

ClientAlert

White Collar

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2010: All Signs Point to a Record-Breaking Year for FCPA Enforcement

On the heels of the US Department of Justice's ("DOJ") massive sting operation, which resulted in the indictment of 22 individuals for conspiracy to violate the US Foreign Corrupt Practices Act ("FCPA"),¹ the DOJ and US Securities and Exchange Commission ("SEC") appear close to settling half-a-dozen investigations involving corrupt payments to foreign officials made by **Alcatel-Lucent, BAE Systems plc, Daimler AG, Innospec Inc., Pride International, Inc.** and **Technip S.A.**² If concluded, these anticipated settlements could result in more than US\$1.1 billion in criminal fines, civil penalties and disgorgement—nearly double the more than US\$646 million in fines, penalties and disgorgement recovered in 2009, and more than ever recovered in a single year since the FCPA's enactment in 1977. And it's only March 1.

These recent enforcement developments are harbingers of "more robust" FCPA enforcement by the DOJ and SEC throughout 2010, and are consistent with warnings issued by Assistant Attorney General Lanny A. Breuer at last week's ABA White Collar Crime Conference in Miami, Florida. In referring to the "largest single prosecution of individuals in the history of DOJ's enforcement of the FCPA," Breuer noted that the DOJ's "aggressive prosecution of individuals" and "the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that [the DOJ] will seek to hold you personally accountable for FCPA violations." Breuer also addressed corporate prosecutions, stating that the DOJ will continue to seek guilty pleas or criminal charges and stiff penalties where "the criminal conduct is egregious, pervasive and systemic, or when the corporation fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct."

Breuer's comments are further proof that the DOJ and SEC are determined to prosecute individuals and corporations, both US and non-US alike, under the FCPA more aggressively than ever before. They also serve as a wake-up call for corporations, as well as their executives, general counsels, compliance officers, internal audit departments and Board members, that have yet to implement internal anti-corruption compliance policies and procedures or assess existing procedures' effectiveness at mitigating risk and preventing and detecting potential FCPA violations.



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¹ See White & Case Client Alert, "DOJ and FBI Go Undercover to Ensnare Twenty-Two Executives in Foreign Bribery Scheme," Jan. 22, 2010, available at <http://whitecasenews.com/ve/ZZML90917292812891646170>.

² Information concerning the anticipated settlements of these six investigations is based on publicly-available news reports, press releases and regulatory filings.

Several themes and trends can be extracted from these pending FCPA settlements, which may serve as a barometer for FCPA enforcement actions throughout the remainder of 2010 and beyond:

- **Bigger Financial Penalties.** The costs of non-compliance with the FCPA are growing substantially. Gone are the days when a financial settlement of US\$44 million would capture one's attention, as it did when Baker Hughes settled with the DOJ and SEC in 2007 for what was then the largest FCPA settlement. Today, in the wake of Siemens' US\$800 million settlement, it is more common to see substantially larger settlement payments. For those settlements discussed herein, the anticipated fines and penalties range from US\$28.8 million (Innospec) to US\$400 million (BAE Systems), and average more than US\$192 million per settlement.
- **Foreign Companies Beware.** Despite previous high-profile prosecutions of non-US companies such as Siemens AG, Novo Nordisk A/S, AB Volvo and Statoil ASA, many non-US multinational corporations remain skeptical of US enforcement authorities' jurisdiction to regulate their conduct outside of the US. In light of the proposed settlements discussed herein, however, there should be no doubt about the willingness and ability of US enforcement authorities to investigate and prosecute non-US companies and their executives for violating the FCPA. As former Assistant Attorney General Alice Fisher stated in a 2006 speech to the American Bar Association, "The Department will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies." This month's proposed settlements further support Fisher's warning. Four of the six companies that have announced future settlements with US enforcement authorities are European companies: Alcatel-Lucent (France), BAE Systems (United Kingdom), Daimler AG (Germany) and Technip S.A. (France). Three of those four companies are considered "issuers" under the FCPA and thus subject to US jurisdiction because during the relevant time period they traded shares or American Depositary Receipts ("ADRs") on US stock exchanges. In the case of BAE Systems, however, the company traded ADRs over-the-counter instead of on a US stock exchange, and thus, would not likely be considered an "issuer" under the FCPA for jurisdictional purposes.
- **Increased International Cooperation.** As US enforcement of the FCPA has become more sophisticated, and as other countries' anti-corruption enforcement regimes begin to align with that of the US, US and foreign enforcement authorities have increased their communication, coordination and

cooperation with regard to large-scale investigations involving multinational corporations and/or alleged misconduct occurring across borders. As DOJ's Deputy Chief of the Fraud Section Mark F. Mendelsohn noted in his remarks at the recent Global Ethics Summit, the extent to which the DOJ is working with other countries "is growing exponentially." This trend will likely continue to grow in light of the US's 56 new extradition and mutual legal assistance treaties ("MLATs") with the European Union and its member states.³ Because four of the six proposed settlements discussed herein involve non-US companies, it is likely that such cooperation and assistance played a major role in bringing these investigations to a close.

- **Ability to Negotiate a Global Settlement.** The BAE Systems and Innospec settlements are part of an emerging trend: global negotiated settlements for multinational companies that uncover misconduct which potentially violates US and other countries' anti-corruption laws. Here, for example, BAE Systems was able to successfully negotiate a global settlement that simultaneously resolved pending matters with the DOJ and the UK Serious Fraud Office ("SFO"). Such an arrangement allowed both US and UK enforcement authorities to expend fewer resources of their own by leveraging each other's enforcement resources, and permitted BAE Systems to resolve all potential liabilities related to the same alleged misconduct and announce settlement of these matters at the same time, thus minimizing the scope of the potential reputational damage of such a settlement.
- **Return of Corporate Monitors.** Although 2009 was a banner year for FCPA enforcement, with 44 enforcement actions against 12 companies and 45 individuals, only two companies were required to implement corporate compliance monitors as part of their settlement agreements—Control Components, Inc. and Kellogg Brown & Root LLP ("KBR"). Given the frequency with which the DOJ and SEC imposed corporate monitors from 2007 – 2008, some practitioners believed that corporate compliance monitors were no longer favored and "a thing of the past." However, proposed settlements of the Alcatel-Lucent and Daimler AG investigations suggest otherwise, each including the imposition of corporate compliance monitors as a condition of settlement. In light of the costs associated with such monitors, companies should take this opportunity to ensure that their compliance policies and procedures are adequately operating to prevent and detect potential violations; such effective performance might discourage US enforcement authorities from imposing a corporate compliance monitor should misconduct be uncovered.

3 See White & Case Client Alert, "56 New Extradition and Mutual Legal Assistance Treaties Take Effect Throughout Europe and the United States," Feb. 2010, available at <http://whitecasenews.com/ve/ZZv71UWZ61T7391bu4>.

- **Availability of Non-FCPA Charges.** Evidence of a potentially improper payment does not automatically mean a company will be forced to plead guilty to violating the anti-bribery provisions of the FCPA. As discussed in more detail below, BAE Systems agreed to plead guilty to other, arguably “lesser,” charges: conspiracy to make false statements to government officials in the US, and breach of duty to keep accurate accounting records in the UK. As one of the world’s largest defense and military contractors, BAE Systems could have faced debarment from government contracts had the company pleaded guilty to corruption or bribery charges. The BAE Systems settlement shows a willingness on the part of US enforcement authorities to forego corruption charges, provided that the underlying misconduct is corrected and the company is sufficiently penalized for its actions.

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Following are brief summaries of publicly available information concerning the six proposed FCPA-related settlements discussed in this Client Alert.

Alcatel-Lucent⁴

Alcatel-Lucent announced in its Consolidated Financial Statements for the period ending December 31, 2009 that it has reached a potential agreement with the DOJ and SEC to settle FCPA violations in Costa Rica, Taiwan and Kenya. The FCPA investigation stemmed from charges against a former Alcatel executive for bribery of Costa Rican officials. The company plans to enter into a deferred prosecution agreement which includes US\$92 million in criminal fines and the imposition of a corporate compliance monitor. Additionally, it will enter into a consent decree with the SEC requiring the disgorgement of US\$45.4 million. Finally, three of its subsidiaries will agree to plead guilty to violations of the FCPA’s anti-bribery, books and records and internal controls provisions.

BAE Systems plc⁵

BAE Systems agreed to plead guilty and pay US\$400 million to the DOJ and US\$47 million to the SFO to settle FCPA-related charges for activities in the Czech Republic, Hungary, Tanzania and Saudi Arabia. The DOJ alleges that BAE Systems earned more than US\$200 million from contracts obtained through improper means. BAE Systems pleaded guilty to one charge of conspiring to make false statements to the US Departments of Defense and State. The government alleged that BAE Systems concealed and misreported corrupt payments made to foreign officials in lease applications and export license applications. BAE Systems’ settlement with the SFO for accounting records violations is the largest SFO settlement in UK history.

Daimler AG⁶

Daimler agreed to plead guilty and pay US\$200 million to settle dual FCPA investigations with the DOJ and SEC. The DOJ and SEC began investigating Daimler in 2004 on a tip that Daimler paid bribes to foreign officials and maintained secret bank accounts for corrupt payments. In 2005, Daimler conducted an internal investigation and self-disclosed to the DOJ and SEC that improper payments were made to retain business, primarily in Africa, Asia and Eastern Europe. Since self-disclosing, Daimler has also instituted measures to “safeguard against the reoccurrence of improper conduct” and evaluated and revised its governance policies and internal controls.

Innospec Inc.⁷

Innospec announced plans in its 2009 Annual Report (Form 10-K) to settle bribery charges with the DOJ, SEC and SFO totaling between US\$28.8 and US\$40.2 million. Both US and UK enforcement authorities were investigating Innospec for its role in the UN Oil-for-Food Program (“OFFP”). In 2008, an agent of the company was indicted for conspiracy to defraud the UN and bribery of Iraqi officials. Innospec undertook a review of its participation in the OFFP and an internal investigation by outside counsel to uncover FCPA issues.

4 Alcatel-Lucent, Consolidated Financial Statements at December 31, 2009 (Feb. 11, 2010), available at <http://bit.ly/bBVHpY>.

5 Press Release, BAE Systems, “BAE Systems PLC Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office,” Feb. 23, 2010, available at http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html.

6 See David Voreacos, Justin Blum & Joshua Gallu, “Daimler Said to Agree to Pay US\$200 Million Over Probe,” *BusinessWeek*, Feb. 12, 2010, available at <http://www.businessweek.com/news/2010-02-13/daimler-said-to-agree-to-pay-200-million-over-probe-of-bribes.html>.

7 Innospec Inc., Form 10-K, Feb. 19, 2010, available at http://www.innospecinc.com/assets/_files/documents/mar_09/cm__1238500858_2009-03-31_Form_10-K.pdf.

Pride International, Inc.⁸

Pride International set aside US\$56.2 million for an expected settlement of FCPA-related offenses with the DOJ and SEC, as announced in its 2009 Annual Report (Form 10-K). After conducting an internal investigation, Pride International uncovered illegal payments from 2001 – 2006 to officials in Saudi Arabia, Kazakhstan, Brazil, India, Nigeria, Libya, Angola and the Republic of the Congo. The company continues to cooperate with the DOJ and SEC in their investigations.

Technip, S.A.⁹

Ahead of the release of its 2009 full-year results, Technip announced that it has set aside €245 million (US\$334 million) for a potential “global resolution of all potential claims in the US arising from the investigation” by the DOJ and SEC into payments made in connection with the construction by TSKJ of a natural gas liquefaction complex for Nigeria LNG Limited. Technip is a 25 percent shareholder in the joint venture, TSKJ, along with Snamprogetti Netherlands B.V., JGC Corporation and KBR. Last year, KBR paid US\$402 million in criminal fines to settle related allegations.

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White & Case’s White Collar Practice Group will continue to monitor and provide updates regarding the current FCPA enforcement environment.

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8 Press Release, Pride International, Inc., “Pride International Fourth Quarter 2009 Results to Include Accrual Pertaining to FCPA Investigation,” Feb. 16, 2010, *available at* <http://www.prideinternational.com/fw/main/Press-Releases-31.html>.

9 Press Release, Technip, S.A., “Technip: Charge for Potential Resolution of the TSKJ Nigeria Matter in the US; Q4-09 Operating Performance Above Expectations,” Feb. 12, 2010, *available at* <http://www.technip.com/english/press/articles/2010/2010-02-12.htm>.

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