Pepper Hamilton LLP
Attorneys at Law

White Collar Litigation & Investigations Newsletter

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# Pepper Hamilton and The Freeh Group Join Forces

## *Combined Firm Offers Capabilities and Reach Unlike Any Other*

On August 28, 2012, **Pepper Hamilton LLP** and the lawyers of **Freeh Sporkin & Sullivan, LLP** announced the union of the legal talent of the two firms and Pepper Hamilton's acquisition of Freeh Group International Solutions, LLC.

The announcement was made by **Nina M. Gussack**, Chair of Pepper Hamilton, and **Louis J. Freeh**, founder of Freeh Sporkin & Sullivan, LLP and Freeh Group International Solutions, LLC. The transition was effective September 1, 2012.

"We are delighted to join forces with Judge Freeh and his talented team," Gussack said. "The Freeh Group will deepen and broaden Pepper's already substantial corporate investigations, white collar advocacy and enforcement practice in key markets. With this merger, Pepper and the Freeh Group have enhanced their world-class capabilities to provide key services with a global reach."

Gussack added that the Pepper and Freeh firms have a successful track record of working together. "We know our partners share a commitment to excellence and have experienced the benefit of working together as colleagues to enhance the value for our clients," Gussack said.

"Pepper Hamilton is the ideal firm to combine with the Freeh Group," said Freeh. "We know each other well, having worked closely together on significant matters in a number of arenas, including white collar, pharmaceutical/medical device, education, and financial services, both in the US and globally."

Freeh added that this innovative move enhances the model for delivering value to clients seeking efficient, timely, cost-effective solutions to complex problems. "This transaction will allow us to do a lot more than conduct investigations and uncover problems," Freeh said. "We will now have the depth to react quickly to sophisticated, complex issues anywhere in the world. Even more unique is our ability to give our clients real solutions, not merely determine facts, and then work with all parties to implement those solutions. That's what clients want. That is where we will provide extraordinary value."

**Scott Green**, Chief Executive Officer of Pepper Hamilton, discussed the strategic competitive advantage that the transaction creates.

"As individual firms, Pepper Hamilton and the Freeh Group have leading white collar and investigative practices," said Green. "But the combined platform allows us to offer clients a full-service approach to solving complex problems."

Green said that the acquisition of Freeh Group International Solutions, a renowned and worldwide consulting company,



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allows the combined firm to offer clients the outstanding capabilities of top consultants, forensic analysts, and former FBI and comparable resources worldwide. "In total, this creates a capability that we see no other law firm being able to match," Green said. Green said that the transaction provides clients with the specialized expertise often needed to address the most complicated challenges. "Whether the challenge involves Foreign Corrupt Practices Act investigations, corporate regulatory compliance programs, or defense in a government investigation, Pepper is well positioned to serve our clients better than ever," Green said.

Green explained that Freeh Group International Solutions will retain its name and, while wholly owned by Pepper, will continue to operate independently of the law firm under the leadership of **James R. Bucknam**, its President and Chief Executive Officer. Freeh will become a member of the Pepper Hamilton Executive Committee and will continue to serve as Chairman of the Board of Freeh Group International Solutions. The attorneys joining Pepper from Freeh Sporkin & Sullivan will join Pepper's White Collar Litigation & Investigations practice group headed by **Thomas M. Gallagher**.

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# Enhanced Sentencing for Criminal Antitrust Defendants: *U.S. v. VandeBrake*

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The Eighth Circuit's recent decision in *U.S. v. VandeBrake*, 2012 U.S. App. LEXIS 8584 (8th Cir. 2012), which affirmed the sentence of Steven VandeBrake, provides prosecutors new support for seeking enhanced sentences in criminal antitrust cases.

*VandeBrake* was a criminal price-fixing and bid-rigging case brought under the Sherman Act. *U.S. v. VandeBrake*, 717 F. Supp. 2d 961 (N.D. Iowa 2011). Steven VandeBrake pled guilty and faced a sentence under the U.S. Sentencing Guidelines (Guidelines) of 21 to 27 months. The trial court about doubled VandeBrake's sentence to 48 months. The upward variance in sentence was based on the court's policy disagreement with the Guidelines and the defendant's lack of remorse.

The trial court examined Guideline Section 2R1.1, which applies to Sherman Act offenses. Finding that the Sherman Act was intended to provide protection against the threat of harm to the "central nervous system of the economy," the court held that the harm caused by price fixing and bid rigging was at least as great, if not greater than, the harm caused by comparable conduct violating the fraud statutes. "[F]raud schemes target only discreet segments of the general population while antitrust violations go the heart of our economic free enterprise system ...." *Id.* at 1003.

The court compared Guideline Section 2B1.1, applicable to fraud and theft cases, with Section 2R1.1. Though Section 2R1.1 has a higher base offense level (12) than Section 2B1.1 (level 6 or 7), sentencing level increases for antitrust violations turn on the affected amount of commerce involved, while fraud guideline increases are based on the amount of actual or intended "fraud loss." As a result, the offense level for antitrust violations increases less rapidly than for fraud violations "in part because on the average the level of markup from an antitrust violation may tend to decline with the volume of commerce involved." Since VandeBrake's crimes did not involve a declining markup due to volume, the court found no basis for the sentencing range to increase less rapidly than the offense level for fraud violations. *Id.* at 1005.

The court also complained that unlike the fraud guideline, Section 2R1.1 did not take account of relevant conduct under Section 1B1.3 nor was there any enhanced punishment for VandeBrake's multiple conspiracies. In calculating the amount of the upward variance, the court used the higher base offense level of Section 2R1.1, while increasing the sentence by reference to the fraud loss table in Section 2B1.1. Along the way, the court controversially wondered if the antitrust guideline, and comparatively lower sentences for antitrust offenses, were not the result of an "explicit and/or implicit bias" favoring antitrust defendants who historically "were almost exclusively wealthy, white, Anglo-Saxon, protestant males who were politically well-connected." *Id.* at 1003. In justifying its sentence, the trial court closely tied its justification for an upward variance to the particular facts of VandeBrake's crimes.

> The sentence and opinions in *VandeBrake* will surely be used by prosecutors to support claims for enhanced punishment for antitrust defendants.

On appeal, VandeBrake centrally argued that his sentence was substantively unreasonable as the "longest sentence ever imposed in an antitrust case." 2012 U.S. App. LEXIS 8584 *19. The Eighth Circuit rejected the appeal and upheld the trial court's variance based on its policy disagreement with Section 2R1.1. The Appeals Court found that the district court provided cogent reasons for comparing Section 2R1.1 to Section 2B1.1, and that the sentencing judge had "tied its policy disagreement to the specific facts involved in VandeBrake's case." *Id. at *18*. One of the judges wrote to disavow the trial court's references to the characteristics of antitrust defendants. A dissenting judge complained that the trial court simply created its own enhanced version of Section 2B1.1 for antitrust offenses, and impermissibly replaced Section 2R1.1 based on invalid reasons for its policy disagreement.

The sentence and opinions in *VandeBrake* will surely be used by prosecutors to support claims for enhanced punishment for antitrust defendants. Expect to see *VandeBrake* cited by the government in future antitrust criminal cases as grounds for sentences at the upper end of Section 2R1.1's range, and less frequently for upward variances from Section 2R1.1. In such cases, defense counsel should be prepared to argue that the *VandeBrake* trial court's view that Sherman Act offenses are the same as fraud crimes requires closer consideration.

In *VandeBrake*, the trial court explicitly regarded the defendants' price fixing and bid rigging as forms of fraud, theft and even robbery.[1] Robbery involves unlawful taking by use or threatened use of force or violence. Referring to a Sherman Act offense as akin to robbery is over the top. Theft is an unlawful taking without consent, and fraud requires a misstatement or omission of material fact. These elements of theft and fraud are absent in a pure Sherman Act violation.[2]

Fraud, theft and robbery are *malum in se* offenses, while a Sherman Act crime is *malum prohibitum*. The quality of a Sherman Act defendant's venality is of a different and lesser nature; though the number is increasing, many countries around the world do not regard price fixing or bid rigging even as criminal offenses. Further, the fairness claims of fraud and Sherman Act victims are also different. A Sherman Act victim's consent to engage in the purchase or sale of goods or services in a manipulated market still implies a willing buyer or seller at the manipulated price. A fraud victim's consent to pay an inflated price is wholly eliminated by the material misrepresentation.

Though there are similarities between fraud and Sherman Act violations, there are also important differences for sentencing purposes. As a result, *VandeBrake* should not auger a recalibration of antitrust sentences under the Guidelines. In the past, upward variances in criminal antitrust cases have been rare indeed. After *VandeBrake*, they will continue to be rare, but perhaps less so.

## Endnotes

1 "The defendants (sic) tools of their trade were not dark clothing worn in midnight burglaries facilitated by pry bars and screw drivers. Instead, in ordinary business attire and in the glare of broad daylight, they used the ordinary communication tools of modern commerce and business, cell phones, BlackBerries, and e-mail to rob their victims. Unlike the neighborhood thief who values high-end TVs, computers, jewelry, and furs, the defendants specialized in cold hard cash." 717 F. Supp. 2d at 966.

2 Of course, a Sherman Act case can also involve fraud as a result of such things as false legal compliance certifications in bid submissions, in which case Section 2B1.1 would apply to the fraud conviction.

# Is Your DBE Performing a Commercially Useful Function? Enforcement Trends in DBE Fraud Cases

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Companies that have been awarded government contracts through a disadvantaged business enterprise (DBE) program or similar program face increasing scrutiny as criminal prosecutions continue to mount and civil penalties increase. More so than ever, participants in DBE programs must understand the applicable rules and ensure the meaningful participation of minority contractors.

## The Background of DBE Programs and the Pass-Through Problem

Many local, state and federal governmental agencies have a DBE program or similar program that seeks to channel a portion of government contracts to small businesses owned and controlled by socially and economically disadvantaged individuals, such as businesses owned by minorities, women, veterans or people with disabilities. As such, including a DBE or similar entity in a proposal can be critical to securing lucrative government contracts or satisfying affirmative action goals. While such programs intend to drive economic growth and remedy past and current discrimination,[1] they have become rife with fraud and abuse. For example, in the construction context, DBEs are frequently used as a "pass-through" entity, an entity that is subcontracted to perform, but does not actually perform, certain work. In such a case, an ineligible company – a company that would not qualify as a DBE – performs the actual work and receives nearly all of the financial benefit. For its role, the DBE usually receives a small percentage of the subcontract amount as compensation for the use of its name and DBE certification. In many cases, the DBE is incapable of performing the subcontracted work because it lacks the necessary expertise, labor, equipment and funds. Thus, in these cases, the government claims that the DBE failed to perform a commercially useful function as it was required to do under the applicable regulations.

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## Federal Criminal Investigations of DBE Relationships Are Increasingly Common and Convictions Can Result in Severe Penalties

Federal agencies and prosecutors are continuing to clamp down on the practice of using DBEs as a "pass-through" to win government contracts or satisfy affirmative action goals. A survey of press releases by just the U.S. Department of Transportation (DOT) revealed more than two dozen convictions in federal criminal DBE fraud cases since 2000. The individuals and companies convicted were not just the sham DBEs, but also included the non-DBE companies who actually performed the DBE subcontracts and general contractors who conspired with sham DBEs. These cases were prosecuted by United States

Attorney's Offices across the country and resulted in sentences ranging from three years of probation to more than seven years of incarceration and combined fines and restitution ranging from $0 to in excess of $900,000. More than half of the federal criminal cases reported by the DOT resulted in prison terms of five months or more. In addition to these criminal penalties, a number of the companies and individuals prosecuted in these criminal cases were debarred and banned from participating in federally funded transportation projects or DBE programs either permanently or for a period of years.

For example, in 2011, Balu Kamat and Carmine Desio, the president and vice president of Environmental Energy Associates (EEA) pled guilty to mail fraud charges relating to the use of EEA as a DBE "front" company on the Metropolitan Transportation Authority's Fulton Street Transit Center Dey Street Concourse. On the Dey Street Concourse Project, EEA entered into a $5.2 million DBE subcontract to perform concrete and miscellaneous demolition work allegedly knowing that EEA lacked the labor, equipment and financial wherewithal to perform the work. The work EEA agreed to perform was allegedly performed by third parties, including employees of one of the general contractors. Kamat and Desio allegedly received a markup or fee for the work others performed. Kamat and Desio were each sentenced to six months of home confinement with electronic monitoring, two years of probation, a $50,000 fine and were jointly ordered to pay $188,000 in criminal restitution.

Also in 2011, Walter Bale, the president of Walter Constructions Associates, Inc. (WCA), pled guilty to money laundering charges in connection with a DBE fraud scheme. Bale obtained three DBE subcontracts to install rebar while allegedly passing himself off as a certified DBE known as Fairview Contracting Corporation (Fairview). Bale allegedly conspired with the owner of Fairview to put WCA's employees and expenses on Fairview's books to create the false appearance that Fairview was performing the subcontracts. Bale was sentenced to three years of probation, ordered to pay a $25,000 fine and forfeited $237,000 to the government. The president of Fairview was also sentenced to three years of probation for his role in the DBE fraud scheme.

In 2006, Michael Tulio, the owner and operator of Tulio Landscaping, was convicted of conspiracy and mail fraud charges in connection with two contracts to replace storm drain pipes along one of the railroad lines of the Southeastern Pennsylvania Transportation Authority (SEPTA). Tulio's bids for these contracts certified that, consistent with SEPTA's DBE program, a certain percentage of the work would be subcontracted to a minority-owned DBE hauling firm. Tulio, however, never used the DBE hauling firm and created fraudulent business utilization reports, invoices, and proof of payments, including altered checks, to create the appearance that his company had done so. Tulio paid the DBE hauling firm a fee for the use of its name to secure these SEPTA contracts, but never intended to use the DBE hauling firm to perform the requisite work. Tulio was sentenced to 15 months in prison, 24 months of supervised release and a $40,000 fine. Tulio and his company were also debarred by the FTA for a period of three years.

Tulio's case was particularly significant because of one of the legal rulings associated with the sentence imposed on him. The United States Court of Appeals for the Third Circuit held that the district court correctly interpreted the loss amount for purposes of sentencing to be the entire amount of the DBE subcontract. The Third Circuit, like several other federal appellate and district courts, did not accept the argument that the loss amount should be limited to the fair market value of the work that should have been, but was not, performed by a legitimate DBE and should not include the value of any services actually performed or any direct costs associated with the services that were performed (*e.g.*, cost of materials).

The importance of the loss amount from a sentencing perspective cannot be understated. In many cases, the loss amount is the driving factor in calculating the applicable sentencing range. By way of background, the Federal Sentencing Guidelines are the starting point for a federal court's analysis of what sentence to give a defendant. After taking into account various considerations relating to the offense and the offender, a calculation under the Federal Sentencing Guidelines results in a proposed sentencing range expressed in terms of months (e.g., 0-6 months, 6-12 months, 12-18 months, etc.). A court is not required to impose a sentence within the range and may, in its discretion, vary even considerably from the range, but the sentencing range remains an important guidepost in many cases. One of the most important factors in the calculation of the sentencing range is the loss amount. Treating the entire DBE subcontract amount as the loss amount, regardless of whether any of the services were legitimately performed or had substantial costs associated with them, has the potential to increase the sentence of an individual or company convicted of DBE fraud by several orders of magnitude. Yet this appears to be the trend.

This past summer, the U.S. Sentencing Commission held its Annual National Training Seminar on the Federal Sentencing Guidelines. Part of the course materials was a series of hypothetical sentencing scenarios, including one involving a DBE fraud case in which the defendant won a $120,000 government contract by misrepresenting his status as a DBE. The hypothetical defendant intended no loss to the DOT, was performing his duties under the contract, and returned the entire $120,000 he had received under the contract as soon as the investigation was initiated. The materials gave the following answer in response to the question of how the loss amount should be calculated:

> Answer: Some sentencing courts have determined that the special rule in n. 3(F)(ii) (for Government Benefits) could apply in some cases where government grants and setasides fund the contract. **If so applied in this case the calculation of loss would include the entire contract award of $120,000 despite any services honestly rendered.** *See United States v. Tulio*, 2008 WL 324193 (3d Cir. Feb. 7, 2008); *United States v. Tupone,* 422 F.3d 145 (3d Cir. 2006); and *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006).

(http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2012/2_Economic_Crimes_Hypotheticals.pdf (emphasis added).)

This hypothetical drives home the point that an individual or company convicted of DBE fraud cannot count on getting credit come sentencing time for any work legitimately done or costs legitimately incurred. There is precedent for a court to simply look at the value of the DBE subcontract and conclude that because it was procured by fraud, the entire amount of the contract represents the loss to the government-DBE-program-victim. This can result in a loss calculation that can be sharply disproportionate to the amount of loss the defendant thinks he or she actually caused by using a sham DBE and a potentially steep sentence of incarceration.

### In Addition to Federal Criminal Prosecution, Companies Who Are or Employ Sham DBEs Can Face Federal Civil Suits

Companies and individuals involved in DBE fraud also face the threat of federal civil litigation, perhaps initiated by their own employees. The Federal False Claims Fact (FCA) is a statute that offers a reward to ordinary citizens to act as whistleblowers and bring lawsuits on behalf of the United States against companies that contract with the federal government to stop fraud. The crux of an FCA lawsuit is that the defendant got or retained federal money by submitting false claims or causing false claims to be submitted to the government. In the DBE arena, the false claim would relate to the legitimacy of the DBE and whether it actually performed the requisite work under the subcontract. The government can elect to intervene in an FCA suit and take over its prosecution, a step widely recognized as increasing the potential for recovery against the defendant. Regardless of whether or not the United States joins in the lawsuit, a successful whistleblower plaintiff is entitled to receive a portion of any damages recovered from the defendant, usually between 15 percent and 30 percent, as well as attorney's fees and costs. Given that it is not necessary for an individual to have personally suffered any harm to bring an FCA suit, this potential for a financial windfall can serve as a powerful incentive for anyone with knowledge of government contracting fraud to act as a whistleblower.

Government agencies are actively soliciting whistleblowers to essentially act as their private investigators. Whistleblower laws and hotlines are being set up at all levels of federal, state and local government and employees, as part of corporate compliance programs, are being actively encouraged to report fraud and abuse, although companies prefer that the reporting be done internally. Along with the proliferation of whistleblower hotlines has come a proliferation of laws to protect whistleblowers from retaliation. For example, at the federal level, the 2009 American Recovery and Reinvestment Act affords rights and remedies to employees who are subjected to discharge, demotion or discrimination as a result of reporting fraud, abuse or mismanagement of stimulus funds.

### Scrutiny of Minority Contractors Is Increasing at Every Level of Government

While federal investigations pose a significant risk to contractors participating in DBE programs, state and local governments also are initiating investigations into sham minority contractors.

By way of example, within the past year, the City of Philadelphia has announced the results of two major DBE fraud investigations.

In July 2012, the city's Office of Inspector General (OIG) announced that a prime city contractor agreed to a $1.85 million settlement to resolve an investigation into a woman-owned subcontractor arrangement and that the City would initiate debarment proceedings against the subcontractor. According to the OIG, Prison Health Services, Inc. (PHS), subcontracted with

JHK, Inc. (JHK), a City-registered, woman-owned business, to provide pharmaceutical supplies to the Philadelphia Prison System. The subcontract with JHK was for 40 percent of PHS's $196 million health-care contract with the Philadelphia Prison System. In reality, other non-minority businesses provided the pharmaceuticals, while PHS paid JHK more than $410,000 for the use of its name and woman-owned business certification. PHS cooperated with the investigation and, in addition to paying the $1.85 million settlement, agreed to undertake various compliance and diversity initiatives. JHK has been removed from the Office of Economic Opportunity (OEO) registry of certified M/W/DSBEs and the City intends to initiate debarment of JHK and its owner from participation in any City contract for two years.

In January 2012, the City of Philadelphia announced that "in the wake of a Philadelphia Office of the Inspector General investigation into a sham minority contracting scheme," the City had "begun debarment proceedings against one contractor, removed a second from its list of certified minority businesses and reached a no-fault settlement with a third contractor, which … agreed to pay the City $100,000." The OIG reportedly established that William Betz, Jr., Inc. (Betz), JHS and Sons Supply Company (JHS) and UGI HVAC, Inc. (UGI) colluded to make it appear as though JHS, a certified minority vendor, provided equipment and supplies for a $1 million contract UGI signed with the Philadelphia Housing Development Corporation to weatherize houses for low-income residents of Philadelphia. According to OIG, in reality, UGI actually purchased those products from Betz, which paid JHS 3 percent of the contract proceeds for the use of its name and minority certification. UGI and Betz allegedly generated false invoices to conceal their scheme. The Office of Economic Opportunity removed JHS from its list of certified minority vendors; the Law and Procurement departments initiated debarment proceedings against Betz; and the OIG and the Law Department reached a settlement agreement with UGI.

In its 2011 Annual Report, the OIG described the Betz case as "the first in a series of investigations that has developed from the OIG's partnership with the Office of Economic Opportunity" and included the following message:

> Companies that fail to meet the city's minority business requirements have been put on notice: The City will not allow anyone to get away with using sham minority businesses as pass-throughs. The worst offenders face the possibility of debarment, but all will suffer the consequences. The city will not let greedy companies circumvent its efforts to support qualified yet financially disadvantaged companies.

(*See* http://www.phila.gov/oig/pdfs/finalannualreport2011.pdf.)

## How to Avoid Becoming the Subject or Target of a DBE Fraud Investigation

Given the recent uptick in investigations prosecutions involving a "pass-through" DBEs and the potential for harsh sentences, companies that participate in a DBE program should ensure that they are in compliance with any statutory and regulatory requirements. The first step in this process is figuring out which rules apply. While this proposition may at first seem obvious, the proliferation of DBE rules and regulations at every level of government has created confusion and inconsistency. For instance, if a DBE subcontract is awarded for a transportation project involving federal funds in the City of Philadelphia, is it governed by U.S. Department of Transportation's DBE regulations? PennDOT's DBE regulations? The City of Philadelphia's anti-discrimination policies? SEPTA's DBE regulations?

Identifying the applicable law is critically important because federal, state and local DBE regulations can be inconsistent and contradictory. DBE rules can vary from federal to state, state to state, or even within a state on key issues such as whether DBEs can hire employees and/or supervisors of general contractors, whether DBEs can rent equipment from general contractors and the extent to which general contractors can provide assistance in the form of mentoring to DBEs. Moreover, many DBE regulations have been amended on multiple occasions and supplemented with official guidance, often times in an effort to resolve these inconsistencies and/or to take into account local industry practices.

Once the applicable regulations have been identified, the critical issue becomes whether the DBE can and will perform a "commercially useful function" as defined in those regulations. This inquiry is at the heart of nearly every investigation and prosecution of DBE relationships because unless a DBE performs a "commercially useful function," its participation in a subcontract cannot be used to satisfy DBE participation requirements.

By way of example, U.S. Department of Transportation's regulations define "commercially useful function" as follows:

> A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and

> is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

49 C.F.R. § 55(c)(1).

With respect to materials and supplies used to perform a contract, the DBE also must be responsible "for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself." 49 C.F.R. § 55(c)(1).

While determining whether a DBE is performing a "commercially useful function" is based on multiple factors and can be industry-specific, it is clear that serving as a "pass-through" entity is not sufficient to withstand scrutiny:

> A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

49 C.F.R. § 55(c)(2).

In short, regardless of what regulations apply, if a DBE lacks the labor, equipment, financial resources, or expertise to perform the subcontracted work and the general contractor or another party effectively performs the work, the parties involved are putting themselves at risk for the criminal prosecutions, civil suits and government investigations described in this article. Because DBE programs have become rife with fraud and abuse, government agencies at every level have decided that strict enforcement – including potential prison time, fines, forfeiture of illegal proceeds and debarment – is the only way to restore the DBE program's once-noble purpose of remedying past injustices.

## Endnotes

1 On August 15, 2012, in the case of *Dynalantic Corporation v. United States Department of Defense* (Civ. A. No. 95-2301), a federal district judge in Washington, D.C. held that Section 8(a) of the Small Business Act, which permits the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses, was unconstitutional as applied to contracts in the military training and simulation industry. While many commentators have speculated on the larger implications of this ruling for the Section 8(a) program for disadvantaged firms and DBE programs as a whole, it has no impact on potential criminal liabilities for DBE fraud. For criminal purposes, the constitutionality of the underlying statute does not matter. Criminal cases in the DBE arena are directed at a defendant's fraud and false statements and are not actions to enforce the underlying statutes and regulations. As the United States Supreme Court has explained: "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional." *Bryson v. United States*, 396 U.S. 64, 68 (1969).

# Upcoming Events

## The New SEC Conflict Minerals Rule: Overcoming the Challenges of Compliance

**Tuesday, December 4, 2012 | Pepper's Philadelphia Office**
3000 Two Logan Square | Eighteenth and Arch Streets
Philadelphia, PA 19103

Register online at
www.regonline.com/Register/Checkin.aspx?EventID=1162690.

**Wednesday, December 5, 2012 | Pepper's New York Office**
The New York Times Building | 37th Floor
620 Eighth Avenue | New York, NY 10018

Register online at
www.regonline.com/Register/Checkin.aspx?EventID=1162700.

On August 22, the Securities and Exchange Commission (SEC) adopted a controversial and far-reaching rule laying out the obligations that publicly traded companies must meet under the "Conflict Minerals" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. While directly applicable to SEC-reporting companies, the new requirements will indirectly but significantly involve far more businesses in the rule's implementation process.

The new provisions require SEC-filing manufacturers and companies that "contract for manufacture" to conduct broad-ranging inquiries into their upstream supply chains in furtherance of a congressionally mandated initiative intended to cut off sources of cash for violent warlords in central Africa. If companies find that their products contain even small amounts of gold, tin, tantalum, or tungsten - metals used in a vast array of products - they must undertake a search designed to ascertain whether any of those materials originally came from the Democratic Republic of the Congo (DRC) or any of its neighboring countries. Unless the answer is clearly "no" the company must file a Conflict Minerals Report with the SEC and will likely have to conduct additional diligence, potentially including an independent private-sector audit.

In short, U.S. and foreign companies affected by the rule will be required to meet stringent new requirements in examining their supply chains. SEC-reporting manufacturing companies and other companies, including some retailers and many other companies that will be drawn into the regime to satisfy their customers' demands, must put in place a reliable system to find out if their products contain even minute quantities of these minerals.

A growing number of companies are discovering they are affected by the new rule and need to understand how to meet their obligations in time for a reporting period that begins January 1, 2013, with the first reports due in May 2014. The compliance costs of this program are expected to be very significant, and a broad cross-section of U.S. companies should be taking steps now to ensure compliance mechanisms are in place by the time the initial reporting period begins.

This seminar brings together experienced faculty on the conflict minerals rule, metals supply chains, SEC compliance, and the due diligence process from the law firm of Pepper Hamilton and the Freeh Group International Solutions, LLC, which have conducted numerous diligence and compliance programs and internal monitoring programs. The seminar will cover who must comply, how to establish a sound supply chain diligence system, and pitfalls to avoid under this new regulatory regime.

**Speakers**

*Blake A. Coppotelli*, Freeh Group International Solutions, advises public and private clients on public corruption, government, regulatory, and/or corporate investigations, financial and investigative due diligence, internal corporate controls and governance, and ethics policies

*Robert A. Friedel*, partner, Pepper Hamilton LLP, member, Corporate and Securities Practice Group, actively involved in federal securities compliance counseling

*Jane C. Luxton*, partner, Pepper Hamilton LLP, chair, Sustainability, Clean Tech, and Climate Change Team, author of numerous publications on conflict minerals with longstanding mining and metals experience

*Richard J. Zack*, partner, Pepper Hamilton LLP, member, White Collar Litigation and Investigations Practice Group, regularly conducts complex internal investigations for Fortune 500 corporations, educational institutions, and government entities

# Upcoming Events

## Construction SuperConference 2012

**December 12-14, 2012 | Palace Hotel | San Francisco, CA**

The Construction SuperConference is continually regarded as one of the leading industry events for construction owners, their general counsel and construction attorneys. The three-day conference will feature impactful plenary sessions and compelling educational sessions from senior-level leaders of legal, consulting and construction companies who bring to the forefront challenging issues and new insights into the legal, business and economic opportunities in today's construction market.

On December 14, Pepper partner **Louis J. Freeh** will be the morning's keynote speaker.

For more information, visit www.constructionsuperconference.com/ME2/Default.asp.

## American Conference Institute (ACI)'s White Collar Litigation Summit

**January 21-23, 2013 | New York**

Pepper partner **Thomas M. Gallagher** will present on the panel, "Recent Cases, Industry Enforcement Trends and Litigation Update on the Health Care and Pharmaceuticals Sector."

Topics to be covered include:

- recent cases and settlements in the health care and pharma industries
- how is/will Obama care impact enforcement in the industry
- OIG issues
- trends in enforcement: good manufacturing practices violations, off label uses, billing fraud and kickbacks
- dealing with the increased prospect of whistleblowers and qui tam cases in a post Dodd-Frank world
- identifying the risk of and preventing overpayments from turning into False Claims Act violations
- developing supporting documentation and creating defensible positions for contractual financial arrangements.

For more information, visit www.americanconference.com/.

# Pepper Hamilton Sponsored American Chamber of Commerce in Italy FCPA and Anti-Corruption Compliance Workshop

*Pictured from left to right: Pepper Hamilton partners Frank J. Cerza, Joseph V. Del Raso, Louis J. Freeh and Gregory A. Paw; managing director of BDO Consulting Brian J. Mich; and managing director of AmCham Italy Simone Crolla.*

On October 30, 2012, Pepper Hamilton sponsored the American Chamber of Commerce in Italy's workshop, "FCPA and Anti-Corruption Compliance for Multi-National Companies Operating in Italy." The workshop was held in Milan, Italy. Simone Crolla, Managing Director of AmCham Italy gave the welcome. Opening remarks on the importance of anti-corruption efforts on international trade was presented by Pepper partner **Hon. Louis J. Freeh**. A panel discussion of the "FCPA and Anti-Corruption Compliance for Companies Operating in Italy" was presented by pepper partner **Gregory A. Paw**, managing director of BDO Consulting Brian J. Mich, and Magistrate Eugenio Fusco, Public Prosecutor of Milan - Chief Prosecutor, Busto Arsizio.