Foreign Corrupt Practices Act Hits its Stride

By Stuart M. Altman and Peter Spivack

As the Foreign Corrupt Practices Act (FCPA) turned 35 years old in 2012, the surge in enforcement activity that was first observed five years ago appears to be leveling off. Nevertheless, numerous events in 2012 signal a statute that is maturing rather than falling into obscurity: the first sustained pattern of trial activity; increasing ability and enthusiasm by the government to conduct industry-wide investigations; and serious policy debates between industry, executive and legislative interests leading up to the much-anticipated issuance of statutory guidance from the government.

In 2012, the U.S. Department of Justice (DOJ) initiated 13 prosecutions and the U.S. Securities and Exchange Commission (SEC) opened 12 enforcement actions, with the pace of enforcement actions dropping significantly from 2011.

However, rather than signaling a relaxing of FCPA enforcement, this reduced case initiation likely reflects the DOJ's preoccupation with issuing the much-anticipated FCPA resource guide, preparing for trials and closing the last chapter on some of its less successful enforcement actions.

Though the number of new actions may have abated, the scope of FCPA activity has expanded, spilling into courtrooms and Congress. Enforcement efforts remain robust and show no indication of a decline. Recent FCPA cases and trends reflect:

- Increased variations in the use of compliance monitors;
- Continued pursuit of individuals in the aftermath of company settlements;
- Industry-wide investigations are on the rise and the government's sweep of the medical device industry is showing results; and,
- Compliance and cooperation are the keys to preventing prosecution or, at the very least, greatly reducing penalties.

Coming off a string of disappointing courtroom setbacks the DOJ and SEC will look to improve their outcomes, while some defendants will take these setbacks as a basis to skip settlement and look to fight the government. In success and in failure, FCPA enforcement has established itself as headline legal news, and this year is not likely to be a quiet one for the FCPA.

DOJ Issues Resource Guide

A Resource Guide to the U.S. Foreign Corrupt Practices Act — the DOJ's and SEC's detailed compilation of guidance on the act and its enforcement — was released in November 2012. It endeavors to provide a multifaceted approach, along with insight into DOJ and SEC enforcement. The long- promised and much-awaited detailed guidance emerges out of the larger context of continued public debate on FCPA reform.

Congressional interest in FCPA re-

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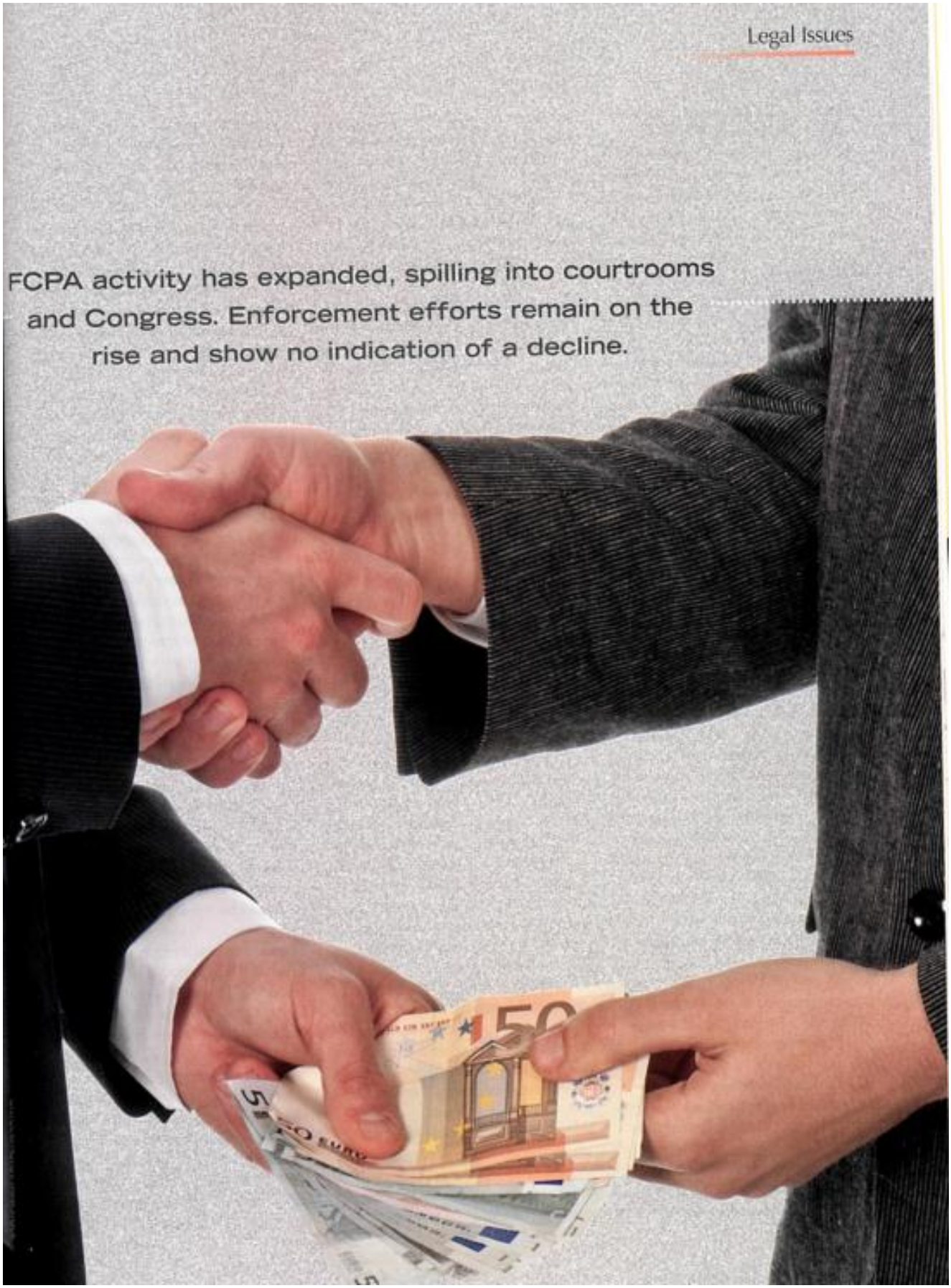

form has been high over the past two years, with multiple hearings on enforcement and reform proposals. With organizations like the U.S. Chamber of Commerce's Institute for Legal Reform continuing its focus on the reforms, the debate will certainly continue and may yet produce results more significant than the guide. However, the Obama administration has made clear that the executive branch will not in the foreseeable future support any effort to amend the FCPA in a way that it perceives as dilutive of the statute's potency.

On March 22, 2012, then-U.S. Secretary of State Hillary Clinton echoed this message, stating, "[O]f course, this administration, like those before us, has taken a strong stand when it comes to American companies bribing foreign officials. We are unequivocally opposed to weakening the Foreign Corrupt Practices Act." Thus, the guide is a strong indication of continued enforcement emphasis.

Flexibility in Compliance Monitorships

The prospect of the onerous burdens of a court-appointed monitor is often the single greatest hurdle to an FCPA settlement. However, only four of the 12 corporations charged in 2012 had independent monitors imposed on them.

The remaining companies were only obligated to self-report and self-monitor for the term of the agreement. This may signal a shift in DOJ thinking in the area.

Of the four, Marubeni Crop. and Eli Lilly and Co. agreed to retain an independent compliance consultant as part of their settlements. The other two companies (Smith & Nephew PLC and Biomet Inc.) were medical device companies that received a hybrid monitor; that is, each of them agreed to a three-year deferred prosecution, but the monitor's term was only 18 months, followed by 18 months of self-reporting.

An independent monitor was not imposed in the other corporate enforcement actions. However, the DOJ has continued to include rigorous new elements in the compliance program that is a part of its standard settlement agreements, including provisions covering mergers and acquisitions due diligence, compliance integration and reporting obligations. While many companies are willing to reach a monetary settlement of FCPA charges, the compliance and monitoring burden imposed by the DOJ can be a difficult hurdle for some.

Warning: Individuals at Risk

Less than three years ago, U.S. Assistant Attorney General Lanny A. Breuer announced that the prosecution of individuals would be a cornerstone of the regulators' FCPA enforcement policy. An increase in such prosecutions soon followed, and 2012 saw a continuation of this trend.

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Collectively, the DOJ and SEC filed FCPA-related claims against five different individuals. One of those individuals, Cecilia Zurita, was added to the existing Haiti Telecom case. Three more individuals, James Ruehlen, Mark Jackson and Thomas O'Rourke, all of whom were charged by the SEC, are all current or former executives of Noble Corp., which settled with the SEC and DOJ in 2010. Thus, the only true new case brought by the DOJ and SEC was against former Morgan Stanley employee Garth Peterson.

Peterson was a former managing director for Morgan Stanley's real estate business in China. According to the charging documents Peterson, a U.S. citizen living in Singapore, conspired with a Chinese public official and a Canadian attorney to circumvent Morgan Stanley's internal controls in order to transfer a multimillion dollar ownership interest in a Shanghai building to himself and his co-conspirators. The Chinese official, an executive at Yongye, a state-owned enterprise, initiated a sale of an apartment building to Morgan Stanley.

After the sale, Peterson induced Morgan Stanley to sell shares in the complex to a holding company at a discount to the interest's actual 2006 market value. After Peterson and his co-conspirators falsely represented to Morgan Stanley that Yongye owned the shell company controlled by the conspirators, Morgan Stanley sold the real estate interest. Peterson and his co-conspirators realized a profit of more than $2.5 million.

To resolve the criminal charges, Peterson pleaded guilty in April 2012 to conspiring to violate the FCPA's internal controls provision and was sentenced to nine months of incarceration followed by three years of supervised release. A fine and disgorgement were imposed in the civil case. Notably, the government declined to charge Morgan Stanley, citing the company's strong internal controls, prompt voluntary disclosure and complete cooperation.

Continued prosecution of individuals in other cases is likely to continue. Many of the corporate charging documents filed in 2012 identify specific executives by title and contain specific allegations concerning wrongdoing. Thus, it is possible that the government may proceed against some of these individuals in the future, even several years after the corporate settlement.

More Flies with Honey Than with Vinegar

Last year proved to be a year of generosity with the DOJ agreeing to settlements with sizable discounts from the U.S. Sentencing Guidelines as a reward for cooperation and settlement. This meant that 2012 saw no new entries on the top 10 all-time FCPA settlement list.

In the continued sweep of the medical device industry, two of the three medical device companies that settled — Smith & Nephew and Biomet — received a 20 percent discount from the

bottom of the applicable guidelines range. Orthofix was the one exception.

In other cases, BizJet International Sales and Support Inc., Data Systems & Solutions LLC and H.C.P. Corp. all received discounts in the 30 percent range to reflect the companies' extraordinary cooperation and remediation in their respective cases. Nordam Group Inc. was able to prove that any fine exceeding $2 million would bankrupt the company and received a substantial, though unidentified, discount, in the interest of the company's sustainability and in recognition of its cooperation.

Two 2012 settlements by Tyco and Marubeni saw no discount. In Marubeni's case this perhaps reflected that it was the last of the entities in that case to settle. A few of these key settlements are highlighted:

- Smith & Nephew (Feb. 6, 2012). The U.K.-based medical devices manufacturer became the second company (Johnson & Johnson was the first) to settle FCPA charges with the government as part of the ongoing investigation into foreign bribery by medical device companies.
- BizJet (March 14, 2012). The DOJ charged BizJet, an Oklahoma-based provider of aircraft maintenance, repair and overhaul services, with conspiring to violate the FCPA's anti- bribery provisions. The DOJ alleged that, between 2004 and 2010, BizJet authorized the payment of hundreds of thousands of dollars to Mexican and Panamanian government officials to secure aircraft service contracts. Two senior BizJet executives briefed the company's board of directors about its intention to pay "commissions" to government officials in order to "gain market share."

To resolve the FCPA anti-bribery charges, BizJet agreed to enter into a deferred prosecution agreement pursuant to which it is required to pay an $11.8 million criminal fine and undertake other remedial measures. In recognition of BizJet's "extraordinary cooperation," including its voluntary disclosure of the FCPA violations and extensive internal investigation and remediation, the DOJ awarded the company a 30 percent reduction off the bottom of the fine range.

- Nordam Group (July 17, 2012). In July 2012, the DOJ entered into a non-prosecution agreement with Nordam, a Tulso, Okla.-based provider of aircraft maintenance, repair and overhaul (MRO) services, in which Nordam agreed to pay a $2 million criminal penalty to resolve FCPA violations. The DOJ alleged that Nordam paid bribes to employees of airlines owned by the People's Republic of China to secure contracts to perform MRO services for those airlines.

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As a result of Nordam's timely, voluntary and complete disclosure of the conduct, its cooperation with the department and its remedial efforts, the DOJ imposed a fine well below the standard range under the guidelines. Nordam also demonstrated to the department and an independent accounting expert that a fine exceeding $2 million would substantially jeopardize the company's continued viability.

2013: A Crystal Ball?

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Though the trend of quality over quantity with respect to new FCPA enforcement actions will likely continue in 2013, the cooling-off period is mostly due to the concentration of case resolutions and pending investigations, many of which are industry-wide.

This reduction in case initiation is unlikely to provide comfort to those in the health care industry. Nine enforcement actions were brought in 2012 against seven companies in the health care sector. After an almost 10-year effort the government has ongoing investigations against at least 21 companies. Thus, the industry sweep will likely continue to play out for at least the next few years.

There are other industry sweeps reportedly ongoing, such as the financial services and movie studio sweeps. An industry at risk is the defense industry.

A longstanding debate in FCPA compliance circles concerns the scope of the act's "foreign official" definition — specifically, whether the definition reaches employees of entities owned by foreign governments whose activities are more commercial than governmental in nature. While several district courts have addressed this question in specific factual contexts, the first appeals court, the 11th U.S. Circuit Court of Appeals, is now looking into the case.

FCPA legislative reform efforts continued to gather steam in 2012. The U.S. Chamber of Commerce Institute for Legal Reform remained active in calling for the guidance to cover a number of areas of concern to businesses seeking to comply with the FCPA.

At the same time, other members of Congress continued to seek automatic debarment of government contractors convicted of FCPA violations and to make it easier for companies and individuals to bring private causes of action for FCPA violations. Such reforms could cause companies to be far less willing to settle cases with the government.

While 2012 was an active year, 2013 is likely to prove just as captivating.

Stuart M. Altman (stuart.altman@hoganlovells.com) is a partner in the Washington, D.,C., office of law firm of Hogan Lovells. Peter Spivack (peter.spivack@hoganlovells.com) is co-leader of the firm's Investigation, White Collar and Fraud practice.