Compliance Incentives Offer a Glimpse of the (Non-U.S.) Enforcement Future?*

Like the amended Sentencing Guidelines, the U.K. Bribery Act<sup>40</sup> offers a defense for organizations who can demonstrate that, at the time of the offense, they had "adequate" compliance procedures in place.<sup>41</sup> Adding

some specificity to this general promise of a defense, this summer, the U.K.'s Serious Fraud Office set forth a list of likely conditions required to trigger the defense. Those conditions include: (i) an effective compliance plan, (ii) a formalized code of ethics, (iii) the creation of an "anti-corruption culture" within the company, (iv) the presence of direct internal corporate reporting systems, (v) regular checks and audits, (vi) appropriate and consistent disciplinary processes, (vii) early detection of potential violations, (viii) voluntary self-referral, and (ix) remedial actions to address past cases of corruption. This variant of a limited corporate amnesty program for compliance-minded companies may well be preferable to the perceived arbitrariness and mystery of the current U.S. self-disclosure process.

Unlike the FCPA, the U.K. law also takes aim at the *demand side* of the bribery equation, making it illegal to request or accept bribes. The U.K. law, moreover, applies to any company doing business in the U.K., and does not contain an FCPA-style exemption for "facilitating payments" or payments made to expedite the performance of a routine governmental action, such as acquiring government licenses or permits.

On November 16, 2010, Breuer said the U.S. "through its FCPA enforcement efforts, leads by example."<sup>42</sup> The U.K. law demonstrates that, in some cases at least, other countries are not only willing to follow the U.S. lead, but are able to signal the way forward.

### *DOJ's Tough Talk Getting Tougher*

This year's fortified FCPA enforcement efforts were accompanied by their share of the executive branch tough talk. Indeed, if public pronouncements are any indication, the government very clearly sees itself leading an unprecedented blitz on global corruption. As Attorney General Eric Holder said during his May 31, 2010 Paris address to the OECD, "I have made combating corruption one of the highest priorities of the Department of Justice . . . ."<sup>43</sup> And Holder did not shy away from, at least in a generalized sense, calling out those Anti-Bribery Convention signatories who fail to comply with their obligations: "[I]t is important to note that many of the 38 OECD member countries have no criminal convictions to date. This is not because bribes are not paid by companies in these OECD countries. It is because investigating and prosecuting corruption is difficult, requiring more will, resources, experience, and effort than most crimes."<sup>44</sup>

Moving to closer to home territory, Breuer, speaking on November 16, 2010, at the 24th National Conference on the Foreign Corrupt Practices Act, delivered an uncharacteristically blunt message to the business community:

I am aware that, for some of you, as we have become more aggressive, you have become more worried . . . I want to tell you this afternoon that you are right to be more concerned. . . I continue 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>45</sup>

Few will accuse Breuer or his boss of mincing words.<sup>46</sup>

### *What is a Company to Do?*

No one can argue that 2010 was anything but a banner year in FCPA enforcement. The many emerging pro-enforcement trends, however, virtually guarantee that 2010's record-breaking status will be short-lived, and that 2011 will eclipse these enforcement achievements. As companies—both large and small—close the books on 2010 and move towards this more aggressive anti-corruption future, they must ensure that they are



appropriately tailored to fit the new enforcement realities by taking careful stock of their compliance and ethics programs.

2011, like 2010 and the years before it, will undoubtedly be loudly trumpeted as "The (New) Year of the FCPA." And while the number of investigations, prosecutions, fines, disgorgements, and prison sentences will likely surpass all prior records, the steps to at least start down the at-times serpentine and blind-spot rich road towards avoiding civil and criminal liability remain basic. Setting aside the pithiness of the proposal, the "four R's" are always a sound place to start:

1. *Review* compliance and ethics programs to ensure they are appropriately comprehensive and effective;
2. *Revise and tighten* existing compliance policies and procedures so that they contribute to a culture of compliance that maximizes the company's chances of identifying and promptly remedying problems;
3. *Retain* outside counsel to investigate cases of suspected non-compliance, and to suggest appropriate amendments to the company's compliance and ethics program; and
4. *Report* to the company's executives the results of regularly-conducted assessments of the company's compliance and ethics program implementation and effectiveness.

No doubt about it, 2010 broke all records, in the process generating nearly as much uncertainty for corporate compliance officers as it provided answers. However, as companies ponder what the New Year holds, they should direct their focus to conscientiously monitoring emerging trends and acting quickly and thoughtfully to limit and (hopefully) avoid liability, in order to best ensure that they maintain a comfortable distance from the FCPA record books, news reports, and blogs in 2011 and beyond.

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

<sup>2</sup> See DOJ, Lanny A. Breuer, *Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act* (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>.

<sup>3</sup> See DOJ, Assistant Attorney General Lanny A. Breuer *Speaks at the 24th National Conference on the Foreign Corrupt Practices Act* (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

<sup>4</sup> See, e.g., Mike Koehler, "We Are In a New Era of FCPA Enforcement; and We Are Here to Stay," Corporate Compliance Insights Blog, Nov. 17, 2010, available at <http://www.corporatecomplianceinsights.com/2010/new-era-of-fcpa-enforcement-lanny-breuer/>.

<sup>5</sup> See *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> See *id.* It must be noted, however, that the "Catch 22 Sting" discussed below gave a significant boost to these numbers.

<sup>8</sup> See Trace International, *Global Enforcement Report 2010*, at 2-3, available at <https://secure.traceinternational.org/news/documents/GlobalEnforcementReport9.2010.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Notably, eight of the top ten involve foreign companies, and all but the top two were wrapped up in 2010. For more information on the top ten, see *In New Top Ten, Eight Are Foreign*, The FCPA Blog, Nov. 5, 2010, available at <http://www.fcpablog.com/blog/2010/11/5/in-new-top-ten-eight-are-foreign.html>.

<sup>11</sup> So described because the bribes were paid to facilitate the construction of liquefied natural gas facilities on Bonny Island, Nigeria. DOJ estimated the value of those contracts to exceed \$6 billion. See DOJ, *Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty*, Press Release No. 10-751 (June 28, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

<sup>12</sup> See generally T. Markus Funk, *Meeting (and Exceeding) Our Obligations: Will OECD's Anti-Bribery Convention Cause the Dodd-Frank Act's 'Whistleblower Bounty' Incentives to Go Global?*, Oct. 8, 2010, available at [http://www.perkinscoie.com/files/upload/COMM\\_10\\_06\\_MarkusFunkArticle.pdf](http://www.perkinscoie.com/files/upload/COMM_10_06_MarkusFunkArticle.pdf).

<sup>13</sup> See Organization for Economic Cooperation and Development, United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions (Oct. 15, 2010), available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

<sup>14</sup> See U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act* (Oct. 2010), available at [http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf).

<sup>15</sup> For a summary and analysis of the report, see generally *Is The Government Listening?*, The FCPA Blog, Nov. 10, 2010, available at <http://www.fcpablog.com/blog/2010/11/10/is-the-government-listening.html>.

<sup>16</sup> See 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). DOJ and the SEC presently—and controversially—include in their interpretation of this key term employees of state-controlled enterprises.

<sup>17</sup> DOJ and the SEC have launched several enforcement actions on the basis that payments were made to secure foreign permits, licenses, applications, and certificates, or were made in connection with custom and tax duties—payments that, some argue, are acceptable under the stand-alone exception for payments made to facilitate and expedite business-related activities in connection with "routine governmental action." See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

<sup>18</sup> Courts are rarely required to weigh in because truly adversarial proceedings in FCPA cases are so rare. As argued *infra*, however, the emerging trend to employ "traditional" investigative approaches in FCPA cases is likely to result in more cases going to trial, and thus more judicial rulings on the government's interpretation of key FCPA provisions.

<sup>19</sup> See generally *It's FCPA Time! Huge Undercover Investigation Leads To 22 Bribery Arrests*, Business Insider Law Review Blog, Jan. 19, 2010, available at <http://www.businessinsider.com/huge-undercover-doj-investigation-leads-to-22-fcpa-arrests-2010-1>.

<sup>20</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>21</sup> See SEC, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 C.F.R. Parts 240 and 249, Release No. 34-34-63237; File No. S7-33-10 (Nov. 3, 2010).

<sup>22</sup> SEC, *SEC Proposes New Whistleblower Program Under Dodd-Frank Act*, Press Release No. 2010-213 (Nov. 3, 2010).

<sup>23</sup> Section 922 includes a very discrete group of individuals not eligible for whistleblower awards.

<sup>24</sup> On October 29, 2010, the SEC announced that it set aside some \$452 million to reward Dodd-Frank tipsters.

<sup>25</sup> See *supra* note 21 ("By excluding from the award calculation any monetary sanctions that the whistleblower is ordered to pay or that are ordered against the entity whose liability is substantially derived from the whistleblower's conduct, the proposed rules limit the awards to highly culpable whistleblowers more than the awards to less culpable whistleblowers.").

<sup>26</sup> "SEC Getting At Least One FCPA Tip A Day," *Wall Street Journal* (Sept. 30, 2010).

<sup>27</sup> Quoted in Prepared Statement of Professor Mike Koehler, Assistant Professor of Business Law, Butler University, Before the Subcommittee on Crime and Drugs of the United States Senate Committee on the Judiciary (Nov. 30, 2010).

<sup>28</sup> See comments of Arlen Specter before the Subcommittee on Crime and Drugs, Committee on the Judiciary, United States Senate, November 30, 2010, available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4869>.

<sup>29</sup> See SEC, *Speech by SEC Staff: Remarks at News Conference Announcing New SEC Leaders in Enforcement Division*, Remarks of Cheryl Scarborough (Jan. 13, 2010).

<sup>30</sup> See generally *United States v. Castle*, 925 F.2d 831, 835-36 (5th Cir. 1990) (barring prosecution of Canadian official for conspiracy to violate the FCPA, in part, because "[Congress included] virtually every possible person connected to the payments except foreign officials [in the statute]").

<sup>31</sup> See *U.S. v. Siriwan*, No. 09-cr-00081, Indictment (filed C.D. Cal. Jan. 28, 2009). Siriwan has not, however, been extradited to the U.S., in large part because of the pending case against her in her native Thailand.

<sup>32</sup> See generally Testimony of Michael Volkov, Esq. Partner, Mayer Brown LLP Before the Senate Judiciary Committee Subcommittee on Crime and Drugs Hearing on "Examining Enforcement of the Foreign Corrupt Practices Act" (Nov. 30, 2010).

<sup>33</sup> See *U.S. v. Esquenazi*, No. 09-cr-21010, Antoine Plea Agreement and Factual Proffer Statement (filed S.D. Fla. Mar. 12, 2010).

<sup>34</sup> See *U.S. v. Fourcand*, No. 10-cr-20062, Plea Agreement (filed S.D. Fla. Feb. 19, 2010).

<sup>35</sup> H.R. 5366, 111th Cong (2010).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* Note that 48 CFR § 9.406 already grants to the government the power to debar contractors who are convicted of FCPA offenses.

<sup>38</sup> Although the U.S. State Department placed "temporary administrative hold" on weapons export licenses for BAE Systems and its customers after BAE pleaded guilty to FCPA violations, that hold has since been released. See generally *Debarment for BAE?*, The FCPA Blog, Mar. 4, 2010, available at <http://www.fcpablog.com/blog/2010/3/4/debarment-for-bae.html>.

<sup>39</sup> For a detailed analysis of the amendments, see T. Markus Funk, *Corporations Benefit From Sentencing Guidelines Amendments . . . In Four Easy Steps*, available at <http://new.abanet.org/sections/criminaljustice/Pages/funk.aspx>.

<sup>40</sup> See Bribery Act 2010, 2010 c.23. The Act received Royal Assent on April 8, 2010, and is scheduled to come into effect in April 2011.

<sup>41</sup> The defense allows companies to avoid criminal prosecution and face, at most, civil liability instead.

<sup>42</sup> The full text of the speech can be found at DOJ, *Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act* (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>; excerpts are available at <http://new.abanet.org/sections/criminaljustice/Pages/Anti-CorruptionTaskForce.aspx>.

<sup>43</sup> DOJ, *Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development* (May 31, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100531.html>.

<sup>44</sup> See *id.*

<sup>45</sup> See *supra* note 42.

<sup>46</sup> However, as of this writing, the SEC announced that they are deferring plans to set up their new whistleblower office due to "budget uncertainty."