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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.

Since November 2006, 25 known deferred and non-prosecution agreements have been entered into for FCPA violations. Of those, eight were exclusively related to violation of the United Nations' oil-for-food program in Iraq. Of the 17 agreements containing non-program violations, 10 were deferred prosecution agreements, and seven 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), Siemens AG,⁸ Statoil ADA,⁹ Panalpina World Transport (Holding) Ltd.,¹⁰ Shell Nigeria Exploration & Production Co.,¹¹ Transocean Inc.¹² and Tidewater Marine International.¹³ Although not technically a DPA, the Siemens deal effectively functions as a deferred prosecution agreement.

NPAs were entered into by Faro Technologies,¹⁴ Westinghouse Air Brakes,¹⁵ Lucent Technologies,¹⁶ Paradigm B.V.,¹⁷ Omega Advisors,¹⁸ Halliburton¹⁹ and Noble Corp.²⁰ During this same period, several companies also consented to cease-and-desist orders.²¹

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.²²

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. Likewise, Panalpina World Transport (Holdings) Ltd. recently entered into a DPA after paying \$49 million in bribes over a five-year period.

For those cases involving bribes less than \$500,000, NPAs have been used.²³ 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, and Noble entered into an NPA in November 2010 based on five payments totaling \$74,000 made to a Nigerian customs agent for “special handling charges.”

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.²⁴ 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.²⁵

In 2008 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.”²⁶

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

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DPAs apparently are used when larger dollar amounts are involved.

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 several companies entering into DPAs, while others, like Aibel Group and Paradigm, were required to retain outside compliance counsel.²⁷ An independent compliance consultant was required of Statoil ASA, 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.²⁸ 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.

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.”²⁹ 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.)³⁰

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.”³¹

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,³² 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 an FCPA case — received only a two-year term. Statoil ASA, however, paid a \$10.5 million penalty yet was given a three-year term.

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."³³

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.³⁴

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. Panalpina's bribes totaling \$49 million ultimately cost it over \$70 million in penalties. 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.³⁵

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

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. The recent spate of DPAs involving companies dealing with Panalpina, all of which self-reported, resulted in none of the companies receiving monitors, and instead agreeing to maintain strict compliance programs.

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.³⁶

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.³⁷ 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 and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/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 and 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/Deferred-ProsecutionAgreement.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, SEC Files Settled FCPA Action Against Willbros Group Inc. and Several Former Employees (May 14, 2008), *available at* <http://www.sec.gov/litigation/litrelases/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 Press Release, Dep't of Justice, Statoil ASA Satisfies Obligations Under Deferred Prosecution Agreement and Foreign Bribery Charges Are Dismissed (Nov. 19, 2009), *available at* www.justice.gov/opa/pr/2009/November/09-crm-1257.html.
- ¹⁰ See deferred prosecution agreement in *United States v. Panalpina World Transport (Holding) Ltd.* (S.D. Tex. Oct. 10, 2010) (on file with author).
- ¹¹ See deferred prosecution agreement in *United States v. Shell Nigeria Exploration & Prod. Co.* (S.D. Tex. Nov. 4, 2010) (on file with author).
- ¹² See deferred prosecution agreement in *United States v. Transocean* (S.D. Tex. Oct. 21, 2010), alleging violations of 18 U.S.C. § 371 (conspiracy), 15 U.S.C. § 78dd-1 (FCPA) and 15 U.S.C. § 78m (books and records) (on file with author).
- ¹³ See deferred prosecution agreement in *United States v. Tidewater Marine International* (S.D. Tex. Nov. 1, 2010) (on file with author).
- ¹⁴ 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.
- ¹⁵ Westinghouse Non-Prosecution Agreement (on file with author); Litigation Release No. 20457, SEC, SEC Sanctions Westinghouse Air Brake Technologies Corporation for Improper Payments to Indian Government Employees (Feb. 14, 2008), *available at* <http://www.sec.gov/litigation/litrelases/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.
- ¹⁶ 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, 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>.
- ¹⁷ 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.
- ¹⁸ 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>.
- ¹⁹ 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, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-23.htm>; Litigation Release No. 20897A, SEC, 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.
- ²⁰ Letter from U.S. Department of Justice, dated Nov. 4, 2010 (on file with author).
- ²¹ 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.
- ²² Litigation Release No. 20571, SEC, 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, 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, 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.
- ²³ Press Release, Dep't of Justice, *supra* note 15; Litigation Release No. 20457, SEC, 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, 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 18; Litigation Release No. 20251, SEC, 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.
- ²⁴ 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.
- ²⁵ Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, to Chairman, U.S. House of Reps., Committee on the Judiciary (May 15, 2008).
- ²⁶ 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 (Mar. 7, 2008), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.
- ²⁷ Press Release, *supra* note 7; Press Release, *supra* note 17; Press Release, Dep't of Justice, *supra* note 15; Litigation Release, *supra* note 15; Press Release, *supra* note 3; Press Release, Dep't of Justice, York International, *supra* note 22; Litigation Release No. 20319, *supra* note 22.
- ²⁸ See note 21, *supra*.
- ²⁹ *In re Westinghouse Air Brake Techs.*, File No. 3-12957 (Feb. 14, 2008), available at <http://www.foley.com/files/WabtecSECOOrder.pdf>.
- ³⁰ 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.
- ³¹ *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/f074ef18-a571-4ea0-953c-3f2200090682/Alert_whitecollar_051508_addendum.pdf.
- ³² It is a private company not subject to the SEC's regulation.
- ³³ See deferred prosecution agreement, *United States v. AGA Medical* (D. Minn.), available at <http://www.corporatecrimereporter.com/documents/DeferredProsecutionAgreement.pdf>.
- ³⁴ The SEC Takes It Back, *supra* note 4.
- ³⁵ 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.
- ³⁶ Dealing with the DOJ, <http://fcpublog.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).").
- ³⁷ 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/title9/28mcrm.htm#9-28.710.

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