Recent Developments in FCPA Law and Practice

James J. Benjamin, Jr.
Akin Gump Strauss Hauer & Feld
February 2012[1]

Prepared for New York City Bar Association CLE Program
"Hot Topics in SEC Enforcement: Investigations in a Time of Turmoil"
March 30, 2012

Overview of FCPA's Anti-Bribery Provisions

- The FCPA's anti-bribery provisions are set forth in Sections 30A, 30B, and 30C of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3
- In a nutshell, the statute prohibits covered persons and entities from:
    - "corruptly"
    - offering, promising, providing, or authorizing the provision of money or anything of value
    - directly or indirectly
    - to a "foreign official," a foreign political party or official thereof, or a candidate for foreign political office
    - to obtain or retain business, or to direct business to any person. *See* §§ 30A(a), 30B(a), 30C(a).
- Under the statute, the government has three separate bases for asserting jurisdiction over a person or entity:
    - Section 30A applies to:
        - issuers;

---

[1] The 2011 Mid-Year FCPA Update, http://www.gibsondunn.com/publications/pages/2011Mid-YearFCPAUpdate.aspx, and 2011 Year-End FCPA Update, http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf, both prepared by the firm of Gibson Dunn & Crutcher LLP, were helpful to the author of this outline and provide a comprehensive overview of developments in FCPA cases during 2011.

        - foreign issuers that are required to file reports under Section 15(d) of the 1934 Act (*i.e.*, foreign issuers with ADRs trading on U.S. exchanges);
        - and their officers, directors, employees, and agents
    - Section 30B applies to "domestic concerns" and their officers, directors, employees, or agents. A "domestic concern" is defined as:
        - a business that is organized under the laws of any state or has its principal place of business in the United States; and
        - any individual who is a U.S. citizen, resident, or national
    - Section 30C applies to any person or entity – even those who are not issuers or domestic concerns – if the person or entity violates the statute "while in the territory of the United States"

- The statute does not apply to "any facilitating or expediting payment . . . the purpose of which is to expedite or to secure the performance of a routine governmental action." *See, e.g.*, § 30A(b). "Routine government action," in turn, is defined to include low-level matters such as obtaining permits or licenses, processing visas and work orders, providing police protection or mail services, and providing phone, power, water, and cargo unloading services. *See, e.g.*, § 30A(f)(3).

- The statue recognizes an affirmative defense if:
    - The payment "was lawful under the written laws and regulations" of the foreign country; or
    - The payment was "a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to" either "the promotion, demonstration, or explanation of products or services" or "the execution or performance of a contract with a foreign government." *See, e.g.*, § 30A(c).

- Under the statute, a "foreign official" is defined as any officer or employee of:
    - "a foreign government or any department, agency, or instrumentality thereof"; or
    - a "public international organization" (itself a defined term). *See e.g.*, § 30A(f)(1).

- The FCPA is enforced jointly by the SEC and the Department of Justice.
    - The Department of Justice has sole authority to bring criminal charges for violations of the FCPA; the SEC is limited to bringing civil enforcement actions.

- In practice, it is common for both agencies to conduct parallel investigations of the same conduct. In a parallel investigation, the agencies typically conduct joint interviews of witnesses and may hold joint meetings with defense counsel. Although the Department of Justice is prohibited from giving the SEC access to documents that it has obtained through a grand jury subpoena, *see* Fed. R. Crim. P. 6(e), the SEC will generally share documents that it has obtained with the Department of Justice.

- Under longstanding DOJ policy, the Fraud Section in Washington must participate in any case in which criminal FCPA charges are filed. A U.S. Attorney's Office cannot independently bring an FCPA case without participation by the Fraud Section.

Recent Cases Demonstrate the FCPA's Broad Jurisdictional Reach

- Newcomers to the FCPA are often surprised at the breadth of the statute's jurisdictional reach. The statute's three separate jurisdictional provisions, when taken as a whole, sweep very broadly and can reach conduct that, at first blush, seems to have little or no connection with the United States. Two major cases from 2011 illustrate this point.

- *Magyar Telekom cases*

    - On December 29, 2011, the DOJ and the SEC announced parallel settled enforcement actions against Magyar Telekom, PLC and Deutsche Telekom, AG. In addition, the SEC filed a contested civil enforcement action against three former senior executives of Magyar Telekom. *See United States v. Magyar Telekom, PLC*, Cr. No. 11CR00597 (E.D. Va. Dec 29, 2011); *SEC v. Magyar Telekom, PLC*, 11 Civ. 9646 (S.D.N.Y. Dec. 29, 2011); *SEC v. Elek Straub et al*., 11 Civ. 9645 (S.D.N.Y. Dec. 29, 2011). As outlined in the charging documents and press releases, the conduct is far afield from the United States.

    - Magyar Telekom is the largest telecommunications company in Hungary. Its majority owner is Deutsche Telekom, a German company. The three individuals sued by the SEC, all of whom are former Magyar Telekom executives, are Hungarian citizens believed to reside in Hungary.

    - In 2005 and 2006, Magyar Telekom made improper payments to government officials in Macedonia and Montenegro to secure business advantages for Magyar Telekom in those countries. The payments were made in Euros (not in U.S. dollars) and, in the case of the Macedonian scheme, were arranged and paid in part through a Greek intermediary. There is no indication that any conduct occurred in the U.S. (apart from emails that were routed through U.S. servers) or that any U.S. individuals or U.S.-based companies were involved.

    - The improper payments were not accurately reflected in Magyar Telekom's books and records. The false entries on Magyar Telekom's books and records were, in turn, consolidated into Deutsche Telekom's books and records, causing Deutsche Telekom to also maintain inaccurate books and records.

  - As a result of this conduct, Magyar Telekom and Deutsche Telekom paid a total of $95.1 million in penalties and disgorgement to the DOJ and the SEC

  - Based on all of this, one might reasonably ask, "Why does the U.S. government have any authority over this conduct?" The answer lies not in the routing of emails, but rather in the fact that, during the relevant time period, both Magyar Telekom and Deutsche Telekom had ADRs trading on the New York Stock Exchange. (Both companies delisted their ADRs in 2010).

  - Because of the listing of ADRs, the U.S. government was able to assert jurisdiction over Magyar Telekom and Deutsche Telekom as "issuers" under § 30A. The three Magyar Telekom executives, in turn, were sued as officers, employees, and agents of an issuer under § 30A.

- *Charges against former executives and agents of Siemens in connection with Argentine bribery scandal*

  - In December 2008, Siemens AG entered into the largest-ever FCPA settlement, paying a total of approximately $1.6 billion to the DOJ, SEC, and German authorities. The charges arose from a pattern of bribery around the world that was previously ingrained in Siemens' corporate culture.

  - Three years later, in December 2011, the DOJ and SEC followed up with parallel criminal and civil FCPA charges against a total of nine individuals. *See United States v. Uriel Sharef, et al.*, 11 Cr. 1056 (DLC) (S.D.N.Y.); *SEC v. Uriel Sharef, et al.*, 11 Civ. 9073 (SAS) (S.D.N.Y.). The individual defendants are alleged to have participated in a long-running, complicated bribery scheme directed at Argentina.

  - The bribery scheme arose from the Argentine government's plan, back in the 1990s, to introduce new national identity cards for all Argentine citizens. The project was envisioned as being massive in scope and was valued at approximately $1 billion. As alleged in the DOJ indictment and the SEC complaint, Siemens engaged in a sustained pattern of bribery to procure the Argentine contract and, after the contract was canceled by the Argentine government, to obtain the economic benefits that had been anticipated for Siemens. Here is a summary of the complex allegations:

    - In the mid-1990s, Siemens agreed to pay approximately $100 million in bribes to Argentine officials in exchange for the identity card contract. Siemens was awarded the contract and paid a substantial portion of the promised bribe amounts through complex shell companies.

    - In May 1999, the Argentine government suspended the project during a presidential election campaign. In response, Siemens sought to re-start the contract by paying outstanding bribes and also agreeing to pay new bribes to members of the incoming government. Again, the bribes were paid through circuitous means.

    - In May 2001, the new Argentine government canceled the project. In response, Siemens paid the outstanding bribes and then launched a sham arbitration in Washington, D.C., to recover the lost profits on the canceled project.

    - During the arbitration, Siemens took active steps to prevent any evidence of the bribery from coming to light. Siemens officials made false statements to the arbitration panel and bought off witnesses to prevent them from exposing the bribery.

- Seven of the nine defendants were employees of Siemens or one of its subsidiaries. The other two were consultants who worked on Siemens' behalf in Argentina. None of the nine individual defendants is a U.S. citizen. (Most are Germans; one is Argentine). Nor did any of the defendants work for a U.S. arm of Siemens.

- The government has asserted jurisdiction over the Siemens individuals under both Sections 30A and 30C:

    - In May 2001, Siemens' ADRs were listed on the NYSE, and the company became an "issuer" under Section 30A. The indictment and the SEC complaint allege that jurisdiction lies because all nine defendants were directors, officers, employees, or agents of Siemens. (*Note*: Siemens, a sprawling global organization, has a complex corporate structure with multiple operating and regional subsidiaries. Some of the defendants might argue that they were working only for a subsidiary of the German parent that was not an "issuer" within the meaning of the FCPA).

    - In addition, the indictment alleges that the eight defendants who were charged criminally also are subject to jurisdiction under Section 30C because they violated the FCPA "while in the territory of the United States." In support of this allegation, the indictment cites meetings in Miami and New York and a series of bank transfers through New York and improper financial transactions involving accounts located in Florida. The indictment also relies on the Washington, D.C. arbitration, in which a number of defendants are alleged to have participated personally.

- As of early January 2012, none of the defendants was in custody. Presumably the government intends to seek provisional arrest and extradition of the eight persons who have been indicted.

- In the indictment, the DOJ has also brought additional, non-FCPA charges. The indictment alleges that all eight defendants: (a) conspired to commit money laundering in connection with the opaque financial transactions through which the bribes were paid; and (b) committed wire fraud against the Argentine government by pursuing the sham arbitration, which resulted in award of approximately $217 million in favor of Siemens.

  - The inclusion of different charges with separate legal theories is common in DOJ practice. Wire fraud, in particular, is a much simpler charge and does not have the same legal jurisdictional complexities as the FCPA. Perhaps the government included a wire fraud charge in this case to guard against any possible technical weaknesses in the FCPA theory against certain defendants.

Second Circuit Upholds "Conscious Avoidance" Jury Charge in Significant FCPA Case

- Under well-settled case law, if the government is required to prove, in a federal criminal case, that a defendant had knowledge of a particular fact or circumstance, it may do so by showing that the defendant was aware of a high probability that the fact or circumstance was true, but took affirmative steps to "consciously avoid" confirming it. *See, e.g., United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000). Sometimes colloquially called the "ostrich" instruction, a jury instruction on conscious avoidance is meant to prevent a defendant from escaping liability if he deliberately "stuck his head in the sand" to avoid explicitly confirming facts that were known to be highly probable. Conscious avoidance is not, however, to be used as a "back door" to let the government establish criminal liability upon a showing of mere negligence. *Id*. at 157.

- The conscious avoidance doctrine has been established mainly through case law. However, the FCPA contains an unusual statutory provision codifying the conscious avoidance method of establishing knowledge in FCPA cases. Under the statute, "[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that the circumstance does not exist." *See* § 30A(f)(2)(B).

- In a significant FCPA appeal decided on December 14, 2011, the Second Circuit held that the district court gave a proper conscious avoidance charge. *See United States v. Kozeny*, 2011 WL 6184494 (2d Cir. Dec. 14, 2011). In doing so, the Court of Appeals upheld the conviction of Frederic Bourke Jr., an American handbag entrepreneur, in connection with a tangled scheme to obtain an interest in the state oil company of Azerbaijan through bribes paid to Azeri government officials.

- The architect of the Azeri bribery scheme was Viktor Kozeny, a notorious international rogue known as the “Pirate of Prague” who has thus far successfully avoided extradition to the United States. The government alleged that Kozeny and his confederates promised and paid millions of dollars in bribes to Azerbaijan government officials in order to be able to acquire the state oil company upon its privatization. In fact, the oil company was never privatized and the scheme failed. *Id*. at *1-*3.

- Bourke was not accused of directly participating in any acts of bribery. He was a third-party investor in Kozeny’s consortium and did not participate in day-to-day activities in Azerbaijan. *See id*. However, the government alleged that Bourke was aware of a high probability of the fact that Kozeny’s scheme revolved around bribes, but that he failed to take steps to confirm that fact. On appeal, the Second Circuit held that the circumstantial evidence of Bourke’s knowledge was sufficient to support a conscious avoidance charge. Among the key pieces of evidence cited by the court were the following:

    - Bourke “was aware of how pervasive corruption was in Azerbaijan generally”;

    - Bourke knew “of Kozeny’s reputation as the ‘Pirate of Prague’”; and

    - Bourke created a corporate structure to insulate himself and other Americans from liability for any FCPA violations.

  Id. at *7. One might ask whether these items, even taken as a whole, could reasonably have supported a conscious avoidance charge. The Second Circuit placed special reliance, however, on an additional piece of evidence: a tape recording of a call between Bourke, another U.S. investor (who was not charged), and their attorneys. (The call came to light because Bourke waived the attorney-client privilege during the investigation. This appears in retrospect to have been a very bad decision for Bourke). During the call, Bourke alluded to the possibility of bribes and took pains to say that he didn’t “endorse it” or have “knowledge of it.” Id. at *8. The court held that this was the “strongest evidence demonstrating that Bourke willfully avoided learning whether corrupt payments were made.” *Id*. at *7.

- The *Bourke* case has attracted significant attention and commentary in the FCPA world. For criminal lawyers whose practice extends beyond FCPA cases, the use of the “conscious avoidance” instruction is not remarkable. However, the case illustrates the problems that FCPA defendants may encounter if they face significant circumstantial evidence of the high likelihood of bribery. Because FCPA investigations tend to be centered in locations where corruption is endemic and the means of bribery have become well-known, these are features of many FCPA cases.

- By the same token, robust and effective due diligence will help refute any argument of guilty knowledge or conscious avoidance. Thus, as in other FCPA contexts, effective due diligence is critical for those looking to avoid the “conscious avoidance” theory of liability.

Courts Reject Arguments that SOE Employees Should be Categorically Excluded from the Definition of "Foreign Official"

- A recurring question in recent years has been the proper interpretation of the term "foreign official" under the FCPA. The DOJ and SEC have generally taken the position that all employees of state owned enterprises ("SOEs"), even low-level people, are "foreign officials" within the meaning of the statute if the foreign government owns a majority of the SOE or otherwise exercises control over it. In some countries, this creates an extremely broad class of people who could be deemed "foreign officials," because of the scope and breadth of foreign government involvement in many commercial enterprises around the world.

- In decisions issued in 2011, two district judges rejected defense attempts to narrow the definition of "foreign official" by excluding employees of SOEs.

- *CCI Case*

    - In *United States v. Carson*, 2011 WL 5101701 (C.D. Cal. May 18, 2011), commonly called the "CCI Case," the government charged former employees of Controlled Components, Inc. ("CCI") with FCPA violations. CCI, which makes valves for the power generation industry, sold its products to state-owned companies in China, Korea, and the United Arab Emirates. The government charged the defendants with involvement in paying more than $4.9 in bribes to officers and employees of the company's SOE clients over a four-year period.

    - Four of the defendants moved to dismiss the indictment, arguing that the term "foreign official" under the FCPA does not include employees of SOEs. The defendants pointed to language of the FCPA, which defines a "foreign official" as an officer or employee of "any department, agency, or instrumentality" of a foreign government. They argued that SOEs are not departments, agencies, or instrumentalities of a government, and thus that the statute does not apply to improper payments made to employees of SOEs.

    - The presiding judge, James V. Selna of the Central District of California, rejected this argument, holding that in some circumstances SOEs may be "instrumentalities" of a foreign government, and that there is no categorical rule that excludes SOE employees from the definition of "foreign official" under the FCPA. Judge Selna held that whether a particular SOE employee is a "foreign official" is a question of fact, for the jury to decide based on the evidence at trial. The judge outlined a series of factors that may "bear on the question of whether a business entity constitutes a government instrumentality, including:

        - The foreign state's characterization of the entity and its employees;

        - The foreign state's degree of control over the entity;

        - The purpose of the entity's activities;

        - The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;

        - The circumstances surrounding the entity's creation; and

        - The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g. subsidies, special tax treatment, and loans)."

      Carson, 2011 WL 5101701, at *3-*4. The court made clear that these factors are not exclusive, and that "their chief utility is simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an 'instrumentality' under the FCPA – with state ownership being only one of several considerations." *Id*. at *4.

    - In his discussion, Judge Selna pointed out the long history of U.S. government involvement in commercial enterprises, dating back to the First and Second Banks of the United States in the 18^{th} and 19^{th} centuries and including more modern enterprises such as the Tennessee Valley Authority. *Id*. at *6. The court observed, "Given this country's long history of using corporations to carry out governmental objectives, the Court rejects the idea that governmental and commercial actions are necessarily incompatible." *Id*.

- *Lindsey Manufacturing Case*

    - Judge Howard Matz of the Central District of California arrived at the same conclusion in *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011). In that case, the government charged former employees and consultants of Lindsey Manufacturing, a U.S. company, with paying bribes to employees of a state-owned Mexican utility in order to win contracts with the utility. Before trial, the defendants moved to dismiss, arguing that a state-owned corporation can never be an "instrumentality" under the FCPA, and therefore that the utility's employees were not "foreign officials" as a matter of law. Judge Matz rejected this argument, holding the question to be one of fact for the jury to decide.

DOJ Experiences Mixed Results in Trials Against Individual Defendants

- For many years, the DOJ and the SEC directed their FCPA enforcement program almost entirely against corporations, as opposed to individuals. Experience has shown that corporations rarely have the will or capacity to litigate against the government and that they almost always settle if the government is intent on bringing FCPA charges. One consequence of this history is that for a number of years, the government's FCPA enforcement program took shape without adversarial testing of the government's positions in court or a meaningful body of case law interpreting the FCPA.

- In recent years, however, the DOJ and the SEC have emphasized their commitment to prosecute individuals as well as companies for FCPA violations. Individuals, in turn, have shown that they often have the will and the capacity to challenge the government's allegations.

- In 2011, a number of individual FCPA defendants forced the government to trial. The results were mixed, emphasizing the risks to both the government and to defendants if cases go to trial.

- *Haiti Teleco Case – Record Prison Sentence*

    - On October 25, 2011, Joel Esquenazi, a resident of Miami, was sentenced to a term of 15 years' imprisonment following his conviction by a jury for violating the FCPA. This is the longest-ever prison sentence imposed on a defendant for violating the FCPA. *See* Press Release, "*Executives Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti*," U.S. Department of Justice (Oct. 25, 2011); *see also* Judgment, *United States v. Esquenazi*, No. 1:09-20101-CR-Martinez-1 (S.D. Fla. Oct. 26, 2011). Carlos Rodriguez, the executive vice president of Terra, was sentenced to seven years' imprisonment. *Id*.

    - According to the government's press release, Esquenazi was the president of a Florida company called Terra Telecommunications Corp. Terra had contracts with Haiti Teleco, a Haitian SOE that is the sole provider of land line telephone service in Haiti. At trial, the government proved that Esquenazi and his co-defendant, Rodriguez, participated in a scheme to pay almost $900,000 through shell companies to bribe employees of Haiti Teleco in order to secure advantageous business terms.

    - The fifteen-year sentence imposed on Esquenazi is quite severe for a white-collar case. The DOJ touted the sentences imposed against Esquenazi and Rodriguez in a press release with a quote from Assistant Attorney General Lanny Breuer.

- *Lindsey Manufacturing Case – Dismissal Because of Prosecutorial Misconduct*

    - The government had a much more difficult time in the Lindsey Manufacturing case. In May 2011, a jury convicted all defendants after a five-week trial, but in December 2011 the presiding judge, Hon. A. Howard Matz, granted a post-trial motion to dismiss the indictment and issued an opinion in which he found multiple instances of prosecutorial misconduct. *United States v. Aguilar*, 2011 WL 6097155 (C.D. Cal. Dec. 1, 2011).

- The central allegation in the case was that Lindsey Manufacturing, a U.S. company, paid bribes through a Mexican sales agent to obtain contracts with a state-owned Mexican utility company. *Id*. at *1. At trial, the principal defense was that Lindsey was not aware that its Mexican sales agent was paying bribes. Although the jury convicted all defendants after only seven hours of deliberations, Judge Matz found that the evidence against the Lindsey defendants was "far from compelling"; that there was no direct evidence of criminal intent; and that the "circumstantial evidence was, at best, murky." *Id*. at *26.

- The case was a spin-off of a prior prosecution in the Southern District of Texas that was directed at an entirely separate U.S. company that had paid bribes to the same Mexican utility through the same Mexican sales agent. The lead prosecutor in both cases was the same. *Id*. at *2.

- The Lindsey case proceeded on an expedited schedule. Because of the fortuitous arrest of a Mexican co-defendant who happened to travel to the United States, the government was forced to indict the Lindsey defendants on a short time frame based on a truncated investigation. *Id*. at *2-*3. After the indictment, the Lindsey defendants demanded a speedy trial, and pre-trial proceedings were compressed into an unusually short time frame. *Id*. To complicate matters, relations between the prosecution team and the defense lawyers were acrimonious, and there was near-continuous pre-trial motion practice, included repeated defense motions for disclosure of various materials. As Judge Matz found, each side was forced "to divert resources away from trial preparation" and the defendants were "thwarted" in their efforts to "discover information about the investigation and the evidence supporting the charges." *Id*. at *3.

- In retrospect, Judge Matz concluded that the government's investigation was botched and sloppy in numerous respects, and that if the government had met its disclosure obligations, the defense would have been able to present a more effective defense by asking the jury to look skeptically at the government's investigative efforts.

- In particular, Judge Matz found that the government made a series of mistakes and misrepresentations, including the following:

    - Inaccuracies in the co-case agent's affidavit in support of a search warrant and arrest warrant; the affidavit incorrectly suggested a connection between Lindsey Manufacturing and the defendant in the Texas case when, in fact, there was no connection. *See id*. at *6-*7;

    - False and misleading grand jury testimony by the other co-case agent in which she described the evidence in a slanted, inaccurate manner. *See id*. at *8-*9;

        - Failure to comply with the court's discovery orders in a timely manner, including failing to disclose a key grand jury transcript until after the jury verdict was returned. *See id*. at *9-*11;

        - Wrongfully obtaining privileged emails between an incarcerated defendant and her attorney and making misrepresentations to the court about the matter. *See id*. at *12; and

        - Making improper arguments about evidence from the Texas prosecution that had been admitted only for a limited purpose. *See id*. at *13-*15.

    - The judge found that the suppression of the grand jury transcript was a violation of the prosecution's obligation, under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose exculpatory evidence. The judge further found that the transcript was material under *Brady* and its progeny because it would have allowed the defendants to present a defense focused on the weaknesses in the prosecution's investigation. See *United States v. Aguilar*, 2011 WL 6097155 at *23. As the court held:

        > "Lacking the factual support they needed, [defense counsel] could not and did not assert, in effect, 'The evidence will show that the Government team failed to conduct a complete and fair investigation. In fact, the Government obtained the very charges in the indictment through false and misleading grand jury testimony of an FBI agent. The prosecution has been scrambling to find out what happened ever since. Had they done their homework properly, they would have learned long before now that there was no crime.' Had defense counsel been able to deliver such an opening statement, it is likely that at later stages the jury would have understood the point of their cross-examinations and would have viewed the Government's evidence with greater skepticism." *Id*.

        This reflects a broad understanding of *Brady* that no doubt will be embraced by the defense bar in future cases.

    - Apart from the *Brady* violation, the court also found that dismissal was warranted under its supervisory powers given the long list of violations and problems on the part of the government. *See id*. at *25 ("the Government's misconduct went way beyond the delayed and incomplete production of the . . . grand jury transcripts"). Finding prejudice to the defendant and characterizing the prosecution team's missteps as "flagrant," the court threw out the case. *Id*. at *26-*28.

- It is difficult to draw any general lessons from the outcome in the Lindsey case. The government has appealed and it is possible that the Ninth Circuit may take a different view of the case. Even if Judge Matz's ruling is upheld, one might look at the case and conclude that it is simply an unfortunate example of the mistakes and problems that sometimes occur in large, complicated cases, especially when there are the kinds of extenuating circumstances (a compressed schedule, a problematic case theory, contentious motion practice) that Judge Matz emphasized.

- However, it is also true that the problems in the Lindsey case came to light precisely *because* the case was hotly contested. If the individual defendants had chosen to plead guilty, none of the violations would have surfaced. It is also true that most FCPA cases are big, complicated, and somewhat messy. Putting all of this together, now that the DOJ and SEC are so aggressively charging individuals in FCPA cases, one would expect to see other large, complex cases with great potential for mischief if the government does not conduct itself with great care and professionalism.

- *The "SHOT Show" Sting Prosecution – Hung Jury, Faulty Conspiracy Charge, and Acquittals*

  - In 2010, the government unveiled an elaborate FCPA "sting" operation directed at the military and law enforcement products industry. During the investigation, an informant and two undercover FBI agents presented the defendants with a fictitious scheme to sell $15 million in military-related products to outfit Gabon's Presidential Guard. As portrayed by the informant and the undercover agents, the participants in the scheme – suppliers of military and law enforcement products such as pistols, bulletproof vests, armored vehicles, and night vision goggles – would have to inflate their invoices by 20%, with a portion of that amount to be passed onto Gabonese Minister of Defense as a bribe. The scheme was discussed at a cocktail reception at a well-known Washington, D.C. restaurant and at an industry conference in Las Vegas. *See* Indictment, *United States v. Amaro Goncalves, et al.*, No. 09-cr-00335-RJL (D.D.C. Apr. 16, 2010).

  - The government indicted 22 individuals, three of whom pled guilty. The presiding judge, Hon. Richard J. Leon, divided the remaining defendants into four trial groupings.

  - <u>First trial</u> (defendants Pankesh Patel, John Benson Weir III, Andrew Bigelow, and Lee Allen Tolleson)

    - The first trial, against four defendants, commenced on May 16, 2011 and ended nearly two months later, after six days of deliberations, with a hung jury. *See* Docket Entry, *United States v. Amaro Goncalves, et al.*, No. 09-cr-00335-RJL (D.D.C. July 7, 2011). The defense was able to avoid a conviction by presenting an entrapment defense and attacking the credibility of the government's informant, who did not testify.

- During the trial, Judge Leon granted a motion to dismiss one substantive FCPA count against one defendant, Pankesh Patel. Patel, a citizen of the United Kingdom, was charged under Section 30C of the FCPA based on acts that were undertaken "while in the territory of the United States." *See* Indictment ¶¶ 8, 33, *United States v. Amaro Goncalves, et al*., No. 09-cr-00335-RJL (D.D.C. Apr. 16, 2010). One of the counts rested on Patel's sending a document from the United Kingdom to Washington. Judge Leon held that this was not sufficient to satisfy the requirement that Patel have undertaken an act "while in the territory of the United States." *See* Docket Entry, *United States v. Amaro Goncalves, et al*., No. 09-cr-00335-RJL (D.D.C. June 6, 2011). A separate count charged Patel based on his presence at the Washington, D.C. cocktail reception; that count went to the jury.

o <u>Second trial</u> (defendants R. Patrick Caldwell, Stephen Giordanella, John G. Godsey, Marc F. Morales, Jeana Mushriqui, and John M. Mushriqui)

- The second trial, against six defendants, commenced on September 26, 2011 and ended on January 31, 2012, after ten days of deliberation. *See* Docket Entry, *United States v. Amaro Goncalves, et al*., No. 09-cr-00335-RJL (D.D.C. Jan. 31, 2012). In the second trial, the government put the informant on the witness stand. The defense attacked him, and the entire sting operation, vigorously.

- On December 22, 2011, at the end of the government's case, Judge Leon granted the defense motion for a judgment of acquittal on Count One of the indictment, which charged all defendants in a single, overarching conspiracy to violate the FCPA. Judge Leon found that the defendants, as competitors, did not join a common agreement with the same objects. This ruling resulted in the dismissal of all charges against one of the defendants, Stephen Giordanella; the charges against the other defendants, who faced substantive FCPA counts, proceeded to the jury. *See* Docket Entry, *United States v. Amaro Goncalves, et al*., No. 09-cr-00335-RJL (D.D.C. Dec. 22, 2011); see also Press Release, "*Carlton Fields Client Stephen G. Giordanella Acquitted in Largest Foreign Bribery Case in U.S. History*" (Dec. 22, 2011).

- On January 30, 2011, after nine days of deliberation, the jury acquitted two of the remaining defendants, Greg Godsey and R. Patrick Caldwell. The following day, Judge Leon declared a mistrial with respect to the remaining three defendants after the jury declared that it was unable to reach a verdict. The jury foreman reported that the jury count was 10-2 in favor of acquitting Morales and 9-3 in favor of acquitting the

Musriquis. See Rachel H. Jackson, "Mistrial in FCPA Sting Case," http://www.mainjustice.com/justanticorruption/2012/01/31/breaking-news-apparent-mistrial-in-fcpa-sting-case/ (Jan. 31, 2012).

- In summary, the DOJ's trial record in the SHOT Show cases has been very poor. After a total of some six months of trial proceedings, nobody has been convicted; three defendants have been acquitted; and a mistrial was declared with respect to seven other defendants.

- *U.S. v. John J. O'Shea – Acquittal on all FCPA Charges*

  - In November 2009, the government indicted John J. O'Shea, a former manager at ABB Network Management, a Texas-based company that provides products and services to electric utilities. *United States v. John J. O'Shea*, No. H-09-629 (S.D. Tex. Nov. 16, 2009). The indictment charged O'Shea, with violating the FCPA in connection with bribes to Mexican government officials to secure lucrative contracts with the state-owned Mexican utility company. (The case is related to the troubled Lindsey Manufacturing prosecution discussed above). O'Shea was charged with twelve substantive FCPA counts as well as other charges.

  - On January 16, 2012, after four days of a jury trial, the presiding judge, Lynn N. Hughes, granted a defense motion for a judgment of acquittal on all twelve substantive FCPA charges at the close of the government's case. *See* Docket Entry, *United States v. John J. O'Shea*, H-09-629 (S.D. Tex. Jan. 16, 2009). In his remarks from the bench, Judge Hughes criticized the government's main cooperator, Fernando Basurta, Jr., for giving vague and abstract testimony; the judge also criticized the government for failing to connect any bribe payments to the defendant. The judge dismissed the jury but ordered a mistrial on the remaining charges (money laundering and falsifying government records). At the time this outline was prepared, it was not clear whether the government would seek to retry O'Shea on the remaining non-FCPA counts