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Special Issue

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International Securities & Capital Markets Newsletter

Recent Developments in International Securities Law

Dear Committee Members,

This is a special issue of the International Securities & Capital Markets Newsletter, published by the International Securities & Capital Markets Committee of the American Bar Association's Section of International Law. We hope you find it interesting and useful. This newsletter contains all contributions received in connection with our Committee's 2012 Year in Review submission. Because our Committee's submissions for this year's YIR were substantially in excess of the aggregate allowable word count for that submission, we chose to publish this special edition of our newsletter so that all contributors would have a forum for their publication and all readers would have the benefit of all our authors' wisdom and insights.

Regards,

Thomas M. Britt III

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The Foreign Corrupt Practices Act

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The US Foreign Corrupt Practices Act (“FCPA”) prohibits covered persons from bribing foreign officials to obtain or retain business, and imposes certain accounting requirements on issuers.¹

Both US and foreign companies faced US Department of Justice (“DOJ”) and US Securities and Exchange Commission (“SEC”) enforcement actions in 2012, including Oracle,² Pfizer,³ Tyco International,⁴ and Total S.A., a French multinational that faces the fourth largest FCPA settlement in history.⁵ Over 80 foreign and domestic companies face ongoing investigations.⁶

The government also suffered litigation setbacks including dismissed criminal charges against John O’Shea, former manager for ABB, Ltd., due to insufficient evidence.⁷ Further, the government suffered judicial backlash when the second of two trials resulting from an undercover operation in 2010—the largest ever FCPA case against individuals—ended with excluded evidence, deadlocked juries and acquittals.⁸

In 1988, Congress passed the Trade Act, obligating the DOJ to release guidance on its FCPA enforcement procedures.⁹ Twenty-four years and 200 enforcement actions later, the DOJ, along with the SEC, released the much-anticipated but less-than-surprising guidance in November 2012.¹⁰ The 120-page publication reiterates previous positions (not the least of which is stressing the need for a robust compliance program) and posits some unlitigated legal interpretations.¹¹ The guidance, however, is non-binding.¹²

The DOJ also published two FCPA opinion procedures releases, first, addressing payments made by a foreign embassy to U.S. lobbyists¹³ and, second, payments of travel costs for 18 visiting foreign government officials.¹⁴

Takeaways for 2012:

¹ 15 U.S.C. §§ 78dd-1, *et seq.*

² Press Release, Sec. & Exch. Comm’n., SEC Charges Oracle Corporation With FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012) (penalties of \$2 million related to illicit payments made by its Indian subsidiary’s use of fake invoices).

³ Lists of enforcement actions can be found at <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (SEC) and <http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html> (DOJ).

⁴ Press Release, Sec. & Exch. Comm’n., SEC Charges Tyco for Illicit Payments to Foreign Officials (Sept. 24, 2012) (settlement of \$26 million related to illicit payments made by Tyco subsidiaries to secure contracts or avoid penalties or fines in over a dozen countries).

⁵ Total S.A., Report of Foreign Private Issuers (Form 6-K), (Aug. 1, 2012) (company set aside of \$398 million).

⁶ “The Corporate Investigations List,” The FCPA Blog, available at <http://www.fcpablog.com/lists/>.

⁷ Press Release, Berg & Androphy, Executive John O’Shea Acquitted in 12-Count FCPA Case (Jan. 17, 2012).

⁸ “DOJ Ends Africa Sting Prosecution,” The FCPA Blog, Feb. 21, 2012, available at <http://www.fcpablog.com/blog/2012/2/21/doj-ends-africa-sting-prosecution.html>.

⁹ Omnibus Foreign Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

¹⁰ U.S. Dept. of Justice and the U.S. Sec. & Exch. Comm’n., *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Washington, Nov. 14, 2012, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

¹¹ *Id.* at ii.

¹² *Id.* at 57-68.

¹³ U.S. Dept. of Justice, FCPA Op. Release 12-01, Sept. 18, 2012.

¹⁴ U.S. Dept. of Justice, FCPA Op. Release 12-02, Oct. 18, 2012.

- The government reduced settlements by as much as 30% in cases of co-operation, significant remediation and voluntary disclosure¹⁵ and reduced one settlement by 20% due to demonstrated hardship.¹⁶
- Evidence from regulatory investigations may be used in shareholder lawsuits,¹⁷ and vice versa.¹⁸
- Information obtained during an investigation may lead investigators toward competitors.¹⁹
- The DOJ may terminate an FCPA-related deferred prosecution agreement early.²⁰
- Covered yet small payments made over a short period of time may be insufficient for enforcement action.²¹
- A lengthy international investigation may not lead to an enforcement action.²²
- Morgan Stanley avoided prosecution related to its former managing director's FCPA-related conduct (for which the manager was sentenced to 9 months in prison) due to its "robust compliance program."²³

¹⁵ Deferred Prosecution Agreement between Smith & Nephew, Inc. and the U.S. Dept. of Justice (Feb. 1, 2012) (cooperation, remediation, and voluntary disclosure resulted in a 20% fine reduction); U.S. v. BizJet International, Deferred Prosecution Agreement (Mar. 14, 2012) (settlement of \$11.8 million was reduced 30% from the bottom of the fine range due to, *inter alia*, prompt voluntary disclosure, cooperation and meaningful remediation); U.S. v. Data Systems & Solutions, LLC, Deferred Prosecution Agreement, (June 18, 2012) (a 30% reduction in the base fine due to "extraordinary cooperation," including an "extensive, thorough and swift internal investigation.").

¹⁶ In re The NORDAM Group, Inc., Non-Prosecution Agreement (July 6, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-npa.pdf>.

¹⁷ See generally *Loizides v. Schramm et al.*, Lead Case No. 37-2010-00097953-CU-BT-CT (Calif. Sup. Ct. of San Diego, Aug. 13, 2010); *City of Brockton Retirement System v. Avon Products, Inc. et al.*, Case No. 1:11-cv-04665-PGG (S.D.N.Y. 2012).

¹⁸ See *Okada v. Wynn Resorts*, (Clark County District Court, Jan. 11, 2012) (Compl.), *Wynn Resorts v. Okada* (Clark County District Court, February 19, 2012) (Compl.).

¹⁹ Trace Compendium, "Marubeni Corporation," available at <https://traceinternational2.org/compendium/view.asp?id=381> (last visited Nov. 20, 2012). See also Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011) ("Johnson & Johnson...has also cooperated extensively with the government and, as a result, has played an important role in identifying improper practices in the life sciences industry.").

²⁰ Matt Kelly, "A First: Justice Department Ends DPA Early," COMPLIANCE WEEK, Nov. 9, 2012, available at <http://www.complianceweek.com/a-first-justice-department-ends-dpa-early/article/267762/>.

²¹ Huntsman Corporation, Annual Report (Form 10-K) (Feb. 17, 2011) ("less than \$11,000 in payments were made to officials" over 9 months in 2009-11); Huntsman Corporation, Quarterly Report (Form 10-Q) (November 4, 2010) ("...the SEC and DOJ notified us that they would not recommend any enforcement action...").

²² See Schlumberger N.V., Annual Report (Form 10-K), (Feb. 4, 2011); Schlumberger, Quarterly Report (Form 10-Q) (Nov. 24, 2012). Company was investigated in 2007 for potential violations, and disclosed the beginnings of a grand jury investigation in 2009; yet in October 2012 the company reported that the DOJ had closed the inquiry entirely.

²³ Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.

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About the International Securities & Capital Markets Committee

This committee focuses on national and international laws and regulations dealing with issuance of securities and regulation of capital markets activities. Issues include: laws relating to on-line information about issuers; securities issues relating to privatizations, including offering techniques, relationship between economic policy and legal structures for privatizations and the role of legal and financial advisors; regulatory matters concerning derivatives and hybrid securities; new requirements for foreign issuers in the U.S. related to the Sarbanes-Oxley Act; and SEC and other accounting standards for foreign issuers and cross-border private placements.

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