

## Recent Developments in FCPA Law and Practice – Focus on Prosecution of Individuals

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### 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;
    - 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);

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<sup>1</sup> The 2013 Year-End FCPA Update, <http://www.gibsondunn.com/publications/pages/2013-Year-End-FCPA-Update.aspx>, prepared by the firm of Gibson Dunn & Crutcher LLP, was helpful to the author of this outline and provides a comprehensive overview of developments in FCPA cases during 2013.

- 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 statute 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.

### **DOJ's Successful Use of Cooperators in FCPA Cases to Develop Charges Against Others**

- One of the DOJ's most powerful tools is the ability to "flip" members of a conspiracy and induce them to plead guilty and testify against their co-conspirators in hopes of a reduced sentence. Although the mechanics (and the rewards) of cooperation vary in different federal districts, there is generally a robust structure in place to incentivize cooperation, and to allow the government to argue that cooperating defendants are telling the truth.
- In recent years, DOJ relied on cooperators in a number of significant FCPA cases. Each case carries different lessons.

#### *BizJet International Sales and Support, Inc. – dramatic sentence reduction for cooperators*

- In January 2012, two former executives of BizJet International Sales and Support, Inc., a U.S. affiliate of Lufthansa, pled guilty to FCPA charges pursuant to cooperation agreements in the Northern District of Oklahoma. *See* Docket, *United States v. Peter DuBois*, 11-Cr-183-GKF (N.D. Okla.); Docket, *United States v. Neal Uhl*, 11-Cr-184-GKF (N.D. Okla.). The two executives, Peter DuBois and Neal Uhl, admitted their participation in a scheme to bribe government officials in Brazil, Mexico, and Panama for contracts to maintain, repair, and overhaul aircraft in those countries.
- As is often the case when the government enters into cooperation agreements, the court records surrounding the guilty pleas of DuBois and Uhl were originally placed under seal. On the same day that DuBois and Uhl pled guilty, the government also obtained sealed indictments against two other BizJet executives, Bernd Kowalewski (the former CEO) and Jald Jensen (the former sales manager). *See* Docket *United States v. Bernd Kowalewski*, 12-Cr-006-GKF (N.D. Okla.); Docket *United States v. Jald Jensen*, 12-Cr-007-GKF (N.D. Okla.). Filing charges under seal a tactic sometimes used by the DOJ to lull charged individuals into traveling to the United States, but it didn't work in this case, as Kowalewski and Jensen have remained abroad and thus have been able to avoid arrest.
- On April 5, 2013, DuBois and Uhl were sentenced to probation. Both sentences reflected very substantial leniency: DuBois had been facing a Sentencing Guidelines range of 108-120 months in prison, while Uhl had been facing a range of 60 months in prison. The dramatic sentence reductions amply illustrate the incentives to cooperate and the benefits that a cooperating defendant can receive if the cooperation is successful.

*Alstom Power, Inc. – cooperator’s sealed guilty plea creates travel risk and leads to airport arrest of co-conspirator*

- In November 2012, David Rothschild, a former sales executive at Alstom Power, Inc., a U.S. subsidiary of French industrial giant Alstom S.A., pled guilty to an FCPA charge pursuant to a cooperation agreement in the District of Connecticut. *See Docket, United States v. David Rothschild*, 12-cr-223-WWE (D. Conn.). Rothschild admitted his participation in a scheme to use outside consultants to bribe foreign officials in Indonesia to win a valuable contract.
- As in the BizJet case, Rothschild’s criminal case, including the record of his guilty plea and cooperation with the government, were initially placed under seal. A few weeks after Rothschild’s plea, the government filed a sealed indictment against another Alstom executive named Frederic Pierucci. *See Docket, United States v. Frederic Pierucci*, 12-cr-238-JBA (D. Conn.).
- About five months later, in April 2013, Pierucci arrived at JFK airport in New York and was arrested as he entered the country. He was deemed a risk of flight and was held without bail. This episode amply illustrates the risks and uncertainties for non-U.S. nationals who choose to travel to the U.S. during a FCPA investigation. Those risks are heightened when there is a cooperating defendant in the picture.
- In July 2013, about three months after he was taken into custody, Pierucci pled guilty. Around the same time, the government unsealed charges against two other Alstom executives, Lawrence Hoskins and William Pomponi. Pomponi turned himself in on May 3, 2013, was released on bail, and is currently awaiting trial; Hoskins is still at large. *See Docket, United States v. William Pomponi and Lawrence Hoskins*, 12-cr-238-JBA (D. Conn.)

*PetroTiger Ltd. – cooperator’s sealed guilty plea is followed by arrest of two co-conspirators*

- A similar pattern unfolded in an FCPA case involving PetroTiger Ltd., an energy company with offices in New Jersey and operations in Colombia. In November 2013, Gregory Weisman, PetroTiger’s former general counsel, pleaded guilty in a sealed proceeding to a scheme to bribe Colombian officials to secure a valuable oil services contract there. *See Docket, United States v. Gregory Weisman*, 13-cr-730-JEI (D.N.J.). Weisman also pled guilty to a separate scheme to skim moneys from a corporate transaction at the expense of several of PetroTiger’s board members. Although the docket is ambiguous, it appears highly likely that Weisman pled guilty pursuant to a cooperation agreement.
- On the same day that Weisman pled guilty, the DOJ filed sealed criminal complaints against the two former co-CEOs of PetroTiger, Knut Hammar skjold and Joseph Sigelman. Hammar skjold was arrested in late November 2013 as he entered the United States at Newark Airport; Sigelman was arrested in January 2014 in the Philippines and made his

initial appearance in federal court on January 8, 2014. The charges against Hammaraskjold and Sigelman remain pending. See Docket, *United States v. Knut Hammaraskjold*, 13-mj-2086-JS (D.N.J.); Docket, *United States v. Joseph Sigelman*, 13-mj-2087-JS (D.N.J.).

### **DOJ's Use of Obstruction Charges in Tandem with FCPA Allegations**

- For many years, federal prosecutors have obtained success in bringing obstruction of justice or perjury charges alongside underlying substantive counts. This reflects the adage that “the cover-up is often worse than the crime”; false statements or obstruction can provide powerful evidence of criminal intent and can lead to substantial additional penalties at sentencing.
- In the past year, the U.S. Attorney's Office for the Southern District of New York has made effective use of obstruction charges in two important corruption-related prosecutions.

#### *BANDES – false statements during SEC examination*

- In August 2013, the U.S. Attorney's Office for the S.D.N.Y. announced that three individuals – Erensto Lujan, Jose Alejandro Hurtado, and Tomas Clarke Bethancourt – pled guilty to FCPA charges arising out of their work at a New York-based broker dealer that provided fixed income trading services to BANDES, the state economic development bank of Venezuela. In their guilty pleas, the defendants admitted that they participated in a scheme to pay millions of dollars in bribes to an official of BANDES to obtain securities trading business for their employer.
- The bribery scheme came to light during a routine SEC examination of the broker-dealer where the defendants worked. In an effort to conceal the bribery scheme, the defendants deleted emails and Clarke lied to the SEC exam staff. The misconduct during the SEC examination resulted in a separate charge of obstruction, and will be taken into account at sentencing.

#### *U.S. v. Frederic Cilins – high-profile obstruction charges relating to alleged bribery scheme in Guinea*

- In April 2013, federal agents arrested a French national named Frederic Cilins on charges that he obstructed a S.D.N.Y. grand jury investigation into alleged corrupt payments to obtain valuable mining rights in the impoverished African country of Guinea. The underlying allegations of bribery, which were chronicled in a detailed *New Yorker* article entitled “Buried Secrets: How an Israeli Billionaire Wrested Control of One of Africa's Biggest Prizes” (July 8, 2013), see [http://www.newyorker.com/reporting/2013/07/08/130708fa\\_fact\\_keeefe](http://www.newyorker.com/reporting/2013/07/08/130708fa_fact_keeefe), are colorful and dramatic, involving an elaborate scheme to bribe former high-ranking Guinea government officials.

- As alleged by the U.S. Attorney's Office, Cilins sought to obstruct the investigation by exerting improper influence on a key cooperating witness, the widow of a former official in Guinea. Cilins allegedly offered to pay the cooperating witness \$5 million if she would: (a) deliver original copies of key incriminating documents so that he could destroy them and (b) sign an affidavit falsely denying the existence of the bribe scheme. Cilins was denied bail and is currently awaiting trial. *See* Docket, *United States v. Frederic Cilins*, 13-cr-975-WHP (S.D.N.Y.).

## **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 recent years, a number of individual FCPA defendants have forced the government to trial. The results have been 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.
- First trial (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.
- Second trial (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 Musiquis. *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