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Expert Analysis

FCPA Prosecution: Lessons Learned From Deferred And Non-Prosecution Agreements

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News of government investigations into a company's violations of the Foreign Corrupt Practices Act conjure images of dramatic public trials that conclude with handcuffed executives and financial penalties that leave the offending company on the brink of collapse. In reality, however, such scenes rarely come to life. This is because of the Justice Department's growing use of deferred prosecution agreements and non-prosecution agreements to settle many of its more recent FCPA matters with large corporations. In these DPAs and NPAs, the offender obligates itself to certain penalties and compliance measures.

The recent spate of investigations and subsequent settlements has made it possible to predict, more or less, which of the three primary FCPA standards will be found to have been violated. Accurately forecasting the penalty that will accompany the breach, however, remains nearly impossible. The increase in cases has provided more insight into the types of behavior being investigated, but the cases have not revealed a consistent pattern as to the reasons behind using either DPAs or NPAs or ties between the bad act and the penalties levied in those agreements.

The Justice Department's 2008 release of guidelines for application of compliance monitors should assist with at least that aspect of penalties, but many other key questions remain unclear. Using the most recent known DPAs and NPAs, as well as other recent FCPA-related settlements, as sources, this article will attempt to shed light on the reasons that DPAs or NPAs were used in certain circumstances and also identify correlations between the violation and the types of penalties assessed by the government.

The Focus on Corporate Assistance Spurs Use of DPAs and NPAs

The Justice Department's emphasis on the importance of meaningful company assistance in internal fraud investigations came to light with its 2003 issuance of the Thompson Memorandum.¹ It focused on the authenticity of the company's cooperation with the government investigation to determine

whether it qualified for a deferred or non-prosecution agreement. In December 2006 the agency released the McNulty Memorandum,² which listed criteria for the Justice Department to consider when determining whether criminal charges should be brought.

These two directives triggered the government's increasing use of DPAs and NPAs to resolve cases against companies under investigation for FCPA violations and other forms of corporate misconduct. Generally, these agreements require:

- The payment of restitution to victims and/or fines to the government;
- Cooperation by the corporation with ongoing government investigations of individuals or other corporations; and
- Implementation of an ethics and compliance program, which typically includes internal controls to effectively prevent, detect and respond to any future corporate misconduct.

DPAs and NPAs are perceived as a more efficient option than conviction. These agreements avoid the sometimes massive expenditure of manpower and other resources necessary for prosecuting cases involving mammoth corporations. Using these agreements also avoids difficult issues such as the suffering of innocent third parties and the general public due to the conviction of a major corporation. The use of DPAs and NPAs is likely to increase as the government continues to focus on corporate misconduct.

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Since December 2006, 18 known deferred and non-prosecution agreements have been entered into for FCPA violations. Of those, seven were exclusively related to violation of the United Nations' oil-for-food program in Iraq. An eighth, involving York International, was based in part on violations of that program and in part on violations in other countries. Of the 12 agreements containing non-program violations, six were deferred prosecution agreements, and six were non-prosecution agreements. This article examines only the agreements based on violations of the FCPA and not those related to the oil-for-food program.

Companies entering into DPAs include AGA Medical Corp.,³ Willbros Group,⁴ Baker Hughes,⁵ York International,⁶ Aibel Group Ltd.⁷ (a wholly owned subsidiary of Vetco Gray not purchased by GE) and Siemens AG.⁸ Although not technically a DPA, the Siemens deal effectively functions as a deferred prosecution agreement. NPAs were entered into by Faro Technologies,⁹ Westinghouse Air Brakes,¹⁰ Lucent Technologies,¹¹ Paradigm B.V.,¹² Omega Advisors¹³ and Halliburton.¹⁴ During this same period, several companies also consented to cease-and-desist orders.¹⁵

DPAs Apparently Are Used When Larger Dollar Amounts Are Involved

While there are no known guidelines as to when each agreement type is to be used, one trend has emerged. The decision to use a DPA or NPA may be contingent on the dollar amounts involved. DPAs seem to be used when large bribes and profits amounting to millions of dollars are involved.¹⁶ For instance, an agreement akin to a DPA was used in the case of Siemens, which involved \$1.4 billion in bribes to government officials. Likewise, in one of the earliest and best-known cases, Willbros Group entered into a DPA in May 2008 after an investigation revealed more than \$600 million in bribes to Nigerian officials.

For those cases involving bribes less than \$500,000, NPAs have been used.¹⁷ Such was the case with Faro Technologies, which agreed to an NPA in June 2008 based on \$444,500 in "referral fees" to Chinese state employees. Likewise, Textron entered into an NPA in August 2007 after, among other things, making 36 payments totaling almost \$115,000.

Analysis of Penalties Assessed In the Agreements

Justice Department Relies on Compliance Monitors

The government's imposition of independent monitors is becoming more frequent in corporate fraud matters and has also grown more frequent in DPAs or NPAs in certain FCPA cases.¹⁸ Inclusion of a monitor in a DPA or NPA is supposed to ensure years of compliance for a previously troublesome corporation. The appointment of a monitor allows the government to verify whether the corporation is fulfilling its obligations as set forth in the agreement. The government finds monitors particularly useful when the agreement

requires the corporation to overhaul its ethics and compliance programs and to bolster internal controls.¹⁹

Last year the Justice Department issued guidelines for the selection and use of independent corporate monitors. The guidelines state that a monitor is an “independent third party” whose primary responsibility is to “assess and monitor a corporation’s compliance with those terms of the agreement that are designed to address and reduce the risk of recurrence of the corporation’s misconduct.”²⁰

In most cases, this will require the monitor to evaluate internal controls and corporate ethics and compliance programs. While the monitor may need to understand the full scope of the corporation’s misconduct, his or her responsibilities should be no broader than necessary, depending on the facts of the case. Communication among the monitor, corporation and government is expected to occur.

In certain circumstances, the monitor may need to make periodic written reports to the government and corporation. If the monitor makes recommendations to the corporation regarding ethics and compliance that the corporation chooses not to adopt, the government may consider this fact in determining whether the corporation has fulfilled its obligations under the agreement.

In the event the monitor finds evidence of previously undisclosed or new misconduct, he or she has the discretion to report it to the corporation and/or the government. This type of detail regarding the selection process and the role of a monitor has been lacking in DPAs, but that is sure to change following the implementation of these guidelines.

Agreements Vary as to Type of Monitor, Roles and Duration

In the agreements examined, various types of compliance monitors were assigned. The DPAs refer to these monitors in various terms, including compliance monitors, independent compliance consultants and outside compliance counsel. Traditional or independent monitors were required of all companies entering into DPAs, except Aibel Group and Paradigm, which were required to retain outside compliance counsel.²¹ An independent compliance consultant was required of Faro and Westinghouse.

In the recent case of Kellogg, Brown & Root and Halliburton (which involved an NPA for Halliburton and a criminal plea for KBR), KBR agreed to an independent monitor for three years, while Halliburton agreed to retain an independent consultant for 60 days and then again one year later but for a 30-day period.²² But the agreements leave unclear the reasons for the types of monitor selected, the role to be played by the monitor and the selection process.

DPAs apparently are used when larger dollar amounts are involved.

Specific details for the selection process were lacking in the agreements. The agreements generally state that independent compliance consultants must be acceptable to both the Securities and Exchange Commission and the Justice Department (where both are applicable). For example, the SEC ordered Westinghouse to retain an independent compliance consultant “not unacceptable to the staff of the commission.”²³ Agreements mandating monitors state that the companies and the Justice Department will work together to find a monitor, and if they cannot reach a mutually acceptable choice, the government will select one.

The factors affecting the selection of a compliance officer over a monitor may be the amount of money involved and the cooperation of the company. For instance, Aibel’s matter involved an illegal payment of less than \$50,000, and the company was required only to retain outside compliance counsel. (It is interesting to note that Aibel initially did not receive a criminal fine either.)²⁴

The distinction between the type of overseer is also unclear. Typical monitor duties include reviewing and evaluating internal controls, record-keeping, and following financial reporting procedures as they relate to FCPA compliance.

The tasks assigned to an independent compliance consultant appear similar to those normally designated to a monitor.

For example, the role of the compliance consultant in Westinghouse’s agreement is “to review and evaluate [its] internal controls, record-keeping, and financial reporting policies and procedures as they relate to [its] compliance with the books and records, internal

accounting controls, and anti-bribery provisions of the FCPA ... and other applicable foreign bribery laws.”

Likewise, the role of the corporate monitor for Willbros was to “assess and monitor the company’s compliance, including evaluating the company’s compliance program with respect to the [FCPA] and other relevant anti-corruption laws.”²⁵

In agreements in which a monitor was mandated, the term of the agreement does not appear to correlate to the size of the criminal penalty. Two of the companies entering into DPAs not involving the oil-for-food program received three-year terms, including AGA Medical, with a \$2 million fine and no civil penalty,²⁶ and Willbros, with a \$22 million fine plus disgorgement. Baker Hughes, with an \$11 million criminal fine, \$10 million in civil penalties and \$24 million in disgorgement — at the time one of the largest payouts ever in a FCPA case — received only a two-year term.

Reasons for the term of an NPA seem unclear because the agreements are not public.

Both AGA and Willbros had provisions allowing for a one-year extension solely at the discretion of the Justice Department, but Baker Hughes did not. York International, which entered into a DPA for both oil-for-food program and non-program violations, received a three-year term with a \$10 million criminal fine, \$2 million civil penalty, and \$10 million in disgorgement and prejudgment interest.

The difference in monitor term length between Baker Hughes, at two years, and AGA, Willbros and York, each at three years, may have been influenced by the offending individuals’ ranking in the corporation’s chain of command. At AGA, illegal conduct was committed by a “high-ranking officer and part owner of AGA who had authority to set company policy, contract with distributors, hire and fire employees, set sales prices, and approve sales practices in foreign countries.” At Willbros, the president was involved in the illegal conduct, and a vice president was involved at York. The highest-ranking employee who appears to have been involved at Baker Hughes was a business development manager.

There is no discernible pattern in the length of non-prosecution agreements. Again, because the agreements are not public, the term is unknown for Omega Advisors. For the remaining five, terms range from 18 months for Paradigm to three years for Westinghouse Air Brake. Paradigm was assessed a criminal fine of \$1 million and no civil penalty (private company); the ranks of the offenders in this matter were not revealed in the agreement. Westinghouse paid a criminal fine of \$300,000, a civil penalty of \$87,000, and \$288,000 in disgorgement and prejudgment interest. The illegal conduct at Westinghouse reached the vice-president level.

Size of the Total Sanction: Patterns for Criminal and Civil Penalties

The monetary sanctions in the agreements ranged from \$675,000 for Westinghouse to \$800 million for Siemens. Sanctions consisted of both criminal fines and civil penalties, as well as disgorgement of profits, a recent phenomenon that first arose in FCPA enforcement five years ago.²⁷

As one might expect, more egregious FCPA violations and larger ill-gotten profits resulted in larger penalties.

Westinghouse, for example, paid \$137,400 to foreign officials and was penalized a total of \$675,000 in fines and disgorgement. Baker Hughes, on the other hand, paid \$9.3 million in bribes and was assessed \$45 million in sanctions. Siemens, in the largest payout ever in an FCPA case, paid \$1.4 billion in bribes and was hit with \$800 million in sanctions in the United States alone.²⁸

In some of the agreements criminal fines appear to be loosely tied to the disgorgement amounts, either slightly higher or lower. For example, Faro disgorged \$1.4 million and paid a criminal penalty of \$1.1 million. However, Willbros disgorged \$8.9 million but paid a \$22 million criminal fine. One factor that may have led to this is that one of Willbros’ violations was a tax-avoidance scheme in Bolivia for which no disgorgement was assessed; disgorgement may not have been possible in this scenario, and a greater fine was awarded as a result.

Meaningful cooperation by corporations facing FCPA charges appears to play a significant role in the penalties assessed.

For instance, the massive scope of bribery at Siemens could have left it facing up to \$2.7 billion in fines under the federal sentencing guidelines. Instead, the

Justice Department recommended a penalty reduction to \$450 million because of Siemens' "exceptional ... wide-ranging cooperation efforts throughout this investigation, which included a sweeping internal investigation, the creation of innovative and effective amnesty and leniency programs, and exemplary efforts with respect to preservation, collection, testing and analysis of evidence."

Similarly, the government made note of eLandia Group's extreme cooperation in its cease-and-desist order, and the company ended up with a \$2 million criminal penalty, which was far below the \$4.2 million to \$8.4 million range in the U.S. sentencing guidelines.

Privilege Waiver

A trend that was borne out in our review, and which is becoming an increasingly hot topic for commentators, is that, contrary to popular belief, agreeing to waive the attorney-client privilege does not necessarily earn the company favorable governmental treatment. Aibel, the sole company to make a full waiver, still received a three-year term and a \$4.2 million criminal fine for a \$45,500 bribe. Such results explain why a broad waiver has become the exception, rather than the rule.²⁹

Recent actions by the Justice Department may make broad waivers even more unlikely. According to the agency's Filip Letter announcing new corporate prosecution guidelines in the U.S. attorneys' manual, prosecutors may no longer request a privilege waiver.³⁰ Specifically, under the new guidelines, cooperation credit will no longer be tied to an agreement by the company to waive attorney-client privilege or work product protection. Companies will be given cooperation credit for disclosure of relevant facts, whether or not those facts are contained in privileged or non-privileged material.

Conclusion

Numerous investigations into violations of the FCPA are presently underway, and more are surely to come as the government will keep a close eye on companies dealing in notoriously troublesome regions. If recent history is an accurate indicator, many of these will result in deferred or non-prosecution agreements. As more agreements come to light, so too should the reasons for using a particular type of agreement and the penalties assessed. Until then, the prior DPAs and NPAs provide valuable insight into what types of agreements and penalties a company that finds itself in violation of the FCPA may be able to negotiate.

Notes

- ¹ U.S. Dep't of Justice, Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/ctff/corporate_guidelines.htm. The Thompson Memo focused on the authenticity of the corporation's cooperation with the government investigation to determine whether it should qualify for an agreement.
- ² U.S. Dep't of Justice, Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, U.S. Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. In August 2008 the Filip Memo was issued limiting the use of the privilege waiver, which was often mandated by the government under the McNulty Memo. See Press Release, Dep't of Justice, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>.
- ³ Press Release, Dep't of Justice, AGA Medical Corporation Agrees to Pay \$2 Million Penalty and Enter Deferred Prosecution Agreement for FCPA Violations (June 3, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/June/08-crm-491.html>; AGA Resolves China-Related FCPA Charges, <http://fcpublog.blogspot.com/2008/06/aga-medical-resolves-china-related-fcpa.html> (June 4, 2008); *United States v. AGA Med. Corp.*, docket number unavailable, *deferred prosecution agreement filed* (D. Minn. June 2, 2008), *available at* <http://www.corporatecrimereporter.com/documents/DeferredProsecutionAgreement.pdf>.
- ⁴ Press Release, Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008), *available at* http://www.justice.gov/opa/pr/2008/May/08_crm_417.html; Litigation Release, Sec. & Exch. Comm'n, SEC Files Settled FCPA Action Against Willbros Group Inc. and Several Former Employees (May 14, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20571.htm>; The SEC Takes It Back, <http://fcpublog.blogspot.com/search/label/Siemens> (Mar. 3, 2009).
- ⁵ Press Release, Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay \$11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/April/07_crm_296.html; Staying on Top of FCPA Compliance: Baker Hughes, Bribery and the Mandated Compliance, <http://www.secactions.com/?p=182> (Apr. 24, 2007); The SEC Takes It Back, *supra* note 4.
- ⁶ The SEC Takes It Back, *supra* note 4.
- ⁷ Press Release, Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines (Feb. 6, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html; Aibel Group Ltd. Deferred Prosecution Agreement (on file with author).
- ⁸ Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>; Siemens to Plead Guilty, <http://fcpublog.blogspot.com/2008/12/siemens-to-plead-guilty.html> (Dec. 12, 2008); More on Siemens, Posting of Ellen S. Podgor to the White Collar Crime

- Professors Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/12/more-in-siemens.html (Dec. 16, 2008).
- ⁹ Faro Technologies, Dep't of Justice Non-Prosecution Letter (June 3, 2008), *available at* <http://www.millerchevalier.com/files/upload/FaroAgreement.pdf>; The SEC Takes It Back, *supra* note 4.
- ¹⁰ Westinghouse Non-Prosecution Agreement (on file with author); Litigation Release No. 20457, Sec. & Exch. Comm'n, SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees (Feb. 14, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20457.htm>; Press Release, Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay \$300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2008/02/02-14-08wabtec-agree.pdf; The SEC Takes It Back, *supra* note 4.
- ¹¹ Press Release, Dep't of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/December/07_crm_1028.html; Litigation Release, Sec. & Exch. Comm'n, SEC Files Settled Action Against Lucent Technologies Inc. in Connection With Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay \$1.5 Million Civil Penalty (Dec. 21, 2007), *available at* <http://www.sec.gov/litigation/litreleases/2007/lr20414.htm>.
- ¹² Press Release, Dep't of Justice, Paradigm B.V. Agrees to Pay \$1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/September/07_crm_751.html.
- ¹³ Press Release, U.S. Attorney, Southern District of New York, U.S. Announces Settlement with Hedge Fund Omega Advisors Inc. in Connection With Omega's Investment in Privatization Program in Azerbaijan (July 6, 2007), *available at* <http://www.usdoj.gov/usao/nys/pressreleases/July07/omeganonprospr.pdf>.
- ¹⁴ Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* <http://www.usdoj.gov/opa/pr/2009/February/09-crm-112.html>; Press Release, Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <http://www.sec.gov/news/ress/2009/2009-23.htm>; Litigation Release No. 20897A, Sec. & Exch. Comm'n, SEC Charges KBR Inc. with Foreign Bribery; Charges Halliburton Co. and KBR Inc. with Related Accounting Violations — Companies to Pay Disgorgement of \$177 Million (Feb. 11, 2009), *available at* <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm>. Halliburton is the former parent company for Kellogg, Brown & Root LLC. KBR is the entity that committed the violations of the FCPA. It made a criminal plea and consented to the entry of a final judgment that permanently enjoins it from violating the FCPA. Halliburton agreed to indemnify KBR; therefore, both companies were jointly liable for disgorgement.
- ¹⁵ These include Delta & Pine Land Co. and subsidiary Deltapine, Dow Chemical Co., Con-way Inc., and United Industrial Corp. Latin Node Inc. (a company purchased by eLandia) is potentially unique and was not required to enter a DPA or NPA.
- ¹⁶ Litigation Release No. 20571, Sec. & Exch. Comm'n, SEC Files Settled FCPA Action Against Willbros Group Inc. and Several Former Employees (May 14, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20571.htm>; Press Release, Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2008/05/05-14-08willbros-guilty.pdf; Press Release, Dep't of Justice, *supra* note 5; Litigation Release No. 20094, Sec. & Exch. Comm'n, SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), *available at* <http://www.sec.gov/litigation/litreleases/2007/lr20094.htm>; Press Release, Dep't of Justice, *supra* note 3; Press Release, Dep't of Justice, Justice Department Agrees to Defer Prosecution of York International Corporation in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 1, 2007), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2007/10/10-01-07york-defer.pdf; Litigation Release No. 20319, Sec. & Exch. Comm'n, SEC Files Settles Foreign Corrupt Practices Act Charges Against York International Corporation for Improper Payments to UAE, Officials, to Iraq Under the U.N. Oil for Food Program and to Others (Oct. 1, 2007), *available at* <http://www.sec.gov/litigation/litreleases/2007/lr20319.htm>; Press Release, Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay \$26 Million in Criminal Fines (Feb. 6, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/February/07_crm_075.html.
- ¹⁷ Press Release, Dep't of Justice, *supra* note 10; Litigation Release No. 20457, Sec. & Exch. Comm'n, SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees (Feb. 14, 2008), *available at* <http://www.sec.gov/litigation/litreleases/2008/lr20457.htm>; Litigation Release No. 20414, Sec. & Exch. Comm'n, SEC Files Settled Action Against Lucent Technologies Inc. in Connection with Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay \$1.5 Million Civil Penalty (Dec. 21, 2007) *available at* www.sec.gov/litigation/litreleases/2007/lr20414.htm; Press Release, Dep't of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/December/07_crm_1028.html; Press Release, Dep't of Justice, Paradigm B.V. Agrees to Pay \$1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/September/07_crm_751.html; Press Release, Dep't of Justice, Faro Technologies Inc. Agrees to Pay \$1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/June/08-crm-505.html>; Press Release, *supra* note 13; Litigation Release No. 20251, Sec. & Exch. Comm'n, SEC Files Settled Books and Records and Internal Controls Charges Against Textron Inc. for Improper Payments to Iraq Under the U.N. Oil for Food Program — Company Agrees to Pay Over \$3.5 Million and to Make Certain Undertakings Regarding its Foreign Corrupt Practices Act Compliance Program (Aug. 23, 2007), *available at* <http://www.sec.gov/litigation/litreleases/2007/lr20251.htm>; Press Release, Dep't of Justice, Textron Inc. Agrees to \$1.15 Million Fine in Connection with Payment of \$600,000 in Kickbacks by its French Subsidiaries under the United Nations Oil for Food Program (Aug. 23, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/August/07_crm_646.html.
- ¹⁸ The Justice Department disclosed May 22, 2008, that it used DPAs 85 times in recent years. Congressional investigations identified an additional 12 that had not been disclosed, bringing the total number of DPAs to 97. Eric Lichtblau & Kitty Bennett, *30 Former Officials Became Corporate Monitors*, N.Y. TIMES, May 23, 2008.

- ¹⁹ Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Chairman, U.S. House of Reps., Committee on the Judiciary (May 15, 2008).
- ²⁰ U.S. Dep't of Justice, Memorandum from Craig S. Morford, Acting Deputy Attorney General, U.S. Attorneys' Manual, Title 9, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.
- ²¹ Press Release, *supra* note 7; Press Release, *supra* note 12; Press Release, Dep't of Justice, *supra* note 10; Litigation Release, *supra* note 10; Press Release, *supra* note 3; Press Release, Dep't of Justice, York International, *supra* note 16; Litigation Release No. 20319, *supra* note 16.
- ²² See note 15, *supra*.
- ²³ *In re Westinghouse Air Brake Techs.*, File No. 3-12957 (Feb. 14, 2008), available at <http://www.foley.com/files/WabtecSECOrder.pdf>.
- ²⁴ Aibel's 2007 agreement was subsequently revoked for the company's failure to abide by its terms. Press Release, U.S. Dep't of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay \$4.2 Million in Criminal Fines (Nov. 21, 2008), available at <http://www.usdoj.gov/opa/pr/2008/November/08-crm-1041.html>. The discussions of Aibel's agreement relate to the original agreement entered and not to any subsequent revocation.
- ²⁵ *United States v. Willbros Group Inc. et al.*, No. H-08-287, *deferred prosecution agreement filed* (S.D. Tex. May 14, 2008), available at http://www.whitecase.com/files/Publication/95d58d9b-6e08-41c7-a777-3da795789277/Presentation/PublicationAttachment/f074e1f8-a571-4ea0-953c-3f2200090682/Alert_whitecollar_051508_addendum.pdf.
- ²⁶ It is a private company not subject to the SEC's regulation.
- ²⁷ The SEC Takes It Back, *supra* note 4.
- ²⁸ Siemens AG also paid more than \$569 million to the Munich public prosecutor's office. The company is also an example of another trend of note in FCPA prosecutions: prosecution by foreign authorities and, at times, cooperation between U.S. and foreign authorities in FCPA prosecutions.
- ²⁹ Dealing with the DOJ, <http://fcablog.blogspot.com/2009/01/dealing-with-doj.html> (Jan. 28, 2009) ("We saw that the privilege waiver language in DPAs was the exception (statistics from 2007 showed only 3 waivers, while in 2008 we found but two).").
- ³⁰ Letter from Mark Filip, Deputy Attorney General, to U.S. Sens. Patrick Leahy and Arlen Specter (July 9, 2008); U.S. Attorneys' Manual § 9-28.710, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcr.htm#9-28.710.

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Deferred Prosecution Agreements and Non-Prosecution Agreements in FCPA Cases Since December 2006

Company	Date	DPA/NPA	Alleged Violation	Bad Acts and Business Benefit	Industry	Country	Company Size	Term	Criminal Fine	SEC Penalties	Monitor	Self-Report	Privilege Waiver	How High up?
United Inhabit Corp.	06/28/09	Not entirely clear SEC required UK to cease and desist from future violations and did not impose further penalty beyond what is listed because of UK's cooperation.	Anti-Bribe, books and records, internal controls	Made more than \$100,000 in payments to an agent with the expectation that the agent would pass payments of some payments to officials of the Egyptian Air Force in order to facilitate the award of a contract to construct and staff a military aircraft depot in Cairo.	Aerospace and defense systems contractor	Egypt	\$564 million in annual revenue	Unknown	No	\$257,700 in disgorgement plus payment interest	No	No, but cooperation noted.	Unknown	President of a subsidiary of the corporation
Lufthansa Inc. (questioned by standards)	04/07/09	None explicit government accepted a fine for single criminal count from court from Lufthansa.	Anti-bribe	Paid \$2.25 million in bribes, directly and through intermediaries, to officials at Honduran and TeleYemen, the state-owned telecommunications companies	Telecommunications services	Honduras and Yemen	\$21.6 million in revenue, 250 employees	3 years	No	\$1 million (outside the U.S. excluding penalties of \$1.2 million to \$1.4 million because of extensive cooperation)	No	Yes, by standards	Unknown	Senior management

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KPMG, Brown & Root LLC and Halliburton	08/1/09	KBR with respect to Halliburton Halliburton also agreed to be jointly and severally liable with KBR.	Anti-bribery, books and records, internal controls	KBR formed a consortium that offered an award in the U.K. and in Japan to make \$700 million in bribes to Nigerian officials to obtain construction contracts. The U.K. agent also made payments to accounts that were controlled by Nigerian government officials and paid \$5 million cash to a Nigerian political party. Halliburton did not have adequate internal controls, the due diligence on the U.K. agent did not uncover the bribery scheme and it did not conduct due diligence on the Nigerian agent.	Global engineering, construction and services company Halliburton is an energy services company.	Nigeria	\$1.6 billion in revenue, 57,000 employees	Unknown	\$402 million paid by KBR	Corporate liability in the for \$177 million in disgorgement	KPMG and independent monitor for three years. Halliburton agreed to retain independent consultant for 60 days and then one year later, for 30 days, to evaluate its internal controls and record-keeping policies.	No	Unknown	Sales vice president, KBR chairman and CEO

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ITT Corp.	02/1/09	No charges filed yet	Books and records, internal controls	Chinese subsidiary paid \$20,000 through third-party agents to officials of Chinese state-owned entities. Also it improperly recorded the payments to the government entities as "commissions" in its corporate ledger.	Multinational company focusing on water and tube management, global delivery and security, and within and flow control	China	40,000 employees with \$2 billion in annual revenue	Unknown	Unknown	\$20,000 also surrendered \$1.4 million in profits and management interests	Unknown	Yes	Unknown	Chief financial officer with "managerial discretion"
Beiersdorf AG	12/1/06	DPA	Anti-bribe, books and records, internal controls	Made thousands of corrupt payments, totaling \$1.4 billion to bribe government officials for business around the world	Electronics and electrical engineering	Argentina, Brazil, China, Iraq, Israel, Mexico, Nigeria, Russia, Venezuela, Vietnam	427,000 employees \$105.6 billion in revenue	Unknown	\$400 million (between all five subsidiaries since 2000 - \$150 million to Munich public prosecutor office)	\$500 million (management)	Compliance monitor for up to 4 years.	No, but cooperation noted	Permanent	All levels of management; SEC calls it "a corporate culture where bribery was tolerated and even rewarded at the highest levels of the company."

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Conventy Inc.	06/27/06	Consented to the entry of a consent and-avoid order	Books and records, internal controls	A wholly owned subsidiary of Conventy (hereby) emits hundreds of small payments totaling \$17,000 to Philippine customs officials and officials of INQUIRY state-owned entities.	International transportation	Philippines	\$1.4 billion in revenue	Unknown	No	\$500,000	Unknown	Yes	Unknown	Conventy did not know about the illegal payments until 2009 when it disclosed the information to the SEC (shown SEC's willingness to prosecute regardless of criminal knowledge (K)).
Fero Technologies Inc.	08/05/06	NPA	Anti-bribe, books and records, internal controls	\$44.500 in "retail fees" to employees of state-owned or state-controlled entities in China to secure contracts worth \$4.9 million in profit Sales director ordered accounting staff to alter account entries to delete payees.	Computerized measurement devices and software for automotive, aerospace and consumer goods industries.	China	760 employees (\$48.5 million market capitalization)	2 years	\$1.1 million	\$1.4 million disgorgement (\$40,000 pre-judgment interest)	Independent corporate consultant acceptable to both SEC and Justice Department	Yes	No	Director of Anti-Fraud

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AGA Medical Corp.	06/03/06	DPA	Anti-bribery (company may be deemed to have committed bribery)	Keystone up to 20% to establish and operate hospital and government-employee centers for using AGA's payments in local "communities" \$20,000 to a patient official to assist in approval of patient Up to \$1,000 available to government employee doctors per each AGA product purchased Business Benefit: \$15.5 million in China sales from 1997 to 2005	Medical device manufacturer	China	Private company; \$130 million in revenue in 2007; 900-100 employees	3 years (due 1-year extension possibility)	\$2 million	N/A (outside company)	Yes	Yes	No	High-ranking officer and part-owner with authority to set company policy and approve sales practices in foreign countries Head of International sales

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Willbros Group	02/14/08	DPA	Anti-bribe, books and records	\$6 million in bribes to Nigerian court and tax officials and employees of government-owned oil refinery resulted in \$2.9 million in profits in Nigeria \$200,000 in bribes to officials of government-owned oil and gas company in Ecuador to secure \$3 million contract for fraudulent tax avoidance scheme in Bolivia	Oil and gas services	Nigeria, Ecuador, Bolivia	5,475 employees \$1.75 billion market capitalization	3 years (plus 1-year extension provisions)	\$22 million	\$6.9 million disgorgement \$1.4 million prepayment interest, no civil penalty to company level	Yes	Yes, "promptly"	United attorney-client privilege waiver	President, supervisory employee in Nigeria, corporate vice president in Nigeria
Wingtrak Air Shuttle	02/14/08	NPA	Anti-bribe, books and records, internal controls	\$197,400 in cash payments to Indian Ministry of Railroad officials; payments obligated on "contingent" expenses and "supplier"	Manufacturer of bus, rail systems and related products for trains and passenger vehicles	India	6,028 employees \$2.5 billion market capitalization	3 years	\$500,000	\$97,000 civil penalty; \$250,000 disgorgement \$29,400 prepayment interest	Independent compliance consultant	Yes	Unknown	Vice president/ chair of wholly owned Indian subsidiary

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Lucent Technologies	1/22/07	NPA	Books and records, internal controls	275 phone tips acquired in February to U.S. by Chinese officials	Communications (mobile service providers, businessmen and governments to deliver voice, data and video communications end users)	China	76,410 employees \$13.5 billion market capitalization	2 years	\$1 million	\$1.5 million	No	Yes	No	Lucent China's chairman, CEO, Lucent China COO, Lucent's New Jersey employees with unknown level of seniority
York International	1/09/07	DPA	Books and records, conspiracy to commit wire fraud, and other related program violations	Non-FCPP bid; Hundreds of improper payments to employees of government contractors and customers and government contractors to obtain and retain government contracts in Bahrain, Egypt, India, Turkey and United Arab Emirates; achieved by submitting false invoices for services never performed; invoices paid in cash; Payments to Nigerian agent knowing considerations	Global provider of handling, air conditioning, ventilation and refrigeration products	Ind (FCPP), Bahrain, Egypt, Nigeria, India, Turkey, UAE, China	140,000 full-time employees \$17.7 billion in market capitalization (data are by Johnson Controls, which acquired York in December 2006)	3 years	\$10 million	\$9 million disgorgement \$1 million pre-judgment interest, \$2 million civil penalty	Yes	Yes (as part of ongoing CFPF probe)	Unsettled but York appears net to have waived the privilege	YIC president/ general manager and sales manager of York subsidiary

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Paradigm B.V.	06/24/07	NPA	Anti-bribery	<p>Kazakhstan: Paid \$22,250 to agent to give to Kazakhneft's official to secure tender</p> <p>Nigeria: Paid Nigerian politician \$100,000 to \$200,000 to obtain contract with Nigerian National Petroleum Corp. Paid agents in</p>	Oil and gas industry	China, Indonesia, Kazakhstan, Mexico, Nigeria	650 employees offices in 25 countries; corporate company	18 months	\$1 million	N/A (private company)	No, but Paradigm must retain outside compliance counsel	Yes	Yes	Unknown

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Tyden	06/2/07	NPA	Books and records, internal controls, and off-book program violations	Non-FCPP Act: \$6 payments totaling \$115,000 to secure contracts	Companies in the aircraft, industrial and financial industries by manufacturing helicopters, jets, weapons, surveillance systems and fuel systems, engine control units	Bangladesh, Indonesia, Egypt, India, United Arab Emirates	44,000 employees; \$12 billion market capitalization	Letter of 9 years or until prosecution is filed in the agreement are final	\$1.75 million	\$2.9 million disgorgement; \$40,000 prepayment interest; \$500,000 civil penalty	No	Yes	Unknown	MMH is Es of in the manager, expect under review of by FBI-DOJ subsidiaries

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Delta & Pine Ltd Co. and Turkish Delta Pine (subsidiary)	07/28/07	Consented to the entry of a consent-deck order and agreed to entry of a final judgment	Books and records, internal controls	Turk Delights made payments of \$45,000 to officials in Turkish Ministry of Agriculture and Rural Affairs. Delta & Pine found out in 2004 but did not stop the payments.	Collander product	Turkey	\$175 million in revenue	Unknown	None	\$800,000	Independent compliance consultant	No	Unknown	"Others"
Baker Hughes	04/28/07	DPA	Anti-bribery, books and records, internal controls	\$4.1 million to agent to give to officials of Kazakhstan. \$5.2 million to secure oil services contract that generated \$2.6 million annually from 2007 to 2008	Oil and gas services	Kazakhstan, Nigeria, Angola, Indonesia, Russia, Uzbekistan	\$5,000 employees, operates in 80-plus countries, \$26.5 billion market capitalization	3 years	\$11 million	\$10 million civil penalty, \$24 million disgorgement	3 years	Yes	Yes	Business development manager

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Dow Chemical Co.	02/13/07	Consented to the entry of a non-prosecution order	Books and records, internal controls	\$200,000 in improper payments to Indian government officials by subsidiary	Production of chemicals, hydrocarbons, and agricultural	India	\$07.5 billion in revenue, 45,000 employees	Unknown	None	\$525,000	Dow hired an independent consultant to allow willingness to comply with FCPA.	Yes	Unknown	Unknown. Dow did not know about the legal payments until an internal audit when it disclosed the information to the SEC (above 0 EC's willingness to prosecute regardless of criminal knowledge).
Alcoa Group Ltd. (wholly owned subsidiary of Velco Gny not purchased by GE)	02/06/07	DPA. On Nov. 21, 2006, the Justice Department for the first time ever received a DPA. An Alcoa criminal charge against the previously protected party.	Anti-bribery	\$45,500 payment for payments to customs process	Oil and gas supplies (production facilities, process systems, technology and other products)	Nigeria	7,000 employees	5 years	\$4.2 million	None mentioned in Justice Department agreement	No, but must finish outside compliance course	Yes	Yes	Deputy project manager

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Carage All Stars (Hedge Fund)	07/06/07	N/A	Anti-Bribe	Former owner of bribed in transaction in which he received, producing \$400 million return to gain control of Acacia (oil industry)	Hedge fund	Azerbaijan	\$6 million	Unknown	Unknown	\$500,000	Unknown	No, but cooperation noted	Unknown	Executive/Principal of the hedge fund
Hecus Technologies Inc.	N/A	Has not yet entered a plea of DPA, but probably a plea to work	Anti-Bribe, books and records	Paid at least \$500,000 in bribes, disguised as "consultants," to government officials to gain business for the company	Exports defense CTR security related equipment and technology	Vietnam	\$250,000 in revenue, 15 employees	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown	Founder and president