Debevoise & Plimpton

FCPA Update
April 2017
Volume 8
Number 9

FCPA Update

A Global Anti-Corruption Newsletter

Also in this issue:

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email prohlik@debevoise.com, eogrosz@debevoise.com, or pferenz@debevoise.com

Corporate Recidivism in the FCPA Context

I. Introduction

Among the flurry of resolutions in the final days of the Obama administration, two "repeat offenders" settled FCPA cases: Zimmer Biomet Holdings, Inc. ("Zimmer Biomet")[1] and Orthofix International N.V. ("Orthofix").[2] Zimmer Biomet and Orthofix are hardly the first such "repeat offenders." In July 2016, Johnson Controls Inc. ("JCI") settled an enforcement action involving activities of a Chinese

Continued on page 2

1. *In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771 (Jan. 12, 2017); *United States v. Zimmer Biomet Holdings, Inc.,* Superseding Information, No. 12-CR-00080 RBW (filed Jan. 12, 2017); *United States v. Zimmer Biomet Holdings, Inc.,* Deferred Prosecution Agreement, No. 12-CR-00080 RBW (filed Jan. 12, 2017).
2. *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800 (Jan. 18, 2017).

Corporate Recidivism in the FCPA Context
Continued from page 1

subsidiary with the Securities and Exchange Commission ("SEC"),[3] and the DOJ simultaneously "declined" to bring any charges.[4] Each of these companies was a "repeat offender" in having previously settled FCPA-related allegations.

By analyzing and comparing these three recent resolutions, this Article highlights factors that may influence whether U.S. authorities bring follow-on FCPA enforcement actions and, if so, what penalties they seek to impose. As discussed below, companies are well advised to make concrete compliance enhancements in an effort to avoid recidivist status and the significant penalties that can accompany a second resolution.

II. Recidivism Under the United States Sentencing Guidelines

The United States Sentencing Guidelines ("U.S.S.G.") specifically provide for corporate recidivism scores, including on account of separate business lines. Chapter Eight of the U.S.S.G. deals with the sentencing of organizations and imposes higher penalty multipliers for recidivist corporate defendants. Penalty multipliers are based on an organization's "Culpability Score."[5] Beginning with a score of 5 (equivalent to a multiplier range from 1.00 – 2.00), the U.S.S.G. add 1 point if an organization *or separately managed line of business* committed any part of the instant offense less than 10 years after a criminal adjudication based on similar misconduct or a civil or administrative adjudication based on more than one instance of similar misconduct.[6] For adjudications within 5 years, add 2 points.[7] This alone raises the multiplier range to 1.20 – 2.40 or 1.40 – 2.80, respectively.[8]

Because of corporations' propensity to settle, except in the relatively rare context of guilty pleas, courts themselves do not apply the U.S.S.G. in imposing penalties for violating the FCPA. But the DOJ uses the guidelines in calculating monetary penalties in the context of deferred prosecution agreements ("DPAs") and other resolutions.[9] Given that the U.S.S.G. provides for recidivism penalties for different

Continued on page 3

3. *In the Matter of Johnson Controls, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Rel. No. 78287; Admin Proc. File No. 3-17337 (July 11, 2016).
4. Letter from Daniel Kahn, Deputy Chief, Fraud Section, Criminal Division, Department of Justice, to Jay Holtmeier, Esq, & Erin G.H. Sloane, Esp., WilmerHale regarding JCI (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download.
5. U.S.S.G. § 8C2.6 (2016).
6. *Id.* § 8C2.5(c)(1). "'Prior criminal adjudication' means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere.*" *Id.* § 8A1.2 note 3(G).
7. *Id.* § 8C2.5(c)(2).
8. *Id.* § 8C2.6.
9. For example, in the BK Medical ApS ("BK Medical") Non-Prosecution Agreement ("NPA"), the DOJ noted that BK Medical received a discount off the fine range, but did not include the calculations in the NPA. BK Medical ApS, Non-Prosecution Agreement, at 1–2 (June 21, 2016). The U.S. Attorneys' Manual outlines how prosecutors should consider the U.S.S.G. in determining the appropriateness of plea agreements and selecting plea charges. DOJ, *U.S. Attorneys' Manual,* § 9-27.400–430.

Corporate Recidivism in the FCPA Context
Continued from page 2

parts of a corporation, the key question is when and how the enforcement agencies exercise their prosecutorial discretion in bringing and resolving enforcement actions. The three recent "repeat offender" cases shed some light on that issue.

III. Recent "Repeat Offenders"

In July 2016 and the early days of 2017, the SEC settled with three repeat FCPA violators: Zimmer Biomet, Orthofix International, and JCI. Each had been subject to a prior SEC action:

"[C]ompanies are well advised to make concrete compliance enhancements in an effort to avoid recidivist status and the significant penalties that can accompany a second resolution."

- Zimmer Biomet (then Biomet Inc.) consented to a court order requiring it to pay disgorgement, interest, and retain an independent compliance expert in 2012.[10]
- The same year, Orthofix similarly settled with the SEC and consented to a court order requiring it to pay disgorgement and interest, and accept monitoring of its FCPA program.[11]
- In 2007, York International ("York," acquired by JCI in 2005) consented to similar terms, including retaining an independent compliance monitor and paying disgorgement, interest, and a $2,000,000 fine.[12]

Each was also a repeat offender with respect to the DOJ, with Zimmer Biomet and Orthofix entering into DPAs in 2012,[13] and York International entering into a DPA in 2007.[14] However, the DOJ chose to initiate a new enforcement action only against Zimmer Biomet,[15] concluding its new investigation of JCI with a "declination"[16] and

Continued on page 4

10. *SEC v. Biomet, Inc.,* Litigation Release, Civil Action No. 1: 12-CV-00454 (D.D.C.) (RMC) (March 26, 2012), https://www.sec.gov/litigation/litreleases/2012/lr22306.htm.
11. *SEC v. Orthofix International N.V.,* Litigation Release, Case No. 4:12-CV-419 (filed July 10, 2012), https://www.sec.gov/news/press-release/2012-2012-133htm.
12. *SEC v. York International Corporation,* 07 CV 01750 (filed Oct. 1, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20319.htm.
13. *United States v. Biomet, Inc.,* Deferred Prosecution Agreement, No. 12-CR-00080 RBW (filed Mar. 26, 2012); *United States v. Orthofix International, N.V.,* Deferred Prosecution Agreement, No. 4:12-CR-00150-RAS-DDB-1 (July 10, 2012).
14. *United States v. York Int'l Corp.,* Deferred Prosecution Agreement, No. 07-CR-00253 (Oct. 1, 2007).
15. *United States v. Zimmer Biomet Holdings, Inc.,* Superseding Information, Crim. No. 12-CR-00080 RBW (filed Jan. 12, 2017).
16. Letter from Daniel Kahn, Deputy Chief, Fraud Section, Criminal Division, Department of Justice, to Jay Holtmeier, Esq, regarding Johnson Controls ("JCI"), (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download.

Corporate Recidivism in the FCPA Context
Continued from page 3

taking no action against Orthofix.[17] By reviewing, comparing, and contrasting the agencies' treatment of these corporate recidivists, it may be possible to understand why these defendants were treated differently and to raise questions about the logic of applying "repeat offender" penalties in the FCPA context.

A. Zimmer Biomet Holdings

Zimmer Biomet, formerly two separate entities, is a medical device manufacturer based in Warsaw, Indiana.[18] In 2012, Biomet paid $22.8 million in fines for bribing Argentinian, Brazilian, and Chinese public healthcare providers.[19] The criminal information charged one count of conspiracy to violate the anti-bribery provisions, three counts of violating the anti-bribery provisions, and one count of violating the FCPA's accounting provisions.[20] The associated DPA resulted in $17.3 million in fines.[21] The DPA had a term of three years; required Biomet to cooperate fully with the DOJ in any and all matters relating to corrupt payments, false books and records, and inadequate internal controls; and imposed a corporate monitor and reporting obligations.[22] Biomet settled an SEC civil complaint relating to the same activities for another $5.5 million.[23]

In July 2014, Biomet disclosed that it became aware of further improprieties in Brazil and Mexico.[24] Pursuant to the DPA, it informed its independent compliance monitor, the DOJ, and SEC.[25] In March 2015, the term of Biomet's DPA and independent compliance monitor were extended for an additional year.[26] Biomet disclosed that "[t]he DOJ could, among other things, revoke the DPA or prosecute Biomet and/or the involved employees and executives."[27]

Continued on page 5

17. *Orthofix Announces Resolution of SEC Investigations* (Jan. 18, 2017) http://ir.orthofix.com/releasedetail.cfm?releaseid=1008341.
18. Zimmer Biomet, *About Us*, http://www.zimmerbiomet.com/corporate/about-zimmer-biomet/about-us.html.
19. *See United States v. Biomet, Inc.*, Deferred Prosecution Agreement, No. 12-CR-00080 RBW, ¶ 5 (filed Mar. 26, 2012); *SEC Charges Medical Device Company Biomet with Foreign Bribery* (Mar. 26, 2012), https://www.sec.gov/news/press-release/2012-2012-50htm.
20. *United States v. Biomet*, Information, No. 12-CR-00080 RBW, ¶ 1 (filed Mar. 26, 2012).
21. *See United States v. Biomet, Inc.*, Deferred Prosecution Agreement, No. 12-CR-00080 RBW, ¶ 5 (filed Mar. 26, 2012).
22. *Id.* ¶¶ 2, 4.
23. *SEC Charges Medical Device Company Biomet with Foreign Bribery* (2012), https://www.sec.gov/news/press-release/2012-2012-50htm.
24. Biomet, Inc. Current Report (Form 8-K), SEC (July 2, 2014).
25. *Id.*
26. Biomet, Inc. Current Report (Form 8-K), SEC (Mar. 13, 2015).
27. *Id.*

Corporate Recidivism in the FCPA Context
Continued from page 4

In April 2016, the DOJ "notified Biomet that the government had determined that Biomet had breached the DPA based on the conduct in Mexico and Brazil and based on Biomet's failure to implement and maintain a compliance program as required by the DPA."[28] The January 2017 DOJ and SEC enforcement actions against Zimmer Biomet involved a superseding criminal information against Zimmer Biomet alleging one count of violating the FCPA's internal controls provisions,[29] a criminal information and plea agreement with JERDS Luxembourg Holding S.A.R.L. (a Biomet subsidiary) alleging a violation of books and records provisions of the FCPA,[30] a new DPA with Zimmer Biomet,[31] and an SEC administrative order against Biomet Inc.[32] Penalties, disgorgement, and interest totaled $30.4 million including approximately $17.4 million to the DOJ[33] and $13 million to the SEC.[34]

The superseding information against Zimmer Biomet explicitly linked the violation of the internal controls provisions to red flags arising out of the earlier investigation and resolution:

> Despite being aware of red flags and prior corruption-related misconduct at Biomet's subsidiaries in Mexico and Brazil, and despite entering into the 2012 DPA both in connection with corruption in Brazil and other countries relating to Biomet's distributors, and as a consequence of its failure to implement internal accounting controls, Biomet knowingly failed to implement and maintain an adequate system of internal accounting controls.[35]

In fact, Biomet used the same Brazilian distributor (albeit in a somewhat different form) that committed the bribery resulting in the 2012 DPA.[36] While Biomet formally cut ties with the Brazilian distribution company at the heart of

Continued on page 6

28. *United States v. Biomet Inc.,* DOJ Status Report, Crim. No. 1:12-cr-80 (RBW), ¶ 3 (filed June 6, 2016).
29. *United States v. Zimmer Biomet Holdings, Inc.*, Superseding Information, Crim. No. 12-CR-00080 RBW, ¶ 79 (filed Jan. 12, 2017).
30. *United States v. Jerds Luxembourg Holding S.A.R.L,* Information, Docket No. 1:17-CR-00007-RBW, ¶¶ 41–42 (filed Jan. 12, 2017); *United States v. Jerds Luxembourg Holding S.A.R.L,* Plea Agreement, Docket No. 1:17-CR-00007-RBW (filed Jan. 12, 2017).
31. *United States v. Zimmer Biomet Holdings, Inc.,* Deferred Prosecution Agreement, Crim. No. 12-CR-00080 RBW (filed Jan. 12, 2017).
32. *In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771 (Jan. 12, 2017).
33. *United States v. Zimmer Biomet Holdings, Inc.,* Deferred Prosecution Agreement, Crim. No. 12-CR-00080 RBW, ¶ 7 (filed Jan. 12, 2017).
34. *In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771, at 11 (Jan. 12, 2017).
35. *United States. v. Zimmer Biomet Holdings, Inc.,* Superseding Information, Crim. No. 12-CR-00080 RBW, ¶ 19 (Jan. 12, 2017).
36. *Id.* ¶¶ 19–20.

Corporate Recidivism in the FCPA Context
Continued from page 5

the original actions, it began using another distribution company despite warnings that the two companies were related via the very individual who committed the original bribes.[37] It turned out that the same individual had control of the second distribution company, but Biomet reportedly did not take any additional actions to determine the individual's role.[38] The relevant conduct occurred both before and after the 2012 DPA.[39]

The new DPA – resolving the superseding information – explained Zimmer Biomet's failure to comply with the obligations of the 2012 DPA because the monitor was unable to certify that Zimmer Biomet's compliance program met the requisite standards and Zimmer Biomet continued its illegal conduct during the 2012 DPA's term.[40] The 2017 DPA explained that "the 2012 DPA *obligated Biomet to disclose the conduct* described in the [superseding information], and some of the conduct . . . predated the 2012 DPA."[41] Even though Zimmer Biomet self-reported the unlawful activity, it did not receive voluntary disclosure credit, given the obligation to report. However, Zimmer Biomet did receive credit for its cooperation with the DOJ,[42] despite the fact that the 2012 DPA similarly obligated Biomet to cooperate in subsequent FCPA investigations.[43]

The DOJ imposed a fine of $17,460,300, a "criminal penalty at the middle of the United States Sentencing Guidelines fine range."[44] In calculating the fine, Zimmer Biomet's culpability score was raised by 2 for committing part of the instant offense within 5 years of a criminal adjudication based on similar conduct.[45] The final culpability score was 10, resulting in a multiplier between 2.00 – 4.00, with 3.00 being applied. Zimmer Biomet agreed to pay the fine, implement an independent compliance monitor, and have JERDS Luzembourg Holding S.A.R.L. plead guilty to the charge against it (related to the conduct in Mexico).[46]

Continued on page 7

37. *Id.* ¶ 27.
38. *Id.* ¶¶ 27–44.
39. *United States v. Zimmer Biomet Holdings, Inc.,* Superseding Information, Crim. No. 12-CR-00080 RBW, ¶¶ 44, 71 (filed Jan. 12, 2017).
40. *Id.* ¶ 4.
41. *Id.* (emphasis added).
42. *Id.*
43. *United States v. Biomet, Inc.,* Deferred Prosecution Agreement, No. 12-CR-00080 RBW, ¶ 4 (Mar. 26, 2012).
44. *United States v. Zimmer Biomet Holdings, Inc.,* Deferred Prosecution Agreement, No. 12-CR-00080 RBW, ¶ 4 (filed Jan. 12, 2017).
45. *Id.* (citing U.S.S.G. § 8C2.5(c)(2)). Technically, the guideline did not apply because the 2012 DPA was not a "prior criminal adjudication" as defined by the sentencing guidelines. U.S.S.G. § 8A1.2 note 3(G) ("'Prior criminal adjudication' means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.").
46. *United States v. Zimmer Biomet Holdings, Inc.,* Deferred Prosecution Agreement, Crim. No. 12-CR-00080 RBW, ¶ 18 (filed Jan. 12, 2017).

Corporate Recidivism in the FCPA Context
Continued from page 6

Zimmer Biomet agreed to pay the SEC disgorgement of $5,820,100, prejudgment interest of $702,705, and a civil penalty of $6,500,000.[47] The cease-and-desist order alleged violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.[48] Specifically regarding the anti-bribery provisions, the order alleged that Biomet's subsidiary engaged brokers to circumvent customs laws and that Biomet, as parent, saw numerous red flags, was on notice of compliance risks as early as 2008, had employees at all levels aware of the customs issues and failed to question how the hired brokers were overcoming such issues, had employees aware of the bribes, and failed to take steps to detect ongoing bribery.[49]

"Both the DOJ and SEC take corporate recidivism into account when determining whether to bring an enforcement action and in the type of penalty applied. Given the number of factors potentially influencing such decisions, it is difficult to draw firm conclusions as to which factors the enforcement agencies view as most important."

B. Orthofix International

Within a week of Zimmer Biomet's second settlement, the SEC announced it settled claims with Orthofix International, a Texas-based medical device company.[50] In 2012, Orthofix had settled claims by the SEC and DOJ related to corrupt payments in Mexico.[51] The 2017 settlement related to Orthofix's improper booking of revenue payments to doctors at government-owned hospitals in Brazil.[52] With these settlements, Orthofix became another FCPA recidivist. But unlike Zimmer Biomet, Orthofix's repeat conduct did not take place in the same jurisdiction.

In July 2012, Orthofix settled claims of violating the internal controls provisions (DOJ and SEC) and books and records provisions (SEC only) of the FCPA, related to

Continued on page 8

47. *In the Matter of Biomet, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79780, Accounting and Auditing Enforcement Rel. No. 3843, Admin. Proc. File No. 3-17771, at 11 (January 12, 2017).

48. *Id.* ¶¶ 30–32.

49. *Id.* ¶ 30.

50. *Medical Device Company Charged with Accounting Failures and FCPA Violations,* SEC Press Release (January 17, 2017), https://www.sec.gov/news/pressrelease/2017-18.html.

51. *United States v. Orthofix International N.V.,* Deferred Prosecution Agreement, No. 4:12-CR-00150-RAS-DDB-1 (filed July 10, 2012); *SEC v. Orthofix International N.V.,* Consent of Defendant Orthofix International, Civ. Action No. 4:12-CV-419 (filed April 9, 2012).

52. *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800, at 2 (Jan. 18, 2017).

Corporate Recidivism in the FCPA Context
Continued from page 7

the conduct of its wholly-owned Mexican subsidiary, Promeca S.A. de C.V.[53] Promeca employees paid Mexican healthcare officials approximately $300,000 in return for agreements with a social-service agency and its hospitals to purchase Orthofix products.[54] As a result, Orthofix paid a total of $7.4 million in fines, disgorgement, and interest to the SEC and DOJ.[55] As part of the agreed-upon final judgment, as is common, the SEC permanently enjoined Orthofix from violating the books and records and internal controls provisions of the FCPA.[56]

In its DPA with the DOJ, Orthofix agreed to continue cooperating with the DOJ, implement a new compliance program, and undertake periodic reporting to the DOJ during the term of the DPA.[57]

In August 2013, Orthofix engaged outside counsel to review allegations of bribery with respect to its Brazilian subsidiary, Orthofix do Brasil Ltda.[58] Pursuant to its earlier-described settlements, Orthofix self-reported the allegations to the SEC and DOJ.[59] In September 2015, the DOJ extended the term of the DPA through July 2016, "stating that the Company's efforts to comply with the internal controls and compliance requirements of the DPA during the first eighteen months of the DPA were insufficient."[60] In July 2016, after the extended DPA expired, the DOJ filed a dismissal with the court.[61]

In January 2017, the SEC announced a settlement with Orthofix related to the Brazilian subsidiary's conduct between 2011 and 2013.[62] In its cease-and-desist order, the SEC explained that corrupt payments by the Brazilian subsidiary were "improperly recorded as legitimate business expenses and generated illicit profits," resulting in violations of the books and records and internal controls provisions of the FCPA.[63] The order pointed out that this failure occurred even though the

Continued on page 9

53. *United States v. Orthofix International N.V.,* Information, No. 4:12-CR-00150-RAS-DDB-1 ¶ 38 (filed July 10, 2012); *SEC v. Orthofix International N.V.,* Complaint, Civ. Action No. 4:12-CV-419, ¶ 3 (filed July 10, 2012).
54. *SEC v. Orthofix International N.V.,* Complaint, Civ. Action No. 4:12-CV-419, ¶ 22 (filed July 10, 2012).
55. *United States v. Orthofix International N.V.,* Deferred Prosecution Agreement, No. 4:12-CR-00150-RAS-DDB-1, ¶ 6 (filed July 10, 2012); *SEC v. Orthofix International N.V.,* Consent of Defendant Orthofix International, Civ. Action No. 4:12-CV-419, ¶ 3 (filed April 9, 2012).
56. *Id.*
57. *United States v. Orthofix International N.V.,* Information, No. 4:12-CR-00150-RAS-DDB-1 ¶¶ 5, 8–9 (filed July 10, 2012).
58. Orthofix Int'l N.V. Quarterly Report (Form 10-Q) (Aug. 1, 2016), at 14.
59. *Id.*
60. *Id.*
61. *Id.*
62. *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800, at 2 (Jan. 18, 2017).
63. *In the Matter of Orthofix International N.V.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease & Desist Order, Securities Exchange Act Rel. No. 79828, Accounting and Auditing Enforcement Rel. No. 3851, Admin. Proc. File No. 3-17800, at 2 (Jan. 18, 2017).

Corporate Recidivism in the FCPA Context
Continued from page 8

SEC charged Orthofix with violating the same FCPA provisions in 2012.[64] Internal controls deficiencies included the setting, approval, and payment of commissions and discounts.[65] "[A] lack of centralized global accounting and payment controls allowed Orthofix Brazil to record the improper payments as legitimate business expenses."[66] Even though Orthofix took some steps after the 2012 allegations, it "did not start fully implementing sufficient remedial steps until after the discovery of the Brazilian conduct in late 2013."[67]

Sanctions included that Orthofix cease and desist from committing or causing any future violations of the books and records and internal controls provisions of the FCPA; and pay disgorgement of $2,928,000, prejudgment interest of $264,475, and a civil monetary penalty of $2,928,000.[68] Orthofix also was required to retain an independent FCPA consultant for one year to review and evaluate Orthofix's FCPA-related policies and procedures (as actually implemented) and make recommendations to be reviewed by the SEC and adopted by Orthofix.[69]

On the same day as the SEC Cease-and-Desist Order, Orthofix announced that the DOJ had declined to take any "further action with respect to this matter."[70]

C. Johnson Controls, Inc.

As discussed in our July 2016 issue,[71] the SEC in July 2016 announced a settlement with Johnson Controls, Inc. related to one of its Chinese subsidiaries.[72] The same subsidiary, acquired by JCI in 2005, settled a complaint by the SEC[73] and entered a DPA with the DOJ[74] in 2007.

Continued on page 10

64. *Id.*
65. *Id.* at 6 ¶ 15.
66. *Id.* at 6 ¶ 16.
67. *Id.* at 6 ¶ 18.
68. *Id.* at 7.
69. *Id.* at 8–11.
70. *Orthofix Announces Resolution of SEC Investigations* (Jan. 18, 2017) http://ir.orthofix.com/releasedetail.cfm?releaseid=1008341.
71. Andrew Levine, Bruce Yannett, and Philip Rohlik, "Early Thoughts on the DOJ's Pilot Program, The Continued Breadth of the Accounting Provisions, and Possible Implications for Self-Reporting," FCPA Update, Vol. 7, No.12 (July 2016), http://www.debevoise.com/~/media/files/insights/publications/2016/07/fcpa_update_july_2016.pdf.
72. *In the Matter of Johnson Controls, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Rel. No. 78287; Admin Proc. File No. 3-17337, ¶¶ 2–3 (July 11, 2016).
73. *SEC v. York Int'l Corp.,* Complaint, No. 1:07-cv-01750 (RCL) (Oct. 1, 2007); *SEC v. York Int'l Corp.,* Litigation Release, No. 1:07-cv-01750 (RCL) (Oct. 1, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20319.htm.
74. *United States v. York Int'l Corp.,* Deferred Prosecution Agreement, No. 07-CR-00253 (Oct. 1, 2007).

Corporate Recidivism in the FCPA Context
Continued from page 9

JCI is, among other things, a global provider of temperature control systems for buildings, industrial facilitates, and ships.[75] JCI purchased York International Corporation in 2005, while it was under investigation for FCPA violations.[76] In October 2007, York International (then a part of JCI and parent of China Marine) settled[77] a complaint by the SEC that alleged violations of the anti-bribery, books and records, and internal controls provisions of the FCPA both before and after (though mostly before) the acquisition by JCI.[78] Alleged conduct included payments by the Chinese subsidiary to agents and others (including Chinese government personnel at ship yards) without sufficient supporting documentation in order to obtain and retain business.[79]

"Misconduct occurring in the same jurisdiction or by the same subsidiary could be relevant with regard to treating a parent as a repeat offender. . . . The nature and relative similarity of the repeated misconduct may be relevant too."

The same day, York (acquired by JCI in 2005) entered a three-year DPA with the DOJ admitting to the appended statement of facts and to the facts set forth in the criminal information.[80] It agreed to pay a $10 million penalty; conduct a review of its internal controls, policies, and procedures; and engage an independent compliance monitor.[81]

According to the SEC's 2016 Cease-and-Desist Order with JCI, after it acquired York, JCI devoted additional resources to the compliance program.[82] Specifically with respect to China Marine, JCI terminated the individuals involved in the corrupt

Continued on page 11

75. *In the Matter of Johnson Controls, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Rel. No. 78287; Admin Proc. File No. 3-17337, ¶ 2 (July 11, 2016).
76. *Id.*
77. *SEC v. York Int'l Corp.,* Litigation Release, No. 1:07-cv-01750 (RCL) (Oct. 1, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20319.htm.
78. *SEC v. York Int'l Corp.,* Complaint, No. 1:07-cv-01750 (RCL) (Oct. 1, 2007).
79. *Id.* ¶ 44.
80. *United States v. York Int'l Corp.,* Deferred Prosecution Agreement, No. 07-CR-00253, ¶¶ 2, 5 (Oct. 1, 2007).
81. *Id.* ¶¶ 3, 8–9.
82. *In the Matter of Johnson Controls, Inc.,* Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities Exchange Act Rel. No. 78287; Admin Proc. File No. 3-17337, ¶ 5 (July 11, 2016).

conduct and hired a new managing director (a Chinese national and resident) who reported to JCI's Denmark subsidiary (which oversaw JCI's international marine business).[83] Further, "[b]ecause the misconduct . . . involved the improper use of agents, JCI limited the use of agents in its China Marine business model and required that all sales go through its internal sales team based in China."[84]

Despite these efforts, employees at the Chinese subsidiary "devised another avenue to continue the payments."[85] "From 2007 to 2013, the managing director of China Marine, with the aid of approximately eighteen China Marine employees in three China Marine offices, continued the bribery and theft that began under his predecessor by using vendors instead of agents to facilitate the improper payments."[86] When JCI learned of the conduct in December 2012, it self-reported and began an internal investigation.[87]

In July 2016, the SEC entered a cease-and-desist order accepting an offer of settlement from JCI.[88] Although JCI neither admitted nor denied the allegations,[89] the Cease-and-Desist Order alleged that JCI's internal controls over certain vendor payments were not rigorous and employees specifically used vendors considered to be "low risk" because their transactions were small and they did not normally interface with government officials.[90] In combination with the low-value of each transaction, the delegation of authority to the Chinese general manager meant few transactions at the Chinese subsidiary required approval by the general manager's superiors.[91] Improper payments totaled at least $4.9 million, resulting in an $11.8 million benefit to JCI.[92]

As a result of this conduct, the Cease-and-Desist Order alleged that JCI "failed to make and keep [accurate] books, records, and accounts . . . [because] [n]umerous vendor payments were incorrectly recorded."[93] Further, JCI "failed to devise and maintain an adequate system of internal accounting controls."[94] The SEC's main

Continued on page 12

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* ¶ 6.
87. *Id.* ¶ 11.
88. *Id.* at 1.
89. *Id.* ¶ 7.
90. *Id.* ¶ 8.
91. *Id.* ¶ 9.
92. *Id.* ¶ 10.
93. *Id.* ¶ 12.
94. *Id.* ¶ 13.

Corporate Recidivism in the FCPA Context
Continued from page 11

critique was that JCI "put almost all of its reliance for oversight of [the Chinese subsidiary] on a newly hired managing director to self-police his high risk business," which created a "culture of impunity."[95] Further, JCI failed to detect the improper vendor scheme, created by the collusion of the Chinese general manager and several members of his staff.[96]

The SEC ordered that JCI cease and desist from current and future violations of the FCPA and pay disgorgement of $11,800,000, prejudgment interest of $1,382,561, and a civil penalty of $1,180,000, for a total of $14,362,581.[97] The SEC specifically stated that it was imposing the penalty (and not a greater amount) based on JCI's cooperation in the investigation.[98] This included prompt self-reporting and an internal investigation, cooperation throughout the SEC's investigation (which allowed the SEC to complete its investigation quickly), firing numerous employees, placing illicit vendors on a "do-not-use/do-not-pay list," largely closing down the infracting offices, and bolstering its integrity testing and internal audits.[99]

Because of JCI's voluntary self-disclosure, thorough investigation, full cooperation, agreement to continue cooperating with any ongoing investigations, and payment of disgorgement and penalties, the DOJ granted JCI a "declination" under the FCPA Enforcement Plan and Guidance's pilot program and "closed [its] inquiry into this matter despite the bribery by employees of [the Chinese subsidiary]."[100]

IV. Potential Lessons from Recent FCPA Recidivism

The 2016 – 2017 enforcement actions (or non-actions) against Zimmer Biomet, Orthofix, and JCI make it somewhat difficult to distinguish how the enforcement agencies view repeat offenders, both providing lessons and raising questions for consideration. Relevant factors may include (1) the jurisdiction or subsidiary in which the misconduct took place; (2) the nature and similarity of the repeated misconduct; (3) the relative ease or difficulty for subsequent misconduct to take place; (4) the amount of remediation actually occurring between the two violations, and likely most importantly; (5) the actual or constructive knowledge of employees of the parent. Although the SEC ultimately brought a second action

Continued on page 13

95. *Id.* ¶¶ 13, 15.

96. *Id.* ¶ 15.

97. *Id.* at 6–7. Johnson Controls was further required to report to the SEC periodically for one year and submit a report to the SEC. *Id.* at 8.

98. *Id.*

99. *Id.* ¶¶ 19–20.

100. Letter from Daniel Kahn, Deputy Chief, Fraud Section, Criminal Division, Department of Justice, to Jay Holtmeier, Esq, & Erin G.H. Sloane, Esp., WilmerHale regarding JCI (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download.

Corporate Recidivism in the FCPA Context
Continued from page 12

against each of these three companies, these factors nevertheless may have played a role in the amount of civil penalty assessed. Further, Zimmer Biomet's recidivist status dramatically increased the fine imposed by the DOJ.

Misconduct occurring in the same jurisdiction or by the same subsidiary could be relevant with regard to treating a parent as a repeat offender. In Zimmer Biomet, the subsequent misconduct took place in the same jurisdiction as the original misconduct, while in Orthofix it did not. Even though the U.S.S.G. applies the recidivist penalty for conduct by "a separately managed line of business," the greatest impact of remediation from an earlier resolution should occur in the jurisdiction in which the original misconduct took place, as remedial efforts will focus on the problems identified there. As between the Zimmer Biomet and Orthofix, this appears to be the case, as the latter (where conduct occurred in a separate jurisdiction) was not charged by the DOJ. At the same time, the DOJ offered a "declination" to JCI, even though the misconduct took place at one of the same subsidiaries involved in the 2007 DPA. With regard to bringing an enforcement action, the SEC appears not to have taken this factor into account, as all three companies were charged.

The nature and relative similarity of the repeated misconduct may be relevant too. JCI and Zimmer Biomet are distinguished by a change (for JCI) and lack thereof (for Zimmer Biomet) in the type of misconduct at issue in each enforcement action. In Zimmer Biomet, the same distributor (under a different name) involved in the original misconduct was engaged again by the same subsidiary. In JCI, however, local management replaced one payment scheme with another and did everything possible to avoid detection and the remedial steps taken by the parent. This distinction may explain the difference in the DOJ's decisions regarding each corporation. As practitioners and compliance professionals know, it is not particularly uncommon for employees of an overseas subsidiary in a high-risk jurisdiction to try to continue making payments even after a payment channel has been discontinued as the result of FCPA concerns. Sometimes this simply involves disguising the same third party (*e.g.*, Zimmer Biomet) and sometimes this takes the more sophisticated form of creating a new payment scheme (*e.g.*, JCI).

The ease with which these continuing payments are made may be relevant to enforcement agencies. Parent companies arguably are more culpable if a subsidiary easily continued corrupt payments, especially when the similar scheme could or should have been prevented (or quickly detected) by the parent, given its notice after the initial FCPA enforcement action (*e.g.*, Zimmer Biomet). Enforcement agencies may view the parent as less culpable when elaborate,

Continued on page 14

Corporate Recidivism in the FCPA Context
Continued from page 13

difficult to detect steps are taken to continue the corrupt payments (*e.g.*, JCI). For this reason, companies should consider conducting follow-up audits after shutting down payment mechanisms that raise FCPA concerns.[101]

In differentiating among the three repeat offenders, the enforcement agencies clearly considered the amount of remediation that actually occurred between the two violations. The DOJ declined to proceed against JCI, which had implemented the recommendations of a monitor from its 2007 DPA. With regard to the SEC, Orthofix's failure to quickly implement global remediation clearly counted against it. As the 2017 Cease-and-Desist Order makes clear, the company had not yet implemented improved controls in its Brazilian subsidiary until after discovering the misconduct.[102] Regarding Zimmer Biomet, the second instance of misconduct was discovered quite soon after the first resolution.

"In differentiating among the three repeat offenders, the enforcement agencies clearly considered the amount of remediation that actually occurred between the two violations."

Perhaps the most important factor for the enforcement agencies (especially the DOJ) is the knowledge or involvement of employees at the parent corporation, present in Zimmer Biomet, but not in Orthofix or JCI. According to the allegations in the superseding information, "Biomet Executive" was an "an attorney at Biomet [(the then-listed company)] and Biomet International [(a wholly owned subsidiary)] during the relevant period [who] became a high-level attorney during that period."[103] Biomet Executive and others involved in developing Biomet's internal accounting controls and anti-corruption program knew that Biomet was not implementing the programs.[104] Further, Biomet Executive knew that the same problematic distributor continued to be used in Brazil even after the Executive became aware of the distributor's corrupt conduct.[105] This alleged significant level of knowledge and

Continued on page 15

101. While the relative similarities between the initial and subsequent schemes help explain the DOJ's decision to bring a second enforcement action against Zimmer Biomet and not JCI, the timing of the corrupt conduct does not. The discovery of the continued misconduct by Zimmer Biomet occurred within two years of the original DPA (a timeline consistent with reasonable follow-up) while the misconduct in JCI continued for five years after the original DPA, perhaps suggesting that Zimmer Biomet deserved more credit than it received.

102. *See supra* note 67.

103. *United States v. Zimmer Biomet Holdings, Inc.*, Superseding Information, No. 12-CR-00080 RBW ¶ 15 (filed Jan. 12, 2017).

104. *Id.* ¶ 28.

105. *Id.* ¶¶ 23, 27, 29–30, 38–39.

Corporate Recidivism in the FCPA Context
Continued from page 14

(at the least) acquiescence by Biomet's leadership may explain why the DOJ chose to bring a second enforcement action against Zimmer Biomet but declined to prosecute Orthofix or JCI a second time.

In assessing the impact (or lack thereof) of each factor, it is important to examine both the decision to bring an enforcement action, on the one hand, and the penalty assessed, on the other. As the SEC brought enforcement actions in all three, a comparison of penalties is paramount.

All three companies were subject to disgorgement (now a standard remedy for the SEC) and civil penalties. As disgorgement is, in theory at least, unrelated to the severity of the conduct at issue, recidivism could only be taken into account in assessing the civil penalty. Out of the three corporations analyzed, Zimmer Biomet paid the highest civil penalty (measured as a percentage of disgorgement) of 112%. This is consistent with the theory that the SEC and DOJ found Zimmer Biomet more culpable for its repeat offenses than the other corporate defendants (likely for the reasons set forth above). However, Orthofix was close behind, paying a 100% penalty, perhaps also due to its repeat offender status. JCI's penalty was only 10% of its disgorgement, which, along with the fact that numerous factors (including cooperation) are considered in levying a civil penalty, make it difficult to draw conclusions regarding the monetary impact of repeat offender status.

With regard to the DOJ, the penalty amount is more clearly related to the repeat offender status of the only company subject to a DOJ enforcement action, Zimmer Biomet. As discussed above, the DOJ fined Zimmer Biomet $17,460,300, a "criminal penalty at the middle of the United States Sentencing Guidelines fine range."[106] In calculating the fine, Zimmer Biomet's culpability score was raised by 2 for committing part of the instant offense within 5 years of a criminal adjudication based on similar conduct.[107] The final culpability score was 10, resulting in a multiplier between 2.00 – 4.00, with 3.00 being applied. Without this higher culpability score (and applying the same methodology), the multiplier range would have been between 1.60 – 3.20, resulting in a likely penalty of $13,968,240.[108] Further, without the 2012 DPA, Zimmer Biomet would have likely received voluntary reporting credit (withheld because it was already obligated to self-report), resulting in a culpability score of only 5.[109] The resulting penalty would likely

Continued on page 16

106. *United States v. Zimmer Biomet Holdings, Inc.*, Deferred Prosecution Agreement, No. 12-CR-00080 RBW, ¶ 4 (filed Jan. 12, 2017).

107. *Id.* ¶ 7 (citing U.S.S.G. § 8C2.5). As noted above, technically the guideline did not apply because the 2012 DPA was not a "prior criminal adjudication" as defined by the sentencing guidelines. U.S.S.G. § 8A1.2 note 3(G) ("'Prior criminal adjudication' means conviction by trial, plea of guilty (including an *Alford* plea), or plea of *nolo contendere*.").

108. $5,820,100 (base fine) * 2.4 (the middle of 1.60-3.20) = $13,968,240. *See* U.S.S.G. § 8C2.6.

109. *See id.* § 8C2.5g(1).

have been only $8,730,150, half the fine actually imposed.[110] It is also possible that the DOJ would have agreed to use a multiplier on the lower end of the range without Zimmer Biomet's recidivist status, reducing the penalty even further. In other words, the fact that a corporation has a prior FCPA violation can have a major impact on the level of punishment.[111]

With regard to deciding whether to bring an enforcement action, the impact of each factor is less clear, as the SEC proceeded against all three while the DOJ proceeded against Zimmer Biomet, provided a public "declination" to JCI, and took no action with regard to Orthofix. Given the information in the resolution documents, it is too soon to speculate as to the impact of the various factors discussed above. With regard to JCI, the impact of self-reporting under the 2016 Enforcement Plan and Guidance is explicit. With respect to Zimmer Biomet, it appears that the similarity of the misconduct and the fact that it took place in the same jurisdiction, with the actual or constructive knowledge of employees of the parent, was relevant to the DOJ. It is less clear why no action was taken against Orthofix (not even a public "declination").

Conclusion

Both the DOJ and SEC take corporate recidivism into account when determining whether to bring an enforcement action and in the type of penalty applied.[112] Given the number of factors potentially influencing such decisions, it is difficult to draw firm conclusions as to which factors the enforcement agencies view as most important.

What is most clear from the JCI, Orthofix, and Zimmer Biomet actions is that companies are advised to quickly implement remedial actions across their operations. This should include follow-up audits, where appropriate, to check whether local employees have found ways to reuse prohibited vendors under another name or create new payment mechanisms. In doing so, companies also should consider if there is some linkage between the discovery of any new violation and the remedial actions previously instituted (be it a discovery based on improved third-party due diligence, a whistleblower report following on newly implemented training, or simply noticing something in the wake of an investigation).

Continued on page 17

110. $5,820,100 (base fine) * 1.5 (the middle of 1.00-2.00) = $8,730150. *See id.* § 8C2.6.

111. In fact, the DOJ cited a lack of criminal history as one of the "Relevant Considerations" in Embraer S.A.'s October 2016 DPA, which assessed a fine 20% below the U.S.S.G. range. *United States v. Embraer* S.A., Deferred Prosecution Agreement, Case No. 16-60294-CR-COHN, ¶ 4(g), (j) (filed Oct. 24, 2016).

112. As then-director of the SEC's Division of Enforcement Linda Chatman Thomsen made clear, "recidivists will be punished." *SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order* (Apr. 26, 2007), https://www.sec.gov/news/press/2007/2007-77.htm ("The $10 million penalty demonstrates that companies must adhere to Commission Orders.").

Corporate Recidivism in the FCPA Context

Continued from page 16

Documenting such a linkage may enable a company to demonstrate the fact that the discovery of additional misconduct in the wake of an investigation and remediation is a *benefit* of that remediation and should allow the company to argue that, in those circumstances, an additional enforcement action or enhanced penalties would be inappropriate.

Bruce E. Yannett

Andrew M. Levine

Philip Rohlik

Maxwell K. Weiss

Bruce E. Yannett and Andrew M. Levine are partners in the New York office. Philip Rohlik is a counsel in the Shanghai office. Maxwell K. Weiss is an associate in the New York office. The authors may be reached at beyannett@debevoise.com, amlevine@debevoise.com, prohlik@debevoise.com, and mkweiss@debevoise.com. Full contact details for each author are available at www.debevoise.com.

Continued on page 18

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Negotiated resolutions are the norm in the FCPA context. Like many other complex corporate criminal matters, FCPA matters largely get resolved without meaningful judicial oversight. Although imperfect, such negotiated settlements do provide corporations with a greater degree of predictability and finality. In addition to a monetary penalty, these resolutions often involve the appointment of a compliance monitor, which occurred in more than half of the DOJ's FCPA resolutions in 2016.[1] The appointment of monitors has attracted controversy over the years, including that monitors often are seen as burdensome and expensive, have the practical effect of extending an investigation, and effectively outsource oversight to a third party. As with negotiated resolutions themselves, typically there has been little judicial involvement in the appointment or oversight of corporate monitors.

On March 22, 2017, the United States District Court of the Northern District of Texas approved a modified plea agreement in *United States v. ZTE Corporation*[2] (the "ZTEC case"). In the ZTEC case, which involved the violation of export controls laws rather than the FCPA, the modified plea agreement departed significantly from the type of corporate monitorship with which compliance professionals are familiar. By borrowing from the "special master" mechanism in U.S. civil litigation, the court created a quasi-judicial monitorship that may be actively overseen by the court. While it remains to be seen how the ZTEC monitorship will work in practice, judicial involvement has the potential to result in less predictability and finality than companies entering into negotiated resolutions have come to expect. As with recent litigation surrounding the confidentiality of monitors' reports, the ZTEC case, especially if followed by other judges, provides another reason for companies to be wary of agreeing to a monitor in an FCPA resolution.

Continued on page 19

1. *See e.g., United States v. Teva Pharmaceutical Industries Ltd.,* Deferred Prosecution Agreement, No. Cr. 20968 FAM (S.D. Fla. Dec. 22, 2016), https://www.justice.gov/criminal-fraud/fcpa/cases/teva-pharmaceutical-industries-ltd; *United States v. Teva LLC,* Case No: 16 Cr. 20967 KMW, Plea Agreement (S.D. Fl. Dec 22, 2016), https://www.justice.gov/criminal-fraud/file/920426/download; *United States v. Braskem S.A.* Case No. 16-CR-644, Plea Agreement at 2-3 (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/fcpa/cases/braskem-sa; *United States v. Odebrecht S.A.* Case No: 16 Cr. 643, Plea Agreement (E.D.N.Y. Dec. 21, 2016), https://www.justice.gov/criminal-fraud/file/920101/; *United States v. Embraer S.A.,* Case No. 16-cr-06294-JIC, Deferred Prosecution Agreement at 4 (S.D. Fla. Oct. 24, 2016), https://www.justice.gov/criminal-fraud/file/911356/download; *United States v. Och-Ziff Capital Management Group LLC,* Case No: 16-CR-00516(NGG), Deferred Prosecution Agreement, at 4 (E.D.N.Y. Sept. 29, 2016), https://www.justice.gov/opa/file/899306/download; *United States v. LATAM Airlines Group S.A.* Case No: 16 Cr. 60195 DTHK, Deferred Prosecution Agreement (S.D. Fla. Jul. 25, 2016), https://www.justice.gov/criminal-fraud/file/879136/download; *United States v. Olympus Latin America, Inc.,* Case No: 16-3525 (MF), Deferred Prosecution Agreement (D.N.J. Mar. 3, 2016), https://www.justice.gov/criminal-fraud/file/831256/download; Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Mark Rochon, Esq., "Re: *United States v. VimpelCom* Deferred Prosecution Agreement 16-cr-137 (ER)," https://www.justice.gov/criminal-fraud/file/828301/download.

2. 17 Cr. 0120K (N.D. Tex. 2017).

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 18

The ZTEC Monitorship

On March 22, 2017, ZTE Corporation ("ZTEC"), a Chinese multinational telecommunications equipment and systems company, pleaded guilty pursuant to a plea agreement to a three-count Information, charging the company with conspiracy to violate export laws, obstruction of justice, and making false statements to federal investigators.[3] ZTEC agreed to pay $892 million in fines and forfeitures and subjected itself to an additional $300 million in penalties if it later violates the terms of the plea agreement.[4] ZTEC also agreed to engage an Independent Corporate Monitor ("Monitor") for up to three years.[5] The Monitor's primary responsibility is to assess compliance with the terms of the plea agreement and to evaluate ZTEC's sanctions compliance program.[6]

In advance of the plea, the U.S. Department of Justice ("DOJ") filed a fully executed plea agreement in the Northern District of Texas on March 7, 2017.[7] This agreement included a seven page attachment outlining the obligations and responsibilities under the monitorship.[8] While different in form from attachments to recent FCPA cases, the obligations therein are similar in substance.[9] Pursuant to this agreement, ZTEC was to propose to the DOJ three candidates with appropriate qualifications and experience to serve as the Monitor.[10] The DOJ would retain the right "in its sole discretion, to accept or reject the Monitor candidates proposed by [ZTEC]."[11] The agreement further states that any "disputes between [ZTEC] and the Monitor with respect to a work plan shall be decided by the DOJ,"[12] with similar oversight by the DOJ in the event of any withheld documents.[13] Finally, any reports prepared by the Monitor would be provided to the Board of the Directors of ZTEC; the DOJ;

Continued on page 20

3. U.S. Department of Justice, "ZTE Corporation Agrees to Plead Guilty and Pay Over $430.4 Million for Violating U.S. Sanctions by Sending U.S.-Origin Items to Iran," https://www.justice.gov/opa/pr/zte-corporation-agrees-plead-guilty-and-pay-over-4304-million-violating-us-sanctions-sending.
4. *Id.*
5. *Id.*
6. *Id.*
7. Plea Agreement, *United States v. ZTE Corp.*, No. 17 Cr. 0120-K (N.D. Tex. Mar. 7, 2017), ECF No. 3 ("ZTEC Plea Agreement"), https://www.justice.gov/opa/press-release/file/946276/download.
8. *See id.* at Attachment A.
9. *Compare id.* with *e.g., United States v. Och-Ziff Capital Management Group LLC*, Deferred Prosecution Agreement, Attachment C, No. Cr. 16-516 (NGG) (E.D.N.Y. Sept. 29, 2016).
10. *See* ZTEC Plea Agreement at Attachment A at ¶¶ 1-2.
11. *Id.* at ¶ 2.
12. *Id.* at Attachment A at ¶ 8(a).
13. *Id.* at Attachment A ¶ 5(b).

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 19

the U.S. Attorney's Office for the Northern District of Texas; the Office of Export Enforcement, U.S. Department of Commerce; and the Office of Foreign Assets Control, U.S. Department of the Treasury.[14]

At the March 22 plea, the court did not accept the plea agreement submitted on March 7, but chose to adopt a modified attachment that revised the obligations and responsibilities under the monitorship.[15] At the plea, the court did not offer any reason for departing from the original plea agreement.[16] The modified attachment appointed as monitor James M. Stanton, a former Texas state district court judge and founder of Stanton LLP, a Dallas law firm that focuses on civil litigation in the business and commercial disputes, employment and professional reputation and liability areas.[17] It also removed the language from the plea agreement providing the DOJ with "the right, in its sole discretion, to accept or reject the Monitor candidates proposed by the Company,"[18] as well as the selection criteria for the Monitor.

"The appointment of monitors has attracted controversy over the years, including that monitors often are seen as burdensome and expensive, have the practical effect of extending an investigation, and effectively outsource oversight to a third party."

More importantly, the modified attachment also states that the "parties agree that the Monitor is a judicial adjunct pursuant to Federal Rule of Civil Procedure 53 . . .,"[19] rather than "an independent third-party," as in the original attachment.[20] Instead of providing that the DOJ would be arbiter of disputes about the monitor's role, the modified attachment provides that the "Court will approve or disapprove the proposed work plan . . . . [And a]ny disputes between [ZTEC] and the Monitor with respect to

Continued on page 21

14. *See id.*
15. Plea Agreement Supplement, *United States v. ZTE Corp.*, No. 17 Cr. 0120-K (N.D. Tex. Mar. 22, 2017), ECF No. 14 ("ZTEC Modified Plea Agreement").
16. Rearraignment Hearing, *United States v. ZTE Corp.*, No. 17 Cr. 0120-K (N.D. Tex. Mar. 22, 2017) ("Here's what the agreement is as I understand it: It would be a sentence of three years probation on each count, to run concurrently, with an independent corporate compliance monitor appointed by me, by the Court, which is – I have chosen Mr. James Stanton; or if something happens to him or if I choose to change, that would be who it would be, as set out in Attachment A as modified today.").
17. Stanton LLP, http://www.stantonllp.com/team/james-m-stanton
18. *See* ZTEC Modified Plea Agreement.
19. *Id.* at ¶ 6.
20. ZTEC Plea Agreement at ¶ 6.

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 20

the work plan shall be decided by the Court."[21] Finally, all reports of the Monitor are to be filed with the court and ZTEC board of directors, with copies to the DOJ and other government agencies listed in the original plea agreement.[22]

ZTEC consented to the appointment of James M. Stanton as monitor,[23] but the appointment appears to have occurred at the instigation of the court, given the abandonment of the third party selection mechanism in the original agreement between the DOJ and ZTEC as well as the invocation of Federal Rule of Civil Procedure 53. Stanton has been a court-appointed Special Master on several occasions in civil matters in complex products liability cases in the Northern District of Texas, an area in which he has extensive experience as an advocate.[24] Stanton does not appear to have a regulatory background or significant criminal experience in private practice (which are common among monitors). Moreover, absent from his publicly available biographies is significant experience in dealing with companies from the People's Republic of China, the corporate governance of which can differ greatly from their U.S. counterparts.

Judicial Involvement in Corporate Resolutions

Corporate criminal enforcement can differ depending on the area of law. In complex cases, it can follow the largely consensual process that has evolved in the FCPA arena. Under this process, there is a long period of investigation, in which a company often cooperates with the DOJ, followed by a negotiated resolution, based on legal theories and facts largely determined by the DOJ. The form of resolution can be a non-prosecution agreement ("NPA"), a deferred prosecution agreement ("DPA") and/or a guilty plea (in the FCPA context often entered into by a foreign subsidiary), setting forth the factual and legal basis for the agreement and/or plea as well as a financial penalty and additional undertakings by the company (including monitorships). In the case of DPAs and plea agreements, the agreement is filed with a court at the conclusion of the enforcement action, usually marking the first involvement of a court in the process.[25] The court's involvement at the conclusion

Continued on page 22

21. ZTEC Modified Plea Agreement at ¶ 8(a).
22. *Id.*
23. *Id.* at ¶ 1.
24. *See* Order Appointing Special Master, *In re: Depuy Orthopedics, Inc. Pinnacle Hip Implant Products Liability Litigation,* 11 MD 2244-K (N.D. Tex. Jan. 9, 2012) ECF. No. 81; Agreed Order Appointing Special Master, *Golgart v. Pourchot*, et al., No. 219-04162-2013 (219th Dist. Ct., Collin County, Texas. Apr. 14, 2014); Agreed Order Appointing Special Master, *INX LLC v. Lumenate*, LLC., No. 429-03626-2012 (429th Dist. Ct., Collin, County, Texas. Sept. 12, 2013); *see also* Lexis Nexis – Attorney Strategic Profile for James M. Stanton (1/1/2007 – 4/14/2017).
25. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853. 919-22; *see also United States v. Saena Tech. Corp.,* 2015 WL 6406266 (D.D.C. Oct. 21, 2015) (seeking court approval of DPA); United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160 (D.D.C. Feb. 5, 2015) (same); *United States v. HSBC Bank USA, NA,* 2013 WL 3306161 (E.D.N.Y. July 1, 2013) (same).

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 21

of the process has traditionally been limited in practice, and, in the one appellate decision reviewing a parallel civil process, in law. In the most notable instance in which a U.S. judge took a more active role in reviewing a DPA and rejected a settlement proposed by the United States Securities and Exchange Commission ("SEC") on the grounds that it was contrary to the public interest, the judge's decision was reversed on appeal on the basis that the judge did not pay the SEC the appropriate level of deference.[26]

The U.S. approach contrasts with the recent DPA procedure introduced by the United Kingdom where the court takes an active role in determining whether a DPA is in the public interest.[27] In the United Kingdom, there are two hearings before a judge will approve the DPA. The first is a private hearing, where the judge will scrutinize the DPA with the parties and raise questions on all aspects of it, notably the legal rationale behind it, including particular conduct, the application of the various stages of the sentencing guidelines, the appropriateness of the profit figures used and the conduct, cooperation and changes in corporate culture of the charged party. The judge has the power to refuse the DPA or to require changes to its terms or scope. The second is a public hearing where the facts and terms of the DPA are formally put before the judge in a public forum. Following both hearings, the judge will formally hand down judgment on whether or not the DPA is approved.[28]

Many commentators have criticized the effective abdication of the judiciary's oversight role in the U.S. approach to corporate resolutions.[29] In particular, such negotiated resolutions could be viewed as running contrary to the U.S. system of checks and balances and sometimes allowing the government to extract large penalties based on novel and often untested legal theories, which might not hold up were a case to go to trial (as arguably suggested by the scarcity of parallel individual actions associated with corporate resolutions). Despite these drawbacks, negotiated resolutions between corporations and the government have become the norm in the FCPA context and elsewhere, including in large part due to the regularity and finality they offer corporations. Additional judicial involvement, while potentially jurisprudentially beneficial to the development of the law and the public interest, could alter this perceived regularity and finality arising out of what are, essentially, negotiations between the corporation and the DOJ.

Continued on page 23

26. *SEC v. Citigroup Global Markets, Inc.*,752 F.3d 285 (2d Cir. 2012).
27. *See* "The United Kingdom's First Deferred Prosecution Agreement," *FCPA Update* (Dec. 2015, Volume 7, Number 5), http://www.debevoise.com/~/media/files/insights/publications/2015/12/fcpa_update_ december_2015.pdf.
28. *See* Government of the United Kingdom, "The mechanics of Deferred Prosecution Agreements in the UK," https://www.gov.uk/government/speeches/the-mechanics-of-deferred-prosecution-agreements-in-the-uk.
29. *See* Matthew E. Fishbein, "Why Individuals Aren't Prosecuted for Conduct Companies Admit," New York Law Journal, Vol. 252, No. 56 (September 19, 2014); Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 920-21 (2007); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295, 1326 (2013).

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 22

Should other judges adopt the "special master" approach taken by the court in the ZTEC case, judicial involvement could disincentivize companies from entering into negotiated resolutions with the DOJ. The plea agreement in the ZTEC case did not provide any judicial policing of the DOJ's legal theories (something which arguably could benefit corporate defendants) and removed a significant amount of finality and regularity from the post-resolution process, likely to the detriment of ZTEC. This "worst of both worlds scenario" of judicial oversight arises from the unique burden imposed by corporate monitors.

The Burden of Monitors

Prior to the ZTEC case, monitors have been independent third parties appointed to oversee the implementation of a company's compliance undertakings in the resolution documents.[30] While this provides independent oversight and assurances to the government that a company is fulfilling its obligations, monitorships have long been controversial. Commentators have acknowledged the burden imposed by third parties empowered to involve themselves in every level of a corporation.[31] Moreover, monitors often are appointed at the conclusion of a long investigation and, effectively, extend some parts of that investigation (along with the business disruption associated with it) for up to three more years in many cases. Monitors are also private experts, often with staff, paid by the company, thereby extending and increasing the legal and professional fees attributable to past conduct.

The potential intrusiveness of a monitor is particularly relevant for foreign companies, like ZTEC. Foreign companies, both in fact and often in law, have different corporate governance structures, different corporate cultures and different legal obligations than their U.S. counterparts. Introducing a U.S. lawyer or compliance expert into such a foreign milieu can create friction. For example, during former FBI Director Louis Freeh's monitorship of Daimler AG, it was reported that the company complained about being able to develop adequately a system that reduces corruption while at the same time not becoming crippled by investigations.[32] There were additional complaints that Freeh sought to

Continued on page 24

30. United States Department of Justice, "United States Attorneys' Manual," Criminal Resource Manual § CRM 163, https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors ("Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests, and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.").

31. *See, e.g.,* Christopher M. Matthews, *Eye on the Monitors--Apple's Protest Puts Spotlight on Thorn in Corporate Sides*, Wall St. J., Jan. 21, 2014, at B5; Steven M. Davidoff, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. Times, Apr. 16, 2014, at B7; Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar*, 105 Mich. L. Rev. 1713, 1742-43 (2007).

32. *See* Spiegel Online, "Daimler Upset with Over-Eager America Oversight," http://www.spiegel.de/international/business/trapped-in-the-us-web-daimler-upset-with-over-eager-american-oversight-a-803350.html.

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 23

ignore important characteristics of German law, including data protection for telecommunication data and the protection of wrongfully accused persons in a whistleblower system.[33] Whether or not these complaints were valid, it is noteworthy that Freeh recently was selected as the monitor for another German automobile company, Volkswagen.[34]

"The additional judicial oversight involved in the ZTEC monitorship, if adopted by other judges, may give companies some pause when negotiating resolutions with the government and when considering self-reporting."

Perhaps in recognition of the friction that can be caused by the learning curve for a U.S. monitor in a foreign corporation, several recent FCPA resolutions involving foreign corporations (Siemens, BAE, Technip, Alcatel Lucent, Bilfinger, Total, and Rolls-Royce) have appointed distinguished foreign lawyers, familiar with the foreign companies' home jurisdictions, as monitors.[35] Similarly, in the age of multi-jurisdictional resolutions, experienced U.S. practitioners have been appointed to serve in tandem with foreign monitors in recent FCPA resolutions involving Brazil.[36]

Questions Regarding the ZTEC Case

Unlike monitors in FCPA resolutions, the monitor in the ZTEC case is a "judicial adjunct" reporting to the court. This raises questions regarding both the power of the monitor (essentially an officer of the court rather than an independent third party) and public disclosure of the monitor's work.

Continued on page 25

33. *See* Manager Magazin, "Wie deutsche Konzerne mit US-Aufpassern klarkommen," http://www.manager-magazin.de/unternehmen/artikel/compliance-monitor-fuer-vw-so-lief-es-bei-daimler-siemens-bilfinger-a-1129561.html.
34. *See* Handelsblatt, "Former FBI Chief Open to VW Job as Compliance Monitor," https://global.handelsblatt.com/companies-markets/former-fbi-chief-open-to-join-vw-as-compliance-monitor-710039.
35. *See* Global Investigations Review, "FCPA Monitorships: Counsel Dataset," http://globalinvestigationsreview.com/article/1022402/the-complete-fcpa-corporate-monitors-list (Siemens: Dr. Theo Waigel of Gibson Dunn & Crutcher; BAE: David Gold of Herbert Smith; Technip: Jean Francois Theodore; Alcatel: Laurent Cohen Tanugi; Bilfinger: Mark Livschitz; and Total: Philippe Legrez).
36. Following the Odebrecht and Braskem global settlement with the DOJ and Brazilian prosecutors, it was reported that the DOJ had appointed Morrison & Foerster partner (and former head of the DOJ's FCPA unit) Charles Duross as U.S. monitor. See Global Investigations Review, "DOJ pick Odebrecht and Embraer monitors," http://globalinvestigationsreview.com/article/1139229/doj-picks-odebrecht-and-embraer-monitors. The U.S. and Brazilian monitors will jointly request information and simultaneously present information to the DOJ and Brazilian prosecutors. See Global Investigations Review, "US and Brazil agree local Odebrecht monitors," http://globalinvestigationsreview.com/article/1139256/us-and-brazil-agree-local-odebrecht-monitors.

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 24

The expectation of confidentiality companies had with respect to monitors' reports was already questionable in more traditional "independent third party" monitorships. In 2012, HSBC forfeited more than $1.2 billion as part of resolving charges related to lax controls and money laundering by drug cartels and terrorist organizations. Under its agreement with the government, HSBC agreed to retain an independent monitor that would issue written reports. One of the monitor's reports was filed under seal on the court's docket. An individual filed a request with the court to have the report unsealed. Over opposition from the DOJ and HSBC, the court ruled that the public has a First Amendment right to view the report in redacted form and ordered that it be unsealed.[37] HSBC and the DOJ have appealed the decision and oral argument was heard on March 1, 2017.[38]

A similar challenge occurred in connection with the monitor's report in Siemens Aktiengesellschaft's FCPA resolution. In Siemens' case, the court concluded that releasing the monitor's reports would cause the company competitive harm. Over several years, the Siemens monitor submitted written reports to the DOJ. In 2013, a non-profit dedicated to investigative journalism sought access to the reports. The DOJ denied the requests and the non-profit filed suit. The court upheld - in large part - the DOJ's reasons for withholding or redacting information from the reports. The court said that the information could be considered commercially sensitive information or covered by the attorney work-product privilege.[39]

In ZTEC, the court utilized Federal Rule of Civil Procedure 53 to sidestep the agreement of the parties in selecting a monitor.[40] Rule 53, which governs the appointment of special masters and compliance monitors in civil actions, strictly limits monitors to performing functions that the parties consent to or could be permissibly performed by a court.[41] Federal Rule 53(e) mandates that a "master must file the report and promptly serve a copy on each party, unless the court orders otherwise."[42] In ZTEC, the Modified Plea Agreement states that "the Monitor's reports shall be filed with the Court . . . ."[43] Whether or not the report will be publicly available remains to be seen. "The common law right of public

Continued on page 26

37. *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670, at *7 (E.D.N.Y. Jan. 28, 2016), motion to certify appeal denied, No. 12-CR-00763, 2016 WL 2593925 (E.D.N.Y. May 4, 2016). The court also invited the parties to submit briefing on additional redactions to the report. *Id.*
38. *See United States v. HSBC Bank USA, N.A.*, 13-308cr (2d Cir. 2016), ECF Nos. 1, 167.
39. *100Reporters LLC v. United States Dep't of Justice*, No. CV 14-1264 (RC), 2017 WL 1229709 (D.D.C. Mar. 31, 2017).
40. Modified Plea Agreement, *United States v. ZTE Corp.*, No. 17 Cr. 0120-K (N.D. Tex. Mar. 31, 2017), ECF No. 14 at 3.
41. Fed. R. Civ. P. 53(a)(1).
42. Fed. R. Civ. P. 53(e).
43. ZTEC Modified Plea Agreement at ¶ 8(a).

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 25

access to judicial documents is firmly rooted in our nation's history."[44] The mere filing of a document with the court does not automatically make that document a judicial document.[45] "In order to be designated a judicial document, 'the item must be relevant to the performance of the judicial function as useful in the judicial process.'"[46] Once a court determines that a filing is a judicial document, the presumption of access attaches.[47] In ZTEC, the monitor is a "judicial adjunct" (as opposed to independent third party), whose work is overseen by the court (not the DOJ). The report filed with the court therefore will be the work product of a "judicial adjunct," making it more likely that the reports may be seen as "judicial documents." With the court playing a more substantial role than in traditional corporate monitor relationships, the question of whether or not the document is "relevant to the performance of the judicial function" is arguably a closer one.

Conclusion

The additional judicial oversight involved in the ZTEC monitorship, if adopted by other judges, may give companies some pause when negotiating resolutions with the government and when considering self-reporting. Prior to ZTEC, a monitor typically has been an experienced compliance expert whose professional experience was focused on the type of remediation undertaken by the company subject to the monitorship. By borrowing the special master approach from civil cases, the ZTEC court appointed a very experienced, but generalist, attorney as a judicial adjunct, to be overseen by a judge who, as an Article III judge, is a highly respected and experienced generalist. Although generalist triers of fact are the norm in the U.S. system, the evolution of negotiated resolutions mostly free from judicial oversight has created an exception in the FCPA context, in which the cases are driven, and the law determined, by prosecutors in specialized DOJ and SEC units (and where monitors likewise may have had prior experience in those units). Corporate counsel and practitioners certainly will be watching carefully for additional developments from the ZTEC case, including to see how the civil litigation model of monitorship works in practice.

Continued on page 27

44. *See Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 119 (2d Cir. 2006).
45. *See id.*
46. *Id.* (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)).
47. *See id.*

Judicial Scrutiny of Corporate Monitors: Additional Uncertainty for FCPA Settlements?

Continued from page 26

Depending on what happens in ZTEC and future cases, the potential for a special master monitor could also further encourage self-reporting. However, to the extent the judiciary becomes more involved in appointing monitors, companies should be aware that internal DOJ memoranda, like the 2016 Enforcement Plan and Guidance, are not binding on judges.[48]

Andrew M. Levine

Philip Rohlik

Michael W. Gramer

Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Michael W. Gramer is an associate in the New York office. The authors may be reached at amlevine@debevoise.com, prohlik@debevoise.com, and mwgramer@debevoise.com. Full contact details for each author are available at www.debevoise.com.

48. U.S. Department of Justice, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," April 5, 2016, available at https://www.justice.gov/opa/blog/criminal-division-launchesnew-fcpa-pilot-program.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Jane Shvets
Deputy Executive Editor
+44 20 7786 9163
jshvets@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

Please note:
The URLs in *FCPA Update* are provided with hyperlinks so as to enable readers to gain easy access to cited materials.