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Feature Article

Developments in Foreign Corrupt Practices Law

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Enforcement of the Foreign Corrupt Practices Act of 1977, a federal law criminalizing bribery of foreign government officials, has resulted in many high profile settlements involving major foreign and US companies, particularly over the last decade. This article addresses a relatively popular topic in FCPA scholarship – the "pros" and "cons" of voluntary disclosure – through the lenses of some interesting recent developments in FCPA enforcement. Because calculation of criminal penalties is a highly fact-specific exercise, the benefits of voluntarily disclosing corrupt activity uncovered by a corporation (typically through either internal investigations or corporate whistleblowers) are often questioned as they are difficult to discern through comparison with settlement involving non-disclosed activities. Furthermore, the collateral consequences of FCPA investigations appear to be mounting, with more and more joint and follow-on investigations by non-U.S. jurisdictions as well as multilateral development banks such as the World Bank. Highly publicized arrests of former and current executives also raise boardroom barometers, particularly with respect to potential reputational consequences of FCPA enforcement such as stock drops.

However, despite the lack of a clear effect on penalty amounts, there are discernible advantages to voluntary disclosure. These benefits include preserving the possibilities of the government formally declining prosecution (commonly referred to as "declination") or agreeing to a non-prosecution agreement ("NPA"). Disclosure also increases the likelihood that the government may forgo requiring an external monitor (a common consequence of corporate FCPA resolutions) in favor of far less intrusive self-monitoring and reporting requirements. The following discussion addresses what we believe to be some of the most important considerations with regard to voluntary disclosure of an FCPA violation; however, each company should ultimately make a decision based its own facts and circumstances and in consultation with qualified FCPA counsel.

Pros: Top Five Reasons to Voluntarily Disclose

1. New FCPA Guidance Emphasizes Importance of Disclosure in Enforcement Decisions

The highly anticipated *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("FCPA Guide" or "Guide") was jointly released in November 2012 by the U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"). The Guide provides sought after guidance on a number of FCPA-related enforcement issues consistently raised by the FCPA bar as well as private industry. Among those issues, the Guide addresses the basic principles of FCPA enforcement and, in particular, the benefits of self-reporting. Citing *The Principles of Federal Prosecution of Business Organizations*, the Guide sets out the nine factors to be considered in corporate criminal enforcement decisions, including "the corporation's timely and voluntary disclosure of wrongdoing." The Guide also cites the SEC's *2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, known as the Seaboard Report, which sets out four broad measures of corporate cooperation including self-reporting to the SEC. In keeping with prior public statements by both DOJ and SEC officials regarding the benefits of voluntary disclosure, the FCPA Guide confirms that "both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters," but offers no further statement as to the quantifiable benefits of voluntary disclosure.

Criminal Div., U.S. Dep't of Justice and the Enforcement Div., U.S. Sec. and Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter "FCPA Guide"].

FCPA Guide at 53 (citing U.S. Dep't of Justice, U.S. Attorney's Manual, The Principles Federal Prosecution of Business Organizations, § 9-28.000).

FCPA Guide at 54.

While the FCPA Guide may not discuss the benefits of voluntary disclosure with specificity that many desired, the Guide does point to some concrete benefits. For example, the Guide notes that, under the provisions of the Sentencing Guidelines related to fine calculation, voluntary disclosure may prompt a five-point reduction to the culpability score (which is part of the fine calculation). Furthermore, the three-point culpability score reduction for implementation of an effective compliance program is *not* available where "after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities." Penalty calculations are inherently fact-specific and the Sentencing Guidelines allow for many twists and turns that make it difficult to compare penalties among enforcement actions. However, there are clear incentives built into the Sentencing Guidelines to reward voluntary disclosers when it comes time to calculate the penalty for an FCPA violation.

Id. at §8C2.5(f)(2) (2012).

2. The Dodd-Frank Whistleblower Act Ups the Ante on Potential Disclosure by Employees or Third Parties, including Auditors and Compliance

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in July of 2010, established an SEC bounty program that offers rewards to whistleblowers who are the first to provide original information that leads to the successful prosecution of a securities

15 U.S.C. § 78u-6 (2012); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010).

violation, including a violation of the books and records provisions under the FCPA. Under this program, whistleblowers providing such information will receive between 10 and 30% of the total penalty imposed in any successful enforcement action in which a penalty of more than $1 million is imposed. Agency rules regulating implementation of these provisions went into effect in August of 2011 and, since that time, the SEC has received more than 3000 tips, complaints and referrals regarding potential violations of federal securities laws.

See U.S. Sec. and Exch. Comm'n, *2012 Annual Report on the Dodd-Frank Whistleblower Program*, at 4.

These rules provide significant incentives for employees and third parties to report potential FCPA violations, although there is some incentive for employees to report internally within the company before reporting allegations to the government. Whistleblowers have 120 days to report to the SEC after reporting internally, during which time the information provided will be considered "original" for the purposes of preserving whistleblower status even if the company or a third party provides the information to the SEC first. There is no requirement under these provisions to report allegations internally before reporting to the SEC, but the implementing rules explicitly state that internal reporting is a factor that could increase the amount of the award, while interference with the internal reporting process could decrease the ultimate pay out.

17 C.F.R. § 240.21F ("Rule 21F") at 4(b)(7) (2013).

Rule 21F at 6(a)(4)(i) and 6(a)(3)(i-iii) (2013).

Still, unless a whistleblower is consulting with counsel, it seems unlikely that he or she will understand the contours of these provisions. Whistleblowers may, therefore, perceive a greater incentive not to report internally as they may fear losing their whistleblower status if the company discloses to the government first. Furthermore, as penalties in cases involving voluntary disclosures are generally perceived to be lower, whistleblowers may also view this as an incentive not to cooperate because their reward will be a factor of the final penalty amount. Notably, and perhaps most significantly, the new provisions also allow internal compliance personnel to qualify for whistleblower status if the company does not self-report violations within 120-days of the suspected violation, guaranteeing that at least someone within the company will be both knowledgeable about any violation and qualify for whistleblower status.

In the nearly two years since the program has been in effect, the SEC has only made one award to a whistleblower – a nearly $50,000 award in August 2012 purportedly representing 30% of the penalty imposed in the relevant enforcement action. However, the SEC has indicated that leads from the whistleblower program have been instrumental in several ongoing investigations as well. While these early numbers may not indicate a high quality of whistleblower reports, the whistleblower program has been highly publicized and has certainly generated a high volume of reports. Thus, given the new whistleblower incentives, companies must now carefully weigh the risks of declining to voluntarily disclose an FCPA violation, particularly where an investigation is initiated by an internal reporter.

Press Release, U.S. Sec. and Exch. Comm'n, *SEC Issues First Whistleblower Program Award* (Aug. 21, 2012), http://www.sec.gov/news/press/2012/2012-162.htm.

Ben Protess & Nathanial Popper, *Hazy Future for S.E.C. Whistle-Blower Effort*, N.Y. Times, Apr. 23, 2013 at B1.

3. Vying for Declinations and Non-Prosecution Agreements

In the wake of the SEC's first NPA and last year's highly-publicized Morgan Stanley declination, the FCPA bar is abuzz with talk of the benefits of voluntary disclosure in securing such

Id. at 28-29.

See supra note 16.

Press Release, Dep't of Justice, *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty* (April 22, 2013).

agreements. While fulsome statistics on declinations are not shared by the government, the recent FCPA Guide discusses six examples of declinations. Notably, though not surprisingly, all of these examples involved voluntary disclosures. The Guide further indicates that "in the past two years alone, DOJ has declined several dozen cases against companies where potential FCPA violations were alleged." The Guide also offers multiple examples of non-prosecution agreements associated with FCPA issues uncovered during mergers and acquisitions, all of which were voluntarily disclosed to the government.

While NPAs have been a tool in the DOJ arsenal for some time, the SEC announced its first ever NPA relating to FCPA allegations in April 2013. The agreement covers conduct relating to bribes paid to Argentine government officials by a Ralph Lauren subsidiary between 2005 and 2009. The SEC press release is careful to note in the second sentence that the conduct was discovered during an internal review and "promptly reported to the SEC." DOJ also resolved the Ralph Lauren allegations with an NPA, similarly citing voluntary disclosure as one of the primary factors in the agencies considerations. Also notable are the penalties imposed by both agencies – totaling only approximately $735,000 in disgorgement to the SEC and $882,000 in penalties under the DOJ settlement. Still, while the weight of voluntary disclosure in attaining an NPA or declination are clear, the likelihood of securing such a resolution even in cases involving voluntary disclosure is less clear. Since 2008, the DOJ and SEC combined have resolved FCPA allegations with NPAs in only 16 of nearly 80 corporate FCPA settlements during that time.

4. The Benefits of Self-Monitoring and Reporting Requirements Versus External Monitorship

In recent years there has been an apparent trend away from often oppressively costly external compliance monitoring in favor of settlement provisions requiring periodic self-reporting. The FCPA Guide touts self-monitoring as one of the many benefits of voluntary disclosure, explaining that "companies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform."

FCPA Guide at 71.

Just a few years ago, FCPA resolutions routinely required the imposition of an external compliance monitor to review and report on the implementation of new compliance policies and procedures. According to one study, between 2004 to 2010 more than 40 percent of all corporate FCPA resolutions involved the imposition of an external compliance monitor. In the last few years, that statistic has been turned on its head, with the majority of corporate resolutions requiring self-monitoring and reporting instead of external monitors. In fact, companies voluntarily disclosing FCPA violations in recent years have only received external compliance monitors in relatively rare instances.

F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. Pa. J. Bus. L. 321 (2011).

For instance, medical device company Smith & Nephew Inc. received a compliance monitor after voluntarily disclosing allegations of improper incentive payments to physicians, but this disclosure was made after an industry wide sweep by U.S. enforcement officials had already begun. Press Release, Dep't of Justice, *Medical Device Company Smith & Nephew Resolves Foreign Corrupt Practices Act Investigation* (Feb. 6, 2012).

Monitors add millions of dollars in costs on top of already steep fines and penalties associated with FCPA settlement. Furthermore, monitors conduct independent reviews to assess compliance with corporate policies and procedures. These investigations are often

lengthy, extensive and intrusive and the ultimate findings are shared by the monitor with government enforcement agencies. By contrast, self-monitoring and reporting requirements give companies the opportunity to control the scope of investigations and to advocate when reporting findings to the government, pointing out mitigating factors as well as remediation that may have been undertaken.

In the face of rampant corporate criticism of burdensome external monitoring requirements, officials acknowledged in 2009 that "monitors can be costly and disruptive to a business, and are not necessary in every case" and began a notable shift away from monitorships as a consequence of FCPA resolutions. In 2009, two companies, Helmerich & Payne Inc. and UT Starcom Inc., both voluntary disclosers, entered into FCPA settlements that included compliance self-reporting in lieu of external compliance monitors. Since then, self-monitoring and reporting requirements have steadily increased in frequency. Such requirements appeared in 9 of the 10 corporate FCPA settlements in 2011, and half of the 12 settlements in 2012. As previously mentioned, voluntary disclosure appears to have a heavy impact on the government's decision as to whether to impose a monitor. That decision can cost a company millions in monitoring fees and, potentially more importantly, determine whether the company will retain some control over internal investigations and reporting of any issues that may arise during the reporting period.

5. The Government's Consistent Emphasis on the Use of Proactive Enforcement Tools and Increasingly Aggressive Enforcement

Government-initiated enforcement actions have been on the rise in recent years and, despite some high-profile failures, the government has indicated that it intends to continue to pursue aggressive, proactive investigation and enforcement, including undercover sting operations. In 2007, unofficial statements by DOJ officials indicated that 23 of the last 26 FCPA enforcement actions had resulted from voluntary disclosures, while by 2009 the percentage of prosecutions initiated by voluntary disclosures had apparently fallen to less than half. In a highly publicized 2009 episode, now widely known as the "Catch-22" sting operation, government officials arrested 22 individuals at a Las Vegas gun show on FCPA-related charges after engaging in a two-year, multi-jurisdictional sting operation involving wire taps, undercover agents and industry informants. The investigation was widely touted as an example of a new style of aggressive, proactive FCPA enforcement, but that trend was called into question after the prosecution efforts in that case fell apart with all charges ultimately dismissed.

DOJ officials continue to tout proactive investigative tools, and recent enforcement examples also seem to support the view that proactive government enforcement has not been deterred by setbacks in this and other recent high-profile enforcement efforts. For instance, recently unsealed indictments against former BizJet executives indicate that a high-level executive operated in an undercover capacity, including recording conversations with former BizJet executives, as a part of the government's investigation into FCPA allegations. In 2012, BizJet agreed to pay $11.8 million in criminal

Lanny A. Breuer, U.S. Dep't of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act, at 4 (Nov. 17, 2009).

Press Release, U.S. Dep't of Justice, *Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America* (July 30, 2009),; Press Release, U.S. Dep't of Justice, *UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China* (Dec. 31, 2009),

In 2011, the only company to receive an external monitor was JCG Corporation, which did not involve a voluntary disclosure and was at the time the 6th largest FCPA settlement of all time. Only four companies received external monitorship requirements in 2012. The other two settlements included no monitoring or self-reporting requirement.

Samuel Rubenfield, Wall Street Journal, *FBI Official Says Agency Will Try More FCPA Stings* (Apr. 2, 2013)("'We will do it again,' said Ronald Hosko, an assistant director of the criminal investigative division of the Federal Bureau of Investigation, at the Dow Jones Global Compliance Symposium in Washington, D.C.").

Mark Mendelsohn, Deputy Chief, Fraud Section, U.S. Dep't of Justice, Remarks before the Dist. of Columbia Bar Assoc., Current Developments in FCPA Enforcement and Compliance (Sept. 27, 2007); Breuer, *supra*, note 28.

See, e.g., Press Release, Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010); Dan Margolies, Reuters, *Cocktails and Wiretaps Signal New Anti-Bribery Era*, Apr. 5, 2010.

See, e.g., Christopher M. Matthews, Corruption Currents Blog, *Government Drops High-Profile FCPA Sting Case*, Wall St. J., (Feb. 21, 2012).

Press Release, Dep't of Justice, *Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act*

Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012).

Looking again at the BizJet example, court documents related to the BizJet investigation indicate that information provided by the undercover BizJet executive led to an investigation of a competitor company engaged in a similar scheme. Government's Memorandum in Support of Motion for Downward Departure at 3-4, *United States v. Peter DuBois*, No. 11-CR-183 GKF (N.D. Okla. Mar. 22, 2013).

penalties relating to allegations that the company paid bribes to Mexican government officials. Particularly coupled with increased potential rewards to whistleblowers under the Dodd-Frank legislation, the potential implementation of aggressive tactics such as undercover executives and wiretaps should weigh heavily on any decision regarding voluntary disclosure of potential violations. Industry-wide sweeps prompt even greater concern in this regard, as an inquiry into corrupt dealings in one company will often evidence industry-wide practices.

Cons: Top Five Reasons Companies May Consider Not Disclosing Potential FCPA Violations

1. Likelihood that the Government May Never Uncover the Violation

It may seem obvious but is worth noting that the most compelling reason for a Company not to disclose an FCPA violation is likely a belief that the violation will not be discovered absent disclosure. While DOJ's aggressive tactics have received much attention of late, it is the rarer instance in which an investigation is kicked off by a whistleblower or sting operation. In fact, as previously mentioned, the SEC has made only one whistleblower award to date, although the SEC has indicated that other tips have spurred investigations currently underway. Furthermore, many employees may not even be aware of the SEC's whistleblower program, particularly in the foreign jurisdictions in which much conduct relevant to any violation will typically take place.

See supra notes 14 & 15.

Particularly in cases involving small profits and isolated and remediated conduct, Companies must weigh heavily the likelihood of discovery in any disclosure deliberation. Still, when considering this calculus, it is important to recall that more than half of all FCPA prosecution efforts apparently now arise from proactive government investigation rather than from voluntary disclosures. Also, beyond government discovery, potential violations are now often discovered in increasingly aggressive mergers and acquisitions due diligence, often impeding the acquisition process, increasing negotiating leverage for the other party and sometimes resulting in disclosure requirements or obstructing deals entirely.

See supra note 28.

2. Lack of a Quantifiable Benefit to Voluntary Disclosure

A study by two New York University Law School professors made headlines in late 2012 in concluding that there is no empirical evidence that voluntary disclosures affect FCPA penalty amounts. According to the Wall Street Journal, one of the study's authors indicated that they could not find any evidence that voluntary disclosure results in lower penalties, though they also "could not rule out that disclosure may result in some form of leniency." Furthermore, the study did not consider other measurable financial effects, such as the effects of voluntary disclosure versus proactive government investigation on share price or any potential mitigation of collateral consequences, such as foreign government enforcement or debarments. Moreover, direct penalty and collateral consequences aside, as noted above, some the biggest rewards in a corporate FCPA

Steven J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, at 21-23 (July 2012) NYU School of Law, Public Law Research Paper No. 12-35; Samuel Rubenfield, Corruption Currents Blog, *Study Says Voluntary Disclosure Doesn't Change FCPA Penalties*, Wall St. J., (Sept. 6, 2012).

See Rubenfield, *supra* note 41.

resolution – NPAs, declinations and self-monitoring and reporting – seem to be reserved to voluntary disclosers.

3. Perception that Cooperation without Voluntary Disclosure May Yield Similar Benefits

Missing from the recent FCPA Guide is any clear comparison between the benefits of voluntary disclosure versus cooperation after the initiation of an investigation. The Guide discusses both disclosure and cooperation as important factors in enforcement decisions and, as with respect to voluntary disclosure, cites the U.S. Sentencing Guidelines as authorizing sentencing reductions for "substantial" cooperation. Nevertheless, it can be difficult to translate these benefits into appreciable differences between real-world penalties imposed upon voluntary disclosers versus cooperators and, to the disappointment of many, the Guide provides no further clarity in this regard.

FCPA Guide at 54.

Nevertheless, the Guide does cite the relevant provisions of the U.S. Sentencing Guidelines, which provide a fairly clear distinction between sentencing credits for voluntary disclosure versus cooperation. For instance, while voluntary disclosure is a factor that may be proactively considered by a sentencing court, under § 8C4.1 of the Sentencing Guidelines "substantial assistance" may prompt departure from the guidelines only upon government motion. Furthermore, the section of the Sentencing Guidelines addressing fine calculation authorizes a five-point reduction for voluntary disclosure plus cooperation while only authorizing a reduction of two points for cooperation alone. Interestingly, the NYU study cited above indicates that there is no more appreciable benefit to cooperation in an FCPA investigation than there is with respect to voluntary disclosure – in fact, the authors found no evidence that any mitigating activity, including disclosure, cooperation or remediation, measurably reduced the penalty for an FCPA violation.

U.S. Sentencing Guidelines Manual § 8C4.1 (2012).

Id. at § 8C2.5(g) (2012).

See Choi & Davis, *supra* note 41 at 23.

4. Focus on Individual Enforcement and Recent Spat of High Profile Executive Arrests

U.S. officials have consistently emphasized holding individuals accountable for FCPA violations and recent enforcement efforts seem to bear that out. For example, in October 2011, the former President of Terra Telecommunications received a 15-year prison sentence – the longest FCPA-related sentence ever – for his role in a scheme to bribe Haitian officials at a state-owned telecommunications company. The former vice president received a seven-year sentence. In an even more startling development, a French national and current executive of Alstom S.A. was arrested in April 2013 while passing through New York's J.F.K. airport. The executive was subsequently charged in the United States with participating in scheme to bribe Indonesian officials through consultants.

See, e.g., Elizabeth Murphy, *Breuer: Fight Against Corruption One of the Main Struggles of Our Time*, Main Justice (Nov. 5, 2012), (citing Assistant Attorney General Lanny Breuer stating "[i]f you look at the FCPA over the past 4 years, you'll see we really have been vigorous about holding individuals accountable."); *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 Corporate Crime Reporter 36 (Sept. 16, 2008)("The number of individual prosecutions has risen – and that's not an accident… That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.")

Press Release, Dep't of Justice, *Bizjet International Sales and Support Inc., Resolves Foreign Corrupt Practices Act*

While there is no indication that either Terra Telecommunications or Alstom voluntarily disclosed to U.S. authorities, Alstom indicates that it has been cooperating with U.S. authorities for the past two years. Furthermore, BizJet voluntarily disclosed and, according to a DOJ press release, engaged in "extraordinary cooperation," yet four of its executives, including the former President and Chief Executive

Officer, have been charged with FCPA violations. Based on these and many other highly publicized examples, the potential ramifications of any disclosure in terms of individual exposure to FCPA liability as well as exacerbated reputational damage related to prosecution of individual executives will likely remain a key consideration for any company contemplating a voluntary disclosure.

Investigation and Agrees to Pay $11.8 Million Criminal Penalty (Mar. 14, 2012); Press Release, Dep't of Justice, *Four Former Executives of Lufthansa Subsidiary Bizjet Charged with Foreign Bribery* (Apr. 5, 2013).

5. Foreign Government and Multilateral Development Bank Cooperation and Enforcement

Enforcement of anti-bribery laws by foreign governments and multilateral development banks, such as the World Bank, appears to be rapidly accelerating. As the collateral consequences of FCPA penalties increase, so may hesitance to voluntarily disclose. For example, recent media reports indicate that the government of Argentina has requested detailed information regarding the Ralph Lauren investigation to aid in a separate Argentine criminal investigation into the matter. Examples abound of multi-jurisdictional cooperation efforts, including the chart-topping Siemens FCPA settlement which included $800 million in penalties and disgorgement to U.S. authorities as well as an additional $800 million to German authorities. Since the settlement, Siemens operations in other jurisdictions have come under scrutiny, including inquiries by Russian and Greek authorities.

Stewart Bishop, *Argentina Wants Names in Ralph Lauren Bribery Case*, Law360 (Apr. 23, 2013).

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).

Press Release, World Bank, *Siemens To Pay $100m To Fight Corruption As Part Of World Bank Group Settlement* (July 2, 2009).

Furthermore, Siemens paid an additional $100 million in 2009 to settle corruption allegations with the World Bank relating to corruption in a Russian project involving a Siemens subsidiary. The agreement included a commitment to pay $100 million over 15 years to support anti-bribery efforts, a two year bar on World Bank bidding and a potential four-year debarment of the company's Russian subsidiary. This settlement appears to have been just the beginning, as the World Bank has noticeably ramped up its anti-corruption efforts in recent years with several high-profile penalties and debarments. For instance, in February of 2012, the World Bank debarred Alstom Hydro France and Alstom Network Schweiz AG as well as their affiliates for a three-year period in connection with payments "to an entity controlled by a former senior government official for consultancy services in relation to the World Bank-financed Zambia Power Rehabilitation Project." According to the World Bank press release, the payments totaled less than $150,000 while Alstom paid $9.5 million in restitution. Alstom has also apparently settled corruption allegations with Swiss and Mexican authorities and investigations in the United States, United Kingdom, France, Italy and Brazil appear to be ongoing. Also, as mentioned above, a French Alstom executive was recently arrested by U.S. officials while passing through a New York airport. In 2010, three high-level executives in the United Kingdom were also arrested by the UK's Serious Fraud Office in connection with corruption-related investigations. Nevertheless, while the breadth of international consequences of bribery-related settlements can be daunting for a company considering voluntary disclosure, it is important to recall that these consequences may, in fact, be mitigated by disclosure. For example, it appears that the various Alstom probes may have stemmed largely from a 2004 audit by the Swiss Federal Banking

Press Release, World Bank, *Enforcing Accountability: World Bank Debars Alstom Hydro France, Alstom Network Schweiz AG, and their Affiliates* (Feb. 22, 2012).

Christopher M. Matthews, *Alstom Executive Arrested on Bribery Charges*, Wall St. J., Apr. 16, 2013, at B8; TRACE Compendium, Alstom, (last viewed June 7, 2013).

Sandra Laville & Robert Evans, *Three Directors Of Rail Engineering Firm Alstom Held In Bribery Investigation*, The Guardian (Mar. 24, 2010).

TRACE Compendium, Alstom, (last viewed June 7, 2013); Corruption Watch, Alstom, (last viewed June 7, 2013).

Commission, which might lead one to consider whether Alstom (and its executives) would be fairing better in these investigations if the company were a voluntary discloser.

Conclusion

While the decision to voluntary disclose is by no means clear in every instance, developments in FCPA enforcement continue to suggest that the benefits to disclosure exist. The tangible benefits of voluntary disclosure are often questioned and the mounting collateral consequences – including follow-on investigations in foreign jurisdictions and by multilateral development banks as well as highly publicized executive arrests – are chilling. On the other hand, the government continues to emphasize the importance of voluntary disclosure in its enforcement decisions and recent developments seem to back that up, with more voluntary disclosers seeming to reap the benefits of declinations, NPAs and self-monitoring requirements as opposed to external monitors. Even more, highly incentivized whistleblowers and aggressive, proactive government enforcement tactics should give pause to companies weighing non-disclosure since these new developments increase the chance of detection of corruption incidents.

Ultimately, a decision to voluntarily disclose an FCPA violation should be based on the facts and each company should make a decision based on its own circumstances, in consultation with qualified and experienced FCPA counsel. Considering business realities, such as disclosure requirements in SEC filings, as well as an increasingly low tolerance for FCPA-risk in mergers and acquisitions diligence, executives may be comfortable not disclosing an FCPA violation of any magnitude in only rare instances. The more difficult question in such a case may not be whether, but when, as companies must consider whether to wait to involve the government until an internal investigation has been completed and remediated at the risk of losing voluntary disclosure status if a whistleblower or industry investigation uncovers the violation in the interim.

Leaders in Trade

Committees Support Froman, Pritzker, Foxx Nominations to Obama Cabinet

The Senate Finance Committee voted unanimously on June 11 to approve the nomination of Michael Froman to be the next US Trade Representative (USTR). The Senate Commerce Committee unanimously approved the nominations of Penny Pritzker to be the next Secretary of Commerce and Anthony Foxx to be Secretary of Transportation in a committee vote on Monday, June 10. The nominations now move to the Senate floor for a vote.

Under Sec. Sánchez Announces Reorganization of International Trade Admin.

Commerce Undersecretary for International Trade Administration Francisco Sánchez confirmed to reporters on June 14 that President Obama's proposal to reorganize the trade agencies of the executive branch is effectively dead. The proposal, which would have swept the currently independent Office