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INTERNATIONAL TRADE AND TECHNOLOGY TRANSFER (IT^3) UPDATE

Squire, Sanders & Dempsey L.L.P.

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BIS Proposes New License Exception for Intra-Company Transfers: Opportunity to Comment

On October 3, 2008 the Bureau of Industry and Security (BIS) at the Department of Commerce published a proposed rule that would amend the Export Administration Regulations (EAR) by providing a new license exception called "Intra-Company Transfer" (ICT) for commodities, software and technology, which would be available as 15 C.F.R. § 740.19 of the EAR.[1] Upon approval of an application process, a parent company and its wholly owned or controlled in fact entities could export, re-export or transfer (in country) items under specified Export Control Classification Numbers (ECCN) within approved entities. BIS has identified approximately 200 companies that may benefit from this proposed license exception.

To take advantage of the ICT license exception, an eligible applicant must undergo a rigorous approval procedure. A parent company's entities that it wholly owns or controls are eligible to be users or recipients if they are located in one of the specified countries. After satisfying these threshold eligibility requirements, there are procedural requirements.

First, the eligible applicant and its entities must have an internal control plan in place. This control plan must describe how certain minimum mandatory elements– such as corporate commitment to export compliance, physical security plan, information security plan, personnel screening procedures, training and awareness programs, letters of assurance for software and technology, nondisclosure agreements and end-user list reviews – will be achieved. This control plan must be submitted to BIS for review. An interagency review of each control plan will be conducted. Subsequently, the eligible applicant must submit documentation that the control plan has been implemented.

Also, the eligible applicant must list its wholly owned entities and controlled in fact (a term of art to be defined for this new exception) entities that will be eligible users or recipients. The eligible applicant must list for itself and each user and recipient, any individual or group that has at least a 10-percent ownership interest. Finally, each entity that is an intended user or recipient must provide a signed statement by a company officer stating that it will allow BIS to conduct audits.

Further, the eligible applicant must list the ECCNs of the items it plans to export, re-export or transfer under ICT license exception. The eligible applicant must also provide a narrative describing the purpose for which the requested ECCNs will be used and the anticipated resulting commodities, if any.

There is also an annual reporting requirement. Approved applicants that use the ICT license exception must submit an annual report to BIS. The report must include the use of the ICT by the parent company and the approved entities. Each foreign national employee must be listed who has received technology or source code under this license exception.

There are numerous restrictions and limitations with this proposed license exception. First, this license exception is limited in application by the fact that prior authorization from BIS is required to use it. Next, ICT is limited in eligibility to only approved entities. Third, it is limited in location to specified countries. Fourth, eligible entities must screen non-US national employees who are also foreign national employees in the country in which they are working against lists of end-user concern. Finally, the annual reporting requirements are cumbersome.

Further, this proposed ICT license exception is subject to the same restrictions as the other license exceptions. For example, ICT cannot be used for certain controlled items, i.e., items controlled for missile technology or that are

[1] See 73 Fed. Reg. 57,554 (Oct. 3, 2008).

space qualified and encryption items (EI) or significant items (SI). Further, items exported under ICT cannot be subsequently exported under APR. Even more important, ICT is subject to revocation, in whole or in part, without notice.

Public comments on this proposed rule are due to BIS by November 17, 2008. Please contact George N. Grammas or Ritchie T. Thomas if you have any questions about this proposed rule or would like to submit comments.

ITAR Workshop in the United Kingdom – "How to Cure the Virus"

Squire Sanders will be hosting a conference in association with the UK Export Group for Aerospace and Defence and Strategic Shipping Ltd entitled *ITAR: How to Cure the Virus* in Stratford-upon-Avon, UK on 19-20 November. This two-day conference is an excellent opportunity to expose your EU affiliates to ITAR. Comments from the previous events were unanimously very positive:

- Agenda and content was excellent…liked commercial knowledge added to regulatory info.
- Networking was excellent.
- Good event. Well done!
- Best ITAR training I have attended.
- Very useful and enjoyable event.
- This was a highly successful event which promoted the sharing of ideas, views and issues which we can all learn from.
- An excellent, informative and extremely well organized seminar. I have been to a few of these sorts of events and can honestly say this one was certainly up there either at or close to the top of the pile.
- The quality of all the speakers was excellent, also they were very informal and approachable.
- Workshop format worked well in allowing people to identify issues most relevant to their knowledge/business.
- Timing flexibility was very good, interaction and relaxed atmosphere was excellent.
- The course was designed for all different levels of understanding.
- Very good course materials in term of content and presentation.
- The working sessions were excellent and answered most of my questions.
- Phenomenal knowledge of subject by all speakers.

Limited spaces remain, and registration information can be found at http://www.the-dma.org.uk/events+and+exhibitions.

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Export Compliance Requirements for Defense Contractors

The Department of Defense (DoD) issued an interim rule, effective July 21, 2008, amending the Defense Federal Acquisition Regulation Supplement (DFARS), 28 C.F.R. Parts 204, 235 and 252, to address requirements for complying with export control laws and regulations when performing DoD contracts. Pursuant to Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) (Act), DoD was required to issue requirements for DoD contractors to comply with the export control laws by July 26, 2008. This interim rule was promulgated by DoD because of the requirement of the Act.

The interim rule notes the contractor's responsibility to comply with the EAR administered by the Department of Commerce (Commerce) and International Traffic in Arms Regulations (ITAR) administered by the Department of State (State). The rule sets forth two new DFARS clauses with respect to export controls. First, DFARS 252.204-7008 deals with contracts for which the government anticipates that in the performance of the contract, the contractor will either generate or require access to export-controlled items. This clause requires the contractor to (1) comply with all applicable laws and regulations regarding export-controlled items including Directorate of Defense Trade Controls (DDTC) registration with State and (2) consult with State and Commerce regarding any questions related to ITAR and EAR respectively. This clause notes that it does not change, supersede or waive any of the requirements of applicable federal laws, executive orders and regulations related to export controls. This clause requires the contractor to flow down this DFARS clause to its subcontractors that are expected to have access to or generate export-controlled items.

Second, DFARS 252.204-7009 deals with contracts for which the government does not anticipate that, in the performance of the contract, the contractor will either generate or require access to export-controlled items. This clause requires the contractor to notify the contracting officer if the contractor becomes aware that generate or need access to export-controlled items. Upon receipt of the notification from the contractor, the contractor officer will expeditiously take one of three courses:

1. Modify the contract to include DFARS 252.204-7008, Requirements for Contracts Involving Export-Controlled Items;
2. Negotiate a contract modification that eliminates the requirement for performance of work that would involve export-controlled items; or
3. Terminate the contract, in whole or in part, as may be appropriate, for the convenience of the government, in accordance with the termination clause of the contract.

While this interim rule does not create new export control requirements, the interim rule creates a contractual requirement to comply with the export control laws and to provide notice to the government if it will generate or need access to export control-related items.

DDTC Clarifies When Industry May Self-Determine the Export Jurisdiction of Aircraft Parts

The DDTC of the Department of State recently provided direction as to when industry may self-determine the jurisdiction of aircraft parts and when a commodity jurisdiction (CJ) request should be submitted. DDTC amended the ITAR by changing the language in Category VIII (b) and (h) and adding an explanatory note after subsection (h) that establishes a procedure for the application of Section 17(c) of the Export Administration Act of 1979 (EAA).

Section 17(c) of the EAA governs the export licensing jurisdiction of aircraft parts, directing that notwithstanding any other law or regulation, including the ITAR, certain aircraft components are under the export licensing jurisdiction of the Department of Commerce. Section 17(c) provides:

> Civil Aircraft Equipment.–Notwithstanding any other provision of law, any product (1) which is standard equipment, certified by the Federal Aviation Administration [(FAA)], in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under this Act. Any such product shall not be subject to controls under section 38(b)(2) of the Arms Export Control Act. For purposes of this subsection, the term "controlled country" is any country described in section 620(f) of the Foreign Assistance Act of 1961.

This section provides that if a product is (1) standard equipment, (2) certified by the FAA and (3) an integral part of a civil aircraft, the product is subject to the EAR, not the ITAR.

On August 14 the rule governing aircraft parts on the US Munitions List became final.[2] The final rule includes revisions to USML Category VIII(b) (military aircraft engines) and adds a note, which explains when a CJ is required in relation to the jurisdiction of aircraft parts. Category VIII(b) specifies military aircraft engines (except reciprocating engines) and certain specially designed "hot section" and "digital engine controls" of such engines.

Recent Conference Events

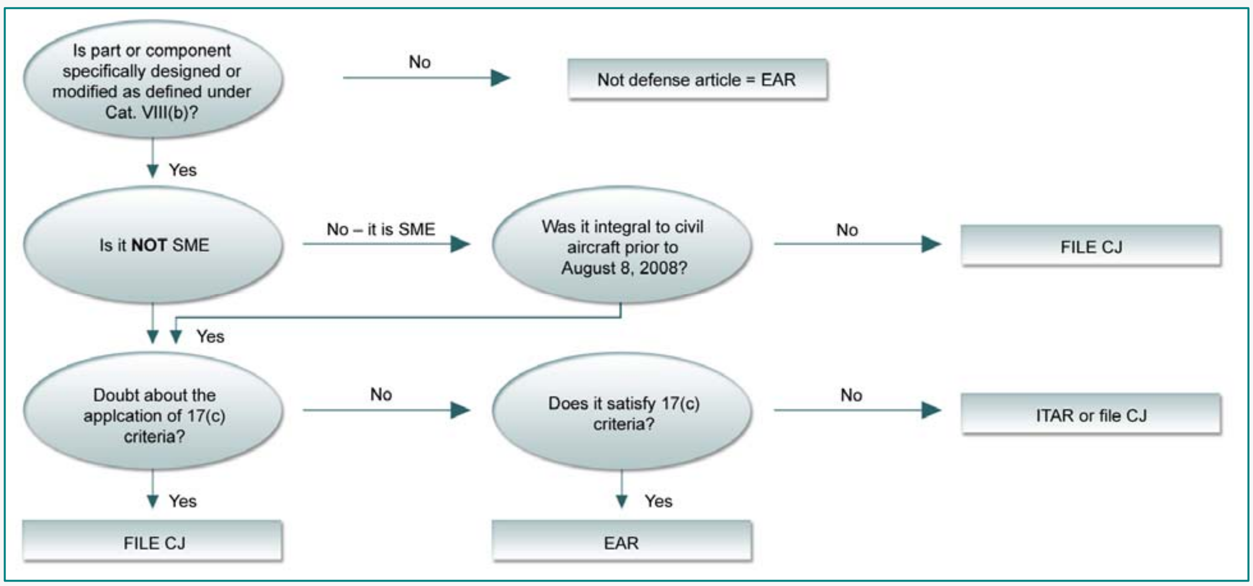
George N. Grammas spoke at the recent Joint Conference of the **Global Offset and Countertrade Association** and the **Defense Industry Offset Association** held in Coeur d'Alene, ID (Oct 13-16). Mr. Grammas' presentation was entitled **"ITAR Controls on Technology Transfers and Outsourcing."** For more information on the application of the ITAR to Offset and Countertrade transactions, please contact Mr. Grammas.

Robert E. Gregg spoke at a **FAR Ethics Compliance Solution** seminar in Vienna, Virginia on November 6. The seminar focused on new FAR requirements for government contractors to create a Code of Business Ethics and Compliance Program upon receipt of a triggering contract. For more information, please contact Mr. Gregg.

[2] See Notice of Final Amendment, 73 Fed. Reg. 47523 (Aug. 14, 2008)

Thus, hot section components and digital engine controls are now classified under subcategory (b), whereas before this amendment, they were classified under subcategory (h). The new provisions read together have a significant effect. Articles in subsection (b) are significant military equipment (SME), while articles in subsection (h) are not. Thus, hot section components or digital engine controls are now designated as SME, when they were not so designated before. In addition to the normal requirements imposed on SME, primarily the Non Transfer and Use Assurance (DSP-83) requirement in Section 123.10 of the ITAR, the designation of hot section components and digital engine controls as SME imposes a commodity jurisdiction requirement to establish Section 17(c) eligibility under the Note. Therefore some articles that were not previously may now be hot section components under this amendment.

The new Note in Category VIII sets forth the circumstances in which the exporter may make a self-determination of Section 17(c) eligibility and when a CJ determination is required. Further, it interprets the trifurcated test set forth in Section 17(c). The flow-chart below shows the logic of the Note with respect to circumstances when the exporter may make a self-determination of Section 17(c) eligibility and when a CJ determination is required.



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Ensuring That Your Export Controls Compliance Program Includes Safeguards Against Whistleblower Complaints

An effective export controls compliance program is essential to ensuring that violations of export control laws and regulations will be minimized and, in the event violations do occur, having a comprehensive program is likely to be an important consideration in mitigating potential penalties assessed by government agencies charged with administering export regulations. Recent developments with regard to whistleblower complaints filed by dismissed employees against employers under the Sarbanes-Oxley Act (SOX) have highlighted the need for export controls compliance programs to include provisions that allow, and indeed encourage, employees to report potential export violations and other export compliance concerns to management. Such provisions can lessen the chances that a disgruntled employee, or former employee, will become a "whistleblower" submitting a complaint under SOX or reporting alleged export controls violations to the responsible US government agency (e.g., the DDTC, the BIS or the OFAC). And, if a whistleblower situation arises, effective provisions for addressing employees' concerns with potential export violations will help blunt any complaints or allegations of violations that might be submitted by the whistleblower to the US government.

Since Congress enacted SOX in 2002, the agency tasked with enforcing the law's whistleblower retaliation provision has dismissed more than 800 of the roughly 1,300 cases that have been filed, many on the ground that the employee alleging retaliation worked for a nonpublic subsidiary of a publicly traded parent. The agency's actions have angered SOX legislative sponsors, who have called on the agency to change its position. Regardless, because SOX liability still could arise in certain situations, both publicly traded companies and their nonpublic subsidiaries should remain vigilant in their handling of reports of wrongdoing and other SOX-protected activity and should maintain good practices in dealing with employee whistleblowers.

SOX's whistleblower provisions offer the first federal protection for corporate whistleblowers and provide remedies including back pay, reinstatement and attorneys' fees in the event of retaliation. SOX prohibits publicly traded companies or "any other officer, employee, contractor, or agent of such company" from retaliating against whistleblowing employees. The Occupational Safety and Health Administration (OSHA) enforces the SOX whistleblower provisions and has investigated the roughly 1,300 whistleblower complaints since SOX went into effect in 2002. Of those, OSHA has dismissed more than 800 cases, many because the employee worked for a corporate subsidiary not covered by SOX, not its publicly traded parent.

Recent trends in OSHA cases suggest that SOX may still apply, though, if an employee shows that he or she was terminated by a person who is an officer, employee, contractor, subcontractor or agent of a publicly traded company. Thus, in the event an employee can demonstrate that the adverse employment decision was made by the nonpublic subsidiary acting as an agent for the public parent or in the event that management from the public parent caused, provoked or participated in the decision leading to the adverse employment decision, a dismissal by OSHA will be less likely. The key is whether the nonpublic subsidiary acts as an agent of its parent and such agency relates to employment matters. In one recent case, OSHA's Administrative Review Board rejected the blanket proposition that a nonpublic subsidiary cannot by definition be an agent of its public parent.

Perhaps more significant, after the Wall Street Journal recently reported on OSHA's history of dismissals based on the employee's allegations being directed at nonpublic subsidiaries, two US Senators, Patrick Leahy and Charles Grassley, responded with correspondence to the US Secretary of Labor, Elaine Chao, vehemently objecting to OSHA's interpretation of the SOX whistleblower provision. This suggests that OSHA's practice may be met with a legislative response intended to broaden the scope of the statute's protection.

The lesson to be learned – companies should maintain solid, compliant reporting and response mechanisms and hotlines for their employees and should take the steps necessary to ensure that all adverse employment actions are taken for objective, legitimate and demonstrably nonretaliatory reasons. Incorporating appropriate reporting and response mechanisms in companies' export compliance programs can serve to lessen exposure to dismissed employees who might submit complaints under SOX or to the agencies administering US export controls laws and regulations. ut the required authorization from the OFAC.

Recent Enforcement Actions and Updates

Bureau of Industry and Security (BIS) – US Department of Commerce

- **Maxim Integrated Products, Inc. Agrees to US$192,000 Settlement:** Maxim Integrated Products agreed to pay US$192,000 to settle charges of 34 violations of the EAR. The BIS alleged that Maxim participated in the following conduct without obtaining the required licenses: exporting integration circuits from the United States to China and Ukraine; re-exporting integration circuits from the Philippines to China, Russia and Estonia; exporting electronics components to a Chinese national; and exporting telecommunications equipment to an Iranian national.
- **Businessman Imprisoned for Illegally Exporting a Night Vision Camera to China:** In December 2007 Philip Cheng received a two-year sentence and US$50,000 fine for brokering the export of thermal imaging and infrared technology without the proper authorization from the Department of State. Recently, the BIS prohibited Cheng from participating in any transaction or activity involving commodities subject to the EAR until December 2015.
- **Marysol Technologies, Inc. Assessed a Civil Penalty for Unlicensed Exports:** Marysol Technologies agreed to pay US$180,000 to settle allegations that it exported laser resonator modules, module cavities and related components to China without the export licenses required by the EAR.
- **America II Electronics, Inc. Accepts US$170,000 Settlement for Export Violations:** America II Electronics agreed to pay US$170,000 for allegedly committing four violations of the EAR by exporting analog-to-digital converters to Russia without the required licenses.
- **Nalco Company Agrees to Settlement for Unlicensed TEA Exports:** Nalco agreed to pay US$115,000 in civil penalties to settle charges pertaining to unlicensed exports of hardness test kits and/or replacement solutions containing triethanolamine (TEA) from the United States to the Bahamas, Dominican Republic and Angola.

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- **Johnson Trading & Engineering Co., Ltd. Settles Charges for Unauthorized Exports of Computer Chips to China:** Johnson Trading & Engineering agreed to pay a civil penalty of US$90,000 to settle allegations of exporting computer chips to China without the required export license, taking actions with the intent to evade the EAR and acting with knowledge of an EAR violation. The BIS alleged that Johnson Trading & Engineering falsely represented that the ultimate destination of its orders of computer chips was Taiwan, when Johnson Trading and Engineering intended to ship these goods to mainland China via Hong Kong. The export of the computer chips required a license to be exported to China.
- **Ingersoll Machine Tools, Inc. Agrees to Settlement for Unauthorized Release of Technology to Foreign Nationals:** Ingersol Machine Tools agreed to pay US$126,000 to settle charges that it released technology for (1) vertical fiber placement machines to an Indian national and several Italian nationals and (2) five-axis power mils to two Indian nationals without the required licenses.
- **Vice President of Select Engineering, Inc. Assessed Civil Penalty for False Statement:** David Rainville agreed to pay US$35,200 to settle allegations that he made "a false or misleading statement to a BIS Special Agent in the course of a BIS investigation" into the unlicensed export of medical electrode sensor elements and stainless steel connectors by Select Engineering to Iran through the United Arab Emirates. Prior to Select's exportation of the medical equipment to Iran, an international trade representative at the Department of Commerce informed Rainville that Select would need to apply for an OFAC license due to the US embargo against Iran. During the BIS investigation, Rainville allegedly misrepresented that he had spoken with the specialist after Select exported the medical equipment. In a separate administrative proceeding, Select Engineering agreed to pay US$52,800 for having knowledge of an unlicensed export to Iran.
- **Engineering Dynamics, Inc. Agrees to Pay for Conspiring to Conduct that Constitutes a Violation of the EAR:** Engineering Dynamics, Inc. (EDI) agreed to pay US$132,791 to settle claims that it participated in a conspiracy to export an engineering software program to Iran through Brazil without the required authorization from OFAC.
- **RESON A/S and Subsidiaries Settle Allegations for Export Violations:** RESON A/S (RAS), a Denmark-based company, agreed to pay US$119,250 to settle charges that it committed 17 violations of the EAR by exporting and assisting its subsidiaries in the export of underwater navigation equipment without the required licenses. RAS subsidiaries RESON, Inc. (United States) and RESON Offshore, Ltd. (United Kingdom) and former subsidiary Underwater Surveys (Pty) Ltd. (South Africa) agreed to pay civil penalties of US$83,000, US$9,900 and US$29,700, respectively, to settle allegations of related violations. The transactions at issue involved exports and re-exports of controlled technology to Denmark, France, Germany, India, Mozambique, Russia, Saudi Arabia, Singapore, South Africa, Taiwan, the United Arab Emirates and the United Kingdom.

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Directorate of Defense Trade Controls (DDTC) – US Department of State

- **Northrop Grumman Corporation Reaches US$15 Million Settlement Involving Exports of Aircraft Navigation Systems Including the Sale of Air Force One Technology to Russia:** Northrop Grumman agreed to pay US$15 million in a consent agreement to settle 110 violations of Arms Export Control Act (AECA) and ITAR, many of which Northrop Grumman discovered after its acquisition of Litton Industries in 2001. Despite receiving licenses from BIS to export the navigation systems, Northrop Grumman and Litton failed to disclose that the systems had been modified for military use, making them controlled by the United States Munitions List (USML). US$5 million of the total penalty may be used to improve Northrop Grumman's export compliance program.
- **The Boeing Company Receives a US$3 Million Civil Penalty:** Boeing entered into a consent agreement to pay US$3 million to settle 40 violations of the AECA and ITAR in connection with exceeding the approved values of manufacturing license agreements and other administrative violations.
- **Lockheed Martin Corporation Settles Charges for ITAR Violations:** Lockheed Martin entered into a consent agreement to settle eight violations of the AECA and ITAR in connection with the unauthorized export of Hellfire missile technology to the United Arab Emirates and Joint Air-to-Surface Standoff Missile technology to a major non-NATO ally. Lockheed Martin agreed to pay US$4 million in civil penalties and to appoint an Internal Special Compliance Official for a minimum term of two years to oversee the implementation of the compliance measures set forth in the consent agreement.

Office of Foreign Assets Control (OFAC) – US Department of Treasury

- **Minxia Non-Ferrous Metals, Inc. Agrees to Pay US$1.2 Million to Settle Violations of Cuban Sanctions:** Minxia agreed to a settlement of US$1.2 million for alleged violations of the Cuban Assets Control Regulations. OFAC contended that Minxia violated the Cuban sanctions by acting without an OFAC license or outside the scope of its license by purchasing or otherwise dealing in Cuban metals from May 2003 to October 2006.
- **York International Corporation Agrees to US$669,507 Settlement for Multiple Sanctions Violations:** York International remitted US$669,507 as part of a settlement of allegations that York violated the sanctions regimes pertaining to Iran, Iraq and the Sudan. Allegedly, York sold air conditioning and refrigeration equipment to Iran and Sudan and made improper payments to Iraq's government under the Oil-for-Food Program.
- **Gate Gourmet, Inc. Reaches Settlement Pertaining to Violations of Cuban Assets Control Regulations:** Gate Gourmet remitted US$581,901 for alleged violations of the Cuban Assets Control Regulations. Gate Gourmet allegedly supplied catering services to Cubana Airlines, referred business with Cubana Airlines to other suppliers and funded employee travel to Cuba.

Engineering Dynamics, Inc. Settles Iranian Transactions Regulations Accusations: Engineering Dynamics paid US$132,791 to OFAC to settle allegations that it made unauthorized imports and exports of engineering software to and from Iran in violation of the Iranian Transactions Regulations.

- **A.G. Edwards and Sons, Inc. Settles Kingpin Sanctions Allegations:** A.G. Edwards agreed to pay US$122,358 to settle allegations that it violated the Narcotics Trafficking Sanctions Allegations by failing to block investment accounts and processing transactions on the accounts of Specially Designated Narcotics Traffickers.
- **Spirit Airlines, Inc. Settles Charges of Violation of Cuban Sanctions:** Spirit Airlines remitted US$100,000 to settle allegations that it transferred funds to Cuba for over-flight payments without or outside the scope of an OFAC license.

FCPA – US Department of Justice

- **Willbros Group, Inc. Pays US$22 Million Criminal Penalty for FCPA Violations:** Willbros Group and its wholly owned subsidiary Willbros International, Inc. agreed to pay US$22 million in connection with making corrupt payments, in violation of the FCPA, to officials from Ecuador and Nigeria to secure contracts for oil and gas projects in those countries. Willbros also agreed to remit US$10.3 million in its settlement with the Securities and Exchange Commission (SEC) in connection with these improprieties.
- **Former Alcatel Executive Sentenced to 30 Months in Prison for Paying Bribes to Costa Rican Officials:** Christian Sapsizian, former deputy vice president of Latin America for Alcatel CIT, received a 30-month prison sentence for violations of the FCPA. Sapsizian paid more than US$2.5 million to officials at Costa Rica's telecommunications authority to obtain a mobile phone contract for Alcatel.
- **Faro Technologies Inc. to Pay Criminal Penalty for Improper Payments to Officials from China:** Faro Technologies agreed to pay US$1.1 million for making "referral fees" in violation of the FCPA to employees of state-owned or controlled enterprises in China in order to secure contracts for the sale of computerized measurement devices worth approximately US$4.9 million. The DOJ agreed to enter into a non-prosecution agreement with Faro for two years due to its cooperation with the investigation and voluntary disclosure of the improper payments.
- **AGA Medical Corporation Agrees to Pay US$2 Million Penalty for Corrupt Payments to Doctors in China:** AGA Medical Corporation (AGA) agreed to pay a US$2 million criminal penalty for making corrupt payments to doctors employed by government-owned hospitals in China, violating the FCPA. In exchange for these payments, the doctors would instruct the state-owned hospitals to purchase AGA products over those of their competitors.

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