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I. INTRODUCTION TO HANDBOOK

A. WHAT IS THE FCPA?

1. A Short History of the Act

The Foreign Corrupt Practices Act (“FCPA” or “Act”) is a groundbreaking law that targets public corruption in the international marketplace. The Act, which imposes both civil and criminal penalties, prohibits any U.S. person or entity or any issuer of U.S. securities, acting anywhere in the world, or any foreign persons who cause an act in the United States, from making a corrupt payment to any non-U.S. government official, directly or indirectly, in order to obtain or retain business. It also requires public companies with securities registered on U.S. stock exchanges to maintain accurate records and implement adequate internal controls. Although it predated the U.S. Sentencing Guidelines for Organizations by fourteen years and the Sarbanes-Oxley Act by twenty-five years, the FCPA applied many principles later incorporated in those laws. Today, it has an ever-increasing impact on the ways in which companies conduct business around the globe.

Congress enacted the FCPA in 1977 in response to a report by the Watergate Special Prosecutor that indicated that major American corporations were engaging in systematic bribery of foreign government officials. Until its passage, the U.S. criminal laws did not expressly prohibit the bribery of foreign officials. The FCPA was the first legislation of its kind, and most other countries did not enact similar anti-corruption regulations until almost twenty years later. Congress amended the FCPA in 1988 to modify the state of mind required for a violation of the Act when paying an intermediary and by adding the facilitation payment exception and two affirmative defenses. At the same time, Congress urged the executive branch to encourage the United States’ trading partners to adopt similar anti-corruption legislation.

Congress amended the FCPA again in 1998 in legislation ratifying and implementing the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”). The 1998 amendments broadened the scope and applicability of the FCPA in several significant ways, including:

- Expanding the jurisdictional reach of the statute to include all U.S. nationals or U.S. companies that do any act outside the United States in furtherance of an improper payment, regardless of whether they use the mails or any means of interstate commerce, as previously required;
- Extending FCPA liability to foreign nationals and foreign businesses that do any act in furtherance of a prohibited payment while in U.S. territory;
- Providing criminal sanctions for FCPA violations committed by foreign nationals employed by, or acting as agents of, U.S. businesses;

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1 Reporters for the Seventh Edition of the FCPA Handbook are Richard Grime, Greta Lichtenbaum, Jeremy Maltby, Beth France, Hayley Ichilcik, Melissa Jackson, Vasu Muthyalal, Joanna Nairn, Lauren Sun, and Sara Zdebie. Other contributors include Laura Conn, Andrew Doersam, Robert Ennis, Marcus Quintanilla, Matt Sheehan, Cameron Smith and Ben Jones. The Handbook was originally developed by James Ukropina of our Los Angeles office, and later editions were carried forward by former partners Grey Bryan and Ira Raphaelson. This edition reflects the lessons and experience passed along by those gentlemen.


• Expanding the definition of foreign officials to whom payments are prohibited to include officers or employees of public international organizations, as designated by the president; and

• Prohibiting payments to foreign officials for the purposes of “securing any improper advantage” (previously, the FCPA had prohibited payments for the purpose of (1) influencing a foreign official’s acts or decisions, or (2) inducing a foreign official to act in violation of a lawful duty or order in order to obtain or retain business).

At the same time, the U.S. Securities and Exchange Commission (“SEC”) and the U.S. Department of Justice (“DOJ”) were stepping up their FCPA enforcement efforts, marking a dramatic enhancement in U.S. anti-bribery efforts around the globe. In the seventeen years since the 1998 amendments, FCPA enforcement has increased exponentially.

In recent years, countries around the world increasingly have recognized that unchecked corruption damages the global marketplace and harms development efforts; accordingly, they have entered into treaties and enacted legislation aimed at eliminating bribery and other forms of corruption. The first such treaty was the OECD Convention in 1997, and, as discussed in detail in Chapter VI, the past several years have witnessed a proliferation of international anti-bribery measures at all levels, including the United Nations (“UN”), the OECD, and in regional, institutional/bilateral, and national arenas. Most notable of these efforts is the United Kingdom (“UK”) Bribery Act, which is discussed separately in Chapter VII.

As enforcement efforts have increased worldwide, there has been more cooperation among governments as they target multi-national companies. Mutual Legal Assistance Treaties (“MLATs”) have increased the ability of U.S. and foreign prosecutors to enforce U.S. criminal law and to exchange information freely. Similarly, information-sharing agreements or memoranda of understanding (“MOUs”) with foreign securities regulators greatly facilitate the investigation of FCPA violations that largely occur abroad. Although the specific levels of cooperation vary, a number of these agreements provide for cooperation and information sharing among agencies in furtherance of international securities law enforcement.

2. A Brief Overview of the Act

The FCPA has two principal parts: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions prohibit the authorization, offer, promise to pay, or payment of anything of value to a foreign official for a corrupt purpose. The elements of an anti-bribery violation are:

• An act by a covered person (including U.S. and foreign issuers of U.S. securities, non-public U.S. companies and U.S. residents, and some foreign non-residents),

• in furtherance of an offer, payment, promise to pay, or authorization of payment of anything of value,

• directly or indirectly,

• to a foreign official,

• corruptly,

• for the purpose of influencing official action or decision, inducing an unlawful act, inducing official influence over government action, or securing any improper advantage, and

• in order to obtain or retain or redirect business.
The Act’s anti-bribery provisions provide two affirmative defenses: (1) that the payment was lawful under the written laws of the foreign country, or (2) that the payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, and directly related to the demonstration or explanation of a product or service or performance of a contract with a government agency. Additionally, the Act includes an exception to the anti-bribery provisions allowing “grease” or “facilitating” payments, which are payments made to expedite or secure performance of a routine, non-discretionary governmental action. As discussed in Chapters III and VII, the making of such payments is increasing fraught with risk because they are often illegal under other laws (including now the UK Bribery Act) and because it is a challenge to stay within the scope of this exception which is construed narrowly by the DOJ and the SEC, both of which have publicly signaled that they discourage the practice of making such payments.

The accounting provisions of the FCPA require companies issuing securities registered on the U.S. stock exchanges to maintain accurate books and records and proper systems of internal controls regarding all transactions, not just those that might violate the anti-bribery provisions. Violations of the FCPA carry significant penalties, including criminal liability (including terms of imprisonment for individual officers, directors, or stockholders), civil fines, substantial loss of goodwill, and other meaningful consequences, including the potential loss of government licenses. Accordingly, while the focus of this handbook is on the accounting provisions as they affect corruption and fraud in international business, it is important to be aware of the fact that these provisions have a broader application.

As discussed in more detail in Chapter II, the two parts of the Act apply to different entities or “covered persons.” The anti-bribery provisions proscribe certain corrupt payments by “issuers,” “domestic concerns” acting anywhere, and other persons acting within the United States or using the U.S. mails and wires. The accounting provisions apply only to “issuers,” not to “domestic concerns.” This means that the entire Act applies to any company subject to the registration or reporting requirements of the Securities Exchange Act of 1934 (“issuers”), but only the anti-bribery provisions apply to the broader category of “domestic concerns” (which encompasses any U.S. person or business entity, including U.S. citizens working for foreign concerns), as well as any person acting within the United States, including by using U.S. mails and wires. Importantly, both provisions affect foreign subsidiaries and affiliates of issuers, and also make U.S. companies liable for acts taken outside the United States by those subsidiaries and affiliates.

### 3. How do FCPA Issues Arise and How are They Resolved?

Whenever a company covered by the Act, or anyone acting on its behalf, interacts with a government entity (including a state-owned business enterprise)—whether as a customer or as a regulator—there is some danger of running afoul of the FCPA. Any interaction with a government official (or a family member of a government official) that involves the provision or offer of anything of value presents a possible pitfall. Although the early years of FCPA enforcement focused on defense contractors and the energy industry (business sectors highlighted by the Watergate Special Prosecutor as being somewhat insensitive to corruption issues), today no industry is immune. In recent years, the SEC and the DOJ have pursued FCPA investigations and “sweeps” in many different areas, focusing on such industry segments as telecommunications, financial services, energy, logistics, tobacco, pharmaceutical goods, and medical devices. Companies facing FCPA enforcement actions include those that only recently began to invest in emerging countries and those in industries that had not previously experienced much FCPA enforcement activity. Additionally, in the current climate, compliance with the accounting provisions of the FCPA is equally as important as the Act’s anti-bribery provisions, with the lower evidentiary requirements of those provisions often used in borderline cases.
A company may learn that it confronts an FCPA problem in a number of ways. A robust compliance program encourages employees to report suspected violations, and can therefore generate calls to compliance hotlines or approaches via other channels of internal reporting. Additionally, the kinds of routine compliance audits required in today’s environment may identify suspicious expenditures and other questionable activities. Companies sometimes learn of internal problems by monitoring industry trends. For example, one general counsel read a news account about a company in the same business line that settled an FCPA action because it had made payments to government officials in China through Chinese entities called design institutes. Recalling that his company had also engaged design institutes, he proactively initiated a compliance review that uncovered similar problems. A company may also learn of an FCPA problem at a potential acquisition target during standard due diligence. Less ideally, a company will learn about a potential problem from a third party, such as a whistleblower or through a civil lawsuit filed by an employee or a competitor. Of course, a company may first hear about a problem from an enforcement agency, either domestically or abroad, that has started an investigation of potential FCPA violations.

Government agencies may learn of potential FCPA violations through many avenues, including the ones discussed above. In some instances, private plaintiffs will bring FCPA-based actions that prompt government investigations. Other times, enforcement actions by foreign governments could trigger U.S. scrutiny. In today’s internet world, information travels quickly. One need only set up a “Google alert” to learn on a daily basis of the investigations going on around the world. Indeed, DOJ officials have acknowledged publicly that they use such alerts to identify possible matters for investigation. More and more, however, companies are choosing to self-report potential violations with hopes of obtaining leniency from the government. However, as described in detail in Chapter V, voluntary disclosure does not guarantee avoiding substantial penalties, even with extraordinary cooperation.

Historically, FCPA violations rarely have resulted in litigated decisions, in part because companies have been reluctant to accept the risks and costs of formal SEC charges or a criminal indictment. Though increasing enforcement activity against individual defendants has generated some recent judicial decisions interpreting provisions of the FCPA, the bulk of FCPA guidance comes from DOJ opinions, from announcements of settlements with the DOJ or the SEC, or from published guidance or public statements from the DOJ, the SEC, and their representatives. Most cases brought by the DOJ are resolved through settlements. The government almost always enters into non-prosecution agreements (“NPAs”) or deferred prosecution agreements (“DPAs”) with companies in which they agree to not prosecute in exchange for proof of continuing compliance. NPAs are similar to plea agreements in that they generally include fines and other penalties, in addition to ongoing monitoring. Additionally, a recent trend in settlements of FCPA investigations, where violations were systemic, is for the government to require independent monitors, paid for by the company, for two to three years who will ensure continued compliance with the Act.

B. Enforcement Trends

In today’s climate of substantially increased enforcement, any company involved in business that extends beyond U.S. borders, either directly or through the actions of an affiliate or subsidiary, must focus on FCPA compliance. Over the past several years, there has been a dramatic increase in FCPA enforcement activities by both the DOJ and the SEC, and both agencies have increased resources
that are focused on tackling FCPA investigations. In addition to the increase in sheer numbers of investigations being initiated, several enforcement trends have emerged:

- The recently issued DOJ and SEC FCPA Guidance\(^5\) reflects an aggressive jurisdictional approach to targeting both foreign individuals and companies, which is consistent with the fact that the majority of the largest FCPA penalty cases involve non-U.S. companies;
- The Guidance, together with recent settlements, also reflects a continuing escalation of government expectations concerning the breadth and depth of a company’s compliance program;
- U.S. authorities are more willing than ever to pursue individuals, as well as companies, for FCPA violations;
- There is an increased focus on rooting out corruption in entire industries that are known to be rife with corruption. The DOJ and the SEC’s so-called “industry sweeps” have focused on the healthcare sector, the movie industry, and the oilfield-services industry, among others. The UK Financial Services Authority (“FSA”) has also engaged in sector-specific thematic corruption reviews, including with the insurance-brokerage industry and investment banking;
- Companies face an increased threat of prosecution by foreign enforcement authorities, as countries and multilateral organizations around the world enter into treaties and enact legislation aimed at eliminating corruption and bribery; and
- Increasing complexity facing companies conducting investigations due to data privacy, secrecy, and blocking laws that are enforced locally.

The penalties for companies that fail to focus sufficiently on FCPA compliance enforcement can be grave and are ever-increasing. Individuals, too, face stiff penalties for violations of the FCPA, and an issuer may not indemnify individuals for fines imposed under the Act. Individuals who violate the anti-bribery provisions may be imprisoned for up to five years per count, and face criminal fines of up to $100,000 per violation and civil penalties of up to $10,000 per violation. Alternatively, under 18 U.S.C. § 3571, a court may impose a fine of $250,000 or double the gross gain or loss from the unlawful activity, whichever is greater. An individual who knowingly commits a violation of the accounting provisions may be fined $5 million, imprisoned for up to twenty years, and may face up to $100,000 in civil penalties. As with corporate FCPA prosecutions, individual prosecutions are increasing.

Companies also must be mindful that FCPA violations can trigger other forms of criminal liability. Increasingly, matters that start as FCPA enforcement actions end up generating charges under related criminal laws and regulations, such as money laundering, mail and wire fraud, export control, terrorist financing, Racketeer Influence and Corrupt Organization Act (“RICO”) (with Travel Act, money laundering, and mail/wire fraud as predicate acts), and state unfair competition laws. In addition to broader criminal liability, FCPA violations can lead to crippling civil liability. For example, companies charged with FCPA violations by the government often will face shareholder suits under securities laws or derivative shareholder actions based on alleged malfeasance by officers and directors.

C. OMM’s FCPA Practice

Since the publication of the Sixth Edition of our FCPA Handbook, the FCPA has taken center stage in the enforcement efforts of both the SEC and the DOJ. In the current enforcement climate, thorough guidance on the thicket of issues presented by the FCPA is all too important.

Like its predecessors, this Seventh Edition of our FCPA Handbook (prepared as of March 2013) seeks to assist clients and others who are experienced in managing the risks of doing business overseas, those just starting to do business overseas, and those seeking to enhance their risk-management practices. Our goal with this Handbook is to educate those that may be affected by the FCPA on the substantive and procedural elements of the Act and its international counterparts, and to provide guidance on how to spot and avoid problems. To accomplish this, we provide specific examples of cases in which FCPA problems have arisen in the past. We also set forth practical guidance on how to design an effective compliance program in order to limit potential problems going forward. And, for those instances in which prophylactic compliance efforts fail, we set forth strategies for conducting a thorough FCPA internal investigation and for managing situations in which enforcement actions arise or voluntary disclosure may be appropriate.

O’Melveny regularly counsels clients about issues arising under the FCPA, and has worked closely with corporate officers, representatives of sole proprietorships, partnerships and joint ventures, general counsel, members of corporate legal staffs, accountants, auditing firms, and private investigative firms. The Firm also has represented corporations, individuals, and others in seeking guidance from, in negotiating with, and in defending against proceedings brought by various enforcement agencies, including the SEC and the DOJ, as well as many of their counterparts in Asia and Europe.

A Contact Sheet of O’Melveny & Myers attorneys available to answer questions related to the Foreign Corrupt Practices Act is located prior to the Appendices. The Firm also provides regular client alerts about significant FCPA developments, which can be found at http://www.omm.com/fcpa/.

O’Melveny’s FCPA App can be downloaded free from the App StoreSM service (search: “OMM FCPA”) offered by Apple Inc.® and is designed for use on the iPhone® and iPad® mobile digital devices. The user-friendly app serves as a comprehensive, convenient reference guide for clients and friends and includes four key features. The first two tabs directly link to mobile versions of two of O’Melveny’s well-known and informative handbooks, O’Melveny’s FCPA Handbook and O’Melveny’s “In-House Counsel’s Guide to Conducting Internal Investigations.” Tab three is divided into five resource sections that serve as an interactive, illustrative directory for users. Tab four features an index of O’Melveny’s leading FCPA practitioners.
II. ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT

A. To Whom Does the FCPA Apply?

The two parts of the Act—the anti-bribery provisions and the accounting provisions—apply to different entities (“covered persons”).


The FCPA’s anti-bribery provisions reach the conduct of issuers of certain U.S. securities and debt, “domestic concerns” (a broad term that includes U.S.-based companies, U.S. citizens, and permanent residents), and foreign parties with sufficient jurisdictional connection to the United States. These provisions cover U.S. companies, citizens and permanent residents anywhere that they act in the world. As interpreted and enforced by U.S. authorities, the anti-bribery provisions also extend to foreign companies and individuals for acts in the United States. Finally, the anti-bribery provisions cover persons acting on behalf of the above three categories (issuers, domestic concerns and foreign non-residents), such as directors, officers, employees, agents, and stockholders. As the following discussion makes clear, the FCPA’s reach has extended in recent years, as U.S. authorities have pressed expansive jurisdictional theories, some of which have begun to find approval in judicial opinions. Though companies and individuals facing enforcement proceedings may be able to construct viable jurisdictional defenses, modern telecommunications increase the likelihood of a jurisdictional connection, and make it increasingly difficult to establish the lack of jurisdiction. Accordingly, any individual working for or on behalf of a U.S. company can safely assume that his or her actions, anywhere in the world, can subject the company to FCPA liability, and may also give rise to personal liability. Any foreign company doing business with a U.S. connection can safely make similar assumptions.

a. Issuers

The FCPA applies to an “issuer” that registers securities under Section 12 of the Securities and Exchange Act of 1934, or is required to file reports under Section 15(d) of that Act, and also to its officers, directors, employees, agents, and stockholders (regardless of nationality or place of residence). Issuers include not only companies incorporated in the United States, but also foreign corporations (sometimes known as “foreign private issuers”) that list shares on U.S. stock exchanges, often through American Depository Receipts (“ADRs”).

The FCPA prohibits issuers—and their officers, directors, employees, agents and stockholders—from using the U.S. mails or wires (or other instrumentalities of interstate commerce) in furtherance of a corrupt payment to a foreign official. The FCPA does not require that the improper payment itself travel across state lines. Rather, the government has taken the position that U.S. courts may assert jurisdiction so long as the use of interstate commerce—through a telephone call, e-mail, or wire transfer, for example—facilitates or promotes the improper payment in some way. An act “in furtherance” of a bribe is a low threshold “intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so.” Notably, the use of interstate commerce

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6 Don Zarin, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT § 4:1.1 n.7 (1995).
9 Supplemental Response of the United States to the Phase I Questionnaire, supra note 5, art. 1.1.3.
that confers jurisdiction can take place outside the physical boundaries of the United States, such as by placing a telephone call to the United States, transferring money that passes through a U.S. bank account, or sending an e-mail that passes through the U.S. wires.10

Recent enforcement actions demonstrate that the government will invoke the FCPA against foreign private issuers where the corrupt conduct occurred overseas and had already been punished by an overseas regulator. Statoil ASA, an international oil company headquartered in Norway, acknowledged bribing Iranian officials in order to secure oil and gas development rights in Iran. The government asserted jurisdiction because Statoil listed ADRs on the New York Stock Exchange (“NYSE”) and two of the bribes were made by wire transfer from a New York bank account. Statoil paid a $10.5 million criminal penalty and disgorged an additional $10.5 million in profits, although the government credited the penalty already paid by the company in resolving an action by the Norwegian authorities.11 In a separate case, the government brought an action against a Swiss foreign private issuer that paid bribes in Nigeria, Angola, and Kazakhstan where some of the payments were wired through a U.S. bank account.12

Alternatively, under the principle of “nationality jurisdiction,” U.S. issuers and officers, directors, employees, agents or stockholders who are “United States person[s]”13 may be held liable under the FCPA for acts performed outside the United States in furtherance of a corrupt payment, irrespective of whether the act involved interstate commerce.14 Under the doctrine of respondeat superior, the Act also applies to the acts of an issuer’s officers, directors, employees, agents or stockholders outside the United States, regardless of their personal liability. In contrast, foreign private issuers and their non-U.S. officers, directors, employees or agents will be subject to U.S. jurisdiction only if they make use of the instrumentalities of U.S. commerce15 or act within the territory of the United States.16

b. Domestic Concerns

The FCPA also applies to “domestic concerns”17 that are not otherwise covered as issuers. Domestic concerns include: (1) U.S. citizens, (2) business entities that are incorporated in the United States or are incorporated overseas but maintain their principal place of business in the United States, and (3) foreign residents of the United States, as well as officers, directors, employees, agents and stockholders acting on their behalf. As with issuer liability, the FCPA prohibits domestic concerns from using interstate commerce in furtherance of a corrupt payment to a foreign official. In addition, the government may invoke nationality jurisdiction against U.S. businesses and citizens for acts done outside the United States irrespective of the use of interstate commerce. The government, for the first time, relied on nationality jurisdiction in its case against a U.S. citizen working as an interpreter in Iraq.18 The illegal conduct—offering a $60,000 bribe to an Iraqi police official—occurred exclusively abroad.

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10 The FCPA defines the term “interstate commerce” as “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.” 15 U.S.C. § 78dd-2(h)(5).
Nationality jurisdiction does not apply to the remaining categories of domestic concerns, namely, individual foreign residents in the United States and foreign business entities that maintain their principal place of business in the United States. The FCPA does not define “residency,” and it is unclear if the residency requirement applies only to lawful permanent residents, if it also includes individuals that continuously reside in the United States under some other immigration status, or if other definitions of residency, such as those found in the tax code, pertain. Though also undefined by the Act, a company’s “principal place of business” is typically the center of its business operations. If its operations are far-flung, however, the principal place of business may be the place where the company’s executive and administrative functions are located. Accordingly, New York would be the principal place of business of a Bermuda corporation that based its executives in, and generated most of its business from, its midtown Manhattan office.

c. Foreign Non-Residents

Congress amended the FCPA in 1998 to prohibit any person from using the U.S. mails and wires or performing any act, “while in the territory of the United States,” in furtherance of a corrupt payment. The 1998 amendments cover individual non-U.S. residents and foreign business entities that maintain their principal place of business overseas. In guidance issued in 2001, the DOJ liberally construed the phrase “while in the territory of the United States” to include foreign non-residents who cause, either directly or through an agent, an act in furtherance of a corrupt payment in U.S. territory. Under this view, physical presence in the United States is not required to create jurisdiction. This construction seemingly makes it almost a certainty that, if U.S. mails and wires are used, the territory nexus is satisfied.

The DOJ has prosecuted foreign subsidiaries of U.S. companies under this provision. In United States v. Syncor Taiwan, Inc., the Taiwanese subsidiary indirectly owned by a California medical device manufacturer pleaded guilty to paying physicians employed by government-owned hospitals in an effort to boost sales. The criminal information alleged that the foreign subsidiary had mailed budgets that included line items reflecting the corrupt payments to the parent company in California. In another case, the government brought and settled an enforcement action against a foreign subsidiary that had sent invoices to, and received wire transfers from, its U.S.-based parent company in connection with improper payments to employees of state-owned steel producers in China. In that case, the jurisdictional hook for liability, according to the criminal information and plea agreements, was that while in the United States, a U.S. citizen and employee of the foreign subsidiary executed the wire transfer requests that facilitated the corrupt payments.

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19 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD R. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3625 (3d ed. 1998). In 2010, the Supreme Court clarified that a corporation’s principal place of business is its “nerve center,” or the location where its officers “direct, control, and coordinate the corporation’s activities.” Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192 (2010). The Court noted that this “should normally be the place where the corporation maintains its headquarters,” so long as the headquarters were actually the location from which the company was controlled and not simply the location where board meetings are held. Id.


21 Whether U.S. courts may exercise personal jurisdiction over a foreign non-resident is a separate issue the government must satisfy in order to mount a prosecution. In order to establish personal jurisdiction, the foreign non-resident must have sufficient connections or contacts to the United States.


25 United States v. Wooh, No. CR 07-244-KI (D. Or. 2007).
The government has continued to take an expansive approach to jurisdiction based on whether a non-U.S. resident acted as an agent of an issuer or a domestic concern, or “caused” an act in furtherance of a corrupt payment in United States territory. For instance, in settlements arising from the Bonny Island project that drove the Halliburton/KBR and other enforcement actions, authorities asserted jurisdiction over non-U.S. companies based on bank transfers between foreign accounts that passed through U.S. accounts. For one non-U.S. company involved in that conspiracy, Marubeni Corp., the government’s asserted jurisdiction was even farther removed—it rested on the fact that Marubeni had been hired by two U.S. companies to assist in retaining business in Nigeria, and was therefore deemed their agent, within the meaning of the FCPA, and on the fact that the overall scheme involved limited acts in the United States and use of the U.S. wires. To support the FCPA conspiracy charge, the criminal information against Marubeni alleged that Marubeni attended a meeting in Houston and faxed a letter to Houston from outside the United States, while co-conspirators directed a wire transfer from a bank in Amsterdam through an account in the United States to the accounts of another co-conspirator in Switzerland. The information also alleged that Marubeni had aided and abetted KBR’s FCPA violation by receiving a wire transfer that occurred entirely “outside the United States.”

In another expansion of territorial jurisdiction, in a case against several executives of Magyar Telekom (the “Straub” case), the SEC asserted anti-bribery jurisdiction based on the fact that emails allegedly in furtherance of the bribery scheme, although sent from locations outside the United States, were routed through or stored on U.S. servers. In a recent decision, the court agreed that the mere routing of emails through the United States was a sufficient nexus to establish jurisdiction. The court held that the FCPA’s corrupt intent requirement did not apply to the jurisdictional element, and thus that the defendants’ emails sufficed to plead the jurisdictional element even if the defendants had not known their email would be routed through or stored in U.S. servers. It also rejected the defendants’ argument that “the requirement ‘make use’ [of a means or instrumentality of interstate commerce] implies that a defendant must have made direct use.” Finally, the court signaled approval of the government’s position that causing an act in furtherance of a corrupt payment in the United States gives rise to jurisdiction, rejecting the defendants’ argument to the contrary and holding that “the difference between ‘causes to’ and ‘uses’ is not so great as to enable the Court to divine a congressional intent to impart a different meaning to one statutory provision and not to another.” The Guidance states that foreign non-residents “may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce.” This concept of acting “indirectly” in the territory of the United States does not appear in the text of the statute. The Guidance also notes that foreign non-residents may be subject to prosecution if they aid and abet, conspire with, or act as an agent of an issuer or domestic concern, even if the foreign entity or individual does not itself act within the United States. But the Guidance does not address the broader territorial questions discussed in Halliburton/KBR and Straub, nor does it discuss whether merely causing an act to occur in the United States is sufficient. And the only example of territorial jurisdiction given in the

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29 Id. at 16-17.
30 Id. at 17.
31 Id.
33 Id.
Guidance involves an act that clearly suffices—attending a meeting in the United States that furthers a bribery scheme.\(^{34}\) The case law reveals, however, that the DOJ and the SEC have a consistent pattern of pursuing actions against foreign companies. Notably, nine of the ten of the largest settlements under the FCPA have been with foreign issuers.\(^{35}\)

d. **Officers, Directors, Employees, Agents, and Stockholders**

As noted, the anti-bribery provisions apply specifically to the officers, directors, employees, agents, and stockholders of any issuers and domestic concerns, regardless of their own nationality or residency.\(^{26}\) As a result, parties falling into each of these categories face individual criminal liability for violating the Act. In recent years, the government has relied on this provision to bring criminal and civil actions against foreign nationals for conduct with a fleeting connection to the United States. A grand jury in Miami indicted a French citizen and a Costa Rican citizen, both executives at the French telecommunications company Alcatel, for their role in allegedly paying bribes to members of the board of directors of the Costa Rican telecom authority.\(^{37}\) The FCPA applied because Alcatel traded ADRs on the NYSE and certain wire transfers passed through U.S. banks. In 2001, the SEC and the DOJ, for the first time, brought a joint civil action against KPMG-SSH, a public accounting firm based in Jakarta, and Sonny Harsono, an Indonesian national and a partner at KPMG-SSH.\(^{38}\) U.S. enforcement authorities alleged that, acting as agents for Baker Hughes, Inc. (a publicly traded U.S. company), KPMG-SSH and Harsono paid a $75,000 bribe to an Indonesian tax official on behalf of Baker Hughes’ Indonesian affiliate in order to reduce a tax assessment entered against the affiliate. In 2011, the SEC brought civil actions against seven former non-U.S. executives at Siemens for their part in a bribery scheme that largely took place in Argentina and sought to secure a government contract there; the DOJ similarly charged multiple non-U.S. former executives with FCPA anti-bribery charges.\(^{39}\) FCPA charges against individuals can often result in dramatic punishment. In 2011, the former president of Terra Telecommunications Corp., Joel Esquenazi, received a 15-year prison sentence, the longest sentence under the FCPA to date, after being convicted on FCPA and money laundering charges.\(^{40}\) As President of Terra Telecommunications, Esquenazi had led an almost four-year scheme to pay shell companies in Haiti that, in turn, paid bribes to Haiti Teleco officials for business. Carlos Rodriguez, Executive Vice President of Terra, was convicted on similar counts and sentenced to 7 years in prison.\(^{41}\) These cases illustrate the government’s willingness to enforce the FCPA even where the conduct has little direct connection to the United States.

\(^{34}\) Id. at 12.


\(^{36}\) The anti-bribery provisions prohibit all officers, directors, employees, agents and stockholders of issuers and domestic concerns from using the mails or any instrumentality of interstate commerce in furtherance of a prohibited offer or payment. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). The FCPA also makes it unlawful for U.S. persons within these categories to do any act outside the United States in furtherance of a prohibited payment or offer, regardless of the use of the wires or instrumentalities of commerce. See id. §§ 78dd-1(g)(1), 78dd-2(g)(1).


In addition, as noted above, under most circumstances, basic principles of *respondeat superior* and corporate criminal liability will make covered persons liable for the FCPA violations committed by their employees or agents. The conduct of agents, a group that may include foreign non-residents who act outside the United States on behalf of a covered person, is particularly important, because a company may be held criminally liable for the acts of a single individual, even if its key officers did not know of the illegal payments. For a discussion of the diligence required of agents, see Section III.D.3., and for a discussion of the components of a compliance program pertaining to agents, see Section IV.B.3.

e. **Special Considerations for Subsidiaries and Affiliates**

The DOJ takes the position that U.S. companies may be held liable for actions of their foreign subsidiaries. The government may rely on several legal theories to support this view. First, in other contexts, criminal responsibility arises where the parent and subsidiary are found to be part of a unitary enterprise and the parent controls and directs the subsidiary. This theory, however, is typically applied in the case of majority-owned or wholly-owned subsidiaries that operate as part of a single group. In its simplest form, the subsidiary is found to be the “alter ego” of the parent, and a court will “pierce the corporate veil” in either a civil or criminal context.

Second, a parent could potentially be held criminally liable when it “ratifies” or acquiesces in acts of a subsidiary—i.e., where the parent, after the fact, learns of the subsidiary’s conduct and knowingly accepts the benefits of the criminal activity. This is an important consideration in the mergers and acquisition context.

Third, as discussed in the previous subsection, under basic principles of agency and criminal law, a company is vicariously responsible for the actions of its agents, including independent consultants and foreign subsidiaries acting as agents. This is an emerging area in the context of FCPA enforcement. Because no cases have litigated the issue since the 1998 amendments, lessons must be drawn from plea agreements or other settlements with the government where the theory of liability is not always clear. Further complicating matters is a trend where the foreign subsidiary accepts criminal responsibility for making corrupt payments while the U.S. parent settles the separate civil case (without admitting liability) brought by the SEC. These settlements can overemphasize the importance of the agency relationship in a particular case where non-public evidence may suggest that the parent knew of or participated in the illegal conduct.

Prior to the 1998 amendments, there was some question as to whether a U.S. company could be held liable for the acts of its foreign subsidiary under an agency theory. At least one court, in the context of a civil RICO suit, analyzed the FCPA’s legislative history and found that Congress had excluded foreign subsidiaries of U.S. corporations from the Act.42 Since then, enforcement authorities have used an agency theory against both U.S. parent companies and their foreign subsidiaries. In one case, the DOJ filed criminal charges against the Chinese subsidiary of a U.S. corporation for cash payments made to employees of state-owned hospitals, and the SEC brought and settled a civil case against the parent.43 The FCPA applied to the foreign subsidiary because it was acting as an agent of a U.S. company. In turn, the SEC based its case against the U.S. parent on the same agency relationship. The parent company faced liability even though there were few allegations concerning the Chinese subsidiary’s status as an agent, and the parent halted the improper payments shortly after uncovering the practice and took additional remedial measures, including the establishment of a compliance program.44

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In their recent guidance, the DOJ and the SEC reaffirmed their position that “traditional agency principles” can give rise to jurisdiction over a parent corporation even where the parent did not actually participate in the illegal conduct of its subsidiary.45 “If an agency relationship exists, a subsidiary’s actions and knowledge are imputed to its parent. Moreover, under traditional principles of respondeat superior, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company.”46 The “fundamental characteristic” of agency, according to the Guidance, is control. Accordingly, the government will “evaluate the parent’s control—including the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent.”47 This analysis is not limited to “the formal relationship” between the two entities; it will also examine the actual interactions the two have.48

While the threshold for determining when a subsidiary qualifies as an agent of its parent is not always clear, any insulation otherwise offered by the separate incorporation of the subsidiary will be jeopardized when a parent company controls and directs a foreign subsidiary or a foreign employee of a subsidiary. Even when a subsidiary is acting independently, a parent may be liable for failing to prevent violations of which it knew or should have known. Similarly, a parent company may be held liable for ratifying prior conduct by accepting its benefits after the fact. The Guidance provides some insight on this point, indicating that “control” is the “fundamental characteristic of agency.” Accordingly, conduct may be imputed from the agent to the parent where the parent possesses some control, no matter how slight, over the subsidiary.49 For example, the DOJ entered into a NPA with Tyco on the basis that an FCPA violation by several of Tyco’s subsidiaries was imputed to Tyco because Tyco disclosed the financial information of the subsidiaries involved in the illegal conduct to the public through the electronic filing of periodic and annual reports on SEC Forms with the SEC. The SEC’s complaint elaborates on the relationship between Tyco and its subsidiary, alleging that Tyco’s subsidiary and agent, TE M/A-Com, Inc., retained a U.S. agent who made illicit payments in connection with a 2006 sale of microwave equipment to an instrumentality of the Turkish government. The complaint further provides documentary evidence of the bribe in the form of an email between employees of TE M/A-Com Inc. stating “[H]ell, everyone knows you have to bribe somebody to do business in Turkey.” Liability was imputed to Tyco because Tyco executed control over TE M/A-Com by utilizing dual roles for its officers: four high-level Tyco officers also served as officers of TE M/A-COM, including as president and as a member of the board of directors. Although no evidence was provided that these officers knew of the illegal conduct, the SEC imputed liability because through the corporate structure and the dual roles of the officers, Tyco controlled TE M/A-COM. Even where no agency relationship was alleged, the government has instituted proceedings against both U.S. companies for the actions of their foreign subsidiaries and foreign subsidiaries of U.S. corporations. For example, the SEC brought an enforcement action against a California company for bribes paid through its foreign subsidiaries in Taiwan, Mexico and Europe.50

The SEC alleged that, at least on some occasions, the payments were made with the knowledge and

45 See 2012 DOJ-SEC FCPA Guide at 27.
46 Id.
47 Id.
48 Id.
49 Id. at 27-28. (“For example, SEC brought an administrative action against a parent for bribes paid by the president of its indirect, wholly owned subsidiary. In that matter, the subsidiary’s president reported directly to the CEO of the parent issuer, and the issuer routinely identified the president as a member of its senior management in its annual filing with SEC and in annual reports. Additionally, the parent’s legal department approved the retention of the third-party agent through whom the bribes were arranged despite a lack of documented due diligence and an agency agreement that violated corporate policy; also, an official of the parent approved one of the payments to the third-party agent.”).
approval of the parent company's founder and chairman of the board. The DOJ charged the subsidiary as a foreign non-resident because these acts took place in the United States. In another case, the SEC alleged that a Pennsylvania corporation made unlawful payments to Indian government employees through a fourth-tier foreign subsidiary.\footnote{Litigation Release No. 20457, SEC v. Westinghouse Air Brak...AccessRelease2008/34-57333.pdf.} The SEC asserted that the subsidiary’s chairman, a non-U.S. resident and vice president of the parent company, “knew about and did nothing to prevent” the corrupt payments.\footnote{See Press Release, DOJ, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm.} The SEC did not plead specific facts establishing the use of U.S. mails and wires by employees of the parent or the subsidiary. The complaint suggests that knowledge and inaction by a dual employee was sufficient to trigger liability for acts of a foreign subsidiary. It remains to be seen whether the government will apply this standard in future cases.

Foreign subsidiaries of foreign issuers have also faced prosecution under the FCPA. In 2004, ABB Vetco Gray UK Ltd., the United Kingdom subsidiary of a Swiss company, pleaded guilty for its role in paying over $1.1 million to Nigerian government officials in an effort to secure oil and gas contracts.\footnote{Press Release, DOJ, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (July 6, 2004), available at http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm.} The parent company, ABB Ltd., settled an SEC action alleging violations of the FCPA's anti-bribery and books and records provisions for using its subsidiaries to pay bribes to officials at state-owned oil and gas companies in Nigeria, Angola, and Kazakhstan.\footnote{Exchange Act Release No. 57333, Cease-and-Desist Order, In re Westinghouse Air Brake Techs. Corp., Admin. Proceeding File No. 3-12967 (SEC Feb. 14, 2008), available at http://www.sec.gov/litigation/admin/2008/34-57333.pdf.} The government asserted jurisdiction based on acts performed through ABB Ltd.’s subsidiary in Texas. More recently, in 2011, the SEC alleged in a Cease-and-Desist Order that Diageo Plc, a UK company, and its foreign subsidiaries had failed to properly account for illicit payments to foreign officials that were made to secure sales and tax benefits in India, Thailand and South Korea because they had recorded them as legitimate expenses for third party vendors and private customers, vaguely recorded them, or failed to record them entirely.\footnote{Litigation Release No. 20457, SEC v. Westinghouse Air Brak...AccessRelease2008/34-57333.pdf.}

### f. Conspiracy Liability

The Act’s jurisdictional reach extends even further (over both corporations and individuals) where the government charges a conspiracy to bribe a foreign official. A conspiracy charge likely permits the government to use an international phone call or e-mail by one member of the conspiracy to assert jurisdiction over the remaining co-conspirators.\footnote{See United States v. Smith, 920 F. Supp. 245, 249 (D. Me. 1996) (attributing use of interstate commerce by conspiracy as a whole to defendant in drug distribution case); United States v. Rosa, 17 F.3d 1531, 1546 (2d Cir. 1994) (finding that knowledge by one member of conspiracy of interstate travel of stolen goods satisfied jurisdictional element as to all members of the conspiracy); Matthew J. Feeley, U.S. Foreign Corrupt Practices Act’s Applicability to Non-U.S. Entities Sponsoring American Depository Receipts, 8 Bus. L. Int’l 91, 97 (2007) (“Like co-conspirators, knowing participants in the scheme are legally liable for their co-schemers’ use of the mails or wires.”) (internal citations omitted)).} For example, if five individuals agree to bribe a Chinese government official and the payment is made in Dubai, an e-mail confirming the payment sent by one of the co-conspirators that passes over U.S. wires could be viewed by U.S. authorities as sufficient to trigger FCPA jurisdiction for all five members of the conspiracy.\footnote{United States v. Smith, 920 F. Supp. 245, 249 (D. Me. 1996) (attributing use of interstate commerce by conspiracy as a whole to defendant in drug distribution case); United States v. Rosa, 17 F.3d 1531, 1546 (2d Cir. 1994) (finding that knowledge by one member of conspiracy of interstate travel of stolen goods satisfied jurisdictional element as to all members of the conspiracy); Matthew J. Feeley, U.S. Foreign Corrupt Practices Act’s Applicability to Non-U.S. Entities Sponsoring American Depository Receipts, 8 Bus. L. Int’l 91, 97 (2007) (“Like co-conspirators, knowing participants in the scheme are legally liable for their co-schemers’ use of the mails or wires.”) (internal citations omitted)).} In a related context, the government has taken the position that the FCPA “does not require that each individual defendant personally use an interstate facility or even authorize one to be used.”\footnote{United States, Response of the United States to Questions Relating to Phase I and Phase II (OECD Questionnaire), question 1.1, available at http://www.usdoj.gov/criminal/fraud/fcpaAntlagree/related/usrph1-2quest.html.} For example, in 2011, the
government asserted jurisdiction over JGC, the first Japanese company prosecuted under the FCPA, based on alleged conspiracy with domestic concerns/issuers to bribe Nigerian officials to obtain construction contracts, even though JGC is neither a domestic concern nor an issuer itself. Although JGC did not itself facilitate any improper payments, it was nevertheless liable under the FCPA because, in coordination with its co-conspirators, its agents’ payments to the Nigerian officials passed over U.S. wires. The Marubeni settlement, discussed above, reflects the same approach. And in their recent guidance, the DOJ and the SEC again reiterated their position that “[i]n conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States.”

2. Accounting Provisions

a. Issuers

The FCPA’s books and records and internal controls provisions apply only to issuers (whether based in the United States or elsewhere) whose stock is traded on national exchanges or in the over-the-counter market. They do not apply to private companies. The books and records requirement applies broadly to all books, records, and accounts that “reflect the transactions and disposition of the assets of the issuer,” and any inaccurate or misleading entry (even those unconnected with foreign bribery) is prohibited. Notwithstanding the name “The Foreign Corrupt Practices Act,” these provisions apply to wholly domestic transactional matters as well. In fact, one of the first enforcement actions brought under this provision was against Playboy Enterprises for entirely domestic conduct involving the company’s failure to accurately record expenses incurred by Hugh Hefner. The internal controls provision requires issuers to devise and maintain a system of accounting controls to monitor the execution of company transactions to ensure that all such transactions are accurately recorded. Unlike the anti-bribery provisions, the accounting provisions do not require a nexus to interstate commerce.

The FCPA’s accounting provisions also make issuers responsible for the books and records and, indirectly, the conduct of their subsidiaries and affiliates, wherever located. When an issuer controls more than fifty percent of the subsidiary’s stock, the subsidiary must comply with the FCPA record-keeping requirements in the same manner as the parent corporation.

The Act also imposes liability for the inaccurate books and records of all majority-owned affiliates. As a result, the conduct of foreign affiliates poses unique challenges for issuers. In 2002, Monsanto Company discovered that two of its Indonesian affiliates, utilizing off-book slush funds, paid over $700,000 in bribes to government officials and inaccurately recorded the payments as bona fide services and product sales. Monsanto incorporated these inaccurate books into its consolidated financials. Without admitting liability, the company agreed to pay a $500,000 civil penalty and a $1 million criminal fine. In another case, AB Volvo—the Swedish transport company that trades ADRs on the NASDAQ—settled an SEC action and entered into a DPA with the DOJ based on the conduct of two wholly-owned foreign subsidiaries.

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60 2012 DOJ-SEC FCPA Guide at 34.
in connection with the UN Oil-for-Food Program. The government alleged that the subsidiaries paid government ministries, in the form of kickbacks, approximately ten percent of the value of contracts awarded by the Iraqi government under the UN program. The subsidiaries improperly recorded these disbursements as “payments to suppliers” or “commissions.” AB Volvo subsequently incorporated these inaccurate books into its year-end financial statements. The company agreed to pay over $19.6 million in disgorgement, pre-judgment interest, and civil and criminal penalties to settle the actions.

Liability under the books and records provision allows the government to reach payments far down the corporate chain and penalize improperly recorded payments to governmental entities. For example, the SEC brought an action against a U.S. company for the failure of a fifth-tier foreign subsidiary to book accurately payments to Indian officials where the payments were made without knowledge or approval of the U.S. parent. In another case, a U.S. company settled with the government after its employees paid commercial bribes (in addition to payments to foreign officials) to sales managers of privately-owned steel mills in China and South Korea. The payments violated the FCPA because they were improperly recorded as “commissions” or “rebates.”

The books and records provisions also permit the government to penalize issuers for purely foreign payments by foreign parties in circumstances where the government likely could not establish jurisdiction under the anti-bribery provisions. The Dow Chemical settlement provides one example of this. There, employees of one of Dow’s Indian subsidiaries made payments to key members of a federal regulatory committee in connection with the registration of the subsidiary’s agro-chemical products. In addition, the subsidiary bribed thousands of state licensing officers, typically in increments of less than $100. The Indian subsidiary did not accurately record these payments in its books and records. The government likely lacked jurisdiction to bring a criminal or civil anti-bribery claim because the payments were made by Indian employees of an Indian corporation outside of the United States and, based on the publicly available information, there was no use (via e-mail, telephone or otherwise) of the instrumentalities of U.S. commerce. However, the failure of the subsidiary to record the payments accurately (i.e., as bribes) made it possible for the SEC to penalize the issuer for the underlying conduct of its subsidiary.

Where an issuer holds less than 50 percent of the voting power, the accounting provisions require it to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls.” What is “reasonable under the circumstances” will vary depending on the degree of control and the laws and practices of the country in which the subsidiary or affiliate is located. For example, while it may not be feasible to impose U.S.-style generally accepted accounting principles on a minority-owned foreign affiliate, U.S. enforcement authorities expect issuers to take prompt action upon discovery of corrupt payments. If the issuer can show good-faith efforts to use its influence, it will have presumptively fulfilled its legal obligation.

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69 See 2012 DOJ-SEC FCPA Guide at 43.
In other contexts, the SEC has taken the position that an ownership interest of less than 50 percent may nonetheless confer control, depending on the relative shares of ownership and minority shareholder rights, such as the ability to block or veto certain activities, to appoint senior management, or to block a quorum. A U.S. company capable of using such minority shareholder rights to exercise de facto control may thus face a greater burden under the accounting provisions.

b. Individuals

The accounting provisions also apply to individuals, including officers, directors, employees and shareholders of issuers, who cause the falsification of the issuer’s books and records or fail to implement or circumvent required internal accounting controls. For a discussion of the elements of a violation of the accounting provisions, see Section II.B.3., infra.

3. The Personal Jurisdiction Requirement

As the foregoing makes clear, the FCPA’s statutory jurisdiction has been interpreted broadly in past cases by both the courts and the government. But even if the FCPA encompasses a defendant’s alleged conduct, the constitutional requirement of personal jurisdiction provides a separate check on the government’s ability to bring suit against a foreign entity. In any lawsuit brought in a U.S. court, the defendant must have sufficient ties to the country (or, in some cases, the State within which the suit was filed) that the exercise of the court’s jurisdiction comports with due process. The party bringing suit must show that the defendant has “minimum contacts” with the forum, and that the exercise of jurisdiction is reasonable because it “does not offend traditional notions of fair play and substantial justice.” There are two ways to satisfy the minimum contacts threshold: general jurisdiction (where the defendant has such “continuous and systematic” contacts with the United States that it is considered at home in the country and therefore subject to U.S. jurisdiction for any and all lawsuits filed against it) and specific jurisdiction (where the claims arose out of or are related to some action the defendant purposefully directed at the United States, rendering the defendant subject to U.S. jurisdiction only for those particular claims).

The personal jurisdiction requirement is easily satisfied when the defendant is a citizen or resident of the United States. But foreign non-residents facing enforcement actions have raised personal jurisdiction defenses in a number of FCPA cases. In Sharef, for example, the SEC brought a civil action in the Southern District of New York against a number of former senior executives at Siemens AG. One was a foreign national alleged to have encouraged another individual to authorize bribes to officials in Argentina. The defendant did not have the power to authorize the bribes himself, and once others in the company authorized the payments the defendant had very little involvement in actually making them. The government argued that there was specific jurisdiction over the defendant because he was a participant in a fraud directed at deceiving U.S. shareholders. The court disagreed, holding that absent a role in preparing false financial statements or otherwise covering up the allegedly illegal payments, the defendant could not be said to have directed conduct at the United States.

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74 Id. at 16.
75 Id. at 19.
by contrast, another judge in the Southern District of New York found that there was personal jurisdiction over three foreign executives of Magyar Telekom, Plc because their employer traded securities through ADRs listed on the New York Stock Exchange and because each of the defendants allegedly signed false management representation letters. The court concluded that by signing the letters knowing that they would likely be relied upon by U.S. investors, the defendants had purposefully directed actions at the United States and were thus subject to specific jurisdiction for suits related to those false representations. The court additionally found that the exercise of jurisdiction was reasonable, noting that where a suit is brought under federal law—and there is thus no alternative forum—courts virtually never decline to exercise jurisdiction on reasonableness grounds. The divergent results in these cases show that the determination concerning personal jurisdiction is an intensely fact-dependent exercise, the outcome of which can be difficult to predict.

B. What are the Elements of a Violation of the FCPA?


The FCPA's anti-bribery provision contains seven separate elements:

a. An Act By a Covered Person

As discussed above, the Act applies to U.S. and foreign issuers, domestic concerns, and foreign non-residents who meet the various jurisdictional requirements.

b. In Furtherance of an Offer, Payment, Promise to Pay, or Authorization of Payment

While the FCPA requires an act, it is critical to note that it does not require that a payment or transfer be made. Merely offering or authorizing a bribe triggers liability under the FCPA, and the statute applies even if the foreign official never bestows the desired benefit. In Monsanto, the company authorized an employee of a consulting firm to pay a senior Indonesian environmental official $50,000 to rescind or amend a requirement that Monsanto's products undergo an environmental impact study. U.S. enforcement authorities instituted proceedings despite the fact that the official never took any action in Monsanto's favor. Similarly, one company was held accountable for a violation of the FCPA's anti-bribery provisions because it promised $850,000 in bribes to Iraqi government officials, even though no payment was ever made. The government has successfully argued that a jury need not agree unanimously on a specific act that was committed "in furtherance" of the conspiracy. Accordingly, "although proof of at least one overt act is necessary to prove an element of the crime, which overt act among multiple such acts supports proof of a conspiracy conviction is a brute fact and not itself element of the crime. The jury need not reach unanimous agreement on which particular overt act was committed in furtherance of the conspiracy. Moreover, "in furtherance" merely requires that a connection exist between the person's—or his agent's—

76 Memorandum and Order, Straub, supra note 28, at 9.
77 Id.
78 Id. at 12.
81 United States v. Kozeny, 667 F.3d 122, 131-32 (2d Cir. 2011).
82 Id. at 132.
utilization of interstate commerce and the unlawful payment. Unfortunately, the legislative history provides no guidance on the meaning of “in furtherance;” it merely reiterates the language of the statute. The Fifth Circuit in United States v. Kay, however, provided some insight into the scope of “in furtherance,” by rejecting defendant’s argument that a “defendant can only be convicted under the bribery portion of the FCPA if the defendant used the mails or other interstate commerce in furtherance of making the bribe itself and not for more broad use of interstate commerce for activities that support the bribe payment.” The Court concluded that “[t]he indictment, by alleging that the false documents transported by interstate means were transported in furtherance of bribes, accurately tracked the interstate commerce element of the FCPA and was supported by evidence from the case. It placed Defendants on notice as to the crime charged and allowed them to present an effective defense. The indictment and the evidence were therefore sufficient with respect to the interstate commerce element of the FCPA.”

In other words, the Court upheld the conviction even though no payment—only documentation supporting the bribes—actually transported in interstate commerce.

c. Anything of Value

There is no minimum threshold under the Act—liability exists from the offer or payment of the first dollar or dinar. Indeed, the government has pursued actions for the payment of as little as $43,000 in the aggregate, and in one case pursued a company that had made just $4,500 of allegedly improper payments. In the Dow Chemical matter, the total payments exceeded $200,000 in the aggregate, but individual payments often amounted to less than $100 each. Moreover, although the FCPA does not define “anything of value,” the term is as broad as it sounds, and is not limited to the offer or payment of money. Companies and individuals have faced liability for providing travel and entertainment, offering employment to family members, funneling money to the election campaign of a political candidate, paying for shopping excursions and medical expenses, and for arranging the services of prostitutes. However, the Guidance emphasized that a gift or payment violates the statute only if the payor intends to improperly influence the recipient, and that that standard is unlikely to be met by small gifts such as cups of coffee or taxi fare. It moreover noted that the “DOJ’s and the SEC’s anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.”

Courts have also construed the phrase “anything of value” broadly in the context of domestic bribery prosecutions. These cases teach that the relevant “value” is not an item’s objective worth, but rather the subjective value attached by the recipient. Though the object may have little real value, corruption occurs when a public official “agrees to misuse his office in the expectation of gain, whether or not he has correctly assessed the worth of the bribe.” For example, the Veraz complaint noted the purchase of cups of coffee or taxi fare by a public official.
of flowers for the wife of the CEO of a government-controlled telecommunications company constituted an item of value.93 Items of value may also include the intangible, such as sham or no-show jobs94 or travel accommodations to popular destinations.95

In a noteworthy enforcement action, Schering-Plough, a New Jersey-based pharmaceutical company, settled books and records and internal controls charges brought by the SEC in connection with payments by its Polish subsidiary to the Chudow Castle Foundation, a charitable organization established to preserve and restore castles in Poland’s Silesian region.96 According to the SEC’s complaint, Schering-Plough’s subsidiary donated approximately $76,000 to the Foundation over a three-year period. During this time, the Foundation’s founder served as the director of the Silesian Health Fund, a government body that oversaw the procurement of medical supplies for regional hospitals. The SEC determined that Schering-Plough’s employees provided false justifications for the donations and that the director did not view the payments as donations to a bona fide charity, but rather as “dues” intended to secure favorable treatment from the Health Fund.97 While the SEC did not allege violations of the anti-bribery provisions (perhaps for jurisdictional reasons), it regarded the payments as an effort to influence official action by providing a benefit to an organization near and dear to the director. In another action involving donations to the same charity, the Chudow Castle Foundation, the SEC commenced an enforcement action against Eli Lilly, a Indiana-based pharmaceutical company.98 According to the SEC’s complaint, Eli Lilly’s wholly-owned Polish subsidiary made eight payments totaling approximately $39,000 to the foundation in order to influence its founder to purchase a Lilly product.

Recent enforcement actions have also focused on travel and entertainment provided to foreign government officials. In the Lucent Technologies matter, the government alleged that Lucent spent $10,000,000 over a three-year period to provide travel and other things of value to high-level employees of state-owned telecom companies in China.99 These companies were existing customers or enterprises with which Lucent sought to do business. Lucent spent over $1.3 million dollars on “pre-sale” trips for foreign officials to attend seminars and visit Lucent facilities. Many of these trips consisted primarily of sightseeing and other leisure activities. Lucent also sponsored “factory inspection tours.” Lucent, however, had outsourced its manufacturing, and the trips—valued at $25,000-$50,000 per person—primarily constituted sightseeing in major U.S. cities, as well as tours of Universal Studios and Disneyland. Enforcement authorities viewed the skewed ratio between social outings and business meetings and Lucent’s mischaracterization of the trips as improper. Again, while the DOJ did not pursue an anti-bribery prosecution, it found that the travel and entertainment constituted a “thing of value”

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93 Complaint, Veraz, supra note 87, ¶ 13.
that Lucent inaccurately recorded in its books and records.\textsuperscript{100} Lucent settled the matter and paid penalties totaling $2.5 million.

In 2011, the SEC provided further guidance suggesting that a company’s subsidiaries must also maintain sufficient internal mechanisms for tracking and reviewing expenses.\textsuperscript{101} For instance, in In re Diageo, the SEC alleged that a Korean subsidiary had paid the travel expenses of foreign officials for recreational side-excursions taken during a trip that was ostensibly being made to tour production facilities.\textsuperscript{102}

d. \textit{Directly or Indirectly}

As Monsanto illustrates, the FCPA prohibits doing indirectly what cannot legally be done directly. That is, a covered person cannot use third parties to circumvent the Act if it knows, or consciously disregards a “high probability,” of a corrupt payment made on its behalf. Congress specifically included a broad definition of knowledge to negate the “head in the sand” defense. A large percentage of the settled FCPA enforcement actions involve “indirect” payments made through third parties, such as agents or consultants. In one of the largest FCPA settlement to date, an oil services company admitted that it, along with its wholly-owned subsidiary, paid millions of dollars in commissions to a consulting firm, an agent located on the Isle of Man. It did so knowing that the agent would transfer the funds to officials at the Kazakhstan national oil company in order to win a services contract on a massive drilling project.\textsuperscript{103} Courts have also found that individuals who acted with “willful blindness” as to corrupt activities, deliberately avoiding red flags, have met this element of a violation. In December 2011, the Second Circuit affirmed the conviction of Frederic Bourke for conspiracy to violate the FCPA and the Travel Act, ruling that though Bourke may not have acquired “actual knowledge” of the bribery scheme at issue, he participated in it and consciously avoided the red flags that had been raised around the scheme.\textsuperscript{104} In discussing the particular red flags Bourke deliberately avoided, the Court focused on (1) his knowledge of the pervasiveness of corruption in the country, (2) the establishment of “advisory companies” intended to shield him from FCPA liability, (3) his expression of concern during a taped phone conference about his liability if bribes were paid, and, finally, (4) advice from his lawyer that bribes might have been paid.\textsuperscript{105} When viewed in totality the Court opined that “a rational juror could conclude that Bourke deliberately avoided confirming his suspicions” that bribes were paid.\textsuperscript{106} After the jury returned its verdict, the foreman was quoted as saying about Bourke’s knowledge that “We thought he knew and definitely should have known. He’s an investor. It’s his job to know.” The government has also targeted companies that paid agents with links to the government (who then bribed foreign officials) without conducting sufficient due diligence\textsuperscript{107} and where officers disregarded evidence that a local distributor, who was not an agent or employee of the company, intended to make illicit payments to


\textsuperscript{104} \textit{United States v. Kozeny}, 667 F.3d 122 (2d Cir. 2011).

\textsuperscript{105} Id. at 133.

\textsuperscript{106} Id.

secure additional business. These cases teach that companies cannot overlook suspicious conduct by consultants, subsidiaries, or agents and successfully claim that they did not know bribes had been paid. (See Section IV.B.3.a, infra, for a discussion of “red flags” that require further investigation.)

e. To a Foreign Official

Contrary to common assumptions, the FCPA does not only prohibit payments to elected government officials or ministers. The statutory definition of a “foreign official” is far broader, and includes “any officer or employee of a foreign government, or any department, agency or instrumentality thereof, or of a public international organization, or to a foreign political party, official of a political party, or foreign political candidate.” This broad definition covers any employee of any branch of state, local, or federal government, including the judiciary, appointed as well as elected officials, the police and the military, and employees of state-owned or state-controlled enterprises.

Although the statute does not define an “instrumentality” of foreign government, U.S. enforcement authorities have taken the position that the term includes state-owned or controlled commercial enterprises. There is no clear rule regarding what percentage of ownership triggers coverage under the Act. At a minimum, it appears that US regulators will likely regard any enterprise in which a foreign government owns more than 50 percent as an instrumentality of a foreign government, and its employees are therefore foreign officials under the FCPA. However, enforcement authorities will also consider such factors as:

- “The foreign state’s degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);”
- “The foreign state’s characterization of the entity and its employees;”
- “The circumstances surrounding the entity’s creation;”
- “The purpose of the entity’s activities;”
- “The entity’s obligations and privileges under the foreign state’s law;”
- “The exclusive or controlling power vested in the entity to administer its designated functions;”
- “The level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);”
- “The entity’s provision of services to the jurisdiction’s residents;”
- “Whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government;” and
- “The general perception that the entity is performing official or governmental functions.”


109 The inclusion of “public international organization” in the definition of “foreign official” was another significant aspect of the 1998 amendment. The Act defines “public international organization” to include organizations in which the United States participates pursuant to any treaty or under any Act of Congress and designated by the President through appropriate Executive Order, through the International Organizations Immunities Act, Pub. L. No. 110-234, 59 Stat. 669, 22 U.S.C. § 288; or any other international organization specifically designated by the President by Executive Order. See 15 U.S.C. § 78dd-1(f)(1). This includes organizations like the International Monetary Fund, the World Health Organization, and the International Committee of the Red Cross.

Accordingly, although an enterprise is unlikely to qualify as an instrumentality of government if the state owns less than 50 percent of its shares, it could nonetheless qualify if the state exercises effective control (such as through golden shares).

Further, when courts have been faced with the issue, they have largely ruled that the question of whether an entity is an instrumentality of a foreign government is a fact-intensive inquiry suitable for a jury. Because courts have declined to rule as a matter of law that entities are not instrumentalities of government, defendants have so far been unable to terminate prosecutions through motions to dismiss. As a result, cases have proceeded to trial. On the merits of the definition, courts have so far tended to echo the same factors advanced by the government. In recent FCPA trials, federal judges have instructed juries to consider the following non-exclusive factors to determine whether an entity is a government instrumentality: the entity provides a service to the citizens of the jurisdiction; key officers and directors are, or are appointed by, government officials; the entity is financed, at least in large part, by government appropriations or revenue; the entity is vested with and exercises unique power to administer its function; and the entity is widely understood to be performing a governmental function.

In short, the FCPA prohibits more than the bribery of high government officials, and includes improper payments to employees of state-owned or controlled enterprises. In many parts of the world, the state owns companies in a broad cross section of industries. As a result, payments which have little chance of distorting sovereign functions of government fall within the scope of the FCPA. Enforcement authorities have targeted improper payments made to employees at state-owned hospitals, oil companies, and steel mills, members of political parties, and tax, customs or other regulatory officials. Moreover, as the Schering-Plough example illustrates, though the Act applies to corrupt payments to individual officials or political parties, care must be taken to ensure that payments to other entities, such as a bona fide charities, do not provide value (psychic or otherwise) to foreign officials.

Finally, the FCPA’s definition of “foreign official” was amended in 1998 to include employees and representatives of public international organizations listed in 22 U.S.C. § 288, such as the World Bank and World Trade Organization.

### f. Corruptly

The FCPA criminalizes only payments intended to improperly influence a foreign official. The intent to secure a *quid pro quo* is essential. The individual offering the bribe must intend to buy the misuse of the foreign official’s position, though there need not be an explicit agreement or meeting of the minds between offeror and offeree. The Guidance observes that the offeror does not necessarily need to know the identity of the offeree; authorizing payments without knowledge of the specific individuals who will receive them is sufficient. In SEC v. Jackson, the District Court for the Southern District of

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113 Information, Syncor Taiwan, Inc., supra note 50.
116 See Kay, 359 F.3d 738.
118 2012 DOJ-SEC FCPA Guide at 14; see also Memorandum and Order, Straub, supra note 28, at 18.
Texas recently took the same view, denying Noble Corporation executive officers’ Mark Jackson and James Ruehlen’s Motion to Dismiss asserting that the SEC must allege by name, or at minimum by role and job responsibility, the foreign official sought to be influenced. The Court, however, disagreed, ruling that “[t]he language of the statute does not appear to require that the identity of the foreign official involved be pled with specificity.” The court observed that “it would be perverse to read into the statute a requirement that a defendant know precisely which government official, or which level of government official, would be targeted by his agent; a defendant could simply avoid liability by ensuring that his agent never told him which official was being targeted and what precise action the official took in exchange for the bribe.” The need for “corrupt intent” overlaps with the requirement, discussed in subsections (g) and (h), that a payment be made to influence an official act or secure any improper advantage in an effort to win or retain business. The three elements are most sensible when applied in conjunction and should be read together. For instance, while courts have not yet addressed the issue, it is unlikely that a defendant could successfully argue that he did not intend a quid pro quo where the offer or payment to the foreign official could improperly aid his business in a direct way.

The illicit nature of a payment may be inferred from, among other things, its lavishness, lack of transparency, whether the company has pending business before the government official or agency and, with respect to agents, whether the payment is commensurate with the work performed or expertise involved. In several written opinions issued in connection with the participation of foreign officials in conferences or promotional tours sponsored by U.S. companies, the DOJ has noted, in finding no FCPA violation, the importance of several of these factors, including, the lack of business with the relevant government agency; that the company played no role in selecting the government employees for the conference or tour; the officials did not have direct authority to award future contracts or licenses; the company paid all expenses for travel and accommodations directly or reimbursed the attendees only upon presentation of a receipt; the company paid, at most, only a modest per diem for expenses; spouses and family did not accompany the officials; and the total cost was reasonable under the circumstances.

For the Purpose of: Influencing Official Action or Decision, Inducing an Unlawful Act, Inducing Official Influence Over Government Action, or Securing Any Improper Advantage

As noted in the previous subsection, the “official action” element is inter-related to the presence of corrupt intent and the requirement of a business nexus. When read together, the three elements require the intent to buy government action in order to secure business. Because the FCPA targets the misuse of official power, the offer or payment must implicate the individual’s official authority. Accordingly, paying an agriculture minister to join Murder, Inc. is unlikely to violate the FCPA—hiring him as an assassin does not tend to implicate his official duties, though it obviously violates a host of other laws—while bribing the same official to award a contract is prohibited.

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120 Id. at *11.
121 Id.; see id. at *12 (“In light of this legislative history, it would be perverse to read into the statute a requirement that a defendant know precisely which government official, or which level of government official, would be targeted by his agent; a defendant could simply avoid liability by ensuring that his agent never told him which official was being targeted and what precise action the official took in exchange for the bribe.”).
122 Id. at *12.
Congress added “improper advantage” in 1998 in order to track more closely the language of the OECD Convention. As the court explained in *United States v. Kay*, the Convention’s use of “improper advantage” refers to “something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which falls to meet the statutory requirements.” According to the Fifth Circuit, the 1998 amendments expanded the scope of the FCPA because the Act was no longer limited to bribes intended “to buy any act or decision . . . [or] to induce the doing or omitting of an official function.” The Kay defendants argued that the Act only covered improper payments intended to secure a specific government contract. Therefore, they contended, bribing Haitian officials in exchange for reduced customs and tax liability was permissible. The court disagreed and found that these bribes “constitute[d] a type of payment that can fall within [the FCPA’s] broad coverage.”

The court held that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person.” Lower taxes might allow the company to underbid competition or turn a bankruptcy-inducing loss into an operating profit. However, *Kay* also made clear that such payments do not necessarily violate the FCPA, and must be intended to produce an effect that would “assist in obtaining or retaining business” before they fall within the purview of the statute. Recent enforcement actions and investigations have followed *Kay’s* lead by targeting payments unrelated to a specific contract, including those seeking favorable tax or regulatory treatment. Similarly, in February 2011, the SEC directly tied a company’s payments to foreign regulators to a company’s sales—specifically, the government claimed that, as a result of payments to Mexican veterinarians who were responsible for certifying meat products for export, Tyson Foods had benefited by making almost $900,000 in profits from export sales. The broadening of this element has correspondingly narrowed the facilitating payment exception discussed below, see Section II.B.2.a, *infra*.

2. What are the Exceptions and Defenses to FCPA’s Anti-bribery Provision?

a. Exception for Facilitating Payments

The FCPA does not prohibit so-called facilitating (or “grease”) payments intended to secure the performance of “routine governmental action” by a foreign official. The statute defines “routine governmental action” to mean only those actions that are “ordinarily and commonly performed,” including:

- Obtaining permits or licenses that qualify a person to do business in a foreign country;
- Processing government papers, such as visas;

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124 Kay, 359 F.3d at 754-55.
125 Id. at 756.
126 Id. at 759.
127 Id. at 760.
• Providing police protection, mail pick-up and delivery, or scheduling inspections or customs inspections; and
• Providing utility service, loading and unloading of cargo, or protecting perishable products from deterioration.

Facilitating payments essentially cover ministerial acts that do not involve the exercise of discretion; the exception never applies to decisions by foreign officials to award or maintain business. Rather, the exception focuses on payments intended to obtain governmental action that is already required by law. However, even some actions that appear on their face to fall within the examples given above may be problematic under the FCPA. Kay emphasized the narrow scope of the facilitating payments exception: “routine governmental action does not include the issuance of every official document or every inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.” Moreover, the government strictly interprets this provision. Recent enforcement actions and investigations have focused on conduct potentially covered by the statutory exclusion, such as payments related to customs clearance, permits, and licenses. The exception was further narrowed, if not closed, in Panalpina where the company was charged with FCPA violations after the freight forwarder made customs payments to avoid clearance delays. In addition, at least one DOJ investigation appeared to involve payments for military protection.

As a practical matter, the exception likely excludes anything more than small, infrequent payments to low-level employees for truly non-discretionary functions. And it does not relieve a company of its obligation to accurately record such payments nor excuse a company’s violation of local law. Accordingly, where a covered person pays the state-owned power company a little extra to keep the lights on, it must record the true nature of the facilitating payment, even if by doing so it admits to a violation of the law of the foreign country. In this latter regard, it is important to stress that in many, if not most, countries, facilitating payments are illegal under local law, even if those laws are seldom enforced. Moreover, the OECD anti-bribery convention does not provide for facilitating payments, and a number of states-party have declined to include this exception in the treaty’s implementing legislation.

What separates a permissible facilitating payment from a prohibited bribe depends on the facts of a particular case and often requires careful legal analysis. Recent enforcement in areas potentially excluded from the Act creates additional uncertainty. In light of these risks, front-line employees should not make decisions about the propriety of facilitating payments without first consulting with their legal or compliance department. For a discussion of compliance programs, see Chapter 4, infra.

b. Defense of Lawfulness Under Local Law

The FCPA provides an affirmative defense to liability where the payment is lawful under the written laws and regulations of the foreign official’s country. The written law requirement prevents reliance on prevailing business customs and practices, or even rules of a local business association, as a defense. In reality, the laws of most countries—even those where corruption runs rampant—prohibit kickbacks

130 Kay, 359 F.3d at 751.
or other corrupt payments. As a result, it is often difficult to obtain an ironclad opinion letter from local
counsel that an otherwise corrupt payment is permitted by the laws of the foreign country. Moreover,
it is important to bear in mind that a party relying on this defense bears the burden of establishing its
elements at trial. Thus, it is important to build a careful contemporaneous record establishing the basis
for the defense.

This defense may be most useful in situations where local law requires a company to take certain actions
as a condition to doing business in the country. The expenditure, however, must match the scope of
the law at issue. For example, where the law mandates foreign businesses to contribute to a sovereign
education fund, making contributions to a foreign official’s favorite educational foundation would go too
far and likely fail as an affirmative defense to liability.

c. Promotional Expenses

i. Defense of Promotion of Products or Services

The Act carves out a defense for the payment of “reasonable and bona fide” expenses of a foreign
official, such as for travel or lodging, “directly related” to the promotion, demonstration, or explanation of
products or services. This defense often comes into play in connection with promotional travel, meals,
gifts, and other efforts related to business involving foreign governments or state-owned enterprises.
The risks of promotional activity, and the ways to mitigate such risks, are discussed in greater detail in
Section III.A.1, infra.


The second aspect of this defense permits the payment of “reasonable and bona fide” expenditures
“directly related” to the execution or performance of a government contract. This defense frequently
overlaps with the lawfulness under local law defense where the contract, such as an oil concession,
is incorporated into local law. Under the contract, for example, government officials may receive
reasonable travel expenses to inspect a factory or receive other reasonable payments directly related to
the Implementation of the agreement. The contract, however, must be with the state or a governmental
agency and not with an individual or a political party.

d. Absence of Necessary Element of an FCPA Violation

By design, the facilitating payments exception and the two affirmative defenses offer only limited
protection. Each is construed narrowly, and the burden of proving the defenses falls on the defendant.
But, in addition to these carve outs, the absence of one of the seven elements of an FCPA violation also
precludes liability. For example, payments made without a “corrupt” intent or to someone who does not
satisfy the definition of a “foreign official,” do not contravene the Act. And, though not a formal defense,
transparent conduct will, as a practical matter, dispel any inference of an improper motive. Avoiding
FCPA pitfalls—insufficient due diligence, retaining agents with close ties to government decision-makers,
or lavish goodwill tours for high foreign officials, to name a few—can dispel the appearance of corruption
and avoid FCPA issues before they arise.

e. Extortion or Duress

The Guidance indicated that there is no FCPA violation where a payment is made in response to an
imminent threat of physical harm, because in that situation the intent element is necessarily missing.134
However, the Guidance stressed that the threat of an economic loss does not constitute extortion. Only

a threat to health or safety is sufficient to excuse a payment on the grounds of duress. In addition, like a facilitating payment, a payment to a government official made under threat or duress must still be accurately recorded in an issuer’s books and records. In a settled civil action against NATCO, for example, the SEC alleged violations of the books and records and the internal controls provisions based on a company’s failure to properly record the purpose of extorted fines paid by its subsidiary to Kazakh officials.135

3. Accounting Provisions
   a. In General

The FCPA’s accounting provisions consist of two sections. First, the “books and records” provisions require all issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”136 Second, the “internal controls” provisions require issuers to “devise and maintain” an adequate “system of internal accounting controls.”137

These provisions apply to issuer transactions outside the United States, and to wholly-domestic transactions as well. In addition, the accounting provisions apply to inaccurately recorded transactions with private as well as governmental entities. And, though these provisions apply directly to issuers, they also reach the conduct of employees and other persons who intentionally falsify an issuer’s books and records or knowingly circumvent or fail to implement an issuer’s internal controls.

The accounting provisions have both a civil and, for “knowing” violations, a criminal component (see Section II.B.3.d, infra). Under the civil provisions, enforced principally by the SEC, the government has taken the position that the Act imposes strict liability on issuers.138 If an issuer does not have adequate controls, or if its books and records contain any false, incomplete, or misleading entries, it faces civil penalties without any showing that it had knowledge of the underlying violation. Nor do the accounting provisions contain a materiality requirement. As in the Dow Chemical matter, the SEC may pursue matters involving the inaccurate recording of small payments that are not material to the books of the subsidiary or the issuer, even when aggregated over several years.139 The practical consequences can be far-reaching. When the DOJ cannot make out a criminal violation of the anti-bribery provisions, which requires proof of scienter, a books and records violation can be much easier to establish.

Individuals also face civil liability for violations of the accounting provisions, often in ways that demonstrate the dramatic reach of the Act.140 The government has targeted both the employees who caused a foreign subsidiary to book improper payments inaccurately and the issuer that incorporated

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139 Although there is no limit in the FCPA regarding the size or materiality of a books and record violation, the Guide notes that “enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.” See 2012 DOJ-SEC FCPA Guide at 39.
its subsidiary’s inaccurate records into its consolidated financial statements. In a separate case, the SEC filed and settled a civil suit against four former employees of subsidiaries of a Swiss company for their role in bribing Nigerian oil officials and then attempting to cover their tracks by submitting phony invoices. The employees, three UK citizens and an American, paid a combined penalty of $170,000. The government has also brought proceedings against employees (without charging the company) for circumventing applicable internal controls and for aiding and abetting the company’s books and records violation. In Nature’s Sunshine, in addition to charging the issuer with books and records and internal controls violations for violations of its subsidiary, the SEC also charged two senior executives of an issuer’s subsidiary with books and records and internal controls violations. These charges were based, not on personal knowledge, but on their positions as “control persons” as defined in § 20(a) of the Securities and Exchange Act of 1934. The executives eventually settled the matter.

b. Books and Records

Historically, the SEC has focused on whether the accounting records of a company accurately document certain types of transactions, even when such transactions are not illegal under the securities laws, including:

- Political contributions;
- Payments to government officials;
- Commercial bribes or kickbacks;
- Rebates to customers that are illegal or of questionable legality;
- Violations of laws regulating alcohol, tobacco, drugs, narcotics, or firearms;
- Violations of customs or currency control laws;
- Income tax fraud; and
- Self-dealing by Insiders.

It is important to note that the “books and records” of an issuer include not only its reported financial statements, but also records kept in the ordinary course of business, including things like proposed itineraries, expense reports, and even receipts used to support requests for reimbursement. As a result, such mundane things as including a phantom guest when seeking reimbursement for a company dinner—or even failing to record every guest at such a dinner—may constitute a books and records violation. In addition, though the records at issue are usually financial, more general records may equally be the basis for liability. For instance, in Magyar Telekom, the SEC brought a “books and records” offense based on agreement for illegal benefits signed between the company and Macedonian government officials that was being held by a Greek intermediary.
The documentation must correctly record not only the financial facts of the transaction itself but also such other information as may be necessary to give a reviewer a complete understanding of the significant aspects of the transaction. The FCPA requires that all reported information be “reasonably current” and “in reasonable detail” or maintained at “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” This requirement is not meant to produce documentation far more extensive than ordinary course-of-business transactions. The SEC made it clear that neither “inadvertent record-keeping mistakes” nor record falsification that a company’s management did not know of—and that it “reasonably should not have known” of—would give rise to prosecution. But it is illegal to falsify, misrepresent, or omit information in the records kept under the FCPA. The SEC has charged companies for the activities of their subsidiaries even when a relatively small amount of money is involved. In NATCO Group, Inc., NATCO’s subsidiary in Kazakhstan was alleged to have violated the books and records provision by improperly paying approximately $45,000 related to visa and charges to Kazakh officials and recording the payment as a visa fine.

Following the enactment of the Act, the SEC announced rules to prohibit issuers from falsifying books and records and to prohibit officers or directors from misrepresenting, misleading, or omitting to state material facts in the preparation of these records. Records are “inaccurate” and violate the Act if they fail to record illegal or even improper transactions, or falsify or disguise such transactions. For example, in the Lucent matter described above, the company paid for lavish trips for employees of state-owned enterprises. Lucent booked many of these visits to its “Factory Inspection Account” even though the trip did not include a factory tour.

The accuracy of records also depends on the specificity of the description of the transaction. Literally true descriptions of “commissions paid,” “entertainment expenses,” or other expenditures are misleading under the Act if they are insufficiently detailed. For instance, in 2012, the DOJ entered into a NPA with Tyco International on criminal books and records charges. The NPA stated that “Tyco subsidiaries made payments, both directly and indirectly, to government officials” in numerous countries and falsely recorded such payments “as legitimate charges, including as ‘consulting fees,’ ‘commissions,’ ‘unanticipated costs for equipment,’ ‘technical consultation and marketing promotion expenses,’ ‘conveyance expenses,’ ‘cost of goods sold,’ ‘promotional expenses,’ and ‘sales development’ expenses.”

The books and records requirement also overlaps with the propriety of making facilitating payments (discussed in Section II.B.2.a., supra) because, even if the grease payment is legal under the anti-bribery provisions, a company violates the FCPA if it does not properly record the true nature of the payment. Because such payments are generally illegal in foreign countries, complying with the FCPA creates a record of a violation of local law.

148 Zarin, supra note 6, § 2:2.
151 See id.
152 In addition to entering into the Non-Prosecution Agreement with the DOJ, a Tyco subsidiary, Tyco Valves & Controls Middle East Inc., entered in a plea agreement with the DOJ on charges that it conspired to violate the FCPA’s anti-bribery provisions. In a related action, the SEC also filed a civil complaint against Tyco for FCPA anti-bribery, internal controls, and books and records violations, which Tyco settled for $10.5 million in disgorgement and $2.5 million in prejudgment interest. See Complaint, SEC v. Tyco Int’l Ltd, No. 12-CV-01583 (D.D.C. Sept. 24, 2012), available at http://www.sec.gov/litigation/complaints/2012/comp-pr2012-196.pdf.
c. Internal Controls

The Act requires public companies and their majority-owned affiliates to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- Transactions are executed according to management’s general or specific authorization;
- Transactions are recorded as necessary to permit preparation of financial statements according to generally accepted standards and to maintain accountability for assets;
- Access to assets is permitted only in accordance with management’s general or specific authorization; and
- The recorded accountability for assets is compared with the existing assets at reasonable intervals, and appropriate action is taken with respect to any differences.

Like the record keeping provision, the internal controls requirement has no materiality threshold, or any limit as to transactions above a certain value.

The legislative history of the internal controls provision reveals that Congress expected management to estimate and evaluate cost-benefit relationships and reject controls that could not be justified economically. The factors that Congress expected management to consider include the size of the business, the diversity of operations, the degree of centralization of financial and operating management, and the amount of contact by top management with day-to-day operations.

Thus, the SEC does not mandate any specific internal accounting controls. Instead, the test for compliance turns on whether an internal control system, taken as a whole, reasonably meets the statute’s specified objectives. In the Lucent matter, enforcement authorities determined that the company had failed to develop sufficient internal accounting controls to monitor travel and entertainment provided to foreign officials or to ensure the accurate recording of such expenses.\footnote{Non-Prosecution Agreement, Lucent Techs., supra note 100, at App. A, p. 9.} Recent enforcement actions signal that the SEC has stringent expectations for a company’s internal controls. For instance, in August 2012, Oracle agreed to pay a $2 million penalty to settle books and records and internal controls charges arising from a slush fund developed by its distributors in India.\footnote{Press Release, SEC, SEC Charges Oracle Corporation with FCPA Violations Related to Secret Side Funds in India (Aug. 16, 2012), available at http://www.sec.gov/news/press/2012/2012-158.htm.} Specifically, the SEC alleged an Oracle subsidiary’s business transactions in India allowed its distributors to develop slush funds and that that slush fund was ultimately used to make improper payments.\footnote{Id.} There were no allegations that Oracle itself made or had knowledge of the improper payments, only that Oracle failed to accurately record the extra funds held by the distributors and failed to maintain an effective system of internal controls that would have prevented the improper use of funds. The Guidance emphasized that internal controls must be tailored to “the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption.”\footnote{See 2012 DOJ-SEC FCPA Guide at 40.}

d. “Knowing” Violations of the Accounting Provision

As discussed above, while the government has taken the position that companies may face strict liability for civil violations of the FCPA’s accounting requirements, criminal responsibility arises only
for “knowing” violations. In this context, courts have held that deliberate falsification constitutes “knowledge” under the Act. The criminal provisions, enforced principally by the DOJ, provide severe penalties for willful violations. Individuals can face a maximum $5 million fine and 20 years imprisonment, while the maximum fine for corporations is $25,000,000. In 2007, a subsidiary of Baker Hughes, Inc.—a publicly traded oil services company—agreed to pay an $11 million criminal fine, in part, for aiding and abetting its parent company’s books and records violation. There, the subsidiary paid an agent over $4 million, knowing that a significant portion of the funds would be transferred to employees of the Kazakhstan national oil company. The subsidiary, BHSI, faced criminal liability under the Act’s accounting provision because it recorded the payments as “commissions,” “fees,” or “legal services,” when it knew the agent would channel the funds to the Kazakh oil officials. The Baker Hughes matter illustrates the potential for criminal prosecution under both the anti-bribery and accounting provisions for using foreign agents as a conduit for illegal payments and then facilitating the inaccurate recording of such payments in an issuer’s books and records.

C. What are the Consequences of an FCPA Violation?

1. Fines, Imprisonment, Other Penalties, and the Statute of Limitations

The FCPA can result in criminal and civil liability for companies, and for their individual officers, directors, employees, and agents. Companies face fines and collateral consequences such as debarment from government business, while individuals risk imprisonment, fines, and other potential collateral consequences. Criminal sanctions can arise either from violations of the anti-bribery provisions or the accounting standards designed to reveal such illegal payments. Typically, individuals prosecuted criminally both intended to violate the Act and to conceal their conduct.

The criminal penalties for violation of the anti-bribery provisions are:

- Up to a $2 million fine per violation for public companies and domestic concerns;
- Up to a $250,000 fine and five years in prison for individuals pursuant to the enhanced penalties in 18 U.S.C. § 3571(b); and
- Alternative fines for corporate entities and individuals where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss pursuant to 18 U.S.C. § 3571(d).

These penalties can be imposed for each violation of the FCPA.

The criminal penalties for willful violation of the books and records provision or willfully and knowingly making, or causing to be made, a false or misleading statement in any application, report, or document required to be filed are even more severe:

- For a natural person, up to a $5 million fine and 20 years in prison, or both;
- Up to a $25 million fine for public companies; and
- Alternative fines for corporate entities and individuals where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss pursuant to 18 U.S.C. § 3571(d).

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158 See Section II.B, supra.
159 Jensen, 532 F. Supp. 2d at 1193-94; United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004).
These penalties can be imposed for each violation of the FCPA.

The FCPA also allows a civil penalty of up to $16,000 against a corporation or any of its officers, directors, employees, or agents violating the anti-bribery provisions of the FCPA. Civil penalties for violations of the accounting provisions can range from $7,500 to $150,000 for individuals, and $75,000 to $725,000 for corporations. The 1998 amendments eliminated “the current disparity and penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies.” Formerly, foreign nationals were subject only to civil penalties. With that revision, all employees or agents of U.S. businesses are subject to both civil and criminal penalties. Issuers and “domestic concerns” may not reimburse their employees, directly or indirectly, for any fines imposed on those individuals under the FCPA.\(^\footnote{162}{15 U.S.C. §§78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).}\)\

Both the DOJ and the SEC may obtain injunctions to prevent violations of the FCPA. Importantly, a host of other draconian sanctions under various other federal statutes might apply to violations of the Act, including federal contract suspension or debarment and the denial of export licenses. Additionally, the proceeds of FCPA violations and foreign corruption are money laundering predicates, and can thus expose violators to possible criminal liability under the money laundering and RICO statutes, as well as civil and criminal forfeiture and civil RICO actions if the proceeds are transported to or from the United States or pass through U.S. financial institutions. Although the FCPA does not itself provide a limitations period by which actions must be brought, general statutes of limitations found elsewhere in the U.S. Code are applicable to suits brought under the FCPA. The statute of limitations for criminal actions alleging violations of the FCPA’s anti-bribery and accounting provisions is five years.\(^\footnote{163}{18 U.S.C. § 3282.}\) For conspiracy offenses, a criminal action is timely so long as at least one act in furtherance of the conspiracy occurred within five years of the filing of charges.\(^\footnote{164}{See 2012 DOJ-SEC FCPA Guide at 35.}\) The DOJ may request the court extend the limitations period for criminal actions for up to three years to permit it to obtain evidence from foreign countries.\(^\footnote{165}{18 U.S.C. § 3292. An application under § 3292 to suspend the statute of limitations “must present ‘something with evidentiary value…tending to prove it is reasonably likely that evidence of the charged offenses is in a foreign country’—not merely unsupported assertions.” United States v. Trainor, 376 F.3d 1325 (11th Cir. 2004).}\) As this is an ex parte application, in most instances, when the DOJ seeks this extension, the party under investigation will not be aware that the statute has been tolled. Civil actions brought by the SEC to enforce fines, penalties, and forfeitures are also subject to a five-year limitations period, which begins to run “when the claim first accrued.”\(^\footnote{166}{28 U.S.C. § 2462.}\) The Supreme Court recently ruled, in a case arising under the Investment Advisers Act, that this five year period begins to run from the date of the fraud and not the date when it was discovered.\(^\footnote{167}{Opinion, Gabelli v. SEC, No. 11-1274 (U.S. Feb. 27, 2013).}\) The Court did not, however, clarify the scope of the provision in that statute which applies to defendants outside the United States. And that limitations period does not apply to equitable remedies (such as injunctions or disgorgement) that the SEC may choose to pursue.\(^\footnote{168}{See 2012 DOJ-SEC FCPA Guide at 35.}\) Moreover, the limitations period for civil actions against foreign individuals is tolled for any period of time during which the defendant is not physically present in the United States.\(^\footnote{169}{See Memorandum and Order, Straub, supra note 28, at 12-14.}\) Cooperating parties may voluntarily enter an agreement with the DOJ or the SEC to extend the limitations period for criminal or civil actions.\(^\footnote{170}{See 2012 DOJ-SEC FCPA Guide at 34-35.}\)
2. Liability of Officers and Directors

Employees and agents who actually make or offer bribes are not the only individuals subject to FCPA liability; officers and directors may also be liable for FCPA violations. Dozens of FCPA cases have imposed some form of liability on officers and directors, with certain officers and directors serving significant prison sentences. While some of these cases involve the anti-bribery provisions, most of the actions against directors and officers have been filed under the accounting provisions of the FCPA under the theory that individuals caused the company to record payments inaccurately or that they circumvented internal accounting controls. Although a corporation may sometimes indemnify its directors and officers for liability, the SEC takes the position that an issuer may not indemnify for liability under the federal securities laws, including the FCPA.171

As discussed in Section IV.A., infra, board oversight is increasingly considered an important element of directors’ duties. Oversight of the FCPA’s provisions is arguably an important duty for directors, particularly given the potential magnitude of the monetary and intangible damage that a corporation may suffer in the event of a significant violation. Shareholders have also targeted directors and officers for failing to maintain adequate controls and to prevent FCPA violations. In short, directors are well-advised to ensure the adequacy of corporate compliance programs as they relate to the FCPA.

3. Related Civil Litigation

The disclosure of an FCPA investigation or enforcement action can lead to a variety of civil claims. Shareholders have instituted derivative suits. In May 2008, shareholders of Alcoa, Inc. sued the company and its officers and directors, alleging that the company paid bribes to Bahraini government officials and employees of a state-owned metals company.172 The lawsuit followed the filing of a civil complaint by the Government of Bahrain and the initiation of a criminal investigation by the DOJ. The plaintiffs asserted that the officers and directors misled shareholders about the company’s business practices and its compliance with applicable anti-bribery laws. The complaint alleged that even if the civil suit brought by the government of Bahrain was unsuccessful and the DOJ elected not to bring criminal charges, “the [c]ompany will expend millions of dollars responding to the claims and/or investigating and disproving the charges, suffering immense reputational harm in the process.”173

The plaintiff’s bar has also brought RICO claims—with the accompanying threat of treble damages—for alleged FCPA violations. Bribery qualifies as a predicate act and the laundering of the illegal payment through U.S. banks can also create liability under RICO. Plaintiffs may also look to state unfair competition laws to bring a claim in state court. And, in a recent trend, employees have alleged unlawful retaliation in wrongful termination suits for bringing corruption concerns to the attention of their former bosses. For a discussion of other laws that apply to FCPA enforcement, see Section II.D, infra.

4. Other Adverse Consequences

Apart from statutory sanctions, there are other potential “costs” associated with foreign bribe payments. The cost of a major corporate internal investigation to determine why payments were made, to whom they were actually made, the circumstances under which they were made, and why payments were made in violation of the company’s code of ethics is substantial. In fiscal year 2007 alone, Siemens

173 Id. at 1.
reportedly paid over $500 million to outside attorneys and forensic accountants as part of a wide-ranging internal investigation. The total cost for the investigation was reportedly more than $1 billion, in addition to the large sums paid to settle the case. Should bribe payments come to light during due diligence associated with a merger or other Investment, the Impact on both acquiring and target company can be extreme. Evidence of corrupt payments uncovered as part of Lockheed Martin’s pre-acquisition due diligence cratered its proposed merger with Titan. A recent enforcement trend treats the proceeds of contracts “tainted” by violations of the Act as money laundering proceeds to be forfeited or disgorged. In this regard, acquiring tainted assets through an asset purchase or joint venture (“JV”) (rather than a merger or stock purchase) does not provide immunity from FCPA liability for the acquiring company. And any company violating the FCPA will incur additional substantial costs in settling with government enforcement agencies because such settlements often require that an independent outside expert review annually the adequacy of the company’s future FCPA compliance.

Moreover, the ability of a U.S. company to do business in a foreign country may be jeopardized. Even if the foreign country itself informally permits such payments, official reaction will be less favorable in light of the anti-corruption laws on the books of most countries, including those highly ranked on the Transparency International corruption Index. See Section VI.B.6, infra.

The most painful sanctions for an FCPA violation may not be those imposed by law. Instead, they may be the loss of “goodwill,” negative Impact on employee morale, and even the loss of jobs, including those of the CEO or the general counsel. Moreover, the negative publicity resulting from substantial penalties can have a direct effect on a company’s stock price. For this reason, prudent counsel often instructs clients to be sure that any payment, whether or not it violates the FCPA, “is worth the cost” of potentially adverse publicity that could appear on the front page of the Wall Street Journal or the New York Times.

**D. What Other U.S. Laws are Relevant to FCPA Compliance and Enforcement?**

Companies should be mindful of other U.S. laws that can come into play in the FCPA enforcement arena. These laws fall into two categories: (1) laws that create affirmative obligations in the area of disclosure and compliance programs; and (2) other-U.S. laws that create collateral legal exposure because they form the basis of alternative or supplemental charges in the context of anti-corruption enforcement matters.

1. **Separate Requirements Relating to Internal Controls and Compliance Programs**
   a. **The Sarbanes-Oxley Act of 2002 and SAB 99**

Congress enacted the Sarbanes-Oxley Act in the summer of 2002 in response to several highly publicized corporate accounting scandals. Though it also focuses on record keeping and internal controls requirements and reflects similar concerns, Sarbanes-Oxley supplements the obligations the FCPA imposes on public companies.
Corporate Compliance Enhancements. Many provisions of the Sarbanes-Oxley Act mandate enhancements to corporate compliance programs. These are:

- **Internal Controls Attestations**
  - **Section 404.** Section 404 of the Sarbanes-Oxley Act and Item 308 of Regulation S-K require that certain public companies include in their annual reports an independent auditor’s attestation of management’s report as to the adequacy of the company’s internal controls and procedures. Auditing standards promulgated by the Public Company Accounting Oversight Board pursuant to Section 404 recognize fraud-related controls as significant, and include guidance that focuses on procedures designed to reduce fraud. Issuers that fail to implement adequate controls will be unable to receive “clean” internal controls certifications.
  - **Section 302.** This section, and the implementing regulations adopted by the SEC, require CEOs and CFOs to sign off on the accuracy of their companies’ financial statements, with severe civil and criminal penalties for false certifications. In practice, most prudent companies have adopted procedures that require lower-level employees involved in the oversight of financial reporting to certify as to the accuracy of reports under their purview, and so on, up the financial reporting chain.
  - **Code of Ethics Disclosure.** Sarbanes-Oxley Section 406 and the SEC’s implementing regulations require a public company to disclose whether it has adopted a written code of ethics that applies to its principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. If the company has not adopted such a code of ethics, it must disclose the reason why it has not. These disclosures must appear in the company’s annual report. In addition, a company must disclose any change in, or waiver of, such a code within four business days of the event on Form 8-K.
  - **Whistleblower Provisions**
    - **Section 301 and Exchange Act Rule 10A-3.** The audit committee of a public company must establish procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting controls, or auditing matters. These procedures must include a way for employees to submit anonymous complaints regarding such matters.
    - **Section 806.** This provision prohibits a company from taking any adverse employment action against, or otherwise discriminating against, employees who have provided information to a supervisor, federal agency, or a member or committee of Congress regarding potential violations of Sarbanes-Oxley, any rule or regulation of the SEC, or any federal law relating to fraud against shareholders.
    - **Section 1107.** Under this provision, an employer or agent of the employer who intentionally retaliates against an employee who provides truthful information to a law enforcement officer relating to the commission or possible commission of any federal offense faces possible criminal sanctions.

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178 Rules of the NYSE and Nasdaq also require listed companies to adopt and disclose codes of business conduct. See Section 303A.10 of the NYSE Euronext Listed Company Manual and Rule 4350(n) of the Nasdaq Marketplace Rules.

179 See also Section II.D.1.n, infra, regarding the Dodd-Frank Whistleblower Provisions.
• **Up-the-Ladder Reporting by Counsel**

Under Section 307 and the SEC’s implementing regulations, outside and in-house counsel who “appear and practice” before the SEC must report “up-the-ladder” evidence of material violations of the securities laws or breaches of fiduciary duty by the company or by any of its officers, directors, employees, or agents.\(^\text{180}\) With respect to in-house counsel, these provisions require that any attorney report such evidence to the CLO or to both the CLO and CEO.\(^\text{181}\) If the attorney does not receive a timely and appropriate response, the attorney then must report the evidence to the Audit Committee, another Board committee, or the full Board.

• **Disclosure Requirements**

Sarbanes-Oxley not only requires enhancements to internal controls, it also may require companies to disclose in their SEC filings when they uncover FCPA violations. Because the FCPA does not explicitly require companies to disclose or report FCPA violations, some practitioners have taken the position that conducting an internal investigation, correcting books and records problems, imposing appropriate discipline, and documenting corrective action (in the event of a subsequent inquiry) satisfies a company’s obligations upon learning of an FCPA violation. Sarbanes-Oxley, however, may create a pragmatic necessity to disclose the violation and corrective action. Where an FCPA violation occurred as a result of inadequate internal controls, the company will have to respond to those deficiencies and may have to disclose the failure of those controls as a “material weakness.”

Questions concerning the necessity of voluntary disclosure to the DOJ and the SEC are further complicated by Staff Accounting Bulletin No. 99 (“SAB 99”),\(^\text{182}\) which contains a qualitative materiality standard for disclosure. Under a strictly quantitative approach, violations involving small sums of money are unlikely to be material, particularly in the context of large corporations. (Though given increased penalties and new theories of forfeiture, even small payments can result in significant liabilities.) These issues remain in flux, but warrant particular attention on a case-by-case basis in light of the evolving standards.

**b. Federal Acquisition Regulation (FAR)**

The Mandatory Disclosure Rule of the Federal Acquisition Regulation (“FAR”), implemented in 2008, requires that government contractors with contracts above a certain threshold level\(^\text{183}\) make timely disclosures of credible evidence of certain federal criminal violations “involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code” and civil False Claims Act violations committed “in connection with the award, performance, or closeout” of the contract or any subcontract.\(^\text{184}\) These contractors must also have a written code of business ethics and conduct and implement an internal controls system as well as training for employees.\(^\text{185}\) In addition, knowing failure by a principal of any contractor, regardless of contract value or duration, to disclose the above violations, as well as a knowing failure to disclose significant overpayment on the contract, may result in suspension or debarment.\(^\text{186}\)

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\(^{180}\) 17 C.F.R. § 205.2.

\(^{181}\) If the company has created a Qualified Legal Compliance Committee (“QLCC”), the attorney may report the evidence directly to the QLCC.

\(^{182}\) 17 C.F.R. § 211(b).

\(^{183}\) Contractors with contracts valued in excess of $5 million and a performance period greater than 120 days are subject to the Mandatory Disclosure Rule. See Guide to the Mandatory Disclosure Rule, 2010 A.B.A SEC. PUB. CONTRACT LAW 10-11.

\(^{184}\) 18 C.F.R. § 52.203-13(b)(3)(i).

\(^{185}\) Id. § 13(b)(1), (c).

Though the FCPA, which is not in Title 18 of the U.S. Code, is not one of the enumerated federal criminal violations that must be reported under the rule, companies who uncover credible evidence of such violations should evaluate disclosure to the Office of the Inspector General under FAR, as conduct involving FCPA violations may also involve separate criminal violations that are covered by the Mandatory Disclosure Rule, such as mail and wire fraud. Separately, an FCPA conviction or civil judgment may lead to suspension or disbarment, a decision left to the discretion of the contracting agency.\textsuperscript{187} Authorities may also consider the factual admission underlying a guilty plea, non-prosecution agreement, or deferred prosecution agreement in considering whether to bar a company that has committed FCPA violations from conducting business with the government.\textsuperscript{188}

c. \textit{Dodd Frank Section 1504}

In August 2012, the SEC finalized rules pursuant to Section 1504 of Dodd Frank, which require that “resource extraction issuers,” defined as those issuers “engage[d] in the commercial development of oil, natural gas, or minerals,” disclose information relating to any non \textit{de minimis} payment made to the U.S. or a foreign government, including state-owned enterprises.\textsuperscript{189} Such issuers would be required to disclose these payments in their annual reports. The provision has been both criticized for potentially increasing compliance costs of extractive companies and causing competitive disadvantage vis-à-vis foreign competitors, as well as praised for its ability to help increase transparency in countries that are rich in natural resources and plagued with government corruption.

d. \textit{Investment Advisers Act Financial Disclosures}

The SEC and the U.S. Commodity Futures Trading Commission (“CFTC”) require entities subject to their regulation to formally disclose certain events (“disclosure events”) involving the particular entity or an affiliate, including non-U.S. affiliates. Large financial institution complexes (including bank holding structures) often consist of entities regulated by the SEC and/or the CFTC, such as investment advisers, broker-dealers, commodity pool operators, commodity trading advisors, and futures commission merchants. Disclosure events include, without limitation and solely as an example, being charged with, convicted of, or pleading guilty to any felony or to certain misdemeanors in a domestic or foreign court. Disclosure events also include being the subject of certain findings or orders by a U.S. federal, state, or non-U.S. regulator, or a self-regulatory organization (such as the Financial Industry Regulator Authority (“FINRA”) or the Chicago Board Options Exchange). An event involving an order by a regulator may be a disclosure event even if the entity, associated person of the entity, or affiliate of the entity settles the charges without admitting or denying the charge. State regulators also generally require financial services entities regulated by them to report disclosure events to the respective state(s) in which they are registered. Further, financial institutions acting as fiduciaries, such as investment advisers and commodity trading advisors, may have an obligation under the federal securities or commodities laws to disclose to clients certain events that may be material to a client or prospective client even if the events would not be considered “disclosure events” for purposes of reporting to the SEC or the CFTC.

Laws like the anti-money laundering statutes and economic sanctions laws are alternatives to prosecutors for situations when the FCPA is unavailable, either on jurisdictional grounds or because not all elements of a bribery charge are present. These laws may also form the basis for supplemental charges in the context of a bribery or FCPA books and records case. In addition, failures in managing FCPA compliance can cause or involve collateral exposure under other laws, such as the securities laws.

\textsuperscript{187} 2012 DOJ-SEC FCPA Guide at 70.

\textsuperscript{188} Id.

e. Mail and Wire Fraud

The mail and wire fraud statutes offer a firm basis for supplemental charges in an FCPA enforcement matter, and indeed, the government has used these statutes to target private corruption. The wire fraud statute provides, in pertinent part: “[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall [be guilty of a crime].” This statute applies to bribery because the payor and recipient of a bribe typically act to defraud the recipient’s employer. The use of mail and wire statutes signals the government’s zeal to prosecute commercial bribery abroad.

One recent example of the overlap between the FCPA and wire fraud is the government’s 2010 settlement of charges against ABB Ltd., a Swiss corporation that provides power and automation products and services, and its subsidiaries. In September of that year, the company entered into a deferred prosecution agreement and its subsidiary, ABB Ltd.-Jordan, pleaded guilty to conspiracy to commit wire fraud and to violate the books and records provision of the FCPA. According to the criminal information, ABB Ltd.-Jordan used international wire communications to and from the United States to further its conspiracy to pay kickbacks to the Iraqi Government to secure oil contracts in the UN’s Oil-for-Food program. An FCPA charge would not have been supported, however, because the payment went to the Iraqi Government and not a government official.

Another such example involves the Schnitzer Steel settlements with the DOJ and the SEC, under which the company’s subsidiary pleaded guilty to wire fraud stemming from bribes the subsidiary paid to managers of both government-controlled and privately-owned steel mills in China and South Korea to induce them to purchase scrap metal. The subsidiary paid the bribes with funds received from the U.S. parent via wire transfers into the subsidiary’s bank accounts in South Korea. Although the FCPA’s anti-bribery provisions did not cover payments to managers of the privately-owned steel mills, the government alleged that the payments constituted mail and wire fraud because the bribes inflated the price of the scrap metal purchased by the customers; and therefore defrauded the companies that employed the recipients of the bribes. As part of the agreements, the subsidiary also agreed to plead guilty to violations of the FCPA’s anti-bribery, books and records, and internal controls provisions, and pay a $7.5 million criminal fine, while Schnitzer agreed to pay a $7.7 million civil penalty for the corrupt deals.

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192 In addition to the cases discussed in this section, see also United States v. Giffen, 473 F.3d 30 (3d Cir. 2006) (government indicted CEO of a New York merchant bank on both wire fraud and anti-bribery charges for bribing Kazakh officials. The alleged bribery funds were transferred by wire into Swiss bank accounts held in the name of corporations controlled by Kazakh officials); SEC v. York Int’l Corp., No. 07-cv-1750 (D.D.C.) (defendant settled charges of conspiracy to commit wire fraud and violations of the FCPA’s books and records provisions for allowing its subsidiaries to make illicit payments to secure and maintain business opportunities worldwide, including bribery payments to government officials in the United Arab Emirates and illicit consultancy payments in the Middle East, Africa, Asia, and Europe).
Wire fraud has also been both an alternative and supplementary charge in prosecutions for schemes alleged to involve the siphoning of funds owed to national treasuries. In United States v. Chalmers, where the defendants were charged with making prohibited payments via wire to the Iraqi Government in order to secure rights to Iraqi oil under the UN Oil-for-Food Program, prosecutors charged the defendants with both wire fraud and violations of U.S. economic sanctions laws (discussed further below). Such payments allegedly defrauded the Iraqi people of the proceeds of Iraqi oil sales by sending the payments directly to Iraqi officials instead of the UN Oil-for-Food Program’s escrow account, which was used to purchase humanitarian aid for Iraqi citizens. That case did not assert FCPA anti-bribery charges, apparently because the payments were made to the government and not individual government officials.196

f. RICO and State Unfair Competition Laws

Conduct that violates the FCPA’s anti-bribery provisions may supply the basis for a private cause of action for treble damages under RICO. Although the RICO statute only specifically identifies bribery of public officials in the United States as a predicate act to a RICO violation,197 some courts have viewed conduct in violation of the FCPA’s anti-bribery provisions as also providing the necessary foundation for racketeering behavior in the context of civil litigation.198 Similarly, other collateral violations, such as a Travel Act violation, may serve as a RICO predicate act.

The relationship between civil RICO claims and conduct in violation of the FCPA’s bribery statute is demonstrated in Robert W. Dziubl v. Cargill Inc. The plaintiff, a lawyer from California, sought damages in excess of $50 million arising out of a real estate JV in Thailand, claiming that Cargill had stolen his interest through a pattern of illegal action. One of the alleged illegal activities was Cargill’s payment of a $1.5 million bribe to a Thai politician to secure the politician’s cooperation in removing opposition to a local real estate deal and forcing the plaintiff out of the joint venture, a payment the plaintiff alleged was in violation of the anti-bribery provisions of the FCPA. Although the court ultimately dismissed the case against Cargill after finding the plaintiff’s claims subject to arbitration in Singapore, it left open the possibility for the plaintiff to challenge the award at the enforcement stage.199

Civil RICO suits have also triggered internal corporate audits and federal investigations resulting in FCPA liability, regardless of whether the original civil suit was ultimately found to have merit. For example, in 2008, Aluminium Bahrain BSC (“Alba”), an aluminum smelter, sued Alcoa, Inc., its raw materials supplier, under the federal civil RICO statute, alleging that Alcoa had bribed both Alba executives and Bahraini government officials to retain market share and charge inflated prices.200 The United States moved to stay the civil action pending a criminal investigation into whether Alcoa violated the FCPA and mail or wire fraud statutes,201 and the case was stayed for three years. During that time, Alcoa’s agent,
Victor Dahdaleh, also a defendant in the civil RICO matter, was arrested and charged with bribery by the UK SFO. Recently, the court declined to dismiss the civil RICO complaint. Investigations by the DOJ and the SEC are ongoing.

Similarly, after the filing of National Group for Communications & Computers Ltd. v. Lucent Technologies, Inc., a civil RICO suit in which the plaintiff, a Saudi communications company, alleged that Lucent, in concert with others, bribed the Saudi Arabian telecommunications minister to cancel the company’s contracts after it refused to pay Lucent and its Saudi Arabian partners kickbacks on construction contracts, the DOJ and the SEC launched investigations into potential FCPA violations arising out of Lucent’s Saudi operations. Lucent itself subsequently undertook a sweeping internal review of its business activity in more than 20 countries, uncovering potential violations of the FCPA in Lucent’s China unit and resulting in the dismissal of that operation’s President and the Chief Operating Officer. After Lucent disclosed these activities to U.S. Government officials in late 2007, it agreed to pay a total of $2.5 million in fines to settle claims with the DOJ and the SEC that its China activities violated the FCPA’s anti-bribery and internal control provisions. Ironically, in 2006, one year prior to the settlement, the trial court dismissed the original civil RICO suit based on the expiry of the statute of limitations and the plaintiff’s failure to adequately allege an enterprise as required for a RICO violation.

Plaintiffs have also used civil RICO suits as a prophylactic measure against federal investigation, employing litigation as a way to assert their own innocence of violations of FCPA anti-bribery provisions. For example, in Grynberg v. BP P.L.C., Grynbeg Production Corporation, a U.S. oil and natural gas company owned and operated by Jack Grynberg, filed suit under RICO against its partners British Petroleum, its former Chairman, its former CEO, and its current CEO, alleging that defendants used funds attributed to Grynberg through joint ventures without his knowledge to bribe Kazakh officials as part of a larger scheme to influence their disposition of national natural resource assets. According to the complaint, “[t]he Foreign Corrupt Practices Act … not only bar[s] this type of activity directly but at the same time compel[s] both the corporate Plaintiffs and Jack J. Grynberg to take independent action to disassociate themselves, in their contractual capacity, from these illegal acts.” Indeed, Mr. Grynberg indicated in published reports that he brought the suit precisely because he wanted to ward off possible DOJ bribery charges: “Unless I assert that I was an unwilling participant in this, my neck could be on the line. I’m too old to go to prison,” said Mr. Grynberg. Ultimately, the parties were ordered to arbitration by the district court.

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206 Id.


g. **Anti-Money Laundering Laws**

Numerous enforcement actions arising from foreign bribery include money laundering charges—including in lieu of or supplementary to an FCPA charge. Even where the FCPA does not itself reach the activity in question, acts of bribery may provide a predicate to money laundering charges under U.S. law, provided that other jurisdictional bases are satisfied. Under 18 U.S.C. § 1957, it is a separate money laundering offense to knowingly engage in a transaction involving “criminally derived” property. More specifically, the statute provides in relevant part: “(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).” The term “criminally derived from” means “any property constituting, or derived from, proceeds obtained from a criminal offense.” The term “specified unlawful activity,” defined in section 1956, includes “bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official.” Unlike wire fraud or FCPA violations, which carry a maximum penalty of 5 years in prison and a fine of the greater of $100,000 or twice the value gained or lost, money laundering counts carry a maximum penalty of 20 years in prison and a fine which is the greater of $500,000 or twice the value of the property involved in the transaction.

In *United States v. Giffen*, federal prosecutors charged James Giffen, the principal shareholder, board chairman and CEO of Mercator Corp., a New York merchant bank, with, among other things, violation of the anti-bribery provisions of the FCPA and money laundering for $80 million in bribes allegedly paid to government officials in Kazakhstan to influence and maintain Mercator’s standing as advisor to the Kazakh Government on the disposition of national natural resource assets. Giffen allegedly created Swiss bank accounts in the names of offshore companies owned by the officials or members of their families, and made payments into those accounts from fees that he and Mercator received in oil deals they brokered for the Republic, as well as from escrow accounts holding payments due to the Republic from oil transactions. These deposits were alleged to be bribes, disguised in some cases as loans or as payments of the fees for consultants who had helped negotiate oil deals for Kazakhstan.

Even in foreign public corruption cases where FCPA charges are not possible for jurisdictional reasons, such as because no one involved in the original scheme had sufficient contacts with the United States to invoke the statute’s jurisdiction, money laundering charges are possible provided the funds in the scheme subsequently have contact with the United States. For instance, in *United States v. Proceeds of Crime Transferred to Certain Domestic Financial Accounts*, the court granted the government’s forfeiture request alleging violations of U.S. anti-money laundering law on the basis of the transfer into U.S. banks of funds obtained through the bribery of an Italian public official by Italian citizens. The government alleged the U.S. accounts were used to conceal the source or ownership of a portion of the proceeds of a fraudulently obtained Italian appeals court damages award of approximately $575.9 million, where the presiding judge received payments to fix the case’s outcome and whose conviction for “bribery in judicial acts” was upheld by the Supreme Court of Italy in 2006. Although this was a civil forfeiture action to recover the funds, the logic underlying the action would likely support criminal money laundering charges against the parties responsible for transferring the funds with the intent to conceal them.

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212 Id. § 1956(c)(7)(B)(i)(v).
213 *United States v. Giffen*, 473 F.3d 30 (2d Cir. 2006).
In *United States v. Lazarenko*, prosecutors charged the defendant, a former Ukrainian prime minister whose corrupt acts resulted in the misappropriation of millions of dollars in public funds during his tenure in office, with wire fraud and money laundering for transferring the misappropriated proceeds to banks in San Francisco. Although the defendant’s corrupt acts did not involve U.S. persons, and therefore did not implicate the FCPA, the government’s action shows U.S. prosecutors’ aggressive attitude toward halting foreign public corruption by using any contacts that the fruits of the corrupt activity have with the United States as grounds for prosecution.\(^{215}\) For Lazarenko, the government’s efforts resulted in a conviction on the money laundering and wire fraud charges, a nine-year prison sentence, and a fine of $10 million.\(^{216}\)

Similarly, the government may also use money laundering charges against the bribe recipients, to whom the FCPA is not applicable, as well as their bribing counterparts. In *United States v. Siriwan*, the DOJ charged two former Thai government officials (who were also mother and daughter) with money laundering for their role in accepting bribes from U.S. film producers.\(^{217}\) The government could not use the FCPA to prosecute Siriwan or her daughter because they were government officials. In the Haiti Teleco case, the government charged 13 individuals, including U.S. company executives, intermediaries, and Haitian government officials, for their roles in an alleged bribery scheme. The telecommunications companies allegedly funneled bribes to Haitian government officials through shell companies in order to receive business advantages and preferential treatment from Haiti Teleco, the only land line telephone service provider in Haiti. Many of those charged ultimately pleaded guilty to FCPA and/or money laundering charges, and three were found guilty after trial. Joel Esquenazi and Carlos Rodriguez, the former president and vice-president of Terra Telecommunications Corp., were convicted in August 2011 of one count of conspiracy to violate the FCPA and wire fraud, seven counts of FCPA violations, one count of money laundering conspiracy, and 12 counts of money laundering.\(^{218}\) Later that year, Esquenazi was sentenced to 15 years in prison—the longest sentence ever imposed in an FCPA case.\(^{219}\) Rodriguez was sentenced to 84 months in prison, and collectively they were ordered to forfeit $3.09 million.\(^{220}\) Former Haitian government official Jene Rene Duperval was also found guilty at trial of two counts of conspiracy to commit money laundering and 19 counts of money laundering, and sentenced to 9 years in prison and forfeiture of approximately $500,000.\(^{221}\)

The DOJ may also use civil forfeiture measures to recover the proceeds of money laundering (or bribery).\(^{222}\) For example, the DOJ has filed two civil forfeiture complaints against approximately $70.8 million in assets belonging to Teodoro Nguema Obiang Mangue, the son of the president of Equatorial Guinea and government minister. According to the complaints, the property was derived from the proceeds of foreign corruption offenses and money laundering.\(^{223}\) Finally, the DOJ’s settlement with HSBC serves as a general illustration of the convergence of risk between money laundering, economic


\(^{219}\) Id.

\(^{220}\) Id.


\(^{222}\) See also Section II.D.1.j, intra, discussing Kleptocracy Asset Recovery Initiative.

sanctions (discussed below) and anti-corruption laws. In the largest-ever penalty under the Bank Secrecy Act, HSBC accepted responsibility for failing to implement an effective anti-money laundering program, which allowed at least $881 million in drug proceeds to be laundered through the United States from countries such as Mexico. HSBC also processed approximately $660 million in transactions from sanctioned countries, including Iran, Cuba, and Libya, through the U.S. financial system. While there were no FCPA charges in this case, it is worth noting that most of the countries named in the settlement are high corruption jurisdictions.

In addition, the SEC, the CFTC, and each federal bank regulatory agency, have civil enforcement authority of the Bank Secrecy Act with respect to financial institutions subject to their respective regulatory jurisdictions. As such, for activities involving the Bank Secrecy Act, companies and individuals should consider any risk that the entity they are working with, or one of its affiliates, may face civil action by a bank or securities regulator for alleged anti-money laundering program deficiencies. The SEC, the CFTC, and federal bank regulatory agencies also have implemented their own rules that require financial institutions regulated by them to file Suspicious Activities Reports (“SAR”) in accordance with the applicable Financial Crimes Enforcement Network regulations and also, with respect to banks, in accordance with separate SAR rules implemented by the relevant bank regulatory agency. The Board of Governors of the Federal Reserve also has civil jurisdiction to require certain non-bank subsidiaries of its bank holding company members to file a SAR with respect to certain transactions.

h. U.S. Economic Sanctions

Conduct that violates the FCPA may violate U.S. economic sanctions laws as well. For example, the cases involving illegal surcharge payments to the former Iraqi Government in order to secure rights to Iraqi oil implicated U.S. economic sanctions laws. Under the UN Oil-for-Food Program, UN-designated officials, in consultation with private traders, set the sale price of Iraqi oil, and the former Iraqi Government retained the right to choose which traders would receive the rights to buy its oil at the set price. All proceeds from the sale of Iraqi oil were to be deposited into an escrow account used for the purchase of humanitarian goods for the Iraqi people. However, many buyers of Iraqi oil ended up paying secret surcharges directly to the former Iraqi Government in order to influence the government’s choice of who would secure the oil purchase rights. Such payments were illegal under various UN Security Council Resolutions and the U.S. Iraqi Sanctions Regulations, which, among other things, prohibited unlicensed financial transactions with the former Iraqi Government.

In United States v. Chalmers, for example, prosecutors accused defendant David Chalmers, a U.S. citizen and sole shareholder of defendant Bayoil Supply and Trading (a Bahamanian company), and defendant Oscar Wyatt (a U.S. citizen), among others, with making illegal surcharge payments and facilitating the Iraqi Government’s plan to enable the payment of these surcharges on Iraqi oil. Some of the surcharges were allegedly funneled through inflated commission charges on transactions for rights to

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225 Id. As part of its deferred prosecution agreement, HSBC agreed to forfeit $1.256 billion and pay $665 million in civil penalties.
227 Id.
228 The United States maintains a range of economic sanctions against a number of countries (including Cuba, Iran, Syria, and Sudan) as well as persons and entities that engage in activity that is counter to U.S. foreign policy and national security interests. The comprehensive sanctions programs prohibit virtually all business transactions between sanctioned countries/entities and U.S. persons. These include transactions in connection with the export or import of goods, services and technology to or from sanctioned countries, and dealing in goods originating in sanctioned countries. Most financial transactions involving sanctioned entities and countries are also prohibited. In some cases, the OFAC regulations serve to block assets subject to U.S. jurisdiction in which a sanctioned government or person has an interest.
229 In addition, in its 2012 DPA, HSBC admitted to violating U.S. sanctions laws by conducting transactions with prohibited countries, including Cuba, Iran, Sudan, Libya and Burma. See supra note 224.
Iraqi oil that, based on instructions from Iraqi officials, representatives of Bayoil Supply and Trading sent through wire transfers to an account in the United Arab Emirates in the name of a company operating as a front for the Iraqi Government. These illegal payments violated the Iraqi Sanctions Regulations’ ban on unlicensed financial transactions with the Iraqi Government. The district court ultimately dismissed the sanctions charges against Bayoil Supply and Trading on the grounds that, as a Bahamanian company, it was not a U.S. person and therefore not subject to the regulations.230 Chalmers, Bayoil Supply and Trading, its U.S. subsidiary Bayoil (USA), Inc., and Wyatt all pleaded guilty to conspiracy to commit wire fraud related to the payment of secret illegal surcharges to the Iraqi government.231

The U.S. Government has also resolved several of the Oil-for-Food cases through settlements. On April 8, 2011, Johnson & Johnson (“J&J”) agreed to pay $70 million as part of a DPA with the DOJ and settlement with the SEC of charges of improper payments to the former government of Iraq, Greece, Poland, and Romania. As part of its DPA, J&J acknowledged that its payments to the former government of Iraq were made to obtain contracts to provide humanitarian supplies.232 On February 21, 2008, Flowserve (a supplier of equipment and services for the power, oil, gas, and chemical industries) agreed to pay $10.5 million to settle the DOJ and the SEC claims of conspiracy to commit wire fraud and violation of the FCPA books and records provisions and acknowledged responsibility for its subsidiary’s alleged payment, between 2002 and 2003, of over $600,000 in kickbacks to the Iraqi Government in order to obtain contracts for the sale of large-scale water pumps and spare parts for use in Iraqi oil refineries.233 On November 8, 2007, Chevron Corporation, a full-service petroleum products company, entered into a NPA with the DOJ, the Office of Foreign Asset Control (“OFAC”), and the New York District Attorney’s Office (“NYDA”) under which the DOJ, the OFAC, and the NYDA agreed not to charge Chevron in connection with allegations that it made $20 million in illegal surcharge payments as part of its purchase of Iraqi oil through third-party contractors participating in the UN Oil-for-Food Program. Under the settlement, Chevron agreed to pay $27 million in fines and forfeitures, which the court raised to $28 million, including $3 million to settle any violations of the Iraqi Sanctions Regulations.234 The SEC had originally charged Chevron with violations of the FCPA’s books and records and internal control provisions for its failure to enforce a company-wide policy prohibiting the payment of surcharges in connection with the purchase of Iraqi oil from third parties and its improper recording of the surcharge payments as premiums.

On March 18, 2010, Innospec Inc., the only manufacturer of tetraethyl lead, used in leaded gasoline, pleaded guilty to violating the FCPA for its payment of kickbacks to the former Iraqi government under the Oil-for-Food program, as well as violations of the U.S. embargo against Cuba. As part of its plea, Innospec admitted that a subsidiary sold approximately $20 million of fuel additives to state-owned power plants in Cuba without a license from OFAC. In total, Innospec agreed to pay over $27 million to

the DOJ, the SEC, and the OFAC. On June 25, 2010, Ousama Naaman, Innospec’s agent in Iraq, also pleaded guilty to charges related to Innospec’s Oil-for-Food activity, and was sentenced to 30 months. Naaman and David Turner, a former Innospec business director, also settled related SEC charges in August 2010, and three Innospec executives have been charged in the UK.

i. Travel Act

The Travel Act prohibits travel or the use of the mail or any facility in foreign commerce with the intent to, among other things, promote or facilitate the promotion or carrying on of “unlawful activity.” Under the Act, “unlawful activity” includes bribery in violation of the laws of the United States. Consequently, FCPA violations that involve travel, use of the mails or any facility in foreign commerce generally implicate the terms of the Travel Act. Bribery of officers or employees of privately-owned companies (as opposed to state-owned) may also result in Travel Act violations. For example, in July 2009, Control Components Inc. (“CCI”), a valve manufacturer, agreed to pay an $18.2 million criminal fine, implement and maintain an anti-bribery compliance program, and retain an independent compliance monitor for three years as part of its guilty plea for violations of the FCPA and Travel Act. According to the information, CCI made corrupt payments to employees of both state-owned and privately-owned companies around the world from 1998-2007. Six former executives were also charged with violations of the FCPA and the Travel Act; five pleaded guilty to FCPA violations and two received prison sentences. Moreover, since violations of the Travel Act serve as predicate acts to RICO violations, conduct in violation of the FCPA that also violates the Travel Act may give rise to RICO claims.

j. Tax Laws

A violation of the FCPA may carry significant tax consequences as well. Though business expenses are generally deductible, it is illegal to deduct bribery or kickback payments made to foreign government officials that violate the FCPA. Thus, if an entity acknowledges that payments were made in violation of the FCPA, that entity may also be liable for civil and criminal tax violations if those payments were previously characterized on their tax returns as legitimate business expenses.

For example, in 2005, Titan Corp., a military intelligence and communications company, pleaded guilty to violating the FCPA’s anti-bribery provision, its books and records provision, and to one felony count

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241 Id.


244 See, e.g., Dooley v. United Techs. Corp., 803 F. Supp. 428, 440 (D.D.C. 1992) (permitting plaintiff’s civil RICO claim on basis that the predicate Travel Act violation may arise as a result of the defendant falling under the jurisdiction of the FCPA).

of Aiding or Assisting in the Filing of a False Tax Return, in violation of 26 U.S.C. 7206(2). According to the information, Titan Corp. improperly funneled payments to the re-election campaign of the Benin president through its agent in Benin. The tax code violation resulted because Titan improperly characterized the improper payments, which led to their subsequent deduction on the company’s tax return. Titan agreed to pay a $13 million fine for the criminal FCPA and tax code offenses, in addition to the $15.4 million disgorgement and prejudgment interest in the parallel SEC case.

k. SEC Disclosure Rules

One notable example of collateral exposure is in the securities arena, where inaccurate FCPA disclosures have led to claims under Section 10(b) of the Securities Exchange Act of 1934. The FCPA contains no private right of action. However, companies have nevertheless faced lawsuits based on violations of the FCPA but framed as violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

These actions have been filed at different times during the process of an FCPA investigation. For example, Wal-Mart recently disclosed that it is the subject of a securities lawsuit (and 11 other derivative complaints) that stems from a New York Times article alleging that Wal-Mart’s Mexican subsidiary had engaged in wide-spread bribery, and that the bribery was known to senior management. The plaintiff alleges that, between December 8, 2011 and April 20, 2012, Wal-Mart made false statements about its international expansion because it knew, among other things, that it was violating the FCPA and Mexican law through its bribery payments. The DOJ and the SEC investigations of Wal-Mart are still pending and no charges have been filed to date.

Other suits have been filed almost immediately on the heels of a SEC disclosure regarding an FCPA investigation. For example, four days after SciClone Pharmaceuticals filed an SEC Form 10-Q indicating that the SEC and the DOJ had initiated FCPA-related investigations, a shareholder suit against SciClone was filed. The action has been voluntarily dismissed.

By contrast, Siemens AG was also sued under 10(b) of the Exchange Act in December 2009 for alleged false statements made regarding the effects of its FCPA bribery scandal, but only after its settlement with the government. The plaintiff alleged that between November 8, 2007 and April 30, 2008, Siemens overstated the company’s financial performance and understated the costs associated with certain “legacy projects”, or fixed-price contracts. The district court dismissed the suit because plaintiff failed to allege scienter, as required by the PSLRA. In 2008, the Ninth Circuit also upheld dismissal of a securities fraud suit against InVision Technologies Inc. based on the plaintiff’s failure to adequately plead

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247 Id.


253 Id.


256 Id.

257 Id.
In 2004, InVision had disclosed that an internal investigation had uncovered possible FCPA violations that might impact a pending merger with GE. Following this announcement, plaintiffs filed suit, alleging that the merger agreement, which had been filed with the SEC, contained misstatements. While the securities fraud litigation was pending, InVision settled with both the SEC and the DOJ. The Ninth Circuit found, however, that the plaintiffs did not sufficiently allege scienter by the officers responsible for the merger agreement.

In Immucor, plaintiffs sued the company and two of its officers. The complaint alleged that between August 16, 2004 and August 29, 2005, the defendants made numerous statements about corruption problems at Immucor's Italian subsidiary. Specifically, the plaintiffs alleged that the defendants misrepresented to investors an overly optimistic assessment of Immucor's corrupt foreign business practices and the strength of Immucor's internal control mechanisms. The defendants moved to dismiss the complaint, contending that it failed to allege any false or misleading statements.

The district court denied the motion to dismiss as to several of the allegedly misleading statements. The company had disclosed the existence of an Italian criminal investigation and an internal investigation of allegedly improper payments. Nevertheless, the judge found that these disclosures created the impression that the investigation was limited to a single incident of poor bookkeeping by Immucor. The court stated that "plaintiffs allege that multiple legally dubious payments made by De Chirico [the former head of the Italian subsidiary and CEO at the time the alleged misstatements were made] or under his direction were being investigated. The omission creates a distorted picture of Immucor’s alleged liabilities. That is, while parts of the disclosure may have been accurate, Defendants’ duty was to describe fully the nature and scope of the conduct under investigation . . . ."  

If not dismissed, settlement of shareholder suits may prove significantly more expensive than settlement with the DOJ or the SEC. For example, in 2006, Nature’s Sunshine Products, a manufacturer of nutritional and personal care products, settled its shareholder suit for $6 million for allegations stemming from an SEC investigation into payments made by a Brazilian subsidiary to import unregistered products. Ultimately, however, the SEC fine was only $600,000. In 2008, Faro Technologies settled securities litigation against it for $6.875 million. The company had previously paid a $1.1 million criminal fine to the DOJ, and $1.85 million to the SEC for disgorgement and interest. Similarly, Syncor International, which settled with the government for $2.5 million in 2002, recently settled its securities fraud litigation for $15.5 million after the Ninth Circuit reversed the district court’s dismissal against certain defendants.

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258 Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736 (9th Cir. 2008).
261 Id. at *13.
Willbros Group, a company that provides engineering and construction services in the oil and gas industry, settled its securities class action suit prior to resolving charges with the DOJ and the SEC. Both involved allegations that the company paid bribes to Nigerian, Ecuadorian and Bolivian government officials. In February 2007, Willbros Group settled its securities fraud suit for $10.5 million. Over a year later, in May 2008, the company settled with the DOJ and the SEC, agreeing to pay $33 million to the DOJ and $10.3 million to the SEC.

There are some significant conclusions to be drawn from these cases. First, upon discovering a potential FCPA issue, a company must quickly determine all the facts and its potential exposure. If the problem is serious, the company may have little choice but to disclose the issue. Once that determination is made, a full and accurate disclosure to investors should be made. In addition, since the DOJ and the SEC monitor corporate filings, a voluntary disclosure to the government should also occur. Second, if, during the course of the investigation, additional facts come to light which suggest that the initial disclosure, albeit accurate at the time, is now inaccurate, an updated disclosure should be considered. This principle is particularly important if the company is in the process of a merger and disclosures concerning the FCPA are included in proxy materials. Such was the case in 2003, with Lockheed Martin’s acquisition (ultimately scuttled) of the Titan Corporation. On September 15, 2003, Titan became a party to a merger agreement, in which Lockheed Martin agreed to acquire Titan, pending certain contingencies. Titan affirmatively represented in the merger agreement that:

To the knowledge of the Company, neither [the] Company nor any of its Subsidiaries, nor any director, officer, agent or employee of the Company or any of its Subsidiaries, has … taken any action which would cause the Company or any of its Subsidiaries to be in violation of the Foreign Corrupt Practices Act of 1977, as amended, or any applicable law of similar effect.

Ultimately, Titan settled an enforcement action with the SEC and the DOJ by paying over $28 million in fines, penalties and disgorgement. At the same time as the enforcement action, the SEC issued a report pursuant to Section 21(a) of the Exchange Act. In that report the SEC stated that:

When an issuer makes a public disclosure of information—via filing a proxy statement or otherwise—the issuer is required to consider whether additional disclosure is necessary in order to put the information contained in, or otherwise incorporated into that publication, into context so that such information is not misleading. . . . [Accordingly] . . . if additional material facts exist, such as those contradicting or qualifying the disclosure of the original representation . . ., omission of which makes that disclosure misleading, a company would also be required to disclose those facts.
I. **Shareholder Derivative Litigation**

In addition to securities fraud actions, shareholders may also file derivative suits, on behalf of the corporation, against the corporation's directors or officers. Typically, derivative suits allege that the directors or officers violated their fiduciary duties to the corporation. In the FCPA context, derivative suits have alleged that the directors have violated their duty of oversight towards the corporation by their inaction or failure to monitor the corporation's activities in high-risk countries and/or implement internal controls sufficient to prevent both substantive and accounting FCPA violations. Derivative actions have been filed after disclosure of both government investigations into non-compliance as well as settlements of FCPA-related charges against the company.

Despite their growing prevalence, derivative suits based on FCPA claims have so far been largely unsuccessful, and no suit has survived a motion to dismiss (although several have settled prior to this stage). Because derivative suits are brought to protect the interests of the corporation, before shareholder plaintiffs can proceed with the suit, they must first demonstrate that the board has failed to pursue the suit by meeting certain pleading requirements. Though the substantive contents of the pleading requirements are governed by the law of the state of incorporation, Delaware (the state law most frequently applied in the FCPA derivative actions) requires that the shareholder plaintiffs either (1) demand that the corporate board undertake the litigation; or (2) demonstrate that making such a demand would be futile (“demand futility”).

Generally speaking, a plaintiff can plead demand futility by alleging facts that show that a majority of directors either face a substantial likelihood of liability or are beholden to other directors who do, or that there is reasonable doubt that a board's decision was a valid exercise of business judgment. Oversight liability based on a director's failure to act requires a showing that “the directors knew they were not discharging their fiduciary obligations or that the directors demonstrated a conscious disregard for their responsibilities such as by failing to act in the face of a known duty to act,” and has been described as “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”

Derivative suits brought by shareholders of Smith and Wesson, Tidewater, Parker Drilling, and Baker Hughes alleging that the board failed to implement and maintain a system of internal controls sufficient to detect or prevent FCPA violations have each been dismissed because the plaintiffs did not make a demand on the corporation’s board and failed to plead that doing so would be futile. The plaintiffs were unable to allege particularized facts as to a majority of individual directors that he or she would face a substantial likelihood of oversight liability.

For example, in *Parker Drilling*, the plaintiff argued that it was sufficient to establish a substantial likelihood of oversight liability by alleging that investigations into potential FCPA violations were ongoing. The court disagreed, however, noting that not only had conclusions of wrongdoing not been reached, but moreover, that even if wrongdoing had been found, “it must still be known to and ignored by the directors before an oversight claim is actionable.” The court also found that the plaintiff failed to allege specific facts against each individual director. The Fifth Circuit has recently upheld the dismissal against Parker Drilling. Similarly, in the Baker Hughes derivative suit, a guilty plea and a $44 million fine for admitted FCPA violations were still found insufficient to establish oversight liability without further evidence that the board consciously failed to address compliance issues. In addition, FCPA-related claims in derivative suits against Hewlett-Packard and Dow Chemical have also been dismissed because the plaintiffs failed to allege that the board even had knowledge about the alleged bribery at issue.
A derivative suit against the directors of Wynn Resorts Limited was also recently dismissed for failure to assert demand futility. In that suit, shareholder plaintiffs did not rely on oversight liability, but instead alleged that the board violated its fiduciary duties by approving a $135 million donation to the University of Macau’s Development Foundation. The shareholders argued that demand futility was satisfied because the board faced a substantial likelihood of liability for approving the donation, which was in fact an improper bribe under the FCPA. They also argued that because the donation was made to secure government approval necessary to expand Wynn’s Macau operations, there was reasonable doubt that the decision was not a valid exercise of business judgment. The court, while acknowledging that the facts alleged in the complaint indicate the circumstances of the donation were “highly suspicious,” found that the plaintiffs’ allegations failed to establish that the directors knew the Macau donation was improper, and therefore that the plaintiffs could not demonstrate the directors were disinterested. Similarly, because the plaintiffs did not allege that the directors had knowledge that the donation violated the law or that it was done to advance an interest other than the company’s, the plaintiffs failed to cast doubt on the board’s business judgment.

By contrast, several cases in which shareholder plaintiffs did make a demand on the board to pursue litigation have resulted in settlement. In 2009, following its settlement with the DOJ and the SEC, Faro Technologies settled a derivative action in which the plaintiff made a demand on the board. More recently, Halliburton and Johnson & Johnson have entered into global settlement agreements covering multiple derivative actions, including those in which the shareholders made a demand on the board. In all three cases, the corporations agreed to implement corporate governance reforms and reimbursement of plaintiffs’ attorneys’ fees and expenses. However, Faro had agreed to increased compliance obligations as part of its settlement of charges with the DOJ and the SEC, and both Halliburton and Johnson & Johnson were already subject to many of the agreed-upon reforms as a result of their government FCPA settlements as well.

m. Arms Export Control Act and International Traffic in Arms Regulations

The Arms Export Control Act (“AECA”), and its implementing regulations, the International Traffic in Arms Regulations (“ITAR”), govern the export of defense-related materials and services, and require disclosure to the State Department of commissions paid to help secure any sales of such materials or services. These obligations have implications under the FCPA when a company fails to scrutinize (or intentionally conceals) bribes paid to foreign officials through commission payments.

On March 1, 2010, BAE Systems plc (“BAES”), a multinational defense contractor headquartered in the UK, pleaded guilty to conspiring to defraud the United States by making false statements about its FCPA compliance program and by violating the AECA and ITAR, and agreed to pay a $400 million fine. BAES represented to the government that it would implement policies and procedures to ensure compliance with the FCPA and the OECD Anti-bribery Convention, but never did so. In fact, both before and after BAES made such representations about its FCPA compliance to the government, BAES made or agreed to make substantial payments to shell companies and third-party intermediaries, including “marketing advisors” to assist in securing the sales of defense-related materials. These payments were

272 Id. at *6.
273 Id. at *10.
274 22 U.S.C. §§ 2751 et seq.
275 22 C.F.R. §§ 120 et seq.
276 Id. §§ 130.5, 130.9.
not subject to the scrutiny BAES had told the government they would be subjected to as part of its FCPA compliance program. Nor were they disclosed to the State Department, in violation of AECA and ITAR. As part of its plea, BAES agreed to institute and maintain an anti-corruption compliance program, and to retain an independent compliance monitor for three years. Notably, BAES did not plead guilty to an actual violation of the FCPA.278

Failure to properly disclose commissions may also lead to a books and records violation. On March 1, 2005, Titan Corp., a military intelligence and communications company, settled charges with the SEC that, among other alleged activity, its systematic underreporting of commissions paid on equipment exported to Sri Lanka, France, and Japan led to a violation of the FCPA’s books and records provision.279 In addition, an FCPA indictment or conviction may lead to revocation or suspension of an arms export license under the regulations.280

n. Dodd-Frank Whistleblower Provisions

Under new whistleblower rules promulgated by the SEC pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act,281 eligible whistleblowers who provide the SEC with original information about a possible federal securities law violation, including the FCPA, can receive 10-30% of the government penalty or recovery. A whistleblower is eligible if he or she “voluntarily” provides the information to the SEC—that is, prior to any request, inquiry, or demand relating to the same subject matter from the SEC or in connection with any investigation conducted by any other federal, state Attorney General or state securities regulatory authority, self-regulatory organization, or the Public Company Accounting Oversight Board.282 The information reported must also be “original information,” which the rules define as derived from independent knowledge (i.e., not derived from publicly available sources) or analysis of the whistleblower and not previously known to the SEC or exclusively derived from an allegation made elsewhere.283 Information obtained through communications protected by the attorney-client privilege is not eligible. In addition, the information must lead to a monetary sanction of over $1 million. Though the whistleblower is not required to report the potential violation internally before going to the SEC, doing so may increase the whistleblower’s reward.284 In addition, the new rules provide for protection for whistleblower employees against employer retaliation, including a private right to sue if the whistleblower is discharged or discriminated against. 285


283 Id. at 39-42.

284 By contrast, if a whistleblower only reports the suspected violation internally and does not report it to the SEC, whether the anti-retaliation protections are afforded to the whistleblower may depend on the substance of the reported violation itself.

285 The application of the anti-retaliation provisions of Dodd Frank to FCPA claims are still being interpreted and defined by the courts. For example, the anti-retaliation provisions may not extend to protect the internal reporting of the FCPA’s anti-bribery provisions. See Egan v. TradingScreen, Inc., No. 10-8202, 2011 WL 1672066 (S.D.N.Y. May 4, 2011) (holding that whistleblower protections extend to the internal reporting of only the following violations: (i) the Sarbanes Oxley Act; (ii) the Securities Exchange Act of 1934; (iii) 18 U.S.C. 1513(e) (SOX amendment the obstruction of justice statute prohibiting retaliation against employee whistleblowers), or (iv) other laws or regulations subject to the SEC’s jurisdiction). Thus, the provisions may be less significant for non-issuers. See Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012) (dismissing suit by plaintiffs who alleged that they had been terminated for reporting, inter alia, a potential FCPA violation to the company because the employer was not an issuer, and thus the reported FCPA violation was not within the SEC’s FCPA jurisdiction). Finally, the anti-retaliation protections may not apply extraterritorially. See Asadi v. G.E. Energy (USA) LLC, No. 4:12-cv-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012).
In its first full year, the whistleblower program yielded 3,001 complaints, the most common of which related to corporate disclosure, offering fraud, and manipulation. FCPA tips accounted for 3.8% of those received. The SEC Enforcement Division has also praised the quality of the tips received under the new program. The SEC also announced that its first whistleblower award was 30%, the maximum provided for by law. Though enforcement officials have stated that companies can still receive credit for self-reporting even if a whistleblower has already emerged, the new whistleblower rules will likely encourage companies to self-report earlier and more frequently than before, as companies conducting internal investigations are beginning to assume that if they know about a potential violation, the government does as well. Moreover, because whistleblowers are not required to report potential violations internally before going to the SEC, it will be important for companies to encourage employees to utilize existing internal reporting procedures.

o. Kleptocracy Asset Recovery Initiative

In July 2010, the DOJ announced the launch of the Kleptocracy Asset Recovery Initiative, intended to recover the assets of corrupt foreign government officials that have been laundered into or through the United States. The initiative represents the DOJ’s attempt to punish and deter corruption even when it is impossible or impractical to punish the kleptocrat himself or herself. Ultimately, the DOJ seeks to repatriate the stolen assets back to the country from which they were stolen.

In addition to the ongoing attempts to recover the assets of Equatorial Guinea minister Obiang, the Kleptocracy Asset Recovery Initiative has also pursued a number of successful forfeitures. On June 28, 2012, the initiative obtained its first forfeiture judgment for over $400,000 in assets of Diepreye Solomon Peter Alamieyeseigha, a former governor of the Nigerian state of Bayelsa. Alamieyeseigha had pleaded guilty to money laundering offenses in Nigeria and for failing to disclose a bank account in Florida. On July 23, 2012, the DOJ announced that it had obtained a restraining order against over $3 million in assets that it had identified as the proceeds of corruption belonging to James Onanefe Ibori, the former governor of the oil-rich Delta State in Nigeria. Ibori was convicted of money laundering and conspiracy to defraud in the UK and sentenced to 13 years in prison earlier that year. On November 14, 2012, the DOJ announced the forfeiture of a Manhattan condominium and Virginia residence that had been allegedly purchased with bribe proceeds paid to the family of the former President of Taiwan, Shui-Bian Chen.


287 FY2012 Dodd Frank Whistleblower Report, Appendix A.


289 SEC Receives More Than 3,000 Whistleblower Tips in FY2012, supra note 286.

290 Thoms, supra note 288.


293 Id.


295 Id.


297 Id.

III. THE FCPA IN CONTEXT

The best way to understand the breadth of the FCPA and its impact on businesses doing business outside the United States is to examine how it has been enforced. Although recently litigated enforcement actions against and criminal prosecutions of individuals have yielded judicial opinions, there remain relatively few court opinions, and therefore, settled enforcement actions provide the most substantial guidance for the interpretation of the statute. Since 2005, the DOJ has brought seventy-two criminal actions against corporations, forty-five of those from 2009 to the present. The SEC, with overlapping FCPA enforcement jurisdiction against issuers, has brought forty-four enforcement actions from 2009 to the present. From these cases, patterns emerge regarding the government’s enforcement priorities and its interpretation of the statute’s scope.

In addition to their enforcement actions, the DOJ and the SEC recently set forth their interpretation of key FCPA provisions in the Guidance. The DOJ also provides guidance on particular circumstances through the opinion release process. Under this procedure, companies may submit factual scenarios to the DOJ, which will review the request and issue an opinion announcing whether it would take any action based on the facts presented or not. The publicly released opinions provide guidance on both the limits of the FCPA and acceptable compliance practices.

Lessons learned from enforcement actions and opinion releases provide insights into the scope of this complex statute and provide a context within which companies can more ably develop and implement an effective compliance program. Because few of the critical concepts in the statute have received any judicial interpretation, the settlements between companies and the government, while useful, do not provide authoritative determinations of the FCPA. Instead, they represent the government’s likely contentions in future litigation. Among other topics, these settlements provide guidance on the government’s approach to promotional expenses, political donations and charitable contributions, liability for payments made by third parties such as agents and JV partners, and anti-corruption diligence in connection with acquisitions and investments.

A. Common Misunderstandings about the Breadth of the FCPA: Promotional Expenses, Taxes and Fees, and Payments Made Pursuant to a Contract

Because the FCPA does not reach payments to government entities (as opposed to government officials) and its affirmative defenses appear to allow certain promotional and other expenses, compliance headaches and enforcement actions have arisen concerning gifts and entertainment unrelated to the promotion of specific products or services, payments required by contract, and the payment of fees and taxes. As many companies have discovered after pushing the envelope in these areas, the scope of permissible payments is limited, and the government enforces that narrow scope. The cases discussed below illustrate how difficult it can be to manage the risks associated with these types of payments.

1. Non-Corrupt Expenditures to Foreign Officials for Gifts and Entertainment Unrelated to Promotions

The FCPA does not prohibit providing gifts and entertainment to foreign officials in the absence of corrupt intent to obtain or retain business. Accordingly, companies may provide gifts, entertainment, and travel to foreign officials, but should ensure that the value and all the relevant circumstances of the gifts and entertainment do not permit any inference that the items were provided with corrupt intent.
Circumstances indicative of a corrupt purpose—or the absence of such a purpose—will include the value of the item, whether providing the item is permitted under local law and the existence of any policies applicable to the recipient, the history of any items of value provided to the official, the business pending before the official, evidence of a quid pro quo, whether or not the items of value were requested by the official, and whether they are mischaracterized in the company’s books and records. Among other factors, the Guidance points to the extravagance of an expenditure on gifts, travel, or entertainment—or the presence of a series of smaller payments that, added together, suggest a pattern of bribes—as an indication of corrupt intent. By contrast, the Guidance states, “hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the giver’s books and records, provided only to reflect esteem or gratitude, and permitted under local law.”

Prior to the Guidance, the DOJ indicated in a series of opinion releases that it would not take enforcement action where there was no indication of corrupt intent. One of the strongest indicators of a lack of corrupt intent is a lack of business before the foreign government agency. In Opinion Release 96-01, for example, an American non-profit corporation proposed to pay for up to ten government officials to attend environmental training in the United States. The non-profit, by the nature of its business, was not interested in obtaining or retaining business with the regional governments of the officials. The DOJ notified the corporation that it would take no enforcement action with respect to the proposed trip.

In 2004, the DOJ addressed expenditures for travel in three different opinions. In Opinion Releases 04-01, 04-03, and 04-04, the DOJ responded to requests from an American company and two U.S. law firms to review proposals for these entities to pay the costs of trips by foreign officials. The officials were to participate in the trips to meet their U.S. counterparts, attend a seminar, and conduct a fact-finding mission. For each of the trips, the companies represented that they had allowed the foreign government to select the officials who would attend, that the company intended to pay all costs directly to the providers or reimburse costs incurred only upon presentation of a receipt, that the company would not compensate the officials or fund any activities other than those described, and that the trips would not violate the local laws of the officials’ nations.

Neither the company nor the law firms in these releases had business pending before the foreign agencies involved in the trip, meaning that the companies could not rely on the defense for bona fide expenditures tied to promotional activities. In fact, unlike the releases discussed in Section III.A.2, infra, the releases do not mention the affirmative defense. Instead, the lack of any business before the foreign agency was itself a factor weighing against a finding of corrupt intent. In addition to the lack of business before the foreign agency, these three Opinion Releases provide other guidelines—similar to those for promotional expenditures to ensure that the expenditures remain reasonable and bona fide—to bolster the DOJ’s decision not to take enforcement action.

The DOJ addressed expenditures for travel most recently in Opinion Release 11-01, responding to a request from an American adoption services provider proposing to pay for expenses for a trip to the United States by two foreign officials. The officials would attend a two-day program to learn more

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300 Id. at 15.
301 Id.
about the provider’s adoption services, and their economy class airfare, lodging, transportation, and meals would be paid for. Among other factors relevant to the DOJ’s decision not to take enforcement action, the provider represented that it had no non-routine business pending before the relevant foreign government agencies, and that its pending routine business principally involved seeking approval for adoptions, a process governed by defined international standards. Moreover, the adoption services provider represented that the foreign governments involved would select the officials, the provider would pay all costs directly, and spouses and family members would not be included.

Lessons Learned

Where there is specific business pending before the foreign government agency involved in the transaction, the officials making the decision should not be the beneficiaries of gifts, travel, or entertainment expenditures absent specific and robust steps to ensure transparency and local law compliance.

- The expenditures should not be lavish, on either a per capita or event basis;
- Expenditures should be limited to business persons, not family or guests;
- Specific participating foreign officials should be selected by the foreign government, not the company;
- Gifts should be infrequent, transparent, and should not take the form of cash or cash equivalents;
- Gifts and entertainment should be legal, within accepted industry norms, consistent with company policy, and not contrary to local law;
- The expenditures should be accurately and adequately documented in the company’s books and records, including their business purpose, value, and proof of pre-approval;
- When arranging travel and hotel expenses for government officials, companies should generally make the arrangements and pay hotel and travel expenses directly, rather than allowing the officials to pay their own way and to seek reimbursement; and
- Companies should generally avoid providing per diem payments, and should never provide per diem payments when the visitors’ expenses are already covered.

2. Managing Travel and Entertainment Within the Limits of the Affirmative Defense

As discussed in Chapter I, the Act carves out an affirmative defense for the payment of “reasonable and bona fide” expenditures “such as travel and lodging expenses,” incurred by the foreign official that are “directly related” to the promotion, demonstration, or explanation of products or services. This defense often comes into play in connection with promotional travel, meals, gifts, and other efforts related to business involving foreign governments or state-owned enterprises. Companies can effectively operate within the bounds of this affirmative defense, but should carefully monitor their activities to ensure that expenses qualify. As is made clear in the legislative history, evidence of a corrupt intent will defeat any attempt to establish that the gift or entertainment was bona fide.305

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305 “If the payment or gift is corruptly made, in return for an official act or omission, then it cannot be a bona fide, good-faith payment, and this defense would not be available.” H.R. Conf. Rep. No. 100-576, at 922 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1955.
One form of promotional expense that companies incur is the “goodwill tour”: the payment of travel and associated expenses for foreign officials invited to meet with company representatives regarding the company’s business. Payments for travel and entertainment do not qualify as lawful promotional expenses unless they are reasonable and directly related to showcasing the company’s products or services and are made without a corrupt intent. Although there have been a few enforcement actions in this area, none of them provides any clear and definitive guidance.

The DOJ has declined to take enforcement action against proposed trips when the sponsoring companies take very specific precautions to ensure no appearance of a corrupt intent, including limitations on lavish expenses, and playing no part in the selection of the individuals attending. In both of the following Opinion Releases, the DOJ specifically noted that the actions of the companies were “consistent with the FCPA’s ‘promotional expenses’ affirmative defense.” In Opinion Release 07-01, an American company informed the DOJ that it intended to pay the domestic expenses for a four-day educational and promotional trip to the United States by a six-person delegation from the government of an Asian country. The trip was intended to familiarize the delegates with the company’s operations with the hope that the company would expand its business to the Asian country. The company represented that it would not host any entertainment or leisure activities for the delegates, that it would make all payments directly to service providers, and that the foreign government, not the company, would select the delegates for the trip. In addition, the company had obtained a written opinion from an established law firm that stated that the sponsorship was not contrary to the law of the Asian country in question. The DOJ responded that it did not intend to take any enforcement action with respect to the proposal.

Similarly, in Opinion Release 07-02, the requesting company represented that it intended to cover the domestic expenses for a six-day trip within the United States for six foreign government officials. The company intended to pay for domestic economy class airfare, lodging, transportation, meals, and a fixed amount of incidental expenses. The company represented that it would not pay for the officials’ international airfare, would not host family members or guests of the officials, and would pay all costs directly to service providers, with the exception of a modest per diem allowance paid upon presentation of a receipt. The DOJ announced that it did not intend to take any enforcement action with respect to the proposal.

Sometimes companies and individuals do not adhere to these guidelines, and enforcement actions follow. In 2004, a federal investigation into payments to secure oil and gas projects in three countries resulted in $16.4 million in fines and civil penalties against ABB Ltd. Following that settlement, in 2006, the SEC sued four individuals involved in that case for allegedly paying approximately $1 million to officials of a Nigerian, state-owned agency responsible for overseeing oil exploration in order to gain an advantage in the bidding process. As part of the $1 million, one of the defendants used his corporate credit card and cash advances from the company to pay for the Nigerian officials’ accommodations, meals, and car services during their trips to the United States, as well as providing them with other gifts and cash while in the United States. Those payments totaled over $176,000. The individuals settled the case and paid penalties of $40,000 or $50,000. The payments did not qualify for the affirmative defense because they were made corruptly and with the intention of inducing the Nigerian government officials to provide confidential competitor bid information rather than to promote the company’s products or services.

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306 FCPA Opinion Procedure Release No. 07-01, supra note 123.
308 Litigation Release No. 18775, ABB Ltd., supra note 54.
In another example of when promotional expenditures go too far—and one highlighted by the Guidance—Lucent Technologies Inc., a global communications solutions provider, paid for Chinese government officials to travel to the United States and elsewhere for sightseeing, entertainment, and leisure purposes. According to the government, Lucent spent over $10 million on travel and entertainment expenses from 2000 to 2003 for approximately 1,000 employees of state-owned or state-controlled telecommunications enterprises in China, all of which were prospective or existing Lucent customers. Many of these employees participating in the travel were key decision-makers specifically targeted by the company. Although many of the approximately 315 trips were ostensibly to provide training to Chinese employees or to allow inspection of Lucent’s factories and were also recorded in Lucent’s books as training or inspection trips, the foreign officials, in fact, spent little or no time in the United States visiting Lucent’s facilities. Indeed, during the relevant time period, Lucent began relocating its manufacturing facilities to locations outside the United States, leaving little to inspect. Instead, they visited tourist destinations, such as Hawaii, Las Vegas, New York City, Niagara Falls, the Grand Canyon, Disney World, and Universal Studios. Lucent resolved the matter by paying $2.5 million—$1.5 million to the SEC and $1 million to the DOJ.310

The SEC and the DOJ also brought enforcement actions against Ingersoll-Rand Company Ltd. for the company’s payment of leisure travel for Iraqi government officials. In connection with the UN Oil-for-Food Program, several subsidiaries of Ingersoll-Rand made kickbacks and provided leisure travel for the officials in order to obtain humanitarian aid contacts. Despite a prohibition on such expenses in the company’s compliance policies, the DOJ and the SEC charged that Ingersoll-Rand was aware of the payments and therefore liable for violations of the FCPA.311

Payments for travel and entertainment formed a centerpiece of recent SEC and DOJ enforcement actions against Aon Corporation, a risk-management and insurance and reinsurance provider. According to the government, an Aon subsidiary operating in Costa Rica managed two funds whose ostensible purpose was to provide training and education for employees of the government agency responsible for issuing reinsurance contracts—but which were used to fund trips to tourist destinations such as Monte Carlo, Paris, and London for conferences that had no apparent connection to the insurance industry. Most of the payments were made to a Costa Rican tourism company whose board of directors included a government official, who took several trips that Aon’s subsidiary directly reimbursed. Separately, the government also alleged that Aon sponsored annual trips to the United States by delegations of Egyptian officials, which cost $100,000 over nine years. While the government conceded that the trips had a business component, it alleged that these trips included a disproportionate amount of leisure activities and lasted longer than the business purpose would justify. In both cases, the government alleged that the payments were improperly booked and had thus violated the FCPA’s accounting provisions. Aon settled the case by paying more than $16 million: $14.5 million in disgorgement and prejudgment interest to the SEC and $1.76 million to the DOJ.312

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Finally, in another example highlighted by the Guidance, telecommunications company UTStarcom, Inc. was penalized after its Chinese subsidiary paid nearly $7 million for travel expenses over a five-year period. According to the government, the subsidiary paid for 225 trips during this period, many of them to popular tourist destinations—such as Hawaii, Las Vegas, and New York—where the company had no facilities, and concealed the true nature of the trips by improperly accounting for them as “training” expenses, even though no training occurred. UTStarcom settled the case by paying $3 million: $1.5 million to the SEC, and another $1.5 million to the DOJ.313

Lessons Learned

Companies can incorporate prophylactic devices into their procedures to ensure that promotional courtesies provided to public officials do not run afoul of the FCPA.

- Ensure transparency by using invitation letters that lay out the proposed itinerary and detail with specificity those expenses that the host proposes to provide;
- Ensure that the trip does not violate the written laws of the foreign country or the internal regulations/policies of the entity that employs the visitors;
- Ensure that the purpose of the trip has a clear business element and that any side trips are minimized;
- Pay the services providers directly—hotels and airlines—and not the foreign officials;
- Avoid any cash payments;
- Invite only business people, not spouses or guests with no business purpose;
- Ensure that the government agency or sponsor selects the individuals who will be traveling on behalf of the agency in connection with any promotional trips arranged by the company;
- Comply with all company policies;
- Record all expenses accurately;
- Treat members of visiting delegations in an equal manner, consistent with their positions, and do not create an appearance of currying favor with perceived decisionmakers; and
- Ensure that the expenditures are not lavish, which may suggest an attempt to influence an official.


Another type of expense that continues to lead to many FCPA enforcement actions is paying foreign government officials in order to avoid higher payments of fees, taxes, or other forms of favorable regulatory treatment, such as the issuance of licenses or permits, or preferential customs treatment for goods and services.

At one point, it was commonly believed that payments to officials to reduce or eliminate government fees or taxes did not fall within the business purpose element of the FCPA. In 2001, however, the government brought an action against Douglas Murphy and David Kay, former president and former vice president of American Rice, Inc., (“ARI”). Murphy and Kay were accused of bribing Haitian customs and tax officials to reduce the Haitian import tax on ARI’s imports. Instead of paying the import tax to

the appropriate government agency, the defendants made smaller payments directly to the tax officials who oversaw the imports. The District Court dismissed the indictments, holding that the FCPA did not apply to the payments because they were not made to obtain business or retain new business. The Fifth Circuit reversed that decision in United States v. Kay, holding that the phrase “obtain or retain business” refers to any intention to either directly or indirectly assist the payer in obtaining or retaining business. On remand, the jury found both Murphy and Kay guilty on all counts. On appeal, the Fifth Circuit upheld the convictions, reaffirming that the business purpose element of the FCPA had broad application:

Although ARI did not make corrupt payments to guarantee one particular contract’s success, ARI ensured, through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it. Trial testimony indicates that ARI believed these payments were necessary to compete with other companies that paid lower or no taxes on similar imports – in other words, in order to retain business in Haiti, the company took measures to keep up with competitors.315

Other examples of enforcement actions in this area include In the Matter of Baker Hughes Inc., in which Baker Hughes’ auditor, at the alleged direction of Baker Hughes executives, authorized payment to an Indonesian tax official to reduce a tax assessment entered against a Baker Hughes subsidiary from $3.2 million to $270,000.316 Baker Hughes consented to a cease-and-desist order to resolve the matter. Similarly, the SEC brought an action against BJ Services Co. in 2004 after a company subsidiary allegedly paid Argentine customs officials 65,000 pesos to overlook violations of Argentine customs law. After an internal investigation, BJ Services reported the payments to the SEC and settled the case filing of a cease-and-desist order.317 The payment in that case did not qualify as a facilitating expense, because the payment was made to overlook, rather than satisfy, a routine regulatory requirement.

Recently, Westinghouse Air Brake Technologies Corporation settled an enforcement action with the SEC and the DOJ for payments by its Indian subsidiary that skirted the edges of the affirmative defense of facilitation payments. Westinghouse paid significant fines in connection with payments to the Indian Railway Board for facilitating the scheduling of product inspections and issuing compliance certificates, and payments to the Central Board of Excise and Customs to discontinue frequent audits.318

In another case, Con-way Inc., an international freight transportation company headquartered in California, settled an enforcement action with the SEC after disclosing a subsidiary’s improper payments of approximately $417,000 to customs officials and employees of majority state-owned airlines in Manila. Con-way’s wholly-owned subsidiary held a 55 percent voting interest in Emery Transnational, a Philippine-based firm. From 2000 to 2003, Emery paid the local customs officials and airline employees

314 359 F.3d 738 (5th Cir. 2004).
315 United States v. Kay, 513 F.3d 432, 441-42 (5th Cir. 2007).
318 One of the company’s Indian subsidiaries, a manufacturer of brake subsystem and other locomotive products, also had made payments to Indian officials in order to obtain and retain business from the state railway system. Westinghouse was charged with violations of the FCPA’s books and records and internal controls provisions was fined $87,000, and paid almost $300,000 in disgorgement and interest. Both the SEC and DOJ also charged Westinghouse under the anti-bribery provisions of the statute because Westinghouse had knowledge of the subsidiaries’ conduct, and the DOJ assessed a separate $300,000 fine. Litigation Release No. 20467, Westinghouse Air Brake Techs. Corp., supra note 51.
in order to receive preferential treatment and “did not characterize these payments in its books and records as bribes.” Con-way settled the action by paying a $300,000 penalty and agreeing to the entry of a cease-and-desist order.

Payments related to the collection of taxes and other fees were the subject of a recent industry sweep that targeted companies in the freight forwarding, oil, and oil services, which netted a sizeable recovery for the government. In 2010, the DOJ and the SEC brought a series of enforcement actions against freight forwarder Panalpina World Transport and six oil services companies—Pride International, Royal Dutch Shell, Transocean, Tidewater Marine International, Noble Corporation, and GlobalSantaFe Corporation—alleging that, over an approximately five-year period, they made payments to government officials in countries including Nigeria in return for obtaining reduced or expedited customs duties and tax assessments. The sweep involved a combination of deferred prosecution agreements, civil settlements, and a non-prosecution agreement, and totaled more than $235 million in criminal fines, disgorgement, and civil penalties.

Companies can avoid violations of the statute by paying fees directly to a government entity rather than to a foreign official. In Opinion Release 07-03, the requesting company sought the DOJ’s position on the payment of approximately $9,000 to an Asian court to cover expenses related to a court-appointed administrator. The Department responded that it did not intend to take any enforcement action because, consistent with the FCPA, the payment would be made to the court clerk’s office and there was nothing to suggest that the presiding judge or estate administrator would personally benefit from the funds once they were paid into the government account.

**Lessons Learned**

The FCPA does not prohibit companies from paying taxes, fees, and fines levied by foreign governments, but such payments should be made directly to the government. Companies should:

- Pay only those charges required by published judicial, legislative or administrative order of the foreign country, or those approved by their companies’ legal departments;
- Pay taxes, fees, and fines directly to the government or agency rather than to individual government officials;
- Accurately document all taxes, fees, and fines to avoid duplicative payments and to detect any corruption or the appearance of corruption; and
- Not assume that payments made to officials responsible for imposing fees or taxes are permissible even though the FCPA contains an exception for facilitating payments.

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319 Preferential treatment included payments to customs officials to overlook regulatory requirements, and payments to airlines officials to favorably adjust shipping records.


4. Payments Made Pursuant to a Contract

The FCPA's second affirmative defense is for payments made pursuant to the performance of a contract with a foreign government or agency. Often, companies will, by the terms of their contract with a foreign government, be required to make certain expenditures. These situations often arise in connection with contracts that call for education or training of officials or for a company to provide subsidies or benefits directly to the government or officials.

The defense is limited to payments or gifts that are “reasonable and bona fide” expenditures “incurred by or on behalf of a foreign official” and “directly related” to the execution or performance of a contract with a foreign government or agency. DOJ Opinion Releases have indicated that the agency considers expenses permissible when required by or necessary to comply with a contract, most often a concession or production sharing agreement with a state-owned entity or government agency. For example, the DOJ indicated it would take no enforcement action in Opinion Release 92-01 when a U.S. company proposed paying the “necessary and reasonable” costs of training employees of a foreign government pursuant to a production sharing agreement and as required by local law.323 Where a contract does not explicitly require the expense, companies enter riskier territory, and a company should ensure that the costs are directly related to performing its obligations under the contract with the government.

Contracts will often require expenditures for fees or travel and companies should ensure that such expenditures remain within those limits in order to comply with the statute. For example, in the Lucent Technologies matter, the company’s contract with state-owned telecom companies in China required Lucent to pay for training and certain travel. But Lucent went above and beyond the requirements of the contract, spending $10 million over a three-year period for travel consisting primarily of sightseeing and other leisure activities, including visits to Universal Studios and Disneyland, which resulted in an SEC enforcement action and a penalty of $2.5 million.324

B. Political Donations and Charitable Contributions

1. Political Donations

Although foreign nationals are prohibited from making political donations in the United States, U.S. companies’ foreign operations are often allowed to make contributions to political parties and candidates on behalf of those companies. Because foreign political parties and candidates are “foreign officials” within the meaning of the FCPA, companies can run afoul of the FCPA by offering payments to political parties or to an official of a political party. Contributions within the purview of the FCPA include not only cash donations to political parties or candidates but also expenditures in support of candidates, such as fundraising events.

In 2005, the then-largest fine ever imposed under the FCPA was paid as the result of an allegedly corrupt political donation.325 Titan Corporation, a military and intelligence contractor, authorized by at least one company executive, made payments of approximately $2 million via its agent to the re-election campaign of Benin’s president to obtain the government’s assistance in the development of the company’s telecommunications project in that country. The SEC sued Titan, alleging that it violated the anti-bribery and accounting provisions of the FCPA by making that payment, as well as others. Titan

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324 Litigation Release No. 20414, supra note 310.
325 Plea Agreement, Titan Corp., supra note 248.
paid disgorgement of $15.4 million, and also pled guilty to three counts of violating the FCPA, which resulted in a fine of $13 million. More recently, Halliburton Co. and Kellogg Brown & Root LLC settled SEC charges involving $5 million in bribes paid to a Nigerian political party, as well as additional corrupt payments made by the companies.326

**Lessons Learned**

- **Companies should ensure that political donations are legal under local laws;**
- **Companies should also ensure that they do not give with the intent to receive a direct or indirect benefit from the candidate or any government official;**
- **Donations should be fully and accurately documented; and**
- **Companies should have internal control mechanisms that require appropriate review and approval of donations by the legal or compliance department.**

2. Charitable Contributions

Recent DOJ and SEC guidance emphasizes that the FCPA does not “prohibit charitable contributions or prevent corporations from acting as good corporate citizens,” but it also cautions that corrupt payments can be made under the guise of charitable contributions.327 In these cases, payments are not made directly to foreign officials (and so are beyond the explicit scope of the statute requiring something of value be provided “to” a foreign official), but the U.S. Government may consider charitable donations to organizations affiliated with foreign officials to be indirect payments to such officials, in violation of the FCPA. In some cases, the issue may be that the charity is being used as a conduit for payments to a government official. In other more difficult situations, the government may argue that a payment to a third party nevertheless benefits the government official.328

In addition to ensuring that donations are made to *bona fide*, non-U.S. charities for proper purposes, companies are responsible for ensuring that the donations are not being used to influence a decision-maker and are documented accurately. FCPA risk exists when a company donates funds or provides personnel or knowledge in connection with a project. For example, companies entering into contracts with foreign governments or state-owned entities are often required by the contract to build schools, roads, hospitals, or similar infrastructure, creating another area of risk. These funds may find their way into the hands of government officials in order to advance the company’s business in that country. If the company knows about the impropriety, it may be liable for bribery or books and records violations of the FCPA.


328 The OECD Phase 1 report for the United States provides that:

[The U.S. confirms that the benefit does not have to be paid directly into the hands of the foreign public official. For instance, if the government official agrees to award a contract to a company in exchange for the conferring of a benefit by that company on a third person, the foreign public official is considered to have received a benefit. The ability to designate a third party as the beneficiary of the benefit, however intangible that benefit might be, is also a benefit to the foreign public official and is sufficient for the purpose of the FCPA.](http://www.oecd.org/dataoecd/16/50/2390377.pdf)

In 2004, the SEC brought a civil action based on a charitable contribution in *SEC v. Schering-Plough Corp.*  From February 1999 to March 2002, Schering-Plough Corporation’s Polish subsidiary donated approximately $76,000 to a Polish charitable foundation. The president of the foundation was also a Polish government official, and the company made the donation to induce the government to purchase the company’s pharmaceutical products. The SEC filed a civil complaint against the company in 2004, which the company settled by paying $500,000 without admitting or denying the allegations in the complaint. Notably, there were no anti-bribery charges alleged by the SEC. Instead, the SEC charged the company with violations of the books and records and internal controls provisions of the FCPA because the “donations” were inaccurately documented, and the company did not have sufficient controls to detect such payments. In December 2012, the SEC filed a complaint against Eli Lilly and Company alleging, among other potential FCPA violations, that the company had contributed $39,000 to the same charitable foundation featured in the Schering-Plough case. According to the complaint, the initial requests for donations came from the government official, the company knew that that official had established the foundation, and the manager who requested the funds provided false descriptions of their use (e.g. securing use of the renovated castle for fictitious conferences).

The DOJ has also issued several Opinion Releases addressing charitable contributions under the FCPA. In Opinion Release 95-01, the DOJ determined that a $10 million donation funding a medical facility near the donor’s future energy plant did not violate the FCPA, because the company made payments directly to the charity, required certifications that the donation would not be used in a manner inconsistent with the FCPA, that none of the people acting on behalf of the charity were affiliated with the government, and requested audited financial reports on use of the funds. In Opinion Release 97-02, the DOJ addressed another permissible charitable arrangement. There, the requesting company proposed funding the construction of an elementary school near the company’s plant in Asia. The company agreed to obtain a written agreement from the government restricting the funds to construction of the elementary school and guaranteeing the availability of land, teachers, and additional funding for administration of the school. The DOJ agreed that the donation did not implicate the FCPA when the payment was made directly to a government entity and not to any individual official.

In many countries, charitable efforts are often directly intertwined with the government. Indeed, in many parts of the world, senior government officials (including heads of state) and their families often sponsor or have, direct or indirect, affiliations with charitable entities. Companies should follow similar guidelines and exercise caution in order to avoid impropriety or its appearance. In Opinion Release 06-01, an American company located in Switzerland planned to contribute $25,000 to an African country’s local ministry of finance to provide local customs officials with financial incentives for positive performance. The company planned to make the payment directly to an official government bank account, and the ministry would then determine the recipients and the value of awards, with the company monitoring the program through periodic reviews. The DOJ indicated that it did not intend to take any enforcement action with respect to the payment. The company’s stated intent to make the payment directly to the government and to minimize the subjectivity in selecting recipients negated any corrupt intent that the DOJ may have inferred from the payment.

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330 Complaint, Eli Lilly & Co., supra note 98.
331 Id. ¶ 10.
In Opinion Release 10-02, a U.S.-based nonprofit microfinance company requested guidance in connection with its Eurasian subsidiary, which was attempting to reorganize from a non-banking financial institution to bank status. The Eurasian country’s government feared that commercialization would ultimately cause funds intended for humanitarian assistance to be withdrawn from the country and required the subsidiary to make a sizable grant to at least one local microfinance institution on a list provided by the government. The company undertook three rounds of due diligence, examining potential grantees’ qualifications, ownership, management structures, operations, potential ties to government officials, and histories of criminal prosecutions or investigations. Through this process, the company identified one acceptable grantee and confirmed that it had no connections to government officials involved with microfinance. It also proposed several additional controls, including staggered payments, monitoring and auditing, a ban on compensating board members, and anti-corruption compliance provisions. Under these circumstances, the DOJ concluded that the grant’s purpose would be for obtaining/retaining business but it would not constitute corrupt giving of anything of value to foreign officials.

Lessons Learned

- Companies should monitor and carefully evaluate their donations to foreign charities or foreign governments for charitable purposes;
- Companies should not make charitable donations with the intent of obtaining or retaining business or to secure an improper business advantage;
- The contribution should be legal under the local law and properly recorded;
- Companies should also publicize the contribution to promote full transparency;
- Companies should conduct appropriate due diligence to assure there is no connection between the charity, its board or staff, and any government official;
- Companies should promulgate and adhere to policies governing charitable contributions; such issues should not be addressed on an ad hoc basis; and
- Where a foreign government requires or encourages local charitable contributions, companies should consider using a third party, such as a non-governmental organization, to select a suitable recipient.

C. Liability for Payments Made by Others on Behalf of a Company

1. Payments By Agents and Other Intermediaries

Vendors, agents, and other intermediaries present one of the more recognized areas of potential risk regarding FCPA violations. In fact, more than 90 percent of reported FCPA cases have involved a third-party intermediary. Under basic principles of criminal and agency law, companies are liable for conduct of agents acting within the scope of employment. Whether these principles apply to all of the identified third parties depends on the specific circumstances.

336 Id. at 5.
a. **Sources of Risk in Agent Relationships**

In classic agent arrangements, companies have been the subjects of enforcement actions after inadequately controlling their agents’ conduct, either by failing to know that their agents were engaging in bribery or by failing to stop them from doing so. Companies have faced liability for a variety of agents, commonly including consultants, customs agents, and, in some cases, lawyers and distributors.

FCPA enforcement cases often feature payments to customs agents or consultant arrangements, especially those with inflated, cash, or ill-defined payment or commission structures suggesting that a company knew, or should have known, that there was a high probability the consultant or agent would pass on portions of the commissions to government. In 2010, for example, GlobalSantaFe Corporation paid $5.9 million in disgorgement, interest, and a civil penalty to settle SEC allegations that the company channeled payment through customs brokers to Nigerian officials, who then provided false documentation that equipment on expired permits had been removed from Nigerian waters.338 And in *SEC v. Monsanto Co.*, Monsanto settled the enforcement action by paying a $1 million fine from the DOJ and a $500,000 penalty from the SEC after a consultant for the company paid a local Indonesian government official $50,000 to lessen regulatory and administrative burdens on the company related to an environmental impact assessment the company was required to obtain.339

In 2007, Baker Hughes faced an SEC enforcement action after paying several million dollars to a consultant hired at the suggestion of Kazakhoil officials.340 The company agreed to pay the consultant a commission from its revenues under its contract with Kazakhoil, allegedly knowing that the firm would transfer the commission payments to an undisclosed official or officials at Kazakhoil. The company also made substantial payments to consultants in Angola, Russia, and Uzbekistan without conducting sufficient diligence to ensure the money would not be passed on to government officials. Baker Hughes settled with the SEC and paid more than $23 million in disgorgement for these violations as well as an additional $10 million civil penalty for violating a 2001 cease-and-desist order from an earlier FCPA violation. In the parallel DOJ proceeding, a Baker Hughes subsidiary pleaded guilty to violating the FCPA and paid an additional fine of $13 million.

In 2011, Armor Holdings, Inc. entered, into a non-prosecution agreement with DOJ after retaining an agent to assist with bidding on U.N. contracts, and the agent obtained confidential, non-public bid information from a U.N. procurement official.341 Armor Holdings paid the agent commissions, through a subsidiary, believing that portions of them would be forwarded to the U.N. procurement official. The company also created false invoices to mask the payments. Armor Holdings agreed to pay a $10.3 million penalty and, in a related SEC proceeding, to pay more than $5.69 million in a civil penalty, disgorgement, and interest.342

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338 Litigation Release 21724, SEC v. GlobalSantaFe Corp., No. 10-CV-01890 (D.D.C. Nov. 4, 2010), available at http://www.sec.gov/litigation/litreleases/2010/lr21724.htm. See also Exchange Act Release No. 64123, In re Ball Corp., Admin. Proceeding File. No. 3-14305 (SEC Mar. 24, 2011) (Although a company accountant suspected that subsidiary made improper payments to customs officials to circumvent import/export restrictions as of June 2006 (three months after acquisition) and learned of an additional improper payment in early 2007, it failed to implement sufficient internal accounting controls, including requiring appropriate invoices and documentation, to prevent continued abuses or to remove individuals who had been involved with the payments.);

Litigation Release No. 21162, Nature’s Sunshine Prods., Inc., supra note 144 (Company made payments to customs agents to subvert import restrictions and purchased false documentation to hide the payments).


FCPA liability is not limited to classic agency requirements—in which an agent is authorized to represent the company. In recent years, the SEC has, using the internal controls requirements of the FCPA, imposed responsibility on U.S. companies for the conduct of its distributors. Though companies exercise less control over the conduct of its distributors than they do over agents, the government has taken the position that companies that are aware of improper payments made by distributors that sell the company’s products are responsible for that misconduct. In the first such instance, InVision, Inc. entered into a NPA with the DOJ in 2004 and agreed to a cease-and-desist order with the SEC in 2005. The government charged that InVision, a company acquired by General Electric after the alleged violations, was aware of a high probability that its foreign sales agents and distributors made or offered improper payments to foreign officials in Thailand, China, and the Philippines in order to acquire and retain business. Though the company had sold its goods, and the title had passed to the distributor, the government claimed that the company’s internal controls were insufficient to detect the payments. The investigation resulted in a $500,000 penalty from the SEC, $589,000 in disgorgement, and an additional payment of $800,000 under the DOJ’s NPA.

In relation to the UN Oil-for-Food program, the DOJ and the SEC brought several actions against companies after a distributor had paid kickbacks—on behalf of the company—to Iraqi officials. Where the companies knew of the payments, however, their classifications of and control over the third party made no difference. A subsidiary of AB Volvo, for example, attempted to distance itself from the bribes by making its Jordanian agent a distributor. Though the distributor purchased the vehicles directly from the AB Volvo subsidiary before making the corrupt payments, AB Volvo remained responsible under the FCPA, because it knew of the payments and maintained the arrangement with the distributor. AB Volvo settled with the SEC, paying a $4 million civil penalty and approximately $8.6 million in disgorgement, and paid a $7 million fine in an agreement with the DOJ. Under similar circumstances, several subsidiaries of Ingersoll-Rand that arranged for distributors to resell goods into Iraq were liable for those payments under the FCPA. The subsidiaries provided “sales deductions” to the distributors that the distributors then passed on to Iraqi officials. Liability rested on these companies because the DOJ and the SEC contended that the companies knew of the payments and did not withdraw from the arrangement, resulting in $4.45 million in penalties and $2.27 million in disgorgement.

In 2011, United Kingdom-based alcoholic beverage producer/distributor Diageo plc settled SEC bribery allegations. In addition to other payment methods, Diageo made payments to third-party distributors, including portions to be passed on to government liquor store employees and “cash service fees” to the distributors for passing on the payments. The company also reimbursed third-party sales promoters for illicit payments to government employees. Both types of payments were improperly recorded, including labels like “incentives,” “promotions,” and “miscellaneous expenses.” The SEC alleged that these practices—in addition to conduct related to hiring a government official as a lobbyist and making various payments directly to officials—violated Diageo’s books and records and internal accounting control obligations. The company paid more than $13 million in disgorgement and prejudgment interest to settle the case.

Finally, a recent cluster of cases has further highlighted companies’ liability for the conduct of their agents. Panalpina, a Swiss freight forwarding company, ensnared several major corporations in DOJ and SEC investigations. In connection with a February 2007 settlement with subsidiaries of Vetco International Ltd., the government charged that Panalpina had paid bribes to employees of the Nigerian Customs Service to move goods quickly through customs, and in many instances, without paying applicable duties. The government charged that an agent forwarded invoices for the illegal payments to one of Vetco’s subsidiaries in Houston with charges for “other services” that were neither listed nor openly advertised, including “express courier payments,” “interventions” and “evacuations,” and the subsidiary paid them with the knowledge of the bribery. The agent made at least 378 separate payments totaling $2.1 million to Nigerian Customs Service officials. Liability rested on the company because its employees “knew that in connection with its unlisted services [the agent] made corrupt payments to [Nigerian] officials to induce those officials to disregard their official duties and responsibilities and to provide preferential treatment . . . ”

To resolve the case, three subsidiaries of Vetco International agreed to a combined criminal fine of $26 million.

Since the Vetco International case, both the SEC and the DOJ have reached settlements with Panalpina and several other companies who paid bribes through it. In 2010, Panalpina paid $11.3 million to settle its SEC charges and another $70.6 million to resolve its DOJ charges.

Collectively, the five companies that used Panalpina to pay bribes agreed to pay about $86 million in plea agreements with the DOJ. These companies also agreed to pay nearly $70 million in disgorgement and prejudgment interest to settle SEC enforcement actions.

**Lessons Learned**

As the line between agent and non-agent is often too subtle and difficult to draw, it is advisable to have the same strong prophylactic measures for all third parties who deal with the government or state-owned enterprises, whether the company considers them to be agents or not. In recent settlements, companies have been held responsible where they knew, or should have known, of payments by an agent or distributor. Thus, companies have the responsibility to prevent and to root out violations by their agents. Adopting a “head in the sand” approach is not a successful strategy for avoiding FCPA liability. Companies should:

- Have written policies that require due diligence in selecting and supervising all vendors, contractors, resellers, and distributors;
- Conduct the necessary diligence and monitoring of their agents. Robust due diligence in connection with third parties can prevent FCPA and other anti-bribery violations, avoid the assumption of liability for violations by others, and also forestall prosecution for acts of bribery committed by parties for whom a company is legally responsible. See infra Section III.D.3;
- Obtain appropriate representations and warranties from all agents regarding knowledge of and compliance with the FCPA and local anti-bribery statutes;

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350 Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations, supra note 321.
• Understand the extent to which the work of a particular agent or business partner involves interaction with a foreign government official, either as a customer or a regulator. When a company sells goods to a foreign government or state-owned enterprises, or its business otherwise depends on government benefits or favorable regulatory treatment, enhanced scrutiny is advisable;

• Ensure that agents’ compensation is commercially reasonable and commensurate with the work performed and that their duties are clearly defined;

• Avoid flat rates, success fees, and other payment mechanisms that may yield disproportionate amounts;

• Implement ongoing monitoring procedures, including work plans, requirements of itemized invoices, expense explanation and documentation, likely to catch bribery attempts by third parties, including distributors;

• Be aware of—and investigate if necessary—common red flags; and

• Obtain and exercise audit rights.

2. Risks with JV Partners

Companies are increasingly teaming up with business partners to share the risk and cost of expanding into new countries. Companies subject to the FCPA face a real risk of liability for the actions of their foreign JV partners.\(^{351}\) A company involved in a JV may be held liable for its violations of the FCPA’s anti-bribery provisions and the internal controls and books and records provisions—although, as explained below in the section related to subsidiaries, liability for violations of the latter may vary depending on the company’s share of the voting power in the JV.

Recently, multiple companies have faced criminal and civil liability for actions by a JV, including foreign companies without an obvious link to the United States and U.S. companies with only a minority interest in the JV. In *United States v. Kellogg Brown & Root LLC* (“KBR”),\(^{352}\) KBR was part of a JV in Nigeria consisting of four companies, each with a 25 percent interest. The Nigerian JV, with the knowing involvement of high-level executives from each company, bribed Nigerian government officials to assist in obtaining multiple contracts worth more than $6 billion. After discussing the issue at “cultural meetings,” the high-level executives from each company entered into sham consulting or services agreements as a way to pay bribes to the Nigerian officials. All four companies involved in the Nigerian JV pled guilty or entered into DPAs with the DOJ—including a Japanese company that was not an issuer and committed no alleged actions in furtherance of the scheme while in the United States.\(^{353}\) Notably, the Japanese company, JCG, was charged with conspiring to violate the FCPA and aiding and abetting violations of the FCPA. Three of the JV companies (other than JCG) also settled with the SEC in addition to settlements with the DOJ.\(^{354}\) (The agents involved and key individuals at KBR were also prosecuted.) Given each company’s involvement in and alleged approval of the bribery scheme, the fact that each

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\(^{351}\) In fact, the UK’s Ministry of Justice has specifically identified JVs as potentially having “higher risk” than typical business operations and recommends various compliance measures a company should incorporate into new JV arrangements. The Bribery Act 2010 § 9 (“MOJ Guidance”) at 26, available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

\(^{352}\) No. 4:09-cr-71 (S.D. Tex. 2009).


company had only a minority interest in the JV did not allow any of them to avoid liability. Moreover, the case illustrated the ways in which a company whose actions appear to be outside the scope of the FCPA, like JCG, may nevertheless be prosecuted for participating in foreign bribery schemes with companies subject to the FCPA.

The DOJ also addressed some of the unique risks associated with JVs in Opinion Release 01-01.355 A U.S. company planned to enter into a 50-50 JV with a French company whereby both companies would contribute pre-existing contracts to the JV. The U.S. company expressed concern that some of the French company’s contracts pre-dated France’s anti-corruption laws, and, accordingly, took a number of precautions to avoid a “knowing violation” of the FCPA. The U.S. company obtained a representation from the French company that “none of the contracts and transactions to be contributed by the French company had been procured in violation of applicable anti-bribery or other laws.” Moreover, the JV agreement contained a provision allowing the U.S. company to terminate the JV, if the French company was convicted of bribery, admitted bribery, or a violation “ha[d] a material adverse effect upon the joint venture.” Given these and other safeguards, the DOJ authorized the JV arrangement, with the explicit caveat that “the ‘materially adverse effect’ standard for terminating the JV agreement may be unduly restrictive” and that if the company’s “inability to extricate itself” should cause it to take “acts in furtherance of original acts of bribery by the French company, the [U.S. company] may face liability under the FCPA.” This caveat, along with other recent actions by the SEC and the DOJ, indicate that the U.S. Government expects companies to exit the JV if it cannot resolve such corruption issues.

Because JVs often involve partnering with state-owned entities or companies with directors that are also public officials, JVs may pose additional risks in the FCPA context. The DOJ addressed such a JV arrangement in Opinion Release 08-01.356 The requesting U.S. company had negotiated with a foreign private company to acquire a controlling share in a state-owned target that the foreign government was divesting. The DOJ announced that it would not take any enforcement action with respect to the proposed transaction. It based its decision on the fact that the company conducted and documented reasonable due diligence on the seller of the shares, the company obtained transparency through adequate disclosures to the relevant government entities of the significant premium paid by the company to the foreign private company, the U.S. company obtained representations and warranties regarding past and future anti-corruption compliance, and the company obtained termination rights from the JV partner. Similar issues were addressed in Opinion Release 01-02, where a U.S. company entering a consortium agreement with a foreign company implemented various compliance measures limiting the activity of the foreign company’s chairman, who was also a foreign official, in order to ensure compliance with the FCPA.357

Lessons Learned

Given the expansive reach of the FCPA, any company subject to the statute engaged in overseas ventures, even as a minority shareholder, should use its best efforts and influence to ensure that effective compliance programs and internal controls are in place at the JV.

- Careful due diligence should be carried out on any JV partner that will include written assurances from the prospective business partner that it has not made a prohibited payment under the FCPA (nor been accused of such conduct) during the preceding years. See Section III.D., infra.

• It is also prudent to adopt contractual measures to insulate a company from liability for future partner misconduct. In this regard, where there is a higher risk of an FCPA violation, companies should consider negotiating a “put” feature in the JV contract for a put or mandatory sale of the contractor’s interest in the event the U.S. company discovers an FCPA violation by the JV. These “put” arrangements come in all shapes and sizes. For example, some puts require that the investment of a withdrawing JV partner be purchased at a profit; others at a break-even amount; and still others on a formula basis such as the “book value,” or at a designated price-earnings multiple at the time of purchase.

• Directors, officers, or employees representing a U.S. company on the board or in the management of an overseas JV in which it is a minority shareholder should be responsible for exerting best efforts to ensure that management institutes adequate controls and compliance programs. They should also be aware that their conduct in connection with such a JV may subject them and their U.S. employer to liability under the FCPA. U.S. companies placing its officers and employees in such positions should take care to educate them about these risks.

3. Improper Payments By Subsidiaries

Companies subject to the FCPA face criminal and civil liability under the FCPA for their subsidiaries’ conduct where the parent “knew,” authorized, or directed such conduct. (As explained in more detail in Section II.A.1.e, supra, the government has also recently advocated theories of liability whereby a parent company could be held liable for the acts of its subsidiaries under an agency theory even without such knowledge or involvement.) Even if the companies do not know of wrongful conduct by a subsidiary, public companies can still be held civilly liable under the accounting provisions for inaccurately described payments and/or inadequate internal controls. In short, the government expects companies to minimize the risk of FCPA violations through the conduct of subsidiaries by maintaining internal controls sufficient to discover any improper payments or other potential violations.

In multiple recent cases, the SEC and the DOJ have held parent companies liable for violations of the FCPA anti-bribery provisions by foreign subsidiaries where management at the parent company have been aware of the underlying activity. For example, Maxwell Technologies, Inc. (“Maxwell”) recently faced charges from both the SEC and the DOJ after its management failed to stop a bribery scheme by a subsidiary. Early on after being alerted about the scheme, one Maxwell executive stated in an email that the bribery scheme was a “well known issue” and further asked for “[n]o more emails please.” Instead of stopping, bribes increased after discovery by the parent company’s management. In settling the case, Maxwell paid $8 million in penalties and fines, as well as over $6 million in disgorgement and interest for bribes paid by its subsidiary.

Similarly, Tyson Foods, Inc. (“Tyson”) recently paid $4 million in penalties and fines and more than $1 million in disgorgement and interest for bribes paid by its Mexican subsidiary. In that case, after acquiring the subsidiary, Tyson executives became aware of the payment scheme, which involved paying salaries to the wives of government veterinarians in charge of inspecting company goods, and approved

358 See 2012 DOJ-SEC FCPA Guide at 27.
359 Id. at 43.
its continuation—thereby creating the basis for the criminal charges for intentionally violating the FCPA’s anti-bribery provisions. As evidenced by the Maxwell and Tyson cases, along with the more recent Wal-Mart case discussed earlier, parent companies that fail to act once it discovers bribery by a foreign subsidiary can face severe repercussions later on.

Publicly held parent companies can similarly be held liable for knowing violations of the internal controls and books and records provisions.362 Recently, Deutsche Telekom AG (“Deutsche”) paid more than $4 million fine to the DOJ as part of a NPA based on knowing violations of the books and records provisions of the FCPA.363 Deutsche’s subsidiary, Magyar Telekom, paid millions of dollars in bribes to Macedonian and Montenegrin officials through sham consulting agreements. Although there was no indication that anyone at Deutsche was aware of its subsidiary’s underlying bribery scheme, one Deutsche executive was aware of improper recordkeeping practices at the subsidiary, such as backdating contracts and maintaining the only copy of executed contracts with an intermediary outside of the company.

Beyond knowledge and approval, publicly-held companies can also be held liable for the conduct of their subsidiaries through the internal controls and books and records provisions relating to issuers, even if the parent company has no knowledge whatsoever of the subsidiary’s wrongdoing. In SEC v. Dow Chemical Co., Dow was held liable for payments to government officials by a fifth-tier subsidiary.364 From 1996 until 2001, the subsidiary used contractors to make payments to Indian government officials to expedite the registration of its products. The subsidiary often used false invoices or fictitious charges to cover the payments. The SEC accused Dow of failing to impose sufficient internal controls and for maintaining inaccurate books and records. Though the SEC did not allege that Dow had any knowledge of the payments, the company consented to a $325,000 civil penalty for the violations.

In another case, Akzo Nobel, N.V. consented to a civil penalty of $750,000 and more than $2 million in disgorgement based on civil violations of the books and records and internal controls provisions after two of its subsidiaries made approximately $300,000 in kickback payments to the Iraqi Government in connection with the UN Oil-for-Food Program.365 The subsidiaries recorded the payments as commissions, resulting in inaccurate entries in the parent company’s own books. That was enough to trigger the record-keeping provisions for issuers and prompt an SEC enforcement action. The company also entered into a NPA with the DOJ, requiring it to pay a criminal fine in the Netherlands.

As explained in the Guidance, for subsidiaries and JVs in which the issuer holds less than 50 percent of the voting power, the accounting provisions require it to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls,” consistent with the requirements of the Act.366 However, an issuer capable of using minority shareholder rights to exercise de facto control may arguably face a greater burden because the government may claim that it should exercise such rights to control the venture’s activities even though it had no obligation to do so. Accordingly, a company should be careful in negotiating such rights and consider whether it makes sense to obtain such control rights over the subsidiary or JV.

362 See 2012 DOJ-SEC FCPA Guide at 44.
366 15 U.S.C. § 78m(b)(6); see also 2012 DOJ-SEC FCPA Guide at 43.
Lessons Learned

Companies should ensure that their internal controls are sufficient to ensure FCPA compliance throughout the company, especially in their foreign subsidiaries since those entities expose the parent entity to significant risk.

- As discussed further in Chapter IV, companies should ensure that their compliance programs apply equally to foreign subsidiaries as to domestic operations;
- Training and monitoring are critical to fostering a bribe-free culture in foreign subsidiary operations; and
- Once allegations of bribes by a subsidiary are uncovered by executives at a parent company, the activity should quickly be investigated and (if substantiated) stopped.

4. Government Entities or Officials as Partners, Employees, or Consultants

Another potential issue involves JVs or partnerships with state-owned entities where government officials serve on a joint board, and their compensation depends on the profitability of the venture, which such officials can often affect through official action. The FCPA does not prohibit JVs with host governments and their instrumentalities. In fact, the laws of some countries require such relationships for concession and licensing arrangements. Special issues arise in this context, however, including compensation paid to a government official.

Companies should exercise particular caution when partnering with businesses owned by foreign governments. In Opinion Release 93-02, an American company entered into a sales agreement with a foreign government-owned enterprise with a virtual monopoly on the nation’s defense industry. All foreign suppliers were required to pay the state-owned business a percentage of the total contract price. The DOJ announced that the arrangement did not implicate the FCPA so long as all commissions were paid directly to the state’s treasury or else deducted by the state-enterprise from the purchase costs.

The DOJ has provided its opinion on salary payments to foreign officials in the context of JVs. First, in Opinion Release 93-01, a U.S. company sought the DOJ’s opinion regarding payment of foreign directors’ fees and expenses where the board of the JV included representatives of the foreign partner, a state-owned entity. The DOJ concluded that because the foreign directors’ fees would ultimately be paid by the foreign partner, either from its share of the net partnership profits or from its other funds, and because the company would make efforts to educate the directors about the FCPA, it would not take any enforcement action.

Second, in Opinion Release 95-03, the DOJ permitted payments to a JV officer who was a foreign official and relative of the leader of the country in which the JV would operate. The DOJ did not bring an enforcement action where the foreign official indicated that his official duties did “not involve any decisions to award business in connection with the government projects sought by the JV or in the appointment, promotion, or compensation of the government officials who would decide which companies will receive such business.” Moreover, the foreign government official and his family “represented directly to the DOJ that they would comply with the FCPA as if they were subject to the Act.”

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Third, in 2001, the DOJ confirmed in Opinion Release 01-02—issued at the request of an American company that sought to form a consortium with a foreign company to bid on business with the government of the foreign company's home country—that a key factor in its decision not to pursue enforcement action with respect to the involvement of a foreign official in a JV or, in this case, a consortium with a foreign company, turned on the representation that the duties of the official, who was also the chairman and shareholder of the foreign company, did not involve him acting in any official capacity concerning the award of the relevant business project.371

Moreover, the chairman of the foreign company, who also acted as an advisor to one of his country's senior government officials and held a position as a senior official in public education, signed the FCPA opinion request and represented, among other things, that his position as a senior official in public education could not affect or influence his government's process of reviewing the consortium's bid and granted him no influence over the business project. The foreign company's chairman also agreed to recuse himself from any discussion of the business project when operating in his official capacity. Furthermore, the consortium agreement required each member to acknowledge and agree to abide by the FCPA, and allowed each side to terminate the agreement in the event of a breach.

While not in the context of a JV or consortium, the DOJ reiterated some of the key factors in the above analyses in another opinion. In Opinion Release 10-01, an American company sought the DOJ's opinion regarding a contract the company had been awarded with a U.S. government agency for work abroad.372 As part of the contract, the company was required to hire a foreign official from the foreign country. In deciding not to pursue an enforcement action related to the hiring of the foreign official, the DOJ emphasized, (1) the company was contractually bound to hire the foreign official pursuant to an outside agreement between other parties (in this case the U.S. agency and the foreign country); (2) the foreign official would not be able to influence any decision or act affecting the company; and (3) the foreign official's role as an employee was separate from his or her official duties.

Companies' concerns should extend to the retention of government officials as consultants or experts. These individuals could include employees of state universities, employees of state-owned business entities, and similar government employees. On those occasions, a company should exercise the same caution to ensure that the payments are not made to a government official who could have influence over business sought by the company.

Finally, payments made to individuals related to government officials could equally implicate the FCPA. As explained in the recently published Guidance, the fact that a "third party is related to or closely associated" with a foreign official is a common red flag associated with third parties.373 Recent enforcement actions exemplify these risks. The Tyson case, discussed in Section III.C.3, supra, involved a scheme whereby Tyson’s foreign subsidiary paid salaries to the wives of government officials responsible for inspecting the company’s meat products for more than twelve years.374 As the wives did not perform any actual services for the company and were paid in order to influence the inspectors’ decisions regarding company products, the company was held liable for violating the FCPA. As a result, Tyson paid a $4 million fine as part of a DPA and an additional $1.2 million in disgorgement and interest to the SEC. Similarly, UTStarcom hired individuals affiliated with foreign government customers and provided them with work visas, when in reality the individuals did not perform any work for the

371 FCPA Opinion Procedure Release 01-02, supra note 357.
The unwarranted salaries, along with a variety of other gifts and benefits provided to employees of foreign government customers, formed the basis of the government’s charges of violations of the anti-bribery provisions of the FCPA.

These cases should not be read to mean that a company can never offer employment to a relative of a government official. In some instances, relatives of government officials are likely to have had significant educational opportunities and may be among the most qualified applicants. However, extending offers of employment comes with risks, which can be mitigated through a rigorous hiring process that ensures that the proposed employees meet or exceed all requirements, are the most qualified for the position, and that the offer is not part of a *quid pro quo* arrangement with the relevant government official. In some instances, it may also be prudent to require disclosure to the foreign government and possibly recusal if the potential employee’s parent has the ability to benefit the employer.

**Lessons Learned**

These opinions indicate that when partnering with a government entity or person extra care should be taken.

- The government official involved must credibly represent that he or she has no ability to influence the awarding of business contracts, or is able to and will recuse him or herself from taking part in any such decision;
- Giving anything of value or payment, including directors’ fees or an offer of employment to a relative, to an individual with authority to award contracts or otherwise confer a government benefit is likely to attract scrutiny and carries significant FCPA risk; and
- Payments made to the state entity carry significantly less risk than payments to government officials individually.

**D. Anti-Corruption Due Diligence in Acquisitions and Investments**

A company considering acquisitions of or investments in companies doing international business should make FCPA and anti-bribery issues a focus of its standard due diligence for several reasons. First, companies are potentially liable for the past corrupt acts of a target company. As explained in the Guidance, “[a]s a general legal matter, when a company merges with or acquires another company, the successor company assumes the predecessor company’s liabilities.” (However, as also explained in the Guidance, such liability is not created if it did not exist before the acquisition or merger.) Second, the value of the target may be reduced or eliminated if it later discovers that its business depends on bribes to be profitable. Third, a company’s reputation will be tarnished if it is discovered later that one of its subsidiaries was or is engaged in bribery. Diligence will allow the acquiring company to assess not only the FCPA risks that the target’s operations will present going forward, but also the potential exposure from the target’s past activities so the acquirer may obtain appropriate indemnification or other protection. Both pre-acquisition and continuing post-acquisition diligence also may help demonstrate

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377 See id.
378 See id.
the absence of “knowledge” should an improper payment be made. Moreover, it is our experience that the DOJ and the SEC expect a U.S. company’s due diligence in international mergers and acquisitions to include FCPA diligence, a fact that was recently emphasized in the Guidance.379

Reasonable diligence means different things in different contexts and the government has encouraged companies to take a “risk-based” approach.380 Diligence must be tailored to the specific situation and be modified for a multitude of factors, such as the global region, the type of business in question, the nature of the business transaction/acquisition (e.g., IPO vs. competitive bid situation), and the target’s relationship with the government. The level of diligence will also depend on the type of agreement in question; sufficient diligence on an agent will differ significantly from that necessary for a potential acquisition. To begin, the former diligence will be conducted over a shorter period than the latter, but companies also need to understand what type of questions to ask and what type of information to gather for each. The following examples explain how to determine what amount and type of diligence is appropriate in a particular situation.

1. The FCPA’s Impact on Many Recent M&A Deals

The following examples of criminal and civil actions demonstrate the importance of conducting the appropriate due diligence in a transactions context. Those companies that discovered FCPA violations before completing the transaction often minimized civil and criminal penalties as well as their own losses. These cases illustrate that a company does not need to purchase FCPA liability along with a new subsidiary, provided the company performs appropriate due diligence on the target’s compliance. If problems are discovered and brought forward during that process, the government is more likely to pursue enforcement actions against the target rather than the acquiring company itself. Moreover, if such due diligence uncovers potential liability, it can also reduce the purchase price.

In United States v. Titan Corp., Titan was the subject of both civil and criminal actions.381 The actions by the SEC and the DOJ resulted directly from information that emerged during due diligence conducted by Lockheed Martin as part of a proposed merger. Titan’s business included developing and constructing wireless telephone systems for developing nations. A senior Titan official based in the United States ordered the subsidiaries to make political donations to the president of Benin to induce him to facilitate the development of a national telecommunications project. Titan’s subsidiaries paid about $2 million to the president’s re-election fund. Titan falsified documents filed with the U.S. Government and underreported commission payments for its dealings in France, Japan, Nepal, Bangladesh, and Sri Lanka.

Titan pleaded guilty to three felony violations of the FCPA and settled an action filed by the SEC. In all, Titan paid a $13 million criminal fine and $15.5 million in disgorgement of profits to the SEC relating to its activities in Benin. Following the discovery of Titan’s activities, Lockheed Martin adjusted the terms of its offer and lowered the price from approximately $2.4 billion to $2.2 billion. Eventually, the proposed merger between the two companies did not proceed. Proper due diligence allowed Lockheed Martin to evaluate carefully whether and how to proceed with the merger and at what price. Moreover, it did not inherit the FCPA issues evident at Titan.

379 See id.
380 See id. at 60.
Following a round of pre-acquisition diligence by Cardinal Health, Syncor International disclosed potential violations of the FCPA by a new subsidiary. Syncor’s foreign subsidiaries in Taiwan, Mexico, Belgium, Luxembourg, and France, made payments totaling at least $600,000 to physicians employed by state-owned hospitals. The bulk of the payments, approximately $400,000, was made by one subsidiary, Syncor Taiwan. Syncor Taiwan derived up to 20 percent of its gross sales from the business generated by those payments. In United States v. Syncor Taiwan, Inc., Syncor Taiwan pleaded guilty to violating the anti-bribery provisions of the FCPA and agreed to a $2 million fine, while the parent company consented to a civil fine of $500,000 in a related action brought by the SEC.382 Cardinal Health acquired Syncor International in June 2002, while the investigation was ongoing, and never faced charges for Syncor International’s actions.

ITXC Corp., a U.S.-based telecommunications provider, discovered and disclosed several FCPA violations following ITXC’s merger with Teleglobe International Holdings, Ltd. in 2004. Yaw Osei Amoako, ITXC’s regional director for Africa, had helped arrange payments totaling $267,468.95 to Nigerian, Rwandan, and Senegalese officials at government-owned telephone companies in exchange for lucrative telephone contracts. Following its merger diligence, Teleglobe reported the improper payments to the SEC and the DOJ and conducted its own investigation. Teleglobe commissioned an independent internal investigation and delayed the filings of its second quarter Form 10-Q pending the conclusion of the investigation, an action which resulted in a NASDAQ delisting notice. Teleglobe was subsequently relisted, with the NASDAQ Listing Qualifications Panel specifically acknowledging the company’s significant efforts to address the FCPA issues and attempts to keep the investing public apprised of the results of the internal investigation. Beginning in June 2005, the SEC and the DOJ brought separate actions against Amoako for violations of the FCPA.383 No charges were ever brought against Teleglobe.

Monsanto Company discovered several violations by a target during a potential acquisition and, as a result, avoided potential liability. In June 2007, Monsanto acquired Delta & Pine Land Company, a U.S. company. Before completion of the deal, however, Monsanto discovered that Delta’s subsidiary had paid approximately $43,000 to Turkish officials to secure favorable government reports for its operations in Turkey. Delta and its subsidiary consented to a $300,000 penalty for Delta’s alleged FCPA’s books and records violations and for the subsidiary’s anti-bribery violations.384

In SEC v. GE InVision, Inc., the government prosecuted InVision Technologies for violations that came to light after InVision agreed to an acquisition by General Electric.385 InVision’s sales agents and distributors made payments to foreign officials in Thailand, China, and the Philippines in order to acquire and retain business. After General Electric discovered the wrongdoing through its diligence efforts, the DOJ conducted its own investigation, finding a high probability that senior employees at InVision knew about the payments and did nothing to confirm their legality. The DOJ noted that InVision paid compensation to the intermediaries without conducting any additional due diligence. InVision paid $800,000 under a NPA with the DOJ and instituted an FCPA compliance program and internal controls to avoid future violations. InVision settled with the SEC for a $500,000 civil fine and $589,000 in disgorgement. General Electric, however, avoided any enforcement action and did not inherit liability along with the acquisition.

In contrast, in part due to bribery schemes conducted by companies it acquired after the fact, General Electric recently paid the SEC a $1 million fine and over $22 million in disgorgement and interest.\footnote{See Litigation Release No. 21602, SEC v. Gen. Elec. Co., No. 10-cv-01258 (D.D.C. July 27, 2010), available at http://www.sec.gov/litigation/litreleases/2010/lr21602.htm.} By failing to uncover the bribery scheme during due diligence prior to going forward with the acquisition, General Electric unknowingly inherited liability for the companies’ past bribery schemes. In fact, although the bribery schemes by the acquired companies had each concluded nearly seven years prior to the settlement with the SEC and thus had far surpassed the five-year statute of limitations on FCPA violations, the SEC was nonetheless able to seek disgorgement of all ill-gotten gains, which has no accompanying statute of limitations.

2. Government Expectations for Acquisition Diligence

Opinion Release 04-02 is generally considered to outline the aspirational standard for due diligence on a potential acquisition.\footnote{FCPA Opinion Procedure Release 04-02 (DOJ July 12, 2004), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf. Opinion Release 04-02 is described in detail in Section IV.B.2, infra.} JPMorgan Partners Global Fund and its partners sought the DOJ's guidance on the purchase of several subsidiaries of ABB Ltd. JPMorgan discovered during a pre-sale FCPA compliance review that the ABB subsidiaries had engaged in several violations of the statute. Before agreeing to the purchase, JPMorgan and ABB conducted a comprehensive internal investigation. Outside counsel reviewed over 1,600 boxes of documents and conducted over 165 interviews of current and former employees. They also employed forensic accountants, with a staff of over 100, to visit twenty-one countries to review and analyze transactions. In all, over 115 lawyers worked over 44,700 hours to conduct the review. JPMorgan and ABB briefed the DOJ on the investigation and submitted twenty-two analytical reports.

In July 2004, the ABB subsidiaries plead guilty to violations of the FCPA and ABB settled a civil action with the SEC. Nonetheless, the diligence efforts described in the DOJ’s opinion have been generally accepted as the standard of diligence for acquisitions, particularly where one party knows or should know of a past violation.

The DOJ revisited the standard for necessary diligence on acquisitions in Opinion Release 08-01.\footnote{FCPA Opinion Procedure Release No. 08-01, supra note 356.} The U.S. company requesting the review had negotiated with a foreign private company to enter into a JV to acquire control of a company in which a foreign government was divesting its controlling share. The U.S. company represented to the DOJ that, as part of its diligence conducted, it had:

- Commissioned a report on the potential JV partner by a reputable international investigative firm;
- Retained a business consultant in the foreign municipality to provide advice on possible due diligence procedures in the country;
- Commissioned company profiles on the investment target and the potential JV partner from the U.S. Department of Commerce;
- Searched for the names of all relevant parties in public and private databases, met with representatives of the U.S. embassy in the foreign municipality;
- Retained outside counsel to conduct an investigation and issue a report; and
- Retained an outside accounting firm to prepare a due diligence report.
The U.S. company also retained a second law firm to review the diligence. After obtaining the necessary representations and warranties and making disclosures to the foreign government, the U.S. company submitted the proposal to the DOJ. The DOJ responded that, in light of the diligence conducted, and several other steps taken by the requesting company, the diligence was sufficient, and it would not take any action on the proposed deal.

More recently, in Opinion Release 10-02, the DOJ reviewed and approved diligence conducted by a non-profit, which was somewhat smaller in scope than the diligence described above. The non-profit micro-finance institution had a foreign subsidiary being compelled to offer a grant to one of six potential local institutions by a regulator. Prior to selecting the grant recipient, the subsidiary undertook a three-stage due diligence process. In the first stage, the subsidiary reviewed public information and information from third-party sources regarding each recipient. In the second stage, the subsidiary requested key documents and interviewed representatives from the remaining potential recipients to gauge potential corruption risk. In the final stage, the subsidiary conducted more targeted diligence of the sole remaining potential recipient, including reviewing more detailed documentation regarding funding, ownership, control of the company, and ties to government officials; collecting information about whether any of the potential recipient's personnel had family members employed in government; conducting internet searches for stories on any illegal or unethical conduct by the company, conducting in-person meetings with leadership from the company; interviewing references; and confirming the company's willingness to comply with anti-corruption controls.

The DOJ has also addressed the issue of whether the inability to conduct sufficient due diligence prior to closing would mean that payments to the target's shareholders could be construed as violating the FCPA or whether the purchaser would inherit liability for the subsidiary's potential violations in Opinion Release 08-02, which the Guidance explicitly references as the model for a company when pre-acquisition diligence is not possible. The requestor, Halliburton, was engaged in a bidding war for the share capital of a 4,000 employee company traded on the London Stock Exchange. Halliburton represented that it would not have sufficient time, and had no rights under UK law, to complete the necessary due diligence prior to closing.

First, the DOJ responded that the purchase price would not be considered a “payment in furtherance of a bribe” under the FCPA in the event the target was engaged in violations of the statute. The target was traded on the London Stock Exchange and 65 percent of the shares were held by large, institutional investors; any purchase price would go to shareholders and not to the target itself. Second, the DOJ advised that it would not bring any enforcement action against Halliburton for pre-deal violations by the subsidiary if Halliburton proceeded with its plan to, in summary, conduct due diligence and any necessary remediation within 180 days of closing, to disclose any discovered violations to the DOJ, and to establish and train new employees on a code of conduct within ninety days of closing. The DOJ also stated that it would not bring any enforcement action against Halliburton for violations committed by the target during the 180-day due diligence period, provided no employees of Halliburton were involved in the violation. The DOJ reserved its right to bring an action against the target for any discovered violations.

As stated in the Guidance, the SEC has similar expectations regarding due diligence requirements.\(^{391}\) Of course, as the DOJ and the SEC have explained due diligence is “only a portion of the compliance process for mergers and acquisitions” and the government equally emphasizes the importance of post-acquisition steps to ensure adequate compliance programs at the acquired company.\(^{392}\) Even the most thorough diligence on an acquisition will serve no purpose unless the acquiring company takes the necessary steps to fix underlying issues and impose proper controls. For example, RAE Systems, Inc. (“RAE”) recently settled with the DOJ and the SEC regarding actions by its two Chinese JVs.\(^{393}\) For one of the JVs involved, RAE conducted diligence prior to its acquisition—diligence which highlighted risks in the Chinese company’s business practices and allegations that its sales people may be making cash payments to employees of state-owned corporate customers. Despite having received this information, RAE made no changes to the JV’s accounting procedures or business model, which relied heavily on a loose system of cash advances to sales personnel who then provided receipts that were known to be often false. Although RAE provided FCPA training and orally told employees at the JV to stop paying bribes or making other improper gifts, the DOJ determined that “such steps were half-measures” and RAE “did not impose sufficient internal controls or make sufficient changes to high-risk practices.” As a result of this JV’s bribes and comparable activity at another Chinese JV (for which RAE had conducted no diligence whatsoever), RAE paid $1.7 million in fines and over $1 million in disgorgement and interest to settle criminal and civil violations of the FCPA’s internal controls and books and records provisions and civil violations of the anti-bribery provisions.

**Lessons Learned**

When one company acquires another, it may also be assuming liability for prior FCPA violations at the target company, particularly if those violations could have been detected through reasonable review prior to the acquisition. The FCPA does not include an affirmative defense of due diligence. Nevertheless, having conducted due diligence before entering into a business deal—like conducting due diligence before making a payment, or engaging an agent or consultant—may permit the buyer to lower the price or pull out of the transaction. Furthermore, the acquiring company may choose to self-report the improper payments to the government to avoid successor liability altogether for past payments. Should the buyer nevertheless proceed after due diligence showing improper payments in the past, and it later turns out that an improper payment was made after the buyer acquired the target, that due diligence may serve as valuable evidence that a U.S. company did not have the corrupt purpose or “knowledge” required to violate the FCPA.

Companies often seek to mitigate successor liability for the FCPA violations of the target by engaging in an asset purchase rather than purchasing all the stock of the target. While this approach is generally regarded as less risky because the liabilities of the old company generally will not pass to the newly formed acquisition vehicle, those risks cannot be entirely eliminated.

If pre-acquisition diligence is not commercially practical, the acquirer should conduct expeditious post-closing diligence and should move quickly to integrate its compliance program with that of the target.

\(^{391}\) 2012 DOJ-SEC FCPA Guide at 62.
\(^{392}\) Id.
3. Government Expectations for Third Party Due Diligence

As explained in the Guidance, “[r]isk-based due diligence is particularly important with third parties and will also be considered by the DOJ and the SEC in assessing the effectiveness of a company’s compliance program.”394 This standard is rooted in the same principles as the “know your customer” requirements for anti-money laundering programs. Such diligence may have the collateral benefit of reducing potential scams against the company.395 By taking a more active role in vetting and monitoring agents, companies can avoid these costs, while simultaneously reducing risks under the FCPA. In a number of recent FCPA settlements, U.S. officials have emphasized the importance of corporate due diligence in assessing corporate culpability. In doing so, senior DOJ officials have stated that these diligence obligations extend not only to the retention of agents, but to diligence reviews of the activities of parties involved in a joint-venture, consultants, distributors, contractors, and even reviews of subcontractors. Inadequate diligence creates significant exposure.

In 2009, for example, United Industrial Corporation settled an SEC case related to its subsidiary’s retention of a retired Egyptian Air Force (“EAF”) general to help the company win EAF contracts.396 The company had a written policy requiring consultants to sign contracts certifying their knowledge of the FCPA and willingness to sign FCPA compliance statements regularly and allow company auditors access to the consultant’s books and records. Yet for certain periods, the EAF agent had no contract at all and, for others, his contracts lacked the elements required by corporate policy. The company also required due diligence forms to be reviewed by corporate counsel, but for several years, no diligence forms were submitted by the EAF agent. Even when forms were submitted, the subsidiary allowed the EAF agent to complete most of the forms himself. These practices continued although the agent repeatedly asked for payments to “keep the pressure” on those with the power to award contracts or to “give motivation” to them.397 The company president initially resisted making additional advances (though he noted that “cushions” already built into the agent’s payments should have allowed him to meet all his “obligations”) but eventually used false invoices and a sham marketing contract to make payments to the agent. The SEC cited a lack of “internal controls sufficient to detect or prevent improper payments,” including failure to require expense substantiation or a statement of anti-bribery compliance, as a reason that the president was able to make payments when he “knew or consciously disregarded the high probability” that the agent would use them to make improper payments.398

Likewise, Daimler AG paid a $93.6 million criminal penalty and $91.4 million in disgorgement to settle DOJ and SEC allegations related to its use of third-party accounts (“TPAs”) to make payments to foreign officials (recorded as “commissions,” “special discounts,” or “useful payments”), despite warnings from

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394 2012 DOJ-SEC FCPA Guide at 60.
395 For example, a 2004 report by KPMG concluded: “Companies with third-party suppliers, business partners or vendor relationships that are based on the concept of ‘self-reporting’ lose millions of dollars each year because of insufficient controls over such business models.” Press Release, KPMG, KPMG Report: Poor Controls Over “Self-reporting” Business Relationships Costing Companies Millions (April 14, 2004); see KPMG, THE SELF-REPORTING ECONOMY: A MATTER OF TRANSPARENCY AND TRUST (Mar. 2004), available at http://www.us.kpmg.com/microsite/attachments/SelfReportingSummaryWP.pdf. The report focused particularly on increased corporate risk involving “self-reporting by sales agents where each business partner provides the other with pertinent financial and other information used to measure activity, such as sales-volume figures. Poor internal controls and oversight cause the majority of self-reporting information to be wrong, causing companies to lose millions in potential revenue.” KPMG Press Release, supra. See also Scams Expose Weaknesses: Do processors vet merchants well enough? AM. BANKER (June 9, 2004) [discussing the importance of vetting merchants in banking], http://www.americanbanker.com/issues/169_111/-223805-1.html.
397 Id.
398 Id. at 8-9.
internal audit that the continued use of TPAs to conduct cash transactions with minimal oversight likely violated the company’s integrity code and certain anti-bribery laws. As described in the Daimler DPA, the DOJ found that due-diligence failures, a decentralized sales network, and a lack of central oversight allowed Daimler and its subsidiaries to use a myriad of tactics—like sham consulting contracts, inflated commission payments, etc.—to funnel bribes and gifts to government officials. For example, the company did not conduct due diligence on agents in China and lacked internal controls to ensure that payments were not passed on to government officials. Companywide, Daimler lacked sufficient controls over selection and use of agents and failed to obtain assurances that payments complied with applicable anti-bribery laws.

The DOJ and the SEC have explained that the following “guiding principles” should always apply to third-party diligence: (1) “companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials;” (2) companies should understand the business rationale for hiring the third party, including how comparable payment terms are to typical arrangements of the same nature, the nature of the services being provided (including potentially documenting actual performance of the same), and timing surrounding the hiring of the party; and (3) companies should monitor the third parties on an ongoing basis such as through updating due diligence, auditing the parties, providing FCPA training, and requiring annual certifications.

Nevertheless, the DOJ and the SEC have not set out a list of specific steps that must be taken when conducting due diligence on third parties, acknowledging that the “degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the third party.” Companies can reduce their risk by adopting a comprehensive protection scheme, like the one described in Opinion Release 06-02. There, the subsidiary of an American company sought to retain a law firm in a foreign country to prepare applications to a government agency. The subsidiary had previously worked with the firm, which had come highly recommended to the company. Nonetheless, the company requested all employees of the law firm and any third parties retained on the matter sign forms confirming that they had not and would not violate the FCPA and that they had not been and were not related to any government official for the past three years. The agreement with the law firm also required weekly progress reports and access to relevant records of the firm. Additional comprehensive and practical approaches to third-party due diligence are described in Section IV.B.3.a, infra.

While such comprehensive measures may not always be necessary, the DOJ and the SEC have indicated that they view a purely form-based diligence as an inadequate “check the box” exercise. They expect companies to take a wide variety of steps to analyze risk associated with potential third parties including enhanced scrutiny once red flags are discovered. For instance, as part of the Nigerian JV cases discussed in Section III.C.2, supra, the SEC’s complaint specifically cited the inadequate due diligence procedures of Technip, one of the companies involved, as evidence of the inadequacy of the company’s internal controls. Technip only required potential agents to respond to

400 2012 DOJ-SEC FCPA Guide at 60.
401 Id.
403 2012 DOJ-SEC FCPA Guide at 60.
a written questionnaire and lacked additional steps “such as an interview of the agent, or a background check, or obtaining information beyond that provided by the answers to the questionnaire.” Similarly, in a recent settlement with Eli Lilly, the SEC viewed the company’s due diligence efforts—reports by an outside party, searches of publicly available information, FCPA diligence paperwork, assurances from the intermediaries at issue—as inadequate because the company failed to properly scrutinize and analyze other red flags such as payments to offshore accounts, use of parties recommended by government customers, an unclear need for the third parties’ services, lack of evidence of underlying services provided, and an inability to independently identify the ultimate beneficial owners of the parties.405

Accordingly, the intensity of the due diligence and monitoring activities should be scaled to risk and should increase as red flags appear.406 According to the Guidance, “common red flags associated with third parties” include the following:

- Demands or requests for excessive commissions or unreasonably large discounts;
- “Consulting” or other third-party agreements with vaguely described terms/services;
- A close relationship between the third party and a foreign official;
- A request by a foreign official to include a certain third party in a transaction;
- A third party consultant who is inexperienced in the business line for which he has been engaged;
- Third parties that are shell companies incorporated in offshore jurisdictions; and
- Requests for payments to offshore bank accounts.407

4. Practical Approaches to Due Diligence

The basic steps of FCPA due diligence for unrelated parties—agents, new business partners, and potential acquisitions—are similar. As discussed above, due diligence for any party, however, should be tailored to the country and business of the target company and—in the acquisition context—to the timing of the deal.

a. M&A Due Diligence

Due diligence in the transactional context must be conducted with some discretion and sensitivity to the fact that the target’s management and employees may have been previously operating under a different set of legal and compliance-related standards than those employed by a U.S. company. On any particular occasion, the diligence must be tailored to the specific agent and circumstances involved. For example, one should consider the country in which the target is operating, the target’s business history, the type of business involved, its existing relationship and contacts with the government, and its dependence on government licensing. The appropriate level of diligence will depend greatly on these and the other circumstances involved.

Begin with public information, then consider interviews and FCPA questionnaires directed to relevant personnel, all of which may be helpful in uncovering information that would not be obvious from a review of documents. To the extent that investigation discloses “red flags,” such as operations in “problem countries,” a heavy reliance on government contracts, a business dependent on government approvals, or significant unidentified expenditures, further diligence should be conducted. This may involve the

406 2012 DOJ-SEC FCPA Guide at 60.
407 Id. at 22-23.
use of investigative services. It may be advisable for the acquiring company to obtain certifications from target company officers regarding the absence of any questionable payments in the company’s past. The certifications and results of the due diligence then should be backed up with representations and warranties and, if appropriate, indemnification provisions. Depending on the circumstances, the acquirer may want to require that the target implement an FCPA compliance program or enhanced internal controls upon closing.

Should due diligence reveal previous improper payments, the acquiring company should consult with counsel regarding its potential exposure and the appropriate steps necessary to protect itself. As a general matter, in the absence of a merger (either actual or de facto), a corporation does not assume the past liabilities of a company it purchases unless it agrees to do so. Nevertheless, there may be theories under which an enforcement action against a U.S. acquirer could be brought, particularly to the extent that the acquirer knowingly takes advantage of a business that the acquired company obtained through improper payments to government officials. In any event, knowledge of past improprieties enhances the risk of liability, should the acquired company engage in similar conduct in the future, and thus calls for the implementation of enhanced compliance measures and appropriate remedial actions.

The types of information about the target’s operations that are typically developed during deal diligence should reveal FCPA-relevant information such as:

- The percentage of the target’s business derived from government contracts;
- The types and identities of agents and consultants it uses and their compensation arrangements;
- Its countries of operation;
- The target’s reputation;
- The extent of its interaction with government, whether as customer or regulator (the latter category includes the extent to which the company’s business requires licenses, permits, and the like);
- The involvement of government officials in its business (either as owners or directors or employees or relatives of any of the foregoing);
- Whether aspects of the target company’s business have received government-issued permits and licenses, and, if so, under what circumstances;
- Whether the target company or its agents or consultants have been involved in any disputes with any governmental entities, or the subject of any governmental inquiries or regulatory reviews;
- Whether the target company regularly conducts internal audit exercises designed to detect any bribery issues, and whether such reviews have detected any potential issues;
- Whether the target company has received any whistleblower or other complaints concerning potential bribery; and
- The state of its internal controls and books and records, including sources of “off-the-books” or discretionary funds that may have been used to pay bribes, and the target’s compliance apparatus and culture in the area of improper payments and more generally.

It is also important to obtain appropriate representations, warranties, and indemnification, and to take appropriate remedial and compliance steps upon closing.
b. **Agent Due Diligence**

Appropriate due diligence may begin directly with its subject, through oral questions, written questionnaires, and requests for references and documentary support. Depending on the circumstances, FCPA due diligence about potential consultants, agents, vendors, partners, or acquisitions should include the following topics and questions:

**Ownership:** When contemplating business with a corporation or some other “legal” person, the first step is always to learn the identity of its owner or owners, and its key officers and employees. It is critical that the diligence document the efforts made to ensure that the company’s funds are not going directly or indirectly to a government official through the acquisition or relationship being created. Be sure to ask:

- Who are the subject’s owners, officers, and employees?
- Are any of these parties government officials, former government officials, or otherwise connected to present government officials (e.g., through family or business relations)?

It is very important to identify any relationships between a consultant or partner and foreign government officials. These relationships may include not only family ties, but also business dealings. In some countries, it is particularly difficult to unravel these relationships, or to determine the ultimate owner behind a named investor, notwithstanding due diligence efforts. In this regard, a U.S. company needs to conduct a reasonable investigation and document the investigative efforts. Many counsel also recommend obtaining an FCPA certificate from a prospective partner or agent concerning such relationships. Where such a certificate identifies a foreign government official, it also may be appropriate to obtain certification from the relevant government official that he or she has no financial interest in the agency or partnership relationship. Similarly, where an agent or consultant is recommended by a government official, or recommended by a third party as being close to a government official, particular scrutiny is warranted.

In choosing a consultant, many U.S. companies find that the best candidate is someone who is a government official or a relative of an official. In many emerging countries, the distinction between governmental and private conduct is ambiguous. When deciding whether to retain a consultant or join a partner who has a family member in government or who is a member of the government, the U.S. company may face a number of significant issues, including the fact that a relative may be the most competent party to handle a particular assignment.

**Experience and Reputation:** Determine the competence, expertise, and reputation of the party, as well as the party’s contacts with important government decision makers. This analysis should focus on the party’s experience, education, former governmental or military service, family and business relationships, and reputation for honesty. Questions may include:

- What is the nature of the subject’s business?
- How long has it been in business?
- What are its qualifications?
- Who are its clients/customers?
- What projects has it performed in recent years?
- Does it use agents or subcontractors?
• Has it made any improper payments to government officials, or been investigated or accused of such payments?
• Has it been involved in any lawsuits, enforcement actions, or government investigations?
• Does it have an anti-corruption compliance program? If so, does this program include written policies and procedures and employee training?

COMPENSATION: Evaluate whether the proposed compensation to be paid in exchange for the services rendered or products delivered is reasonable. “Success fees” deserve special scrutiny. Avoid bundled service contracts and commissions that make retrospective fair-market analysis difficult.

TRANSPARENCY: To the extent possible, ensure transparency in financial arrangements by informing relevant foreign government authorities of any payments or benefits given to intermediaries and/or government employees.

LEGAL OPINIONS: Contact local counsel to ensure that the proposed arrangement will not violate local law (a step that is even more important after 1998, with many countries adopting FCPA counterparts generated by the OECD Convention). If a payment is “legal” under the written laws of a foreign country, such an opinion may serve as an affirmative defense or “safe harbor” to a violation under the FCPA. In any event, the legality of a payment or transaction under local law is an important due diligence criterion in evaluating FCPA compliance. (Keep in mind that even if a payment may be “legal” under the laws of this country and the relevant foreign country, it may be in violation of a company’s code of ethics, which will present corporate policy issues rather than legal issues.)

In some circumstances, it may also be prudent to seek a legal opinion from corporate or outside counsel regarding whether a payment or transaction would violate the FCPA. Because the FCPA contains many ambiguous provisions (e.g., what is “knowledge”), most opinions obtained from counsel will be “reasoned” rather than unqualified opinions.

REPRESENTATIONS AND WARRANTIES: Insert standard representations and warranties concerning compliance with the FCPA and other laws and regulations in contracts.

ACCURATE BOOKS AND RECORDS: Require the consultant or partner to maintain accurate books and records.

COMMON SENSE: Apply a common sense “smell test” to the proposed arrangement. Are there red flags that deserve follow-up?

DOCUMENTATION: After completing diligence, prepare a file memorandum to record the diligence steps taken. Maintain the file throughout the relationship and for a reasonable period of time thereafter. If the arrangement turns out to be “tainted,” documentation of the due diligence conducted will be important in establishing the absence of knowledge of an arrangement that would violate the FCPA.

Documenting a party’s reputation, expertise, and connections with government (if any) is an essential aspect of all due diligence. If a potential partner appears unqualified for the task, presents any questionable reputational issues, or appears closely connected to government officials, there may be an increased risk of indirect payments or provision of value to government authorities.
**Verification:** Once the subject of the due diligence has provided its responses, a company should consult outside sources to verify answers and to fill any gaps. There are many potential sources to assist in this process, including auditing firms, law firms, the relevant U.S. Embassy, the Commerce Department, the State Department, banking institutions, leaders in the local community, credit agencies, reliable internet databases and media sources, and, depending upon the circumstances, private investigations. When conducting a thorough investigation, a U.S. company is likely, particularly in emerging countries, to hear some “negatives” about a prospective partner or consultant. Though such comments should be scrutinized carefully, some may be prompted by jealousy or an attempt to direct business elsewhere. Whenever possible, the partner or consultant should be asked to supply business references from other U.S. companies with which the partner or consultant has worked.

**Advisory Opinion:** An ultimate step in diligence may be to seek an advisory opinion from the DOJ. Few companies have availed themselves of that step for various reasons, including the expense and time involved, and the narrow comfort accorded by virtue of the fact that an opinion provides protection only to the extent that all facts and circumstances were accurately and completely disclosed.
IV. HOW TO ESTABLISH AND IMPLEMENT AN EFFECTIVE ANTI-BRIBERY COMPLIANCE PROGRAM

A. The Importance of Anti-bribery Compliance Programs to Your Company

Establishing a sound anti-bribery compliance program has never been more important for companies—particularly public companies—doing business internationally. The U.S. Sentencing Guidelines, the Principles of Federal Prosecution of Business Organizations, the Sarbanes-Oxley Act, the broadening of individual directors' liability through such cases as Caremark International, Inc., OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance, the Guidance, and continuing aggressive FCPA enforcement collectively emphasize the need for companies to create, enforce, and update effective anti-bribery compliance programs. Moreover, companies subject to the UK Bribery Act are affirmatively required to take steps to prevent bribery.

Consistent with these developments, most FCPA enforcement actions against issuers involve allegations that the internal controls of the company were inadequate for the risks facing that organization. For example, in its complaint against Eli Lilly, the SEC alleged that the company “did not have in place internal controls through which . . . proposals were vetted to ascertain whether [the company] was offering something of value to a government official for a purpose of influencing or inducing him or her to assist [it] in obtaining or retaining business” or to ensure that intermediaries “would not provide a benefit to a government official on [the company’s] behalf in order to obtain or retain business.”

Further, many of the provisions of the Sarbanes-Oxley Act essentially require public companies to enhance their corporate compliance programs. These provisions include internal controls attestations, disclosures relating to the issuer's Code of Ethics, whistleblower provisions, up-the-ladder reporting by counsel, and disclosure requirements relating to material violations of the law. Of these provisions, the one with the most direct impact upon corporate compliance is the requirement that a public company disclose whether it has adopted a written Code of Ethics, and the reasons for any failure to do so. This requirement effectively compels public companies to adopt a strongly written Code of Ethics. As discussed below, a written Code of Ethics is the foundation for a company’s FCPA policies and procedures, as well as for measures of compliance with other laws.

413 Complaint, Eli Lilly & Co., supra note 96, at 15-16.
These various authorities and developments should lead companies and their Boards of Directors to emphasize oversight and undertake periodic risk assessments of businesses and to develop compliance programs.\textsuperscript{414} The sanctions imposed on corporations for violations of many federal statutes, and the new counterpart foreign statutes, can be draconian, particularly under the revised Sentencing Guidelines.\textsuperscript{415} Yet, these sanctions can be mitigated by establishing and maintaining an effective compliance program, and enforcing it in a consistent and even-handed manner.

**B. Elements of an Effective FCPA Compliance Program**

An effective FCPA compliance program is based on two separate but complementary instruments: a broad Code of Ethics, and FCPA-specific policies and procedures. A Code of Ethics sets the company’s general standard for ethical and legal actions. The company’s policy to comply with all applicable laws, including the FCPA, is set forth in the Code of Ethics. Specific compliance policies and procedures (including for the FCPA) are grounded in the Code of Ethics. The Guidance (discussed in detail below) identifies several core components of FCPA-specific compliance policies and procedures. Within that structure, companies must ensure that their programs include guidelines and procedures for managing the whole range of FCPA risk areas.

1. **A Code of Ethics**

The concept of a Code of Ethics has evolved over the past several decades and is identified in the Guidance as one of the “hallmarks of effective compliance programs.”\textsuperscript{416} The general function of such a code is to delineate the high ethical standards that a company demands of its employees, reflecting the importance of honest and ethical behavior, as well as compliance with applicable laws. The Code of Ethics sets the “tone from the top”—corporate management’s message to all employees of its commitment to follow applicable laws and core ethical principles. As noted above, for public companies, the disclosure requirements in the Sarbanes-Oxley Act essentially compel public companies to adopt a Code of Ethics. The SEC has defined a Code of Ethics to mean “written standards that are reasonably designed to deter wrongdoing and to promote (1) \[h\]onest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest . . .; (2) \[f\]ull, fair, accurate, timely and understandable disclosure in reports and documents . . . file[d] with, or submit[ted] to, the [SEC] and in other public communications . . .; (3) \[c\]ompliance with applicable laws, rules and regulations; (iv) \[t\]he prompt internal reporting of violations of the code to an appropriate person . . .; and \[v\] \[a\]ccountability for adherence to the Code.”\textsuperscript{417} The SEC has not mandated specific elements for Codes of Ethics, leaving that decision to the discretion of individual companies.


\textsuperscript{416} 2012 DOJ-SEC FCPA Guide at 57.

\textsuperscript{417} 17 C.F.R. §229.406.
Typical elements of Codes of Ethics are:

- A preamble signed by the CEO that sets forth the company’s values. Such pre-ambles are aimed at establishing a compliance-oriented “tone from the top;”
- Broad statements concerning the importance of ethical and honest behavior, compliance with applicable laws, the avoidance of conflicts of interest, loyalty to the company, confidentiality, health and safety, and protection of company assets;
- Policy statements concerning specific laws. In addition to the FCPA, Codes of Ethics will often cover insider trading, antitrust, discrimination and harassment, and other laws applying to international business, such as export controls, economic sanctions, and anti-boycott laws; and
- A reporting mechanism and safety valve. Often referred to as a “hotline,” companies now often provide email and web access to the office of the general counsel or chief compliance officer, as well as a toll-free telephone number that is answered 24 hours per day. When setting up a reporting mechanism, companies should be aware that anonymous hotlines are favored in the United States, but may be disfavored—or even illegal—in other jurisdictions. Reporting mechanisms should be tailored around a company’s need and geographic footprint, and companies should ensure that any data preservation or monitoring policies involved comply with the different privacy laws in countries where they do business.

The Guidance also emphasizes that companies should keep their Code of Ethics current, and ensure that they are accessible to all employees (including translation into local languages). While not required for privately-held entities, a Code of Ethics is helpful for creating a broader compliance culture within which to establish a company’s FCPA compliance policies and procedures, thereby offering an improved prospect of successful implementation of such specific and detailed FCPA controls.

2. Core Elements for FCPA Compliance Programs and Internal Controls

The Guidance outlines what it terms “hallmarks of effective compliance programs.” Many of these key compliance elements echo those included in NPAs, DPAs, and Opinion Releases over the last several years, including particularly the DOJ’s Opinion Procedure Release 04-02 (“Opinion Procedure Release 04-02”), which first established a paradigm for FCPA compliance programs and procedures. The Guidance builds on Opinion Procedure Release 04-02, incorporating many of its elements and supplementing them with components of the OECD’s best practices. The Guidance advises companies to take a risk-based approach, encouraging the adoption of programs tailored to risks presented by size, industry, geography and other factors over “one size fits all plans.” Indeed, the Guidance recognizes that spreading resources thinly to address all conceivable risks is often much less effective than allocating resources preferentially to areas of the highest exposure.

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419 Id. at 56.
The Guidance identifies the following specific elements that companies should consider implementing (as warranted by their own unique risk profiles):

- A clear commitment from senior management that sets a “tone from the top” and includes a clear policy against corruption;
- A clear, current, and concise code of conduct that is accessible to all employees;
- Policies and procedures allocating compliance responsibilities and detailing internal controls, documentation practices, auditing practices, and disciplinary procedures;
- A compliance approach tailored to company risk, as determined by examining the frequency of interactions with government officials, extent of involvement in high-corruption jurisdictions, the extent of government oversight and regulation in affected industries, and the size of transactions;
- Periodic training and certification for all directors, officers, relevant employees, and (as necessary) business partners and agents;
- Appropriate measures to provide updated and timely guidance on compliance issues;
- A combination of disciplinary measures and compliance incentives applicable at all levels of the company;
- Risk-based due diligence on third parties, including understanding their qualifications and associations, the business rationale for engaging them, the propriety of payment terms (as shown by typical terms in the country and industry involved), executing contracts specifically describing covered services, and monitoring relationships continually;
- A confidential mechanism for reporting suspected violations or misconduct (such as an ombudsman or an anonymous hotline) and a process for investigating reports; and
- Continuous review, testing, and improvement of the program in response to changing risks or identified weaknesses.422

It is important to recognize that a compliance program that includes each of the components delineated in the Guidance will not forestall every mistake and eliminate every risk. With a compliance program that is consistent with the standards set forth in the Guidance, however, a company can tell a compelling story of compliance that can serve to mitigate penalties in the enforcement context.

A recent Deferred Prosecution Agreement involving Pfizer H.C.P. Corporation (“Pfizer”) illustrates application of the current standards for compliance programs, drawing on elements from the Guidance, from the OECD best practices, and from previous settlements and Opinion Releases.423 In addition, Pfizer committed to a compliance program that included more detailed requirements, such as specific criteria for compliance in the areas of gifts, hospitality, and travel for foreign officials in the health care sector and detailed requirements for the scope and conduct of risk assessments.

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3. Core Areas of FCPA Risk

Companies face a variety of risks when competing for business abroad. A company’s individual business model will drive the specific compliance program necessary to mitigate those risks. Some of the most common areas of FCPA risk are described below. The activities of agents and other intermediaries represent a principal area of FCPA risk, and procedures relating to agents and other intermediaries have, therefore, long been the main focus of company FCPA compliance programs. Consistent with that, the Guidance includes specific elements relating to retention and use of agents and other intermediaries, a predominant area of FCPA risk. Due diligence, contractual commitments to comply with the FCPA, and training are the three key risk mitigation strategies for intermediaries.

While it is critical to control the activities of intermediaries in compliance programs, there are others areas that are equally important and challenging to manage. A company’s focus should extend to all the areas with potential payments to or for the benefit of government officials, even where no intermediary is involved. These areas include promotional expenses, travel and entertainment, facilitating expenses, charitable donations, and lobbying. For companies engaging in investment activities, including acquisitions, anti-bribery due diligence procedures may also be an appropriate risk mitigation measure.

a. Third Parties

The retention of third parties can present significant FCPA risks, as third-party arrangements have often been used to funnel bribes to foreign officials. As with compliance programs generally, third-party due diligence should be tailored to risk factors, such as the nature of related transactions, relationships of foreign officials to potential third parties, and corruption levels in jurisdictions where the third party will represent the company. The Guidance identifies several red flags relevant to conducting due diligence on potential agents, partners, intermediaries, or other third parties. These include:

- Unreasonably large discounts or excessive commissions;
- Consulting agreements with vague descriptions of services to be rendered;
- Consultants who typically operate in a different industry or business line than the one for which they have been retained;
- Close relationships or associations with foreign officials;
- Involvement of a third party at the recommendation or insistence of a foreign official;
- A third party that is actually a shell company in an offshore jurisdiction (or whose beneficial owners cannot be identified); and
- Requests for payments to offshore bank accounts.424

The presence of any of these red flags should trigger increased vetting of the relationship. The Guidance recommends that compliance measures for third parties include:

- Understanding the nature of the proposed relationship, its business purpose, and the qualifications of the proposed third party;
- Understanding of any relationships between the third party and foreign officials;
- Executing a contract that specifically outlines services/deliverables and payment terms;

• Analysis of payment terms to determine whether they are consistent with similar arrangements (in terms of geography, type of service provided, etc.); and

• Ongoing monitoring of the relationship, including reviewing performance, providing periodic training, and (as appropriate) obtaining and exercising rights to audit the third party’s books and records.425

In our experience, the most effective compliance measures involving third parties involve close cooperation between the business team and the compliance team. It is critical for the business team to be involved and on board, but some responsibilities, such as agent interviews and maintenance of due diligence files, are more suited to lawyers or other compliance professionals. Finally, it is critical for a company to fully implement the measures it adopts to mitigate risk. For instance, if a company has the contractual right to audit its third parties, it should exercise that right under appropriate, articulated circumstances.

b. Promotional Expenses

Although the FCPA provides an affirmative defense for reasonable promotional expenditures, companies should be aware that the DOJ and the SEC construe this and other defenses narrowly and that, in practice, controlling these expenses requires significant effort. Because a promotional expense policy requires balancing the legitimate need to market products overseas (often in markets where local customs encourage or require gift-giving) and the obvious risk that expenditures will be designed to improperly influence a decision-maker, policies in this area are difficult to develop and manage. The failure to develop such policies and manage this risk, however, may create a significant loophole in any company’s FCPA compliance program. Companies should address business travel and entertainment (discussed in more detail below) in the context of the same policy.

The Guidance affirms that promotional items of nominal value rarely show corrupt intent, noting that “it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither the DOJ nor the SEC has ever pursued an investigation on the basis of such conduct.”426 The Guidance does not, however, provide detailed instructions on how to determine which expenditures cross the threshold and become potential problems. The Guidance does, however, suggest measures to mitigate risk in this area. Based on our experience, as well as the Guidance, previous NPAs, DPAs, and Opinion Releases, the following key measures will serve to limit risk in the area of promotional expenses:

• Clear guidelines on the circumstances in which promotional expenditures are appropriate;
• A requirement of complete and accurate record keeping on the promotional expenditures, including what is being promoted and why;
• Pre-approval by designated persons to ensure accountability;
• Periodic audit of expenses;
• Certification of compliance with local law;
• A “NY Times standard” (no inappropriate forms of entertainment that would tarnish the public image of the company); and
• A statement against “lavish” entertainment that creates an appearance of impropriety.

425 Id. at 60.
426 Id. at 15.
Promotional gifts should also be carefully monitored. An FCPA policy should ensure that gifts:

- Are not in the form of cash;
- Are of nominal value so as to avoid any perception that they are intended to influence the recipient;
- Are infrequent;
- Are legal, within accepted industry norms, and consistent with company policy; and
- Are accurately and adequately documented in the company’s books and records, including their business purpose, value, and proof of pre-approval.

In our experience, other safeguards can reduce the likelihood of improper use of promotional expenditures, such as providing dollar limits on expenditures and tracking the annual, aggregated benefit to officials. Providing transparency by informing government employers when government employees are obtaining benefits also helps to prevent officials from taking the benefits at the expense of the government entity. (There are a variety of ways to achieve such transparency, including: requiring written approval by the entertained/educated individual’s supervisor and extending benefits to entities rather than individuals, thereby allowing the entity to choose the attendee.)

**c. Travel and Entertainment**

Like promotional expenditures, travel and entertainment expenditures may be permitted if: (1) they do not meet the elements of an FCPA violation (e.g., they are not made “corruptly,” to obtain or retain business, etc.); (2) they are lawful under the written laws of the foreign country; or (3) they constitute bona fide promotional expenditures. Again, however, the DOJ and the SEC interpret these exceptions and defenses very narrowly; thus, the analysis is often quite fact-specific. As noted, the Guidance states that nominal expenditures clearly related to business purposes—such as buying a cup of coffee or providing taxi fare—will rarely, if ever, warrant enforcement action.\(^{427}\) While such clearly nominal benefits can be an easier call, it is difficult to judge at what point such expenditures become problematic. Accordingly, to be effective, compliance programs should establish some general guidelines in this area. With respect to meals and entertainment:

- The expenditures should not be lavish, on either a per capita or event basis;
- The activity should be associated with a valid business purpose and not simply with “relationship building;”
- The expenditures should be limited to business persons, not family or guests;
- The expenditures should be infrequent;
- The expenditures should be legal, within accepted industry norms, and consistent with company policy;
- The expenditures should be accurately and adequately documented in the company’s books and records, including their business purpose, value, and proof of pre-approval; and
- When arranging travel and hotel expenses for government officials, companies should generally make the arrangements and pay hotel and travel expenses directly, rather than allow the officials to pay their own way and to seek reimbursement.

\(^{427}\) *Id.*
d. **Facilitating Payments**

Though permissible if they meet the stringent criteria of the FCPA, facilitating payments often violate local law, and are not viewed favorably by the DOJ and the SEC. Further, the UK Bribery Act does not contain a corresponding exception. A policy that addresses these payments should clearly state at the outset whether such payments are categorically disallowed. If allowed, there should be accountability for the determination, with requirements for high-level approval. Except in true emergency situations—such as the need to obtain an exit visa at an airport or cross a check point—approval for any facilitating payment should be required in advance and obtained in writing.

As the line between a permissible facilitating payment and a prohibited bribe is often blurry, it is sound compliance practice to discourage facilitating payments. If permitted, facilitating payments should only be made if the company has verified that all of the below criteria are met. The payment must be:

- Necessary to secure or expedite a routine government action that is non-discretionary in nature (such as supplying utilities);
- Necessary to prevent damage to an important commercial interest of the company with no reasonable alternative;
- Modest in amount;
- Customary;
- Legal under local law; and
- Accurately recorded in the books and records as a “Legal Facilitating Payment.”


e. **Charitable Donations**

The Guidance states that “[t]he FCPA does not prohibit charitable contributions or prevent companies from acting as good corporate citizens” but that charitable contributions can be used to disguise bribes.\(^{428}\) The SEC settlement involving Schering-Plough—and a recent, similar action against Eli Lilly and Company—demonstrates that companies need to monitor charitable donations closely. Ensuring that donations are made to a *bona fide* charity is not enough; companies are responsible for ensuring that the donations are not being used to influence a decision-maker. Risk under the FCPA exists where the donation has the effect of promoting the company’s business interests (even if only indirectly), even where the beneficiary itself does not fall within the class of governmental entities targeted by the FCPA. Indeed, a donation to an apparently unrelated party or entity may be a way of conferring an indirect benefit on a decision-maker.

A proper donations policy should require:

- An advance written request describing the charitable purpose for the donation, any business reason for the donation, and all details about the recipient;
- Screening to ensure that any recipient is a legitimate organization, does not support terrorism, and that there is a proper charitable reason for the donation;
- Screening to verify that any recipient has no connection to a government contract decision-maker or government or political official (or their agent or spouse) capable of providing the company with an unfair competitive advantage. (This inquiry should indicate that the charity was not suggested or referred by such a party);

\(^{428}\) *Id.* at 16.
• An opinion from a local lawyer of good standing confirming that the donation is lawful under the written laws and regulations of the country or state in which it is made;

• Advance written approval of the donation by senior management or committee, including a statement explaining why the donation is in the interests of the company;

• A receipt from the recipient of the donation confirming receipt and warranting that the donation will be used in a manner consistent with anti-bribery laws and will not benefit directly or indirectly any government official or political party official or be used to support any country or organization supporting terrorism;

• Steps to ensure that funds are transferred into a valid bank account;

• Detailed and accurate description of the donation in the company’s books and records and rights for the donor to review audited financial statements; and

• Continuous monitoring of the program’s efficacy.

f. **Lobbying**

Like many other activities overseas, lobbying should be conducted in a manner consistent with applicable anti-corruption laws and the FCPA. This means that adequate safeguards should be utilized both prior to engaging in lobbying and when engaging a lobbyist.

Before undertaking lobbying efforts in a foreign country, it is prudent to do the following, all of which could reasonably be contained in a lobbying policy:

• Secure a written opinion of local counsel on any legal restrictions on lobbying by a U.S. company focusing on executive, legislative, and administrative agency distinctions under the local law;

• Adopt a written policy for lobbying activity that is consistent with the company's anti-corruption and other policies. The written policy should include:
  • An explicit prohibition against making a payment or promise should be made to a covered person in exchange for business or unfair advantage; and
  • A requirement that entertainment must be appropriate and legal under local law without being lavish. (Explicit guidelines in high-risk countries based on local law opinions are prudent); and

• Develop mechanisms to supervise, monitor and audit lobbying, lobbying objectives, and lobbying expenditures.

In addition to the lobbying policy described above, when hiring a lobbyist, the company should conduct a thorough background review to ensure that the lobbyist is well reputed and not a relative or agent of a current or former government official or other covered person. (In limited circumstances, such persons may be engaged as lobbyists, but only with appropriate safeguards, attestations, and input from the corporate legal department.) The due diligence should be documented and should include an assessment of the fair market value of the services. Fees should be consistent with that fair market analysis.

The company should also secure a written engagement wherein the lobbyist acknowledges the company’s anti-corruption policies and commits to abide by them and all applicable laws. The engagement should contain a certification that the lobbyist is not a covered person, does not represent a covered person, and will not share any fees with a covered person.
Lobbyists should also be trained to be sensitive to the risks (including risks to appearances) involved in lobbying activities connected with participation in particular projects (as opposed to lobbying in connection with the legislation or regulation of broad application). All payments to lobbyists and all expenses incurred by lobbyists in connection with their efforts should be documented meticulously.

C. UK Bribery Act Compliance Programs

Many companies with FCPA exposure are also subject to the UK Bribery Act. In many ways, the MOJ Guidance mirrors guidance provided in the Guidance and the guidance reflected in enforcement settlements. The need to establish an anti-corruption program is arguably more compelling for those subject to the UK Bribery Act. While the FCPA imposes strict liability only on public companies in connection with internal controls failures and only for civil violations, the UK Bribery Act imposes potential criminal liability on a strict liability basis for a company that fails to prevent bribery by individuals acting on its behalf. The UK Bribery Act also provides that implementing “adequate procedures” to prevent such bribery is a defense to corporate liability. That said, given the high importance of anti-bribery programs under either regime, companies subject to both the FCPA and the UK Bribery Act should develop strategies for ensuring compliance with both. In our experience, often the most effective program is one harmonized global program that ensures compliance with both.

The MOJ Guidance outlines six principles companies should consider as they develop “adequate procedures” to prevent bribery. These are generally consistent with the Guidance.

- **Proportionate Procedures:** Anti-bribery procedures should be scaled to the bribery risks a company faces, as determined by the scale, nature, and complexity of its activities.

- **Top-Level Commitment:** Top-level management should be committed to preventing bribery by associated persons and should foster a culture that rejects bribery. This commitment includes communicating management’s anti-bribery position, the consequences of engaging in bribery, and the individuals/departments responsible for leading anti-bribery efforts. Management should also engage in implementing procedures, by helping to select/train managers overseeing anti-bribery work and providing oversight of that work.

- **Risk Assessment:** Companies should conduct periodic assessments of their exposure to bribery risks. Risks to consider include:
  - Country risk (activities in countries with high levels of corruption);
  - Sector risk (activities in extractive industries or the large-scale infrastructure sector);
  - Transaction risk (frequency of need for licenses/permit or of political/charitable contributions);
  - Business opportunity risk (involvement in projects that are high value, involve many contractors or intermediaries, and/or are not undertaken at market prices);
  - Business partnership risk (use of intermediaries, consortia, joint ventures, and relationships with politically exposed persons); and
  - Internal risk (training deficiencies, bonus culture that rewards excessive risk-taking, lack of clear policies/procedures for expenditures, and lack of financial controls).

- **Due Diligence:** Companies should engage in due diligence appropriate to perceived risks. For example, less diligence is required for an IT support specialist than for an intermediary who will interact with a public official.
• **Communication and Training:** Anti-bribery policies and procedures should be implemented and understood throughout the company. Communication and training should be provided, as required by risk, both within the company and among intermediaries, partners, and other third parties. Training should be continuous.

• **Monitoring and Review:** Companies should continually monitor and review their anti-bribery policies and procedures. External reviews or audits of policies and procedures may also be appropriate.

The MOJ Guidance also generally distinguishes between policies (statements of the company’s position) and procedures and provides recommendations for each. Policies should include a commitment to bribery prevention and provide both a general approach to reducing bribery risks and an overview of the policy’s implementation strategy. Procedures lay out required steps, and important topics for procedures include management’s role, risk assessment procedures, due diligence, gifts, reporting mechanisms, monitoring, and others.

Finally, the MOJ Guidance advises that companies adopt policies and procedures specifically covering certain common risks, many of which are also targeted by the Guidance on compliance with it. The particular areas highlighted by the MOJ Guidance are:

• **Hospitality/Gifts:** Expenditures should be limited to *bona fide* hospitality, promotional, or business expenditure aimed at improving the company’s image, building relationships, and better presenting products/services. Expenditures should not be excessive in amount or frequency. Guidelines for hospitality should clarify financial limits, require approval of amounts over those limits, and require a host to be present. Guidelines for gifts should limit expenditures to nominal values (as determined for each jurisdiction), create an approval procedures for expensive or frequent gifts, and provide examples clarifying types of gifts that are generally appropriate.

• **Expenses:** Expenditures or reimbursements for travel and related costs connected to business activities or training should likewise be limited to amounts/accommodations that are reasonable, not luxurious, and provided only to business associates (*i.e.*, not to their friends or family members), and for a purpose that is related to business purposes.

• **Public Officials:** Policies should clearly prohibit providing anything of value to a public official in order to obtain or retain business or to induce that official to misuse his office or provide an improper advantage.

• **Facilitation Payments:** Policies should make clear that facilitation payments are prohibited under the UK Bribery Act (though not entirely under the FCPA). Any carve-outs for personal safety should be crafted very narrowly.

• **Retaining Third Parties:** Companies should have policies requiring risk assessment and appropriate due diligence for all agents, representatives, consultants, or local personnel.

• **Political and Charitable Contributions:** Companies should have policies prohibiting political contributions without board approval and limiting charitable contributions (with board discretion to approve higher contributions). Any contributions should be made pursuant to a fixed process.
D. Practical Suggestions for Implementing an Effective FCPA Compliance Program

With the essential elements of an FCPA compliance program at hand, the question becomes how best to implement controls that prevent violations without creating unnecessary obstacles to the conduct of business. The relative effectiveness of an FCPA compliance program will turn on whether a company makes sound judgments in tailoring its program, appoints the right personnel to oversee and manage the risks, and creates procedures that are well understood and easy to follow. This section focuses on steps to translate the principles discussed above into an effective program tailored to the needs of an individual company.

1. Prudent Allocation of Responsibility

As a threshold matter, it is important to set up the appropriate structure within the company both to oversee and implement the compliance regime. A well-crafted compliance program should carefully consider the appropriate limits of discretion for personnel in the field; in most cases, the best approach is for senior staff in consultation with legal counsel to make judgments and set rules regarding whether hotel, travel, or other promotional expenses are bona fide and lawful under local law; or whether exceptions for facilitating payments or affirmative defenses are available. A prudent approach in many cases, for example, is to create a presumption against providing government officials with any gifts, travel, or other things above a set appropriate monetary threshold, while allowing counsel either in corporate headquarters or at an appropriately senior level in a region to authorize exceptions upon a finding that a proposed expenditure qualifies as a facilitating payment, is permissible under the written laws and regulations of the foreign official’s country, or is a reasonable promotional expense.

Policy decisions may have to be made as to whether payments, even though permitted under the FCPA, can be rationalized under the company’s code of ethics. For example, it is crucial to also ensure that expenditures that are otherwise “legal” under the FCPA do not violate local commercial bribery or official corruption law or custom—a question often best put to a combination of local counsel, the U.S. Embassy/Counsel, and local chambers of commerce. Accordingly, a sensible compliance program should channel these difficult, high-stakes, and often sensitive legal and business questions away from local business people towards experienced senior legal and compliance personnel. (Indeed, some policies require pre-approval before providing any “thing of value” to a government official.) Policy should never be made on the ground, yet mechanisms must be in place to ensure that policy questions raised on the ground are addressed promptly and by the appropriate personnel. Finally, combining a pre-approval approach with accurate records of all expenditures will allow a company to monitor expenditures for certain individuals or companies and to assess whether their aggregate annual values are reasonable and appropriate.

2. Tailoring Compliance Program to the Company

A compliance program should be well-tailored to fit the unique characteristics and culture of each individual company. A common mistake is the “quick fix” approach: it is very tempting to borrow another company’s compliance program and adopt that program virtually wholesale, without regard to differences in company culture, the nature of the risks faced by the different companies, and specific management structure and business systems. A more effective approach is a “bottom-up” approach—first identifying the FCPA risks that exist, the personnel making payments, and the personnel
in the best position to make real-time decisions as risks arise. With this information, a company can identify prophylactic measures that will protect it from the consequences of violating the FCPA, while also limiting unnecessary restrictions on the conduct of its business. For example, will a categorical prohibition on facilitating payments unduly restrict business in some markets? Compliance practices should be calibrated to manage the risk at hand, and the company may find that different business realities in different markets warrant varied compliance approaches. In this regard, the company should also examine where it does business—with particular focus on countries that score poorly on the Transparency International Corruption Perceptions Index—and on the challenges those jurisdictions present. Most obviously, a company doing business in India, China, or Nigeria will need to structure its compliance program differently than a company doing business only in France or the United Kingdom. For example, companies doing business in countries with significant state-owned enterprises (e.g., China) must focus their guidelines and training on the range of individuals who are considered government officials.

An important aspect to tailoring a program is periodic reassessment of that program, particularly as the business grows. It is critical for companies to periodically re-assess the types of intermediaries that they use and the ultimate recipients of payment from such intermediaries, in order to evaluate whether existing controls are appropriate to the FCPA risks presented by such payments. For example, the many cases and on-going investigations involving customs officials demonstrate that payments to lower level government employees should be scrutinized and controlled. By extension, payments to such officials by agents or other intermediaries (e.g., customs brokers or freight forwarders) also bear scrutiny, and should be controlled through a company’s agent.

3. Guidelines, Rules, and Examples

A three-prong structure of rules, guidelines, and examples for each of the core risk areas is central to an effective set of written FCPA compliance policies and procedures.

Guidelines provide basic explanations of the standards for employee conduct. Rules in turn delineate strict requirements which, if violated, could lead to disciplinary action. Examples assist the employee in applying the guidelines and rules to a specific work function.

Below is an example of guidance contained in a compliance program for a company doing business in India.

*Contributions may be made to charitable organizations, including organizations that are customers or affiliated with customers, provided that the purpose of the contributions is limited to genuinely charitable aims.*

*As leaders of their communities, “government officials” are often involved in requesting charitable contributions from the Company. While charitable contributions are encouraged, contribution requests must be examined carefully anytime they originate from a customer, and even more carefully when the request originates from a government official. Employees who are responsible for reviewing and approving a contribution must satisfy themselves that the contribution is not a disguised way of conferring a personal benefit on a government official, and that the contribution is not connected to a purchasing or other decision involving Company products or services.*

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The guidelines are followed by a rule:

- **Contributions may never be made as part of an exchange of favors with any government official, even if the recipient organization is a bona fide charity. If a government official has promised any benefit, or issued any threat, in connection with a contribution request, the contribution request must be denied.**

- **All contributions of greater than Rs. 700, or greater than Rs. 1400 in a calendar year, must be considered according to the following procedures:**
  
  - **Request must be in writing:** All requests for contributions must be made in writing. The request must specify at a minimum (i) the person or organization requesting the contribution, (ii) a description of the contribution request, and (iii) the purpose of the contribution. The request must be on official letterhead of the requesting organization and it must be signed by a person authorized to sign on behalf of the organization. Written requests must be forwarded to management for review.
  
  - **Investigation:** All charitable contributions must be carefully reviewed to assess whether the contribution is likely to confer a personal benefit on a government official.
  
  - **Decision:** The final decision to approve a charitable contribution must be made by management.
  
  - **Response:** The Company, through management, must provide a written response to every written contribution request.
  
  - **Evidence of Receipt:** The Company, through management, must obtain evidence of receipt for each contribution made by the Company.

- **Contributions not greater than Rs. 700, or Rs. 1400 in a calendar year, may be awarded without the prior approval of management. However, such contributions must be reported within two days to management. All of the written records connected with each charitable contribution (including the written request, due diligence, letter of acceptance or rejection, evidence of receipt, and any publicity) must be maintained by management.**

- **Under no circumstances may the Company make a charitable contribution in cash (or cash equivalent, such as a check or wire transfer) directly to a government official or to any personal bank account.**

Finally, examples (or “Frequently Asked Questions”) assist the employee to apply the guidelines and rules to a given work function. One of those examples follows.

**Question:** Company is seeking to expand its distribution network into a new region of India. During the first weeks of that effort, the Company and its local agent have each been asked by a regional official to contribute $5,000 to help construct a bus depot in a small town. The town has no official bank account, so the Company has been asked to make the contribution in cash directly to the regional official who will in turn award the construction contract. You have learned that the official has his own contracting company, but he has promised not to award the contract to himself. Company’s local agent supports making the contribution, and warns that failing to do so could make it much more difficult to do business in the region.

**Answer:** Contributions may not be made in cash to government officials under any circumstances. In addition, the circumstances surrounding this request—the lack of an official bank account, the request to give cash directly to an official, the lack of transparency and openness, the fact that the official would have discretion to award the contract to himself or a friend—present a significant risk that some of the money will be diverted to the official’s personal use. As requested, this contribution is not permissible.
4. Implementing Controls on the Method of Payment

Another key strategy to increasing the effectiveness of an FCPA compliance program is to implement controls on the method of payment. Global enforcement authorities are increasingly focused on the intersection between corruption and money laundering, requiring companies to impose rigid and effective controls concerning the method and location of all payments, whether these are fees, commissions, charitable donations, or expenses for travel, entertainment, or promotion. Cash is easily misused, and payments to particular jurisdictions can be questionable, either because the jurisdiction has no connection to the transaction, or because it has a reputation for illegal activity of some kind.

Many companies control FCPA risk by adopting policies similar to those designed to prevent money laundering; such an approach makes it harder for employees or agents or others to divert apparently proper payments for improper purposes. Such policies include requirements for receipt, payment in local currency, and payment to local bank accounts only in the name of the payee. In connection with travel, entertainment, and promotional expenses, some companies now insist on paying directly for travel and lodging, rather than paying travel stipends, or allowing guests to make their own arrangements and later seek reimbursement.

In evaluating the payment structure in any transaction, companies should investigate the following “red flags:”

- Payments to or by offshore holding companies in jurisdictions that have been linked to money laundering;
- Payments through Casas De Cambio, or other money remitters, which have often been linked to money laundering schemes in South and Central America;
- Payments from foreign bank drafts, which may enable the purchaser to conceal his or her identity;
- Payments from third parties who are not apparently linked to the purchaser; and
- Payments that appear “out of place,” such as:
  - Any payments that appear “too large” for the business line, e.g., payments over $100 in cash, money orders, or travelers checks to a parking garage or car wash;
  - Any payments from a locale that does not fit the business line, e.g., payments from another country to a business that is cash intensive;
  - Wire transfers that do not indicate the identity of the sender;
- Wire transfer activity to or from a high-risk geographic location without an apparent business reason or inconsistent with the customer’s business or history;
- Payments with vague or imprecise descriptions;
- Payments in amounts slightly smaller than those triggering internal approval or external reporting thresholds; and
- Payments or receipts with no apparent links to legitimate contracts, goods, or services.432

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431 Generally, money laundering statutes prohibit transporting or conducting financial transactions with the proceeds of an illegal activity, knowing that the money is derived from an illegal activity and knowing that the transaction is designed to conceal or disguise the nature of the illegal activity or to avoid a transaction reporting requirement. See 18 U.S.C. § 1956.

5. Effective Training

Effective training depends on determining the appropriate scope of the program: whom to train and the content and frequency of that training. Every person affiliated with the company—from the Board to sales associates to third-party consultants—should, at a minimum, be provided “sensitivity” training on the FCPA regulations, whether they are in a position to make decisions relevant to FCPA compliance or not. This should take place at the time they join the company and periodically thereafter, with attendance documented. It is also critical to ensure that all employees in a position to make decisions relating to risky payments receive adequate, in-depth training. This will include more than the legal staff and senior managers. Indeed, many recent enforcement actions have shown that it is often those in the middle to lower tiers of management that make the decisions that get companies into trouble.

Substance is also critical; materials need to be both comprehensive and understandable, which usually means free of legalese. Training should be conducted in the native language of the audience and in a manner that keeps the interest and attention of the employees. Training should also not be generic. Rather, it should include examples pertinent to the company’s business and the risks that it faces. Time should also be built in for questions and answers. Question and answer periods permit the trainer to assist the attendees with compliance and also gives management insights into issues that may need to be addressed on the ground. Important questions raised in training sessions are often useful for formulating content for subsequent training materials and guidelines. Finally, companies should carefully consider the appropriate use of web-based training. Although it is a useful and low-cost alternative to in-person training, web-based training is not as effective and is often best used as a supplement to, rather than as a replacement for, in-person training.

6. Attention to Other U.S. Laws that Regulate International Business Will Make the FCPA Compliance Program More Effective and Efficient

A lack of coordination among different functional areas can expose companies to liability under other laws that apply to international business. The FCPA is one of many U.S. laws that regulate the conduct of U.S. companies overseas. While the jurisdictional reach of these other laws can vary from the reach of the FCPA, U.S. companies that export or invest abroad are generally subject to an array of U.S. laws in connection with such activities, including the securities laws, export control laws, economic sanctions laws, anti-boycott laws, and anti-money laundering laws.

A coordinated compliance program increases effectiveness in reducing the overall risk of liability. For example, Immuncor and Titan illustrate that the failure of coordination between functional areas—the deal team and the disclosure team—can expose companies to additional risk under the securities laws. Cases involving customs agents (e.g., BJ Services) highlight the importance of coordination between those charged with FCPA compliance and those responsible for logistics and import compliance. The Titan matter also highlights the fact that both the FCPA and the ITAR regulate the accurate reporting and accounting of agent commission payments.\footnote{In addition to its FCPA fine, Titan entered into a $1.5 million settlement agreement with the State Department to settle charges that it made false statements and failed to report its agent commissions related to exports of defense articles, as required under the ITAR. See Order, In re L-3 Commc’ns Corp. (Dep’t of State, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls Oct. 18, 2006), available at http://pmdttc.state.gov/compliance/consent_agreements/pdf/L3_Order.pdf.}
These examples highlight the importance of establishing compliance programs that manage the consequences of risks arising from all of the laws that apply to international business. In addition, companies that do not coordinate their risk management efforts miss opportunities for bolstering the efficiency of compliance programs. Companies can both lessen their risk and bring down compliance costs if these areas are coordinated. For example, for defense contractors, coordination between the FCPA compliance and export control teams can increase the likelihood that commissions will be accurately recorded on company books and records, that the amount of payments are carefully monitored, and that such payments are accurately reported to the State Department. Activities of agents—whose work can implicate not only the FCPA but also economic sanctions and anti-boycott laws—provide another example. In a coordinated program, agent due diligence includes not only questions related to ties to government officials, but also to terrorist groups and sanctioned countries. In the same vein, the activities of agents in countries that participate in the Arab boycott of Israel can be imputed to the principal; when agents are trained on the FCPA, therefore, efficiencies are gained if that training is combined with U.S. anti-boycott law training and the certificates of compliance apply to both legal regimes. Coordination among those responsible for these areas thus increases the overall effectiveness and efficiency of the program.
V. WHAT TO DO WHEN A POTENTIAL VIOLATION IS DISCOVERED: STRATEGIES FOR INTERNAL INVESTIGATIONS AND VOLUNTARY DISCLOSURE

As the DOJ and the SEC continue to increase their FCPA enforcement activity, it is becoming ever more apparent that companies subject to the Act must have an effective strategy for intelligently responding to potential violations. Issues concerning questionable payments to foreign officials or improper accounting can arise in any number of situations. Such concerns can spiral out of control if a company is not prepared to respond immediately to investigate a potential claim and mitigate any resulting damage. The role of counsel is to help structure an investigation to quickly assess the facts and determine an effective strategy to limit the damage to the company. This Chapter focuses on the various considerations companies in today’s compliance environment must take into account in determining whether and how to investigate potential FCPA violations, and under what circumstances a company should consider voluntarily disclosing a possible violation to the authorities.

A. What is the Purpose of an Internal Investigation and Should One Be Conducted At All?

The first issue a company must decide when faced with evidence of a potential FCPA violation is whether to conduct an internal investigation at all. When a potential FCPA violation comes to the attention of management, the facts are not always clear. The usual case does not involve a blatant FCPA violation or government subpoena that will almost always require a thorough investigation, but rather a “red flag” that may require a more detailed inquiry depending on the circumstances. These “red flags” arise from a variety of situations, including due diligence in connection with a planned transaction, an internal audit or control measure, a whistleblower, or a press report. While it is generally advisable in today’s enforcement climate to investigate any potential FCPA issues, not every circumstance necessarily warrants a full-blown investigation. The decision whether to conduct an investigation and the scope of the investigation involves an important balancing of many factors, including, the SEC disclosure obligations for public companies, the potential consequences of failing to investigate, reputational and economic risks, limited available resources, and disruption to on-going business operations.

In weighing these factors, it is important to understand the purposes of an internal investigation. Obviously, an internal investigation aims to gather all the facts surrounding a potential FCPA issue—the who, what, where, when, and why. But it should be viewed more generally as a means of preparing a company to decide how to respond effectively to an allegation that the company (or one of its agents) has violated the FCPA. Internal investigations allow a company to properly analyze potential liability and determine how to remediate a violation and prevent future problems. Investigations also help companies discover and address global deficiencies in existing compliance structures. In this way, they extend beyond basic fact-finding to internal due diligence and risk mitigation.

1. The Potential Consequences of Failing to Investigate

The risks of failing to respond effectively to a potential FCPA violation can be staggering. Above all else, the company and its employees or agents may face potentially dire consequences from any illegal conduct under the FCPA. As discussed in Chapter II, supra, FCPA wrongdoers may be subject to a host of criminal, civil, and regulatory penalties, including individual or corporate criminal prosecution, regulatory enforcement, collateral civil litigation, and potential debarment. Just as important, however,
are the indirect consequences that may result from failing to properly investigate a potential FCPA violation. Companies or individual employees who turn a blind eye to a potential FCPA problem do so at their own risk.

Indeed, the following are just a few examples of potential consequences of failure to investigate fully a potential FCPA violation:

- A company may be found criminally and civilly liable under the FCPA for a violation even without actual knowledge of an illicit payment, if it “consciously disregards” a potential FCPA violation. In many cases, this imposes an affirmative duty to inquire about and remediate potential FCPA problems;434
- In the criminal context, “willful ignorance” by a company that fails to properly investigate a potential FCPA claim is an aggravating factor under the U.S. Sentencing Guidelines;435
- Under the recently-enacted UK Bribery Act, it is a criminal violation for a company to fail to prevent bribery. This is a strict liability offense and the only defense to this charge is having previously instituted adequate procedures to prevent the bribery;
- Failure to investigate an FCPA issue can be treated as putative “ratification” of wrongful conduct, heightening the risk of potential civil liability and can even lead to punitive damage judgments against the company;436
- An individual officer or director who breaches his or her fiduciary duty to a corporation by failing to investigate FCPA red flags may be found personally liable for any resulting damage to the corporation;437  and
- Auditors may refuse to issue timely quarterly reports and instead insist on an investigation as part of their obligations under Section 10A of the 1934 Securities Exchange Act.438

Companies would be wise to note significant recent examples where corporations have suffered serious consequences for failing to fully investigate a potential enforcement problem. In the FCPA context, SEC v. Triton Energy is the most frequently-cited example. In Triton Energy, the SEC alleged that two former senior officers of a Triton Indonesian subsidiary authorized numerous improper bribes to Indonesian officials. Although Triton Energy—the parent corporation—did not authorize or direct these payments (and the subsequent false accountings), its management failed to investigate and remediate the problems once they learned of them from company auditors. Settling with the SEC, Triton Energy consented to a cease-and-desist order and a $300,000 penalty, causing significant reputational damage.439  As Paul V. Gerlach—then-Associate Director of the SEC’s Division of Enforcement—remarked: “The result in Triton makes clear that whenever senior management becomes aware of FCPA violations, even if it did not authorize them in the first instance, it is liable for failure to investigate and put an end to such violations.”440

434 See supra Section II.B.1.d.
436 See Restatement (Second) of Torts § 909(d); see also, e.g., Davis v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 906 F.2d 1206, 1223-25 (8th Cir. 1990) (affirming imposition of $2 million punitive damage judgment against corporation for failing to investigate unauthorized trade activity).
437 See In re Caremark Int’l, Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (noting that directors and officers can be held personally liable for breaching fiduciary duties if they fail to exercise reasonable oversight to ensure compliance with the law).
2. Getting an Initial Assessment of the Source, Nature, and Credibility of an Alleged FCPA Violation

Given the breadth and complexity of the modern corporation doing business globally, and the diversity of circumstances in which an FCPA violation may occur, in-house counsel and senior management can face serious challenges in deciding when an FCPA “red flag” merits a full-blown internal investigation. In the current enforcement climate, as noted, companies and individuals risk much in failing to take such red flags seriously. Thus, a company must have a systematic method for evaluating the source, nature, and credibility of the facts and circumstances that suggest a potential FCPA violation. At a minimum, companies may consider the following questions in evaluating the nature and credibility of a potential FCPA violation and fashioning an appropriate response:

- Who brought the potential FCPA violation to light? Although it is difficult (and dangerous) to dismiss allegations based solely on their source, it may also be true that certain sources are especially credible and should receive close attention (for example, allegations revealed through internal audits, transactional due diligence, and whistleblowers);

- Where was the questionable payment made? Allegations concerning business activities in “red flag” jurisdictions with known corruption risks are especially serious and may merit particular scrutiny;

- When did the alleged activity occur? Is this an on-going problem that must be immediately remediated or something that happened several years ago?

- What type of oversight has the company historically exercised over the business unit at issue? Does the allegation concern a business unit over which the company has well-established and frequently-monitored internal controls? Does this business unit have a history of compliance problems, whether related to the FCPA or not? This bears not only on the credibility of the allegations, but also on the potential risks to the company—repeated violations are much more likely to result in stiff civil and regulatory penalties and potential criminal prosecution;

- Does the allegation implicate management or other senior employees? Improper payments related to senior company executives may increase the potential penalties assessed to the company as a whole and amplify the company’s reputational risks for failing to investigate;

- Does the allegation suggest that the problem is of a systemic or isolated nature? Even if the problem appears to be isolated, how likely is it that a thorough investigation will reveal more widespread problems?

- Is the conduct the subject of an already existing investigation or litigation either in the United States or elsewhere? A company cannot assume that an allegedly improper payment is just a local issue—it could be indicative of a global enforcement problem.

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441 Involvement of senior executives is also an aggravating sentencing factor under the Organizational Sentencing Guidelines. See U.S. Sentencing Guidelines Manual § 8C2.5.
3. Weighing the Advantages and Disadvantages of Conducting an Investigation

Having given preliminary consideration to the nature, source, and credibility of the evidence suggesting a possible FCPA violation, a company must quickly decide whether to initiate a full-blown investigation. Although such an investigation may include, at a minimum, investigatory costs, attorney’s fees, disruption of business operations, and discovery of evidence that may, ultimately, be used against the company, the benefits of an investigation usually greatly outweigh such costs. In addition to the immediate benefits of gathering the relevant facts, an investigation may:

- Assist in determining what steps need to be taken to promptly remediate any systemic compliance issues, minimize the overall damage and dispel any inference that the company turned a blind eye to potential violations;
- Demonstrate to the government that the company is fully cooperating with an investigation, which may reduce any eventual fines and penalties;
- Mitigate the risk of later whistle-blowing allegations and on-going violations;
- Enhance the company’s global focus on effective compliance, contributing to a broader theme of good corporate citizenship;
- Protect the company and its senior executives and directors from allegations that they breached their fiduciary duties by failing to properly investigate a claim; and
- Prepare potential witnesses for testimony in later criminal, civil, or regulatory investigations by refreshing their memory and familiarizing them with the interview process.

4. Understanding DOJ and SEC Expectations

In formulating its response to a potential FCPA violation, a company should have a clear understanding of the respective expectations of the DOJ and the SEC as to investigating red flags. According to the U.S. Organizational Sentencing Guidelines, for example, the DOJ has stated that “[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.”442 This edict is consistent with the DOJ’s and the SEC’s guidelines on assessing penalties on corporations, both of which emphasize the thoroughness of an investigation and subsequent remediation as key factors in determining proper sanctions.

The DOJ’s Filip Memo

On August 28, 2008, Deputy Attorney General Mark R. Filip announced new DOJ “Principles of Federal Prosecution of Business Organizations” (the “Filip Memo”).443 The Filip Memo superseded previously-issued guidance contained in the December 2006 McNulty Memo and January 2003 Thompson Memo. The Filip Memo reflected a marked shift in policy from previous DOJ charging guidelines by, among others things, expressly prohibiting federal prosecutors from considering, when evaluating a corporation’s “cooperation,” whether it has (i) refused to waive its attorney-client privilege and work product protections; (ii) entered into a joint defense agreement with other potential co-defendants; and (iii) advanced or reimbursed attorneys’ fees or agreed to provide counsel to employees, officers, or directors under investigation or indictment.444

442 Id. § 8B2.1(b)(7).
Despite these significant policy changes, the fundamental factors in the DOJ's basic criteria for evaluating internal investigations have not significantly changed. Like the McNulty Memo, the Filip Memo sets out nine factors relevant in determining whether corporations should be charged, including:

- “The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management”;
- “The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”; and
- “The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies.”

While the guidelines do not assign specific weight to each of these factors, the degree of cooperation is emphasized throughout. The guidelines specifically state that the DOJ “encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities.” The guidelines also stress the position that a “corporation’s response to misconduct says much about its willingness to ensure that such misconduct does not recur.”

The SEC’s Seaboard Decision

Notwithstanding the DOJ policy changes and guidance, the SEC’s guidelines concerning treatment of corporations, have not, as of the time of this publication, changed. Although, as described in Section V.D.3.a, infra, the SEC has some additional tools such as Deferred Prosecution Agreements and Non-Prosecution Agreements which provide some flexibility in settled cases. The SEC’s principal guidance for the prosecution of companies is called the “Seaboard Decision,” and it strikes a similar tone as the DOJ policy on the essential elements of corporate cooperation. But the SEC may, with the approval of the Director or Deputy Director of Enforcement, seek waivers of the attorney client privilege or attorney work product protections. In the Seaboard Decision, the SEC expressed a “willingness to credit” cooperation by a corporation that discovers and discloses wrongdoing. The SEC further stated that, in evaluating the extent of a corporation’s cooperation, it would consider the following questions (among others):

- “What steps did the company taken upon learning of the misconduct?”;
- “What process did the company follow to . . . ferret out necessary information?”;
- “Did the company commit to learning the truth, fully and expeditiously?”; and
- “Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?”
- The Seaboard Decision thus re-affirmed the SEC’s dedication to rewarding “self-policing, self-reporting and remediation.”

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446 Id., § 9-28.750.
450 The SEC also included cooperation in the list of factors it considers in determining whether to impose a penalty on a corporation. See Statement of the Securities and Exchange Commission Concerning Financial Penalties, supra note 269.
Both the Filip Memo and the Seaboard Decision reflect the DOJ's and the SEC's expectation that companies will conduct prompt and thorough internal investigations when facing potential FCPA violations. Thus, while the advantages and disadvantages of commencing an internal investigation often place company executives in a difficult position, the reality of today's enforcement climate renders a prompt internal investigation almost a necessity. Indeed, as time goes on—and the DOJ and the SEC continue to place increased scrutiny on companies' FCPA compliance—the number of situations where internal investigations remain inadvisable in light of potential anti-corruption violations diminishes to zero. Generally, the more likely questions are the timing, scope and type of the internal investigation.

B. The Goals of an Effective Investigation

After deciding to conduct an internal investigation, a company should focus on doing so effectively and efficiently. Depending on the circumstances, internal investigations about questionable payments or accounting under the FCPA should include the following general goals:

- **Gather and Preserve Documentary and Electronic Evidence:** This important step includes issuing appropriate document retention and preservation notices, designing a document collection plan, ensuring the retention of electronic data (including e-mails, hard drives, network drives, and in some cases back-up tapes), and conducting detailed searches for relevant documentary information. In the FCPA context, this step is especially important because the audit trail supporting a questionable payment is often a significant piece of evidence the government uses to (i) link a payment to a questionable source; and (ii) support a potential violation of the FCPA's accounting provisions.

- **Identify and Interview All Relevant Witnesses:** This step typically includes identifying and interviewing key witnesses both inside the company (e.g., first-hand witnesses and senior company management) and outside the company (e.g., auditors, agents, distributors, and other third parties) to gain a better understanding of the justification for, and motive behind, the questionable payments. Caution should be taken to ensure that witnesses—especially company employees—are properly advised of the role of company counsel and the company's right to use and disclose any evidence or statements made in connection with the investigation. Caution should be taken to ensure that witnesses—especially company employees—are properly advised of the role of company counsel and the company's right to use and disclose any evidence or statements made in connection with the investigation. Companies should also carefully consider whether employees require separate counsel and whether there are any statutory or contractual indemnity obligations to advance attorney fees to any employees—actions that the DOJ, as explained above, can no longer take into account when assessing a company's "cooperation" under the charging guidelines (except in rare situations where a corporation's payment of its attorneys' fees rises to the level of obstruction of justice).

- **Evaluate the Company's Business Model and Assess Whether There Is a Systemic FCPA Compliance Problem and Adequate Internal Controls:** This is one of the most important goals of an effective FCPA investigation. A primary focus of the investigation should be to understand how the company does business, and to assess whether the company has implemented appropriate controls. Fees, sanctions, sentences, or other penalties are likely to be much less significant if a problem is merely an isolated instance of wrongdoing in the context of an otherwise robust compliance culture, rather than one that reveals a more systemic problem resulting from a lack of internal controls. A thorough understanding of existing internal controls helps investigators

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452 U.S. Attorneys' Manual, supra note 409, § 9-28.720. Companies may also want to consider the potential advantages and disadvantages of entering into a joint defense agreement with other possible targets or co-defendants, an action that, like indemnification and advancement of attorneys’ fees to employees, can no longer be held against a corporation in a charging decision by federal prosecutors under the Filip Memo (unless such an agreement will prevent the company from disclosing relevant facts learned during the investigation). See id.
determine potential liability for the corporation and identify any potential weakness in the compliance structure that must be remediated. In December 2010, Alcatel-Lucent, S.A. resolved charges that it violated the internal control and books and records provision of the FCPA by entering into a DPA with the DOJ. The DOJ, in assessing a $92 million penalty, criticized Alcatel-Lucent’s “business model” which it found to be “prone to corruption.” Moreover, three of Alcatel-Lucent’s subsidiaries plead guilty to conspiring to violate the anti-bribery, books and records, and internal controls provisions of the FCPA. Control vulnerabilities themselves frequently form the basis for FCPA charges, either on a free-standing basis or accompanied by anti-bribery charges. Thus, a review of bribery allegations will invariably focus on the control environment as well.

• **Determine Whether and How the Company Benefited from the Alleged Payment:** As part of assessing the company’s potential FCPA exposure, any internal investigation should seek to ascertain exactly how the company benefited from an alleged improper payment. Any benefit to the company will factor into a determination of whether to prosecute the company or individuals, and will also be relevant in setting the amount of any eventual penalty or disgorgement. Companies should understand that the disgorgement risk can be quite substantial and is an increasingly important component of recent settlements. For example, in one recent case, Johnson & Johnson agreed to disgorge $38.2 million (plus $10.4 in pre-judgment interest) stemming from payments the DOJ and the SEC determined had violated the FCPA. And this was separate from the $21.4 million criminal penalty imposed by the DOJ.

• **Determine Whether Payments Were Accurately Recorded:** As stated supra, a company can be found independently liable under the FCPA’s accounting provisions even if a payment was not made for an improper purpose, if the payment was inaccurately recorded in the company’s books and records. Careful attention must therefore be paid to how the payment was documented and whether that disclosure could result in an independent basis of liability under the FCPA. For example, Comverse Technology, Inc. settled civil allegations with the SEC that it violated the books and records and internal control provisions of the FCPA by accounting for improper payments to Greek government officials as “agent commissions” and failing to devise and maintain adequate internal controls to insure that all transactions were properly recorded. As part of the settlement Comverse agreed to pay $1.6 million in disgorgement and prejudgment interest.

• **Report Findings to Appropriate Corporate Constituency:** After gathering and analyzing all the relevant facts, investigators should report their findings to the appropriate constituency at the company. This may be the company, the audit committee or the board depending on the type of investigation and allegations. Findings can be reported orally or in writing, and written reports can be of varying detail. This can have important consequences in later civil and criminal litigation, because written reports may eventually be disclosed voluntarily to government regulators and, by compulsion, to opposing civil litigants. Investigators must recognize that much of their work product may be produced at some point in subsequent litigation.

• **Recommend Steps for Remediation and Improvement of Existing Compliance Systems:** Where appropriate, investigators should use the information they gather during an investigation (even if no impropriety was found) to recommend ways to remediate problems (including potential discipline for offending employees) or improve existing compliance structures. Under the DOJ’s Filip Memo, a company’s decision to discipline or terminate an employee may not be considered by prosecutors in evaluating a corporation’s cooperation.\(^{457}\)

• **Evaluate the Necessity or Advisability of Voluntary Disclosure:** If an investigation reveals that an improper payment was made, it may be necessary or advisable to voluntarily disclose that issue to the relevant authorities in the U.S. and, possibly, abroad. Under certain circumstances, the company may also be required to disclose the problem in its public reporting disclosures. The issue of voluntary disclosure is discussed in more depth in Section D, *infra*.

### C. Strategies for Ensuring an Effective and Efficient Investigation

At the outset of an investigation, a company faces a number of important strategic decisions that can profoundly affect the efficiency and effectiveness of the investigation. An internal investigation is a long process with multiple fronts, and its course should be plotted, to the extent possible, from the beginning. This is especially true in the FCPA context, where much of the investigation may need to be conducted overseas, complicating an already complex process. This Section discusses steps companies should take to maximize the effectiveness of an internal investigation.

1. **Define the Scope of the Investigation and Develop a Strategic Plan For Conducting the Investigation at the Outset**

   It is imperative to define the scope of the investigation as early as possible. For example, should the investigation be limited to a single payment in a single business unit, or is there concern that the wrongdoing may span across multiple business units? How many people are directly implicated by the allegations? What time frame is at issue? Is the wrongdoing limited to one country, or is it a multi-jurisdictional issue? Are there investigations or parallel litigations pending? How quickly does the company need an answer in order to assess whether a voluntary disclosure will be made? What are the available resources for the investigation? These are all important factors that weigh on how the investigation is run. An investigation into a single suspicious payment, for example, may involve a much narrower set of documents and relatively fewer interviews, whereas a more comprehensive investigation into global compliance practices will likely involve a greater amount of evidence and more interviews (including people higher up the corporate chain). Defining the scope of the investigation as early as possible will help guide investigators to efficiently conduct the investigation in a manner that minimizes the burden on the company and prioritizes issues that need to be analyzed immediately.

   That said, companies must maintain flexibility and be prepared to expand the scope of the investigation if necessary (often on a moment’s notice). Frequently in FCPA investigations, a company will learn of other issues outside the initial scope of the investigation that may require further analysis, such as questionable payments on unrelated contracts, or broader questions about general billing and budget practices. An employee interviewed about an alleged bribe could justify the payment based on past practices that may have violated the FCPA. Likewise, investigators may identify other questionable...
payments in company books and records during normal document review efforts. These issues should be identified and presented to the company to determine whether to expand the investigation. Importantly, if a company determines that it will voluntarily disclose suspected misconduct to the DOJ or the SEC, it should be prepared to expand the scope of its investigation sufficiently to convince itself, and the government, that the FCPA “problem” does not extend beyond the one being disclosed.

2. Decide Who Should Conduct the Investigation

One of the most important decisions a company will make in an internal investigation is determining who will conduct the investigation. The decision typically comes down to one of three possibilities: (i) existing internal, non-legal personnel (such as internal auditors and/or compliance personnel); (ii) in-house counsel or regular outside counsel; or (iii) independent outside counsel. While internal staff personnel and in-house counsel are far less costly and disruptive to the company (and more familiar with the company’s business model and compliance practices), it is almost always advisable to retain experienced independent outside counsel to conduct investigations into FCPA violations. The substantial benefits of retaining experienced outside counsel generally compensate for their added cost and include the following:

- Qualified outside counsel may be viewed as being less self-interested than those employed by the company directly (or regular outside counsel with an on-going business relationship). The independence—and its appearance—may enhance the credibility of the investigation and lead the government to reward the company for effectively responding to a potential violation;

- Retaining qualified outside counsel demonstrates to the government (and to shareholders) that the company is taking the allegations seriously and is dedicated to uncovering the truth;

- Qualified outside counsel usually have more experience conducting internal investigations focused specifically on FCPA violations. Increased familiarity with the FCPA puts outside counsel in a better position to identify risks and structure the investigation more efficiently;

- Independence allows outside counsel to bypass potential cultural barriers within the company. They do not have to deal with awkwardness inherent in interviewing employees with whom in-house or regular counsel have personal relationships. Company employees also tend to take investigations conducted by outside counsel more seriously;

- Outside counsel are better able to view facts objectively through the eyes of regulators; lacking a direct stake in the outcome of the investigation, they are less prone to be swayed by company allegiances; and

- Using outside counsel has the added advantage of maximizing the chances that applicable privileges will attach to the underlying investigatory material, keeping the government and other potential adversaries from exploiting the fruits of the investigation in subsequent litigation against the company. A company that uses either non-attorney personnel or in-house counsel runs a significant risk that investigatory material will not be protected from subsequent disclosure under the attorney-client privilege or attorney work product doctrines. In Europe communications with in-house counsel are not covered by the attorney-client privilege.
For example, the Filip Memo highlights the risks of using non-attorney personnel to conduct an internal investigation. It notes that, while “[m]any corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected[, o]ther corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel.” As the Filip Memo warns, using non-attorney personnel to conduct an internal investigation may open up an entire investigation to subsequent disclosure to the government and potential civil adversaries.

Utilizing in-house counsel to conduct an internal investigation may yield similar problems. Whether attorney-client privilege or work product protections protect investigatory material from subsequent disclosure often turns on whether the investigation is litigation or business-related. The problem with in-house counsel—and, to a lesser extent, regular outside counsel—is that courts tend to be far more critical about their assertion of privileges because they play a primary business role within the corporation. Retaining outside counsel helps show the court that the investigation has an overall litigation purpose and therefore maximizes the chances of retaining applicable privileges over investigation material.

3. Ensure Proper Authorization

Before initiating an internal investigation, a company should document the purpose of, and authority for, the investigation. It is important to decide from the beginning who will have ultimate decision-making authority over the investigation; this will in turn allocate authority as to remediation, discipline, litigation, settlement, plea negotiation, etc. In some instances—especially where the allegations implicate senior officers or directors of the company—it is advisable for the company to obtain a written authorization for the investigation from a special committee of independent directors. To ensure protection of applicable privileges over investigatory material, that authorization should state explicitly that the overriding purpose of the investigation is to obtain information necessary for counsel to render legal advice about potential liability, and should cite any pending or potential government investigations or related litigation.

4. Designate Company Contacts

It is imperative that the company designate a specific employee contact (or contacts) with general knowledge of company practices and the means and authority to schedule interviews and assist investigators in collecting documents and electronic evidence. This contact should not be connected to any of the allegations under review, and preferably someone with the time and resources to respond promptly to requests for information.


459 It is worth emphasizing that the use of attorneys to conduct an internal investigation will not insulate the facts discovered concerning potential misconduct from disclosure. Indeed, nothing in the new Filip Memo prevents the DOJ from seeking voluntary disclosure of the key facts learned in the course of the company’s investigation. However, the DOJ is now expressly prohibited from seeking interview memos or notes taken by counsel in the course of the investigation that are subject to the attorney-client privilege and attorney work-product protections, which reinforces the importance of counsel’s involvement in the investigation.

460 See, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977) (hiring of an outside law firm is prima facie evidence that purpose of investigation was to procure legal advice); Rossi v. Blue Cross & Blue Shield of Greater N.Y., 540 N.E.2d 703, 705-06 (N.Y. 1989) (same). But see In re Grand Jury Subpoenas, 599 F.2d 504, 511 (2d Cir. 1979) (participation of lawyer in internal investigation does not “automatically cloak the investigation with legal garb”).
5. Anticipate Press Inquiries, Ancillary Litigation, and Regulatory Inquiries

It is not uncommon to receive requests for information from outside parties while an investigation is pending. Information may be leaked to the press. It is imperative that companies anticipate such requests and prepare, where appropriate, to defend against disclosure of privileged investigatory material. As appropriate, public and investor relations personnel should be thoroughly briefed on the issue and told what they can and cannot say. In certain cases, companies should consider hiring public relations consultants to help develop a proper response to minimize any damage from public disclosure. It is also important that companies take all possible steps to ensure that everyone involved in the investigation is aware that information they have is confidential and should not be discussed. For example, all requests for information from the press or other parties should first be directed to counsel conducting the investigation. Company employees should also be instructed about confidentiality at the outset of the investigation, and all investigation-related documents should be labeled as confidential and privileged. Careful consideration must be given to sharing information and documents about the investigation with third parties, including parties under investigation, auditors and the government. Once information is provided to the government, including privileged materials, it is likely to be discoverable in subsequent litigation with former employees. In United States v. Carson, a court found that an employer’s disclosure to the government of documents subject to a Confidentiality and Non-Waiver Agreement preserved the attorney-client and work-product protections, but where the government showed these documents to numerous potential witnesses the defendants had a due process right to the protected documents. Similarly, in Ryan v. Gifford, the Chancery Court of Delaware found the attorney-client privilege waived where the internal investigation report commissioned by a board-appointed special committee was shared with the full board including individual directors who were implicated in the investigation.

6. Understand “Local Law” Issues and Considerations

A company investigating suspected FCPA violations must be aware of any potentially applicable foreign laws that may affect how the investigation is conducted. First, companies must be familiar with local constraints imposed on foreign investigations by local privacy and data protection laws, which are taken extremely seriously in many jurisdictions. For example, many jurisdictions, like the European Union, have significant privacy laws that restrict access and production of employee emails and other documents. Thus, at the outset of an investigation, specific written consents may be necessary to obtain and review employee e-mails. Special attention should be paid to outside experts and private investigators, who then must be instructed about local privacy rules and monitored to ensure that their investigative activities are not exposing the company to further potential liability. Second, substantive local laws may authorize certain payments to local officials. As such laws may provide affirmative defenses to a possible FCPA violation, it is very important to explore them with local counsel. Third, local discovery rules should be contemplated when conducting investigations overseas—a company should closely analyze any applicable foreign discovery rules to minimize the likelihood that material


will become discoverable overseas. For example, in some jurisdictions, communications with in-house counsel or with professionals such as accountants may not be covered by the attorney-client privilege. For each of these reasons, a company should contemplate whether appropriate local (foreign) counsel should be retained to assist U.S. counsel in analyzing potential FCPA violations.

7. Assume Third Parties Will Have Access to Investigation Materials

Although counsel conducting an investigation will go to great lengths to ensure the confidentiality of investigatory material, circumstances beyond the company’s control will often result in an unavoidable waiver of privileges. Documents may be inadvertently disclosed or leaked. Courts may come to contradictory privilege and waiver decisions. A company may have no choice but to comply with a government request for a widespread waiver. Or a company may be forced to disclose work product to prove the independence and reasonableness of an internal investigation in order to fend off a putative shareholder derivative action. Any number of scenarios can result in sensitive investigation material being produced to government or private civil adversaries. It is therefore prudent to advise all involved parties to assume that any communication they transmit, and any document they draft, may eventually be disclosed to third parties, including the government. Company counsel should therefore evaluate appropriate strategies for conducting the investigation in a manner that best protects the company’s interests in appropriately addressing an FCPA violation while protecting against risk of further liability.

D. Determining Whether to Voluntarily Disclose a Potential Violation and the Results of an Internal Investigation

1. When Should a Voluntary Disclosure Be Considered?

SEC disclosure obligations aside, a corporation is not legally obligated to report a potential FCPA violation. While corporations do not have Fifth Amendment rights per se, and therefore have no specific right against self-incrimination, a corporation nevertheless does not have an affirmative duty under the FCPA to report possible or proven violations. That said, companies should carefully weigh the advantages and disadvantages of self-disclosure, which can vary significantly depending on the circumstances. There are a number of factors that a corporation should consider in deciding whether to voluntarily disclose, including:

- The seriousness of the violation and extent to which improper payments may have harmed third parties (including competitors);
- The amount of benefit that accrued to the corporation as a result of the improper payment(s);
- The strength of the evidence supporting the infraction or, conversely, the strength of the evidence supporting any affirmative defenses that the company might have;
- The involvement of senior management in the conduct at issue;
- The risk of disclosure to third parties, including the press and domestic and foreign regulators;
- The risk of a whistleblower, motivated by the reward offered by the Dodd-Frank Act, reporting suspected conduct to the SEC;
- Whether the company is legally obligated to publicly disclose the violation under relevant securities laws (see infra);

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464 See discussion in Section V.C, supra (discussing the benefits of prompt disclosure).
• The reputational risk and potential for future violations (i.e., maintaining goodwill with the DOJ and the SEC can be imperative, especially if a company engages in business abroad in red flag jurisdictions with on-going risks of future FCPA violations);

• The timeliness of a potential disclosure and the balance between needing to know all the facts and making a timely disclosure; and

• The potential benefit that may accrue to the corporation from disclosure, including leniency under the DOJ and the SEC guidelines for voluntary cooperation with an investigation.

2. Is Disclosure Required Under Relevant Securities Laws?

Disclosure is often not simply an enforcement issue—it may also be a reporting issue if a corporation is required to disclose an FCPA violation under Sarbanes-Oxley and other related securities laws. The decision of whether or not to voluntarily disclose an FCPA violation may be moot if a company is required to disclose the violation in its company filings. By failing to disclose an FCPA violation pursuant to securities disclosure regulations, a company (and its officers and directors) may risk incurring liability that is completely independent of an underlying FCPA violation.

Determining whether a company is required to disclose an FCPA violation is unquestionably complex and fraught with risk. There are potentially countless provisions at play. For example, as discussed supra, Section 302 of the Sarbanes-Oxley Act could force a company to disclose an FCPA violation if senior officers are unable to certify the adequacy of the company’s internal controls. Disclosure could also be required under Section 404’s internal controls provisions, which require disclosure of “any fraud, whether material or not material, that involves management or other employees who have a significant role” in the enforcing the company’s internal controls. And even if an FCPA issue cannot be considered as fraud, it may still be necessary to disclose it under Section 404, if it occurred as a result of material deficiencies in the company’s internal controls.

A prime example of the SEC’s focus on disclosure of FCPA violations is its March 2005 Report of Investigation relating to an enforcement action against Titan Corporation. Titan was being investigated by the DOJ and the SEC for over $2 million in bribe payments made by a company agent to the election campaign of the incumbent President of Benin, Africa. While Titan settled its underlying FCPA case (see infra), the SEC nevertheless issued a report indicating its views on certain disclosures made by Titan. In a merger agreement with Lockheed Martin, Titan had represented that it was not aware of any FCPA violations, a representation that was later included in its proxy statement. While Titan later amended the merger agreement and proxy statement to reflect pending DOJ and SEC investigations concerning

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466 Even disregarding the stringent disclosure and certification provisions under Sarbanes-Oxley, public companies should still consider general disclosure obligations under Section 10(b) and Rule 10b-5, and Section 14(a) of the Securities Exchange Act of 1934, which prohibit “material” omissions and misstatements in public filings. Guidance outside the FCPA-arena suggests that the SEC may be beginning to broadly interpret those rules to require disclosure in some cases, even where the alleged wrongdoing implicates relatively nominal amounts of money. See Exchange Act Release No. SAB 99, No. 99 - Materiality (Aug. 12, 1999), available at http://sec.gov/interp/sect/1999.htm. In doing so, the SEC has signaled Exchange Act Release No. SAB 99a willingness in the future to adopt a qualitative approach to materiality. See, e.g., Exchange Act Release No. 8579, Cease-And-Desist Order, In re Huntington Bancshares, Inc., Admin. Proceeding File No. 3-11940 (SEC June 2, 2005), available at http://www.sec.gov/litigation/admin/33-8579.pdf (finding that accounting practices that resulted in financial misstatements of “even a small magnitude”—in this case, less than $.01/share—were “qualitatively material” because they allowed the company to exceed analysts’ estimates). The jury is still out on whether the SEC will adopt a qualitative approach for FCPA violations. At a minimum, this guidance suggests that companies should at least consider other factors besides the pure monetary value of a potential violation—for example, whether a pattern of bribery raises questions about the integrity of management.

potential FCPA violations, it did not amend its original FCPA representation. The SEC’s issuance of a report highlighting this potential disclosure violation gave notice to companies that the SEC may pursue enforcement actions for both an underlying FCPA violation and any related false or misleading public disclosures and omissions related to information gathered during a company investigation.

3. Does Voluntary Disclosure Result in an Actual Benefit to a Company?

In the past five years, there has been a well-documented increase in voluntary disclosures related to FCPA investigations, and there is no sign that the trend will be reversed. For example, in 2006 alone, seventeen of twenty-two newly disclosed FCPA investigations were voluntarily disclosed to the DOJ or the SEC after the companies conducted internal investigations. Whether such voluntary disclosures actually benefit a company is not always easy to determine.

a. What does a Company Hope to Gain from Voluntary Disclosure?

Despite the premium that the Filip Memo and Seaboard Decision appear to place on complete cooperation and voluntary disclosure (see supra), neither of those guidelines prescribe what actual benefits will result from disclosure. The question therefore becomes: What exactly does a company hope to gain by voluntarily disclosing an FCPA violation? The best result, of course, would be that the government takes no action at all, determining either that the violation is an aberrant incident in an otherwise robust compliance culture, enforcement resources are too limited to pursue the case, or that the evidence supporting a violation is weak. In fact, there is evidence suggesting that this is the result in many voluntary disclosure cases.468

Even if a company cannot obtain complete vindication, however, voluntary disclosure may still help avoid prosecution and minimize potential civil and criminal penalties or sanctions. In the criminal context, voluntary disclosure can help a company avoid prosecution altogether through a NPA, or at least obtain a DPA, in which the government files criminal charges against the company but agrees to stay those charges and later drop them if it is satisfied by the company’s cooperation.

In January 2010, the SEC, following the DOJ model, announced that it would begin using DPAs and NPAs.469 The SEC explained that its goal is to encourage individuals and companies voluntarily to report violations and provide assistance. To date, however, the SEC has only entered into one DPA and three NPAs. Only the DPA related to an FCPA violation. In announcing this settlement, Robert Khuzami, then Director of the SEC’s Division of Enforcement, stated “the company’s immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training made it an appropriate candidate for the Enforcement Division’s first Deferred Prosecution Agreement. Effective enforcement of the securities laws includes acknowledging and providing credit to those who fully and completely support our investigations and who display an exemplary commitment to compliance, cooperation, and remediation.” For less egregious violations that attract the attention of only the SEC, a voluntary disclosure may help a company avoid substantial penalties and be subject only to a cease-and-desist order, which requires the company to simply refrain from violating the FCPA in the future.

b. The Government’s Position on the Benefits of Voluntary Disclosure

As stated previously, both the SEC and the DOJ place a high emphasis on voluntary disclosure and cooperation in their guidelines concerning whether, and to what extent, corporations should be punished for FCPA violations. But voluntary disclosure does not assure favorable treatment from the government. In both the DOJ’s Filip Memo and the SEC’s Seaboard Decision, cooperation and voluntary disclosure are only one of several factors the government takes into account when determining the appropriate penalty.

In a 2006 speech in Washington D.C., Alice Fisher—then-Assistant Attorney General for the Criminal Division at the DOJ—provided a telling view into the DOJ’s position on voluntary disclosures. Among other comments about the importance of FCPA prosecution, Ms. Fisher stated:

[It] would not be in the best interests of law enforcement to make promises about lenient treatment in cases where the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty. But what I can say is that there is always a benefit to corporate cooperation, including voluntary disclosure, as contemplated by the Thompson memo[; the McNulty Memo’s predecessor].

The fact is, if you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit. It may not mean that you and your client will get a complete pass, but you will get a real, tangible benefit.

There have been cases where companies have come in and voluntarily disclosed real FCPA violations that we have not prosecuted at all. On the other hand, in other cases, a voluntary disclosure might result in a guilty plea, depending on the circumstances.

So although nothing is off the table when you voluntarily disclose, I can tell you in unequivocal terms that you will get a real benefit . . . .470 (emphasis added).

More recently, the DOJ Assistant Attorney General for Legislative Affairs Ronald H. Weich wrote to U.S. House of Representatives member Sandy Adams (R-FL) to provide examples from the previous two years in which the DOJ declined prosecution of corporate entities. These same examples are listed in the Guidance. The DOJ declined matters in which some or all of the following circumstance existed:

- A corporation voluntarily and fully self-disclosed potential misconduct;
- Corporate principals voluntarily engaged in interviews with the Department and provided truthful and complete information about their conduct;
- A parent corporation voluntarily and fully self-disclosed information to the Department regarding alleged conduct by subsidiaries;
- A parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries;

• A company provided information to the Department about the parent’s extensive compliance policies, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;

• A company agreed to a civil resolution with the SEC, while also demonstrating that a declination was appropriate for additional reasons;

• A single employee, and no other employee, was involved in the provision of improper payments; and

• The improper payments involved minimal funds compared to the overall business revenues.\textsuperscript{471}

As these comments demonstrate, while disclosure guarantees no assurances from the government, it certainly places the company in a better position to argue for lenient treatment. And clearly the government is dedicated to providing some benefit in order to encourage more companies to come forward. The question is whether that benefit is substantial enough to outweigh the significant disadvantages of voluntary disclosure.

\textbf{c. The Disadvantages of Voluntary Disclosure}

Disclosure also has potential pitfalls. While a cooperative posture with the government may result in favorable treatment, the U.S. Supreme Court’s decisions in \textit{United States v. Booker} and its progeny have rendered the Sentencing Guidelines (and thus their guidance on the sentencing benefits of disclosure and cooperation) non-binding and merely advisory.\textsuperscript{472} And, in addition to uncertainty about whether potential penalties may be minimized through voluntary disclosure, there are significant adverse effects that will likely result from disclosing a violation. For example:

• Even if a company’s internal investigation concludes that an FCPA violation is a relatively insignificant, isolated incident, a voluntary disclosure may result in a broad government investigation that will be costly, disruptive, and time-consuming;

• Disclosure to the government will usually require the company to thoroughly investigate its global FCPA compliance practices in order to represent that the disclosed problems (and others like it) do not exist elsewhere in the company. This can result in a dramatic expansion of the initial investigation and correspondingly heightened costs;

• Even if the government agrees to a favorable settlement after its own investigation, the company will still suffer the reputational damage of public disclosure of the violation (not to mention likely shareholder suits);

• Some settlements of FCPA investigations have required independent monitors at company cost to ensure that the company has in place sufficient internal controls to detect and deter future FCPA violations. Although this trend is fading, it can be a cumbersome and disruptive process;

• An SEC injunction or cease-and-desist order may be very difficult to follow in high-risk jurisdictions, and the penalties for repeated violations can be severe;\textsuperscript{473} and

• A voluntary disclosure coupled with discipline of employees may negatively affect company morale and lead employees to the impression that the company is “selling” them out.


\textsuperscript{472} 543 U.S. 220 (2005).

\textsuperscript{473} In April 2007, for example, Baker Hughes, Inc. was forced to retain a monitor and pay over $20 million in disgorgement and prejudgment interest, and a $10 million civil penalty to the SEC after an investigation revealed several illegal bribes to Kazakhstan officials by Baker Hughes, Inc. employees, actions that violated a 2001 cease-and-desist order that had been levied against Baker Hughes for previous FCPA violations. See Litigation Release No. 20094, \textit{Baker Hughes, Inc.}, supra note 340.
d. Case Studies: Recent Outcomes from Voluntary Disclosure

While the jury is still out on whether there is a sufficient and substantial advantage to voluntary disclosures, recent cases suggest that disclosing companies have generally received discounts off fines and have avoided indictment. However, many companies that have disclosed have still been subjected to substantial fines and other damaging repercussions.

Ralph Lauren Corporation

Lesson learned: A voluntary disclosure submitted very quickly after the discovery of illegal payments, quick and thorough cooperation with the government, and early and thorough remedial efforts can help a company avoid prosecution.

In April 2013, the DOJ and the SEC announced their respective decisions not to prosecute Ralph Lauren Corporation for FCPA violations. Over the course of its implementation of an enhanced FCPA compliance program, Ralph Lauren learned of a scheme involving a local manager and its Argentinian Customs broker to pay bribes to Customs to expedite customs clearance and avoid inspections, which also involved falsification of invoices to disguise the bribes. Both the DOJ and the SEC agreed to enter into NPAs with Ralph Lauren, which agreed to pay $734,846 in disgorgement and interest to the SEC, and $882,000 in penalties to the DOJ, and to undertake additional remedial measures and provide periodic reports to the DOJ. Cited reasons for the decision not to prosecute were Ralph Lauren's prompt and extensive cooperation, as well as its proactive efforts to institute remedial measures.  

Morgan Stanley & Co, Inc.

Lesson learned: Voluntary disclosure and implementing and maintaining a robust system of internal controls, along with being the victim of the fraud, can help a company avoid liability altogether.

In April 2012, the DOJ and the SEC announced the results of its investigation into potential FCPA violations by an employee of the Morgan Stanley Real Estate Group. In April 2012, the former managing director of Morgan Stanley’s real estate investment and fund advisory business devised a scheme to pay himself and a Chinese government official who helped him and Morgan Stanley obtain real estate investment opportunities in China. In exchange for the real estate opportunities, the managing director circumvented Morgan Stanley internal controls designed specifically to prevent violations of the FCPA and provided the government official with an ownership interest in one of the properties he helped Morgan Stanley acquire. This investment resulted in an immediate paper profit to the government official of $2.88 million. The managing director pled guilty to one count of conspiracy to evade the company’s internal accounting controls and settled civil charges brought by the SEC. Morgan Stanley was seen as the victim in this matter and was unlikely to be prosecuted. The government, however, has touted the case as an example of the benefits of cooperating and strong internal controls. Specifically, in its press release announcing the guilty plea, the DOJ explained that it declined to bring any enforcement action against Morgan Stanley because it had constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials and it voluntarily disclosed the conduct and cooperated throughout the investigation.


Johnson & Johnson

Lesson learned: Voluntary disclosure, cooperation, and identifying improper practices by other companies despite serious criminal conduct can decrease exposure.

In April 2011, Johnson & Johnson entered into a DPA with the DOJ and settled a civil action by the SEC for paying millions of dollars in bribes and improper travel and entertainment benefits to employees of state-owned hospitals in Greece, Poland, and Romania in exchange for purchasing Johnson & Johnson products. The settlement also resolved allegations that Johnson & Johnson used straw agents to funnel more than $800,000 in kickback payments to the Iraqi government in connection with the U.N. Oil-for-Food Program. In reaching a settlement and fine amount, the DOJ took into account J&J’s timely voluntary disclosure, thorough investigation, “extraordinary cooperation,” and extensive remedial efforts and compliance improvements. The “extraordinary cooperation” for which the DOJ decreased Johnson and Johnson’s criminal fine amount by more than $5 million included identifying improper practices by other companies in the life science industry. Johnson and Johnson paid a criminal fine to the DOJ of $21.4 million and agreed to pay more than $48.6 million in disgorgement of profits and prejudgment interest as part of the SEC settlement. However, as can be seen, the company still paid a steep price.

Oil States International, Inc.

Lesson learned: Voluntary disclosure of a minor FCPA violation can help a company avoid penalties altogether.

In April 2006, the SEC announced that Oil States had consented to a cease-and-desist order for its Venezuelan subsidiaries’ role in making improper payments to officials at a state-owned oil company, Petroleos de Venezuela, S.A. The subsidiary had hired a “consultant” to implement a kickback scheme that resulted in approximately $350,000 in improper payments. After discovering the scheme, Oil States immediately instituted an internal investigation, which concluded that no one at Oil States had been aware of the kickback scheme. The parent corporation then undertook substantial remedial measures, voluntarily disclosed the violation to the DOJ and the SEC and cooperated with their investigation. The parent corporation also disciplined relevant employees, and strengthened its existing compliance structure. In response to these actions, the DOJ declined to press charges, and the SEC imposed no financial penalties, instead issuing a cease-and-desist order. In rendering its decision, the SEC noted that it relied heavily on Oil States’ cooperation with the SEC staff and its voluntary disclosure of the violation.476

Statoil ASA

Lesson learned: Voluntary disclosure may help a company avoid criminal prosecution, even in cases of extremely significant FCPA infractions.

This 2006 case demonstrates some of the potential benefits that accrue to a company that chooses to voluntarily disclose a FCPA violation and cooperate with the DOJ and the SEC investigations. As part of its DPA with the DOJ, Statoil ASA, a Norwegian company listed on the NYSE, admitted that it entered into an agreement to send over $15 million in sham consulting payments—which were improperly recorded as legitimate payments in company books and records—in order to induce an Iranian official to direct oil and gas contracts to the company. Payments totaling over $5 million were made before being stopped by Statoil’s CFO. After the payments were uncovered by the company’s internal audit department, they were leaked to the Norwegian press, and Norwegian authorities then instituted their

own investigation. Statoil retained outside counsel to conduct an internal investigation and adopted a more stringent compliance program.\textsuperscript{477} Statoil also cooperated with all investigations by voluntarily disclosing the results of an internal investigation to the DOJ and the SEC, waiving attorney-client privileges, and making employees available for interviews. In addition to a $3 million fine from Norwegian authorities, Statoil agreed to a $10.5 million criminal fine with the DOJ and a $10.5 million penalty in disgorgement from the SEC (set-off by the $3 million Norwegian fine).\textsuperscript{478}

The DOJ has since characterized the DPA obtained by Statoil as a good example of what a corporation can hope to achieve by cooperating with the government. Specifically, the DOJ noted that it considered the following factors in agreeing not to prosecute Statoil:

- Its voluntary disclosure of the FCPA violations to the relevant authorities;
- Its prompt initiation of an internal investigation, the results of which were shared with the government;
- Its extensive cooperation, including arranging foreign witnesses at company expense;
- Its prompt remedial measures, including replacement of senior management; and
- Its dedication to implementing significant improvements to its existing compliance programs.

\textbf{ABB, Ltd. and Titan-Lockheed Martin}

\textit{Lesson learned: Voluntary disclosure does not guarantee avoiding substantial penalties, even with extraordinary cooperation.}

In July 2004, the DOJ and the SEC announced the results of its investigation into potential FCPA violations by ABB Ltd. and two of its subsidiaries. The allegations were that ABB’s U.S. and foreign subsidiaries had paid over $1.1 million in bribes to government officials in Nigeria, Angola, and Kazakhstan. After noticing the payments, ABB voluntarily disclosed the issue to the SEC and the DOJ and fully cooperated with the investigation. In the later criminal proceeding, two of ABB’s subsidiaries pleaded guilty to two counts of bribery. The DOJ fined each entity $5.25 million. Under a parallel SEC settlement, ABB was assessed $5.9 million in disgorgement and prejudgment interest, a $10.5 million penalty (offset by the DOJ penalty), and an injunction. Thus, despite voluntarily disclosing the issue, ABB still ended up paying over $16.4 million in penalties.\textsuperscript{479}

One year later, in March 2005, the DOJ and the SEC announced settlements against Titan Corporation in connection with the bribery scheme unearthed during its doomed merger discussions with Lockheed Martin (see \textit{supra}). Despite Titan’s voluntary disclosure of the FCPA issues to the DOJ and the SEC, it was nonetheless hit with the most substantial FCPA fine as of that date, including a guilty plea, a $13 million criminal penalty, a payment to the SEC of $12.6 million in disgorgement and $2.9 million in prejudgment interest. Titan was also required to engage an independent monitor.\textsuperscript{480}


\textsuperscript{479} Litigation Release No. 18775, \textit{ABB Ltd}, \textit{supra} note 54.

\textsuperscript{480} Litigation Release No. 19107, \textit{Titan Corp.}, \textit{supra} note 381.
4. Deciding Not to Making a Voluntary Disclosure

In situations where a company, after careful consideration, decides not to make a voluntary disclosure, the company should take several steps to ensure that later discovery by the government of the underlying conduct does not result in additional and undue criticism and penalties. First, regardless of disclosure, it is important that the company conduct a thorough and independent investigation. Second, the investigative steps and findings should be carefully memorialized. Third, those responsible for the conduct at issue and others who may have failed to supervise them should be appropriately disciplined. Fourth, weaknesses in internal controls that allowed the potentially prohibited conduct should be examined and where appropriate remedied. Finally, the company should implement new or enhanced training to ensure that the conduct does not occur again.

5. How to Get the Most Out of a Voluntary Disclosure

If a company decides that voluntary disclosure is the best avenue, it still must decide how best to accomplish that disclosure. A company can maximize the chances of getting a substantial benefit by properly disclosing a violation. Under the Filip Memo and the Seaboard Decision, regulators expect early disclosure, full cooperation, full investigation of potential misconduct, and real-time updates. But without a formal voluntary disclosure program—such as exists at the Department of Defense and the DOJ's Antitrust Division—determining how to go about disclosing a violation can be more difficult than it sounds.

a. When Should Disclosures Be Made?

The first issue a company must decide is when to disclose a potential violation, which can be a difficult issue to resolve depending on the state of available information, the strength of evidence supporting an FCPA violation, and other factors. In a perfect world, a company would voluntarily disclose only after it is able to complete its investigation and analyze the full scope of the problem. Such ideal conditions do not exist, however, in today’s enforcement climate. To the contrary, companies should recognize that federal enforcement authorities have publicly expressed that they expect a real-time disclosure of potential FCPA violations as soon as the company is aware of a problem. Increasingly, this has resulted in companies deciding to make preliminary disclosures of potential violations, laying out an investigation “game plan” and committing to keep the SEC and the DOJ apprised of investigatory developments as they occur. Some experienced counsel view this as the safest course to ensure that a company obtains the full benefit of a voluntary disclosure. Needless to say, not all companies are willing to play by such potentially risky rules. A company should work closely with its counsel to determine the proper timing of a disclosure to strike a balance between the need to gather relevant information and the need to get a benefit from disclosure. At an absolute minimum, a company should be sure to disclose the existence of a violation to the FCPA enforcement authorities at the SEC and the DOJ well before any other type of public disclosure is made (such as in a company’s Form 8-K or other public filing).
b. How Will the Government Respond?

Once a disclosure has been made, the company should anticipate receiving a response from the government with several additional requests for information, including questions about:

- The nature of the violation and the factual circumstances surrounding it;
- Whether the potentially improper payments stopped;
- The strength of the company's existing internal controls and compliance programs, including training on the FCPA and what was done in this specific instance to prevent the violation;
- Other FCPA issues in the past five years and how they have been investigated;
- The degree of confidence that the scope of the problem has been identified, and why the company believes the problem has been identified;
- If the scope has not yet been identified, what the company is doing to gather all the facts. It is critical that sufficient steps have been taken to secure all relevant electronic information to prevent intentional or inadvertent destruction;
- What remediation and/or discipline has, or is planned, to take place, and if none, why not;
- What information the company is willing to share, including whether and when it will disclose the results of the on-going investigation;
- If a disclosure has been made to any foreign authority or if a disclosure is contemplated; and
- When the government can expect another briefing.

c. Is There Such a Thing as a Partial or Discreet Disclosure?

Under some circumstances, a company may consider making a partial or “discreet” disclosure—i.e., disclosing certain FCPA violations but not others that were unearthed during the investigation. A company typically does so at its own peril, because the government will typically request information on all prior potential violations of the Act and expect them to be disclosed.

Companies thinking about making a partial or discreet disclosure should take caution at the outcome of Stolt-Nielsen, S.A. v. United States.481 In 2003, Stolt-Nielsen voluntarily disclosed its involvement in a criminal antitrust conspiracy under the Antitrust Division's Amnesty Program in exchange for the government's promise not to prosecute. One year into the NPA, however, the Antitrust Division reneged on the agreement and indicted Stolt-Nielsen on the grounds that the company's disclosure had understated the time period of its involvement in the antitrust conspiracy. On appeal, the Third Circuit Court of Appeals upheld the government's decision to indict the company. Although a U.S. District Court in Philadelphia ultimately dismissed the indictment in November of 2007 (an order the DOJ chose not to appeal), this case demonstrates that making a partial disclosure risks eliminating the very benefits that a company hopes to gain through voluntary disclosure.482

481 442 F.3d 177, 180-86 (3d Cir. 2006).
d. Making Disclosures in a Way That Protects Privileges

In making a voluntary disclosure, a company should not lose sight of the fact that other potential adversaries—including shareholders and other potential civil litigants—will likely seek access to results of investigations disclosed to the government. If the company does decide to disclose a potential FCPA violation, it should avoid (where possible) disclosing actual investigatory material, in order to maximize the chances of protecting company privileges.

Indeed, in contrast to the McNulty Memo, which permitted prosecutors to request waivers of attorney-client and work product protections “when there is a legitimate need for the privileged information to fulfill their law enforcement obligations,” the new DOJ Filip Memo expressly forbids federal prosecutors from taking into account a corporation’s refusal to waive the attorney-client and work product protections.483 Nevertheless, under the new guidelines, federal prosecutors may still seek the disclosure of relevant facts concerning alleged misconduct.484 This has two important implications on how companies disclose information to the government. First, a company should take care to ensure that it protects these privileges when making disclosures to the government. Second, and perhaps more importantly, a company should make substantial efforts to ensure that the underlying investigation material is covered by an applicable privilege. For example, interview memoranda should, where possible, be written by attorneys and should not contain verbatim transcripts of the interview.485 Investigatory material should also be labeled as confidential work product, where appropriate. Taking efforts to ensure that material is covered by a privilege will maximize the chances that the government will not be able to access potentially sensitive material.

Likewise, company counsel should try to negotiate a confidentiality agreement with the government that limits the ability of the government to disclose material to outside parties. In some courts (albeit the minority), such an agreement will allow a party to “selectively waive” its privilege—i.e., waive the privilege as to the government, but retain it as to other third parties. The company should be careful to check the law in its jurisdiction.

483 There are two limited exceptions to this general mandate: (i) where the corporation relies on an “advice of counsel” defense; and (ii) where communications between counsel and the corporation are “made in furtherance of a crime or fraud.” See U.S. Attorneys’ Manual, supra note 409, § 9-28.720(b)(i)-(ii).

484 The Filip Memo explicitly states that prosecutors will seek access to “non-privileged documents and other evidence” that go “beyond the mere disclosure of facts.” Id. § 9-28.720.

485 The Filip Memo highlights the substantial differences between the protections afforded to information gathered by lawyers versus information gathered by non-attorney personnel. See id. § 9-28.720 at 10.
VI. THE GLOBAL CAMPAIGN AGAINST CORRUPTION

A. Organized Multi-National Efforts

The last several years have witnessed a proliferation of international anti-bribery measures, ranging from the multilateral level (UN and OECD) to the regional, institutional/bilateral and national levels. The common thread underlying all of these anti-bribery measures is the prohibition of a *quid pro quo* exchange of value for a business benefit.

1. The OECD Anti-Bribery Convention

The OECD is a group of thirty-four nations, plus a number of non-member observer countries, whose purpose is to stimulate economic progress and world trade.486

In November 1997, after years of behind-the-scenes negotiations and several days of open debate, the then twenty-nine OECD members unanimously adopted in principle a convention setting forth a policy combating bribery of foreign public officials in international business transactions, as well as a proposed basis for international judicial cooperation in such matters.487 On December 17, 1997, the OECD members and four non-member nations (Argentina, Brazil, Bulgaria, and Chile) signed the OECD Convention, which entered into force on February 15, 1999.488 On February 17, 2012, Russia deposited its instrument of accession to the OECD Convention, becoming the latest non-member party to the Convention.489 In the United States, Congress enacted the International Anti-bribery and Fair Competition Act of 1998, which implemented the OECD Convention and expanded the scope of the existing FCPA.490

The OECD Convention represents a statement of intention by all signatories, many of which had previously shown no enthusiasm for anti-bribery legislation, to combat corruption.491 After ratifying the OECD Convention, each of the signatory nations submitted it to their legislative bodies for adoption and was required to enact implementing legislation by December 31, 1998—and thereafter to enforce those laws. In a world where the United States once appeared virtually alone in its concern about this species of corruption—leading to concerns that U.S. companies faced competitive disadvantages—the OECD Convention has been a welcome development.

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486 The group currently includes: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.


488 See Fact Sheet, Office of Int’l Info. Programs, U.S. Dep’t of State, On Status of OECD Anti-Bribery Convention (Feb. 16, 2000), available at http://www.fas.org/irp/news/2000/02/000216-bribe-usia1.htm. The Slovak Republic was a non-member nation when it signed, but subsequently became the thirtieth member of the OECD.


491 See Andrews, supra note 487.
The OECD Convention requires signatories to enact legislation that makes it a criminal offense “intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official” in order to induce that official to act or to refrain from acting with respect to the award or renewal of business.\(^{492}\) It also prohibits making or offering payments to obtain “improper advantage” from foreign public officials in the conduct of international business.\(^{493}\) (As noted in Section II.B.1.g., \textit{supra}, the concept of improper advantage is undefined, lending itself to potentially broad interpretation.) A “foreign public official” is defined as, among others, any person holding a legislative, administrative, or judicial office of a foreign country, whether that person is appointed or elected.\(^{494}\) Notably, the definition includes officials of “public international organizations,” such as the World Bank and the U.N., but unlike the FCPA, does not cover political parties and party officials.\(^{495}\)

Accordingly, while the Convention prohibits business-related bribes to foreign public officials when made through political parties and party officials, bribery directed solely to non-governmental political figures represents a significant area of potential abuse. Given the close, often indistinguishable relationship between governments, political parties, and candidates for political office, it will require little ingenuity in many venues to stay within the letter of the Convention-based anti-bribery law while effectively buying government action on commercial matters. Although such circumvention of the anti-bribery laws will be discouraged in other ways—such as by the International Monetary Fund’s (“IMF”) warning that it may suspend or delay funding if it perceives that inadequate steps have been taken to discourage corruption\(^{496}\)—these other constraints are obviously far less effective than a clear, direct prohibition on bribery through political “contribution.” The U.S. government shares the IMF’s perspective on this, and has continued to press for broader coverage.

Accompanying the Convention is an “Agreed Commentary” that gives further content to these basic principles. One commentary provision exempts “small ‘facilitation’ payments” (also commonly called “grease” payments) from the ambit of the Convention.\(^{497}\) Thus, for example, a payment made to induce a public official to perform a ministerial function, such as having phone service connected, would likely be excluded from the coverage of the Convention. The somewhat opaque OECD comment on this issue states that criminalizing such payments did not seem to the membership to be a “practical or effective complementary action.”\(^{498}\) This approach is consistent with the FCPA, which also exempts from its coverage small payments to government officials that are made to facilitate or expedite routine actions.\(^{499}\) (As discussed in Chapter 7 however, the new UK Bribery Act does not contain such an exemption; moreover, such payments are often illegal under local bribery laws.)


\(^{493}\) \textit{Id.}

\(^{494}\) \textit{Id.} at art. 1 § 4(a).

\(^{495}\) \textit{Id.}


\(^{498}\) \textit{Id.}

\(^{499}\) 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(c).
The OECD membership recommends that bribery of a foreign public official be met with criminal sanctions that are “effective, proportionate and dissuasive.”\footnote{OECD Anti-Bribery Convention art. 3 § 1.} The range of penalties, according to the Convention, is to be comparable to those applicable to the bribery of a country’s own public officials.\footnote{Id. at art. 3 § 2.} Recognizing that anti-bribery laws are weak or non-existent in many countries, the Convention provides that if a particular country does not impose criminal responsibility for such actions, that country must ensure that the individuals involved are subject to proportionate non-criminal sanctions, including fines.\footnote{Id. at art. 8.} Notably, the sanctions for FCPA violations remain far more harsh than sanctions for similar crimes under legislation passed by member states in order to conform with the OECD Convention.\footnote{Peter W. Schroth, The United States and the International Bribery Conventions, 50 AM. J. COMP. L. 593, 614 (2002).}

The Convention also provides for mutual cooperation among countries, including waiver of the application of bank secrecy laws and cooperation in criminal investigations and proceedings, as well as extradition proceedings.\footnote{OECD Anti-Bribery Convention art. 9.}

Like the FCPA, the Convention goes beyond merely forbidding particular conduct by because it reaches the tools that are commonly employed to facilitate that conduct. For example, Article 8 of the Convention targets accounting practices designed to facilitate or conceal prohibited activity. Specifically, the Convention recommends prohibition of the following accounting devices because they may easily serve as vehicles for bribing or for concealing the bribery of foreign officials: off-the-book accounts; off-the-book or inadequately identified transactions; non-existent expenditures; liabilities with incorrect identification of their object; and false documents.\footnote{Id. at art. 8.}

If enforced consistently, the OECD Convention has the potential to enhance U.S. firms’ ability to compete with foreign competitors. While many countries have implemented the Convention, enforcement remains a challenge. In its 2012 report on enforcement of the convention, Transparency International observes that “[t]he overall level of enforcement remains inadequate.”\footnote{Fritz Heimann et al., TRANSPARENCY INT’L, EXPORTING CORRUPTION? COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION: PROGRESS REPORT 2012 6, available at http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention.} In its report, Transparency International concludes that only seven signatories engage in “active enforcement” of the Convention,\footnote{Id. at 5-6. These seven countries are Denmark, Germany, Italy, Norway, Switzerland, United Kingdom, and the United States.} compared to the eighteen countries that have “little or no enforcement.”\footnote{Id. These eighteen countries are Brazil, Bulgaria, Chile, Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Luxembourg, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa, and Turkey.}


Finally, as of November 2012, sixteen of twenty G-20 nations had become a party to and implemented the OECD Anti-Bribery Convention.510 In February 2010, the OECD released its “Good Practice Guidance on Internal Controls, Ethics, and Compliance,” recommending bribery-prevention practices for businesses and professional associations.511

2. Inter-American Convention Against Corruption

In March 1996, the Organization of American States (“OAS”) approved the Inter-American Convention Against Corruption (“Inter-American Convention”).512 The Inter-American Convention, the first international agreement to address corruption, entered into force on March 6, 1997, and thirty-three of the OAS’s thirty-four members (including the United States) have ratified it.513

In pursuit of its goal to “prevent, detect, punish and eradicate corruption in the performance of the public functions,”514 the Inter-American Convention promotes anti-corruption institutions at the member-state level and cooperation among states parties with the intent of improving the effectiveness and enforceability of national anti-corruption legislation. The Convention requires signatories to criminalize specified corrupt acts; to develop anti-corruption institutions; to offer mutual legal assistance and technical assistance; and to seize assets that result from corrupt dealings.

Most recently, on April 23, 2007, the Secretaries General of both the OAS and OECD signed a MOU.515 This document—the purpose of which was to strengthen the cooperative relationship between the two organizations in relation to “state modernisation, and preventing and fighting corruption”—formalized the cooperation that each organization expected from the other. It delineated the specific areas in which the two organizations pledged cooperation, listed specific activities that the two organizations would jointly undertake, and listed the names of individual contacts at each organization who should be contacted regarding each measure of cooperation.

3. UN Convention Against Corruption

The UN Convention Against Corruption, which entered into force on December 14, 2005, is the first global, legally binding instrument against corruptions, requiring countries to establish criminal offenses to cover a wide range of acts of corruption.516 It is significant because it demonstrates an emerging global consensus on the importance of fighting corruption. It remains to be seen, however, whether the Convention will be effectively implemented or enforced. As of November 2012, there were 140 signatories and 165 parties to the Convention.517

511 Good Practice Guidance on Internal Controls, Ethics, and Compliance, supra note 412. The OECD compiles the efforts undertaken by its parties to implement the convention here: http://www.oecd.org/document/3/0,3746,en_2649_34859_36433004_1_1_1_1,00.html.
513 Id.; Conventions regarding Anti-Corruption, INTERPOL (May 25, 2011), https://secure.interpol.int/Public/Corruption/Conventions/default.asp.
514 Inter-American Convention Against Corruption, Preamble.
The Convention addresses many critical corruption issues:

- Article 5 stresses the importance of issues of transparency and accountability in national legal systems;
- Article 9 focuses on public procurement and calls upon public authorities to “take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption”;
- Article 10 discusses the issue of secrecy in public administration and calls for actions to secure greater freedom of information;
- Article 11 calls upon governments to safeguard the integrity and independence of the judiciary by preventing bribery;
- Article 12 discusses corporate governance and calls for strengthened regulatory and legal actions to curb private-sector corruption;
- Article 14 focuses on anti-money-laundering matters in order to boost prevention, strengthen reporting, and tighten regulation of financial institutions;
- Articles 15 and 16 denounce the bribery of national officials of foreign government, and calls for actions to stop such practices;
- Article 33 underscores the need to protect people who report acts of corruption; and
- Article 43 stresses the need for international cooperation to curb corruption and calls for strengthened actions.

4. The European Union Convention on the Fight Against Corruption

The European Union Convention on the Fight against Corruption (“EU Convention”) was adopted in May 1997. The EU Convention requires that signatory Member States criminalize passive corruption (*i.e.* directly or indirectly soliciting or receiving bribes), as well as active corruption (*i.e.* deliberately attempting to promise or to give bribes directly or indirectly). The EU Convention also stipulates that company officers and directors must be held responsible for corruption committed by a person subject to their authority or on behalf of the company. Efficiency and a lack of jurisdictional wrangling are central to the EU Convention’s terms. Each Member State must “take the measures necessary to establish its jurisdiction over the offences it has established.”


In 1999, eleven African countries meeting under the auspices of the Global Coalition for Africa (“GCA”) developed the Principles to Combat Corruption in African Countries. Two years later, the fourteen South African Development Community (“SADC”) members adopted the South African Development Community’s (“SADC”) members adopted the South African Development Community’s (“SADC”) members adopted the South African

519 Id.
520 Id.
521 These eleven countries were Benin, Botswana, Ethiopia, Ghana, Malawi, Mali, Mozambique, Senegal, South Africa, Tanzania, and Uganda.
523 The fourteen SADC member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.
Foreign Community Protocol Against Corruption. In the same year, the fifteen states of the Economic Community of West African States ("ECOWAS") adopted the ECOWAS Protocol on the Fight Against Corruption. While these efforts represented important steps toward tackling the issue of corruption, they were not unified continent-wide pacts. In order to homogenize efforts across Africa, the African Union worked for two years to draft such a pact, culminating in the adoption of the first continent-wide instrument, the African Union Convention on Preventing and Combating Corruption (the "AU Convention") on July 11, 2003. The AU Convention entered into force on August 5, 2006, thirty days after the ratification of the fifteenth state party. As of February 2012, twenty-nine state parties had signed and ratified the AU Convention, and sixteen states have signed—but not ratified—the AU Convention. Eight African countries have neither signed nor ratified the Convention.

The AU Convention covers both public and private sector corruption, and a wide range of criminal offenses including bribery (domestic or foreign), diversion of property by a public official, illicit enrichment, money laundering, concealment of property, and conspiracy to commit a corrupt act. Article 5 specifically calls for (1) criminalization of the aforementioned acts; (2) strengthening of national control measures to ensure that the establishment and operations of foreign companies are subject to national legislation; (3) creation and/or support of national anti-corruption agencies; adoption of better internal accounting and auditing systems for public income and expenditures; adoption of measures protecting whistleblowers and citizens who report corruption (and punishing those who make false reports); and (6) promotion of education about corruption. The AU Convention also sets the stage for international cooperation to prevent corruption and improve law enforcement in Africa and develops a framework for the confiscation and seizure of assets.

525 The fifteen member nations of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.
526 The African Union grew out of the former Organization of African Unity. The only African nation that is not a member of the AU is Morocco, which opposes the membership of Western Sahara in the AU. Guinea-Bissau, Mali, and Madagascar are currently under sanction. See Member States, African Union, http://www.au.int/en/member_states/countryprofiles (last visited Feb. 24, 2013).
528 State parties that have signed and ratified the AU Convention are Algeria, Benin, Burkina Faso, Burundi, Comoros, Congo, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Liberia, Libya, Madagascar, Mal, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. In addition, Malawi and Seychelles have ratified, but were not signatories.
529 States that have only signed the AU Convention include Angola, Cameroon, Chad, Djibouti, Democratic Republic of the Congo, Equatorial Guinea, Guine, Guinea Bissau, Ivory Coast, Mauritania, Mauritius, Sahrawi, Sao Tome & Principe, Somalia, Sudan, and Swaziland.
530 The eight countries that have not signed the AU Convention are Botswana, Cape Verde, Central African Republic, Egypt, Eritrea, Malawi, Seychelles, and Tunisia.
531 The AU Convention defines “public official” as “any official or employee of the State or its agencies including those who have been selected, appointed, or elected to perform activities or functions in the name of the state or in the service of State at any level of its hierarchy.” AU Convention art. 1 § 1.
532 Id. at art. 4.
533 Id. at art. 5 § 1.
534 Id. § 2.
535 Id. § 3.
536 Id. § 4.
537 Id. §§ 5-7.
538 Id. § 8.
539 Id. arts. 9, 15, 18, 19.
540 Id. arts. 16, 17.
6. Council of Europe Convention on Corruption

The Council of Europe Convention on Corruption ("COE Convention") was adopted in response to heightening global pressure to act in the face of the growing threat of foreign corruption, and the perception that the EU Convention was not strong enough to effectively combat corruption because it lacked a monitoring or enforcement mechanism that would render it powerful enough to compel compliance. The COE Convention includes both the Criminal and Civil Law Conventions.

The Criminal Law Convention was adopted in January 1999. It is like other international conventions in that it requires the criminalization of both active and passive domestic and foreign bribery, and also makes both “trading in influence” and money laundering illegal. However, it is more stringent than other conventions in that it makes bribery in the private sector illegal as well. Recordkeeping issues are addressed using criminal law provisions, which, too, is a unique approach among international conventions. The Criminal Law Convention also has explicit provisions holding corporations responsible for offenses committed for their benefit by a natural person with a leading position within the company. To facilitate enforcement of anti-corruption laws, the Criminal Law Convention requires cooperation among the national authorities of different states.

The Civil Law Convention was passed later, in November 1999, and offers redress to those injured as a result of “acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.” The Explanatory Report notes that this Convention was passed because combating corruption cannot rely exclusively on criminal law. The Civil Law Convention requires nations to take “any necessary measures” to ensure corporate accounting presents a “true and fair view of all aspects of the company’s financial position” and that auditors be required to confirm this. The Civil Law Convention addresses the accessibility and effectiveness of civil-law remedies, the validity of contracts, the role of auditors, “whistleblower” protection of employees, litigation costs, and international cooperation.

As of November 2012, Belarus and forty-two of the forty-seven members of the Council of Europe have ratified the Criminal Law Convention on Corruption, while forty-one members have signed, and thirty-three members and Belarus ratified, the Civil Law Convention on Corruption.

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542 Id. arts. 12, 13.
543 Id. arts. 7, 8.
544 Id. art. 14.
545 Id. art. 18 § 1.
546 Id. art. 21.
549 Civil Law Convention, art. 10.
550 Id. at arts. 3, 4, 8, 9, 10, 13.
B. Efforts of Individual International Institutions

In recent years, international institutions and organizations have increased their focus on corruption. Institutions engaging in recent anti-corruption efforts include The World Bank (the “Bank”) and the IMF.

1. World Bank

The Bank acknowledges that corruption is one of “the greatest obstacles to economic and social development.” Former Bank President James Wolfensohn first singled out corruption as a problem in 1996. During his tenure, the Bank created an internal department to investigate corruption and fraud in Bank-funded projects, and developed diagnostic measurements and corruption indices that are now widely used by external actors, including the U.S. government. Since 1996, the Bank has provided support for some 600 anti-corruption programs and governance initiatives in its member countries, and now governance assessments are part of every Country Assistance Strategy.

Wolfensohn’s successor, Paul Wolfowitz, made anti-corruption an even stronger priority for his administration. While the Wolfensohn Bank discussed corruption, developed tools, and published surveys and reports on corruption, it did little to restrict loans to corrupt countries. Wolfowitz continued Wolfensohn’s anti-corruption efforts, but also aggressively tackled corruption by suspending loans for projects in a number of countries, including Argentina, Chad, Kenya, India, Uzbekistan, and Vietnam because of rampant corruption. While supporters lauded Wolfowitz’s seriousness in dealing with corruption, critics charged that Wolfowitz’s heavy-handed anti-corruption strategy unjustifiably hurt the poor by punishing them for their corrupt leaders.

Realizing the need for a comprehensive governance and anti-corruption strategy, the Bank embarked on a number of global consultations between November 2006 and January 2007 with more than 3,200 representatives of governments, parliaments, donors, civil society, private sector, academia, and other stakeholders. In March 2007, the Bank Board of Directors unanimously endorsed a new governance and anti-corruption strategy paper entitled Strengthening Bank Group Engagement on Governance and Anticorruption. The three main pillars of this strategy are: (1) enhancing country efforts to eliminate corruption, (2) minimizing risk of corruption in Bank-funded projects, and (3) expanding partnerships with other development institutions, the private sector, civil society, and other groups to combat corruption. On March 6, 2012, the Bank released an updated strategy, Strengthening Governance, Tackling Corruption: The World Bank’s Updated Strategy and Implementation Plan.

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555 Id.
559 Id.
Under former World Bank president Robert Zoellick, the Bank adopted debarment with conditional release, rather than “plain vanilla” debarment as the baseline sanction. “Plain vanilla” debarment prohibits a firm or individual from receiving World Bank loans or projects for a definite or indefinite period. Debarment with conditional release is debarment of a firm or individual until it meets specified conditions, such as corporate governance reforms. In connection with this reform, INT appointed an Integrity Compliance Officer (“ICO”), charged with determining whether conditions set by the Bank have been complied with.

On June 25, 2010, the Bank added Article X to its Sanctions Procedures, which provides that the Bank may enforce debarment decisions taken by other multilateral banks. This was done as part of the Agreement for Mutual Enforcement of Debarment Decisions, discussed below. Additionally in 2010, other minor reforms were made, such as (1) the Evaluation and Suspension Officer (“EO”) being able to modify its recommended sanction in light of an explanation from the respondent, and (2) the elimination of the “rubber stamp” by the Sanctions Board of all EO recommendations. Finally, a framework for negotiated resolution of sanctions cases was also introduced.

Effective July 8, 2011, the Sanctions Board now has ninety days (formerly thirty) to consider sanction appeals for “abuse of discretion.”

Likely the most significant development involving the Bank is the Agreement for Mutual Enforcement of Debarment Decisions (“Agreement”). The Agreement—entered into between the African Development Bank Group, Asian Development Bank, European Bank for Construction and Development, Inter-American Development Bank Group, and the Bank—calls for mutual debarment among the five multilateral development banks (MDB). The Agreement, signed in April 2010, is premised on four representations by each of the constituent banks:

- The MDB has adopted the four harmonized definitions of fraud and corruption in the Uniform Framework for Preventing and Combating Fraud and Corruption;
- The MDB follows the International Financial Institutions’ Principles and Guidelines for Investigations;
- The MDB has a sanctions process with certain due-process elements: (i) internal investigative authority with a distinct decision-making authority; (ii) written and publically available procedures that require notice and an opportunity to respond; (iii) an evidentiary standard of “more probable than not”; (iv) a range of sanctions that accounts for the principle of proportionality, including aggravating and mitigating factors;
- Each MDB agrees to recognize and enforce any debarment of a fellow signatory bank if the debarment decision meets each of the following criteria:
  - Debarment is for fraud and corruption under one or more of the four harmonized definitions (i.e., fraudulent, corrupt, coercive, or collusive practices);
• Debarment is made public;
• Debarment period exceeds one year;
• Conduct that gave rise to debarment occurred no more than ten years prior to debarment decision; and
• Decision to debar is made after the Agreement takes effect with respect to that MDB.

Other international financial institutions are permitted to join the Agreement if they meet certain criteria. Finally, the banks are free to leave the Agreement upon written notice to the other signatories.

2. IMF

The IMF began addressing corruption in 1996, when the IMF’s Board of Governors urged the Fund to “promot[e] good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper.” The IMF has since expanded its promotion of good governance, but continues to limit its activities to those economic aspects of governance that have the potential for significant macroeconomic impact. The IMF publishes a number of working papers on corruption, monitors for abuse of IMF funds, makes corruption a part of its country evaluation process, and promotes policies that support fiscal and monetary transparency. Like the World Bank, the IMF has also recently suspended relations with persistently corrupt IMF loan recipients. Finally, the IMF and the World Bank have together endorsed internationally recognized standards and codes related to corporate governance, accounting, auditing, securities, insurance, and transparency.

3. The Asian Development Bank

The Asian Development Bank (“ADB”) and the OECD sponsor the Anti-Corruption Action Plan for Asia and the Pacific (“Plan”), a non-binding initiative that contains principles and standards to assist the region’s countries in developing policies to combat corruption. The Plan describes three “pillars of action:” (1) developing effective and transparent systems for public service; (2) strengthening anti-bribery legislation; and (3) supporting active public involvement. Further, the Plan lays out a broad approach for implementing these “pillars.” The ADB has also given power to investigate corruption allegations and created an enhanced anticorruption division of the Office of the Auditor General within the bank.

4. World Trade Organization

The World Trade Organization (“WTO”), through its Committee on Government Procurement and the Government Procurement Agreement, is attempting to increase transparency in the processes by which governments award contracts. By making the process of, and criteria for, awarding contracts and conferring other benefits more transparent, governments limit the discretion of their officials, thereby reducing the risk of improper influence. WTO members have also agreed to implement domestic procedures to enforce rules against government officials who abuse the procurement process.

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566 Id.
568 Id. at 6-8.
569 Id. at 8.

Australia, Bangladesh, Bhutan, Cambodia, Cook Islands, Fiji Islands, Hong Kong, China, India, Indonesia, Japan, Republic of Kazakhstan, Republic of Korea, Kyrgyz Republic, Macao (China), Malaysia, Mongolia, Nepal, Pakistan, People’s Republic of China, Papua New Guinea, the Philippines, Republic of Palau, Samoa, Singapore, Sri Lanka, Thailand, Vanuatu, and Vietnam have all signed the Plan.
5. **G-20**

In November 2010, the Group of Twenty Finance Ministers and Central Bank Governors (“G-20”) leaders introduced the Anti-Corruption Action Plan.\(^{570}\) The plan called for G-20 nations to lead by example through: (1) fully implementing the UNCAC; (2) criminalizing bribery of foreign officials; (3) better preventing money laundering by public officials; (4) preventing corrupt officials from being able to travel abroad and gain entry into G-20 nations; (5) improving international cooperation in extradition, mutual legal assistance and asset recovery; (6) adopting domestic measures to better track and recover proceeds of bribery and other corruption; (7) protecting whistleblowers; (8) strengthening the effective functioning of anti-corruption bodies and enforcement authorities; and (9) promoting integrity in the public sector through the management of public finances.\(^{571}\)

The Plan tasked the G-20 Anti-Corruption Working Group to annually report on progress made by G-20 countries in implementing the Action Plan.\(^{572}\) The first annual report was prepared for the Cannes, France summit in November 2011.\(^{573}\) In the report, the Working Group noted that thirteen of the twenty member-states had private-sector whistleblower protection, and fourteen of the twenty had public-sector whistleblower protection.\(^{574}\) However, the Working Group noted that improvements needed to be made in denying entry to corrupt foreign officials and in recovery of lost assets.\(^{575}\) In March 2012, the UK hosted the Working Group’s first meeting in London\(^{576}\) and in April 2012, Mexico hosted the Working Group’s second meeting in Puerto Vallarta, where the Working Group conducted a high-level dialogue on transparency and business leadership.\(^{577}\) In 2012, the Working Group articulated principles on the denial of safe haven to corrupt officials\(^{578}\) and asset disclosure by public officials.\(^{579}\)

6. **Transparency International**

Transparency International (“TI”), founded in 1993, is a leading international non-governmental organization focusing on combating corruption, with more than 100 chapters around the world. TI’s major achievement in its fifteen years of operation has been bringing worldwide attention to the problem of corruption, putting the issue on the agenda of international bodies, such as the U.N., the Bank, and the IMF. TI assisted in the formation of a number of international and regional conventions addressing corruption, such as the U.N. Convention Against Corruption, the OECD Anti-Bribery Convention, and the African Union Convention on Preventing and Combating Corruption. TI does not investigate individual instances of corruption, but develops global, regional, and national strategies to combat corruption and aids in implementing these strategies in conjunction with civil society, private, and public partners.

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573 Id. This report also contains recent developments/improvements in G-20 countries since the Seoul Summit (November 2010).

574 Id. at 3.

575 Id. at 4.


TI has a number of informative tools that can be utilized to combat corruption in each of these areas. Its most well-known tool is the annual Corruption Perceptions Index (“CPI”), first released in 1995. Using expert assessments and opinion surveys, the CPI scores and ranks 163 countries by their perceived levels of corruption. Since publishing the CPI, TI has also developed other tools that measure corruption. The Bribe Payers Index reviews the propensity of companies from the thirty leading industrialized countries to bribe when conducting business abroad. The Netherlands is at the top of the rankings in the 2011 Bribe Payers Index—i.e., of the twenty-eight countries reviewed, companies in the Netherlands were the least likely to engage in foreign bribery—while Russia ranked last.580 In 2003, TI began publishing the annual Global Corruption Barometer, a report summarizing the results from surveys assessing public opinion toward and experience with corruption in more than sixty countries. More recently, TI introduced the Promoting Revenue Transparency Project,581 which aims to promote transparency and accountability for revenues from extractive industries by reporting data on both companies and host governments. TI also publishes a number of other resources, including the Business Principles for Countering Bribery, which provide companies a comprehensive anti-bribery model; and the Corruption Fighters’ Tool Kits, a compilation of practical and innovative tools developed and implemented by civil-society organizations and TI national chapters to monitor public institutions and combat corruption.582

TI also works at regional and local levels through its regional departments and national chapters. TI’s four regional departments cover Africa and the Middle East, the Americas, Asia and the Pacific, and Europe and Central Asia; and each department develops region-specific strategies for combating corruption.

7. Initiatives by Other Non-Governmental Organizations (“NGOs”) and Institutions

A wide variety of other organizations and institutions also focus on the issue of corruption. These entities address corruption from local, national, regional, and international levels, and work across and within sectors. The following represents just a sample of the activities and initiatives by some organizations and institutions around the world.

International financial institutions other than the World Bank and IMF have taken efforts to confront corruption issues. The Inter-American Development Bank (“IDB”) also has an anti-corruption policy. Like the ADB, it will sanction firms and individuals for fraudulent and corrupt practices, and declare them ineligible for bank funding for a determined period of time.583 Unlike the ADB, however, the IDB Sanctions Committee publicly lists the firms and individuals it has sanctioned.584 In 2009, the IDB reprimanded one individual and one company and debarred fifteen individuals and thirty-five companies.585 In 2010, it issued sanctions against six firms and thirteen individuals and issued seventeen letters of reprimand.586 In 2011, the IDB sanctioned eleven firms and twenty-seven individuals.587

584 Id.
586 Id.
587 Id.
More broadly, in September 2006, the leaders of the African Development Bank, the ADB, the European Bank for Reconstruction and Development, the European Investment Bank, the IMF, the IDB, and the World Bank established a Joint International Financial Institution Anti-Corruption Task Force charged with the responsibility of developing a coordinated strategy to reduce and prevent corruption in the member institutions’ activities and operations.588

In the NGO sector, TI is the leading organization working on anti-corruption. However, many NGOs that focus on governance or elections also direct significant resources toward combating corruption. For example, the National Democratic Institute589 has programs that reduce election fraud, promote transparency, and encourage legislative oversight of the executive branch, all of which programs work to reduce and prevent corruption. Other civil-society groups, such as Open Society, Global Witness, Poder Ciudadano in Argentina, Mazdoor Kisan Shakti Sangathan in India, Uganda Debt Network, and others,590 have actively monitored both public and private activity and pushed for accountability in a variety of sectors, such as the extractive industries.

In addition to international institutions and NGOs, many think tanks and academic centers have begun to examine the issue of corruption. George Mason University is the home of the Terrorism, Transnational Crime and Corruption Center, which examines the issues of terrorism, transnational crime, and corruption. Another U.S.-based institute, the Center for International Private Enterprise,591 has anti-corruption programs around the world and has issued policy statements addressing both the supply and the demand side of corruption. One non-U.S. example is the Center for the Study of Democracy (CSD) in Bulgaria. CSD writes briefs and reports that evaluate corruption in Bulgarian society and the efficacy of anti-corruption efforts.

In the business community, the International Chamber of Commerce (ICC) continues to promote its Rules on Combating Corruption,592 and currently publishes a “Fighting Corruption” handbook for companies. In 2006, the ICC formed a coalition with TI, the Global Compact, and the World Economic Forum Partnering against Corruption Initiative to coordinate business efforts in the fight against corruption. In the NGO sector, eleven of the world’s leading international NGOs593 endorsed in June 2006 the first-ever global accountability charter for the non-profit sector, citing a desire to maintain the high level of public trust in the NGOs. Although national regulations govern much NGO behavior, this initiative is the first to put forth an international, cross-sector set of standards and code of conduct for the NGOs.

589 The National Democratic Institute concentrates its energies on political party development, citizen and women’s participation, electoral processes, and strengthening legislatures.
591 The Center for International Private Enterprise is a non-profit affiliate of the U.S. Chamber of Commerce.
C. Bilateral Agreements

The SEC is increasingly relying on bilateral agreements to assist it in investigating extraterritorial violations of U.S. securities laws, including the FCPA. To date, the SEC has entered into information-sharing agreements, or MOUs, with at least thirty-six foreign securities regulators. A number of these agreements provide for cooperation and information sharing between agencies in furtherance of international securities law enforcement.

Following the recommendations of the International Organization of Securities Commissions (“IOSCO”), some MOUs significantly expand the ability of the SEC, as the “Requesting Authority,” to gather information outside of U.S. borders. For example, under certain MOUs, the foreign agency—the “Requested Authority”—agrees to transmit information it already has, or to collect new information from its citizens, and even to permit the Requesting Authority’s investigators to attend or participate in witness interviews and other investigatory processes. Because these MOUs are reciprocal agreements, they not only enhance the jurisdictional reach of the SEC, but also pave the way for foreign authorities to use information collected by the SEC. To this end, the Securities Exchange Act specifically permits the SEC to conduct investigations, if so requested by foreign authorities, regardless of whether the alleged acts would violate U.S. law.

D. National Legislation

National legislation results in many instances from the implementation of individual countries’ obligations under the international agreements and conventions discussed above. Another major incentive is accession to international trading bodies. China’s crackdown on bribery and other white collar crime is motivated in large part by commitments made in the WTO accession process. Similarly, several eastern European states have implemented anti-corruption measures in the context of EU accession efforts.

Most countries, even those that score badly on TI’s Corruption Perceptions Index, have anti-bribery laws. Countries like Bangladesh and Kazakhstan, which fall into the bottom half of TI’s Corruption Perception Index, have set up independent government bodies to battle corruption. The fact that corruption remains pervasive among countries with such laws demonstrates that the lack of national enforcement is a key weakness in the global war against corruption.

Nevertheless, legislative progress is occurring. For example, in the U.S., the Dodd-Frank Act requires resource extraction issuers to disclose information relating to payments it makes to a foreign government for the purpose of commercial development of oil, natural gas, or minerals, and the SEC adopted implementing regulations on August 22, 2012. Perhaps more significantly, the U.S. recently

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594 The SEC has MOUs with regulators in, among others, Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, China, Committee of European Securities Regulators, Costa Rica, Egypt, the European Community, France, Germany, Hong Kong, Hungary, IADB/UNECLAC, India, Indonesia, IOSCO, Israel, Italy, Japan, Jersey, Korea, Mexico, Netherlands, Norway, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. See Cooperative Arrangements with Foreign Regulators, SEC (Nov. 29, 2012), http://www.sec.gov/about/offices/oca/oia_cooparrangements.htm.


599 G20 Anti-Corruption Working Group, supra note 572, at 6.

closed an enforcement loophole by allowing the federal government to apply for a restraining order to freeze assets subject to foreign forfeiture proceedings, regardless of whether a final judgment has been entered. This statute, the Preserving Foreign Criminal Assets for Forfeiture Act, was signed into law on December 23, 2010, after unanimous passage in both chambers of Congress.601 Prior to the statute’s enactment, federal law was interpreted to grant only federal courts jurisdiction to issue a restraining order for purposes of effecting a foreign forfeiture when a final judgment was issued.602 One of the bill’s sponsors, Senator Sheldon Whitehouse (D-RI), stated his intention that the law would promote such action internationally: “Assisting other nations in cracking down on international criminal activity also will help us recover the ill-gotten proceeds that U.S. criminals have hidden abroad.”603 In what may be the first application of the new statute, on November 9, 2012, a U.S. district court enforced restraining orders issued by Brazilian courts to preserve assets of persons being criminally prosecuted in Brazil.604

Australia

On February 4, 2010, the Australian Parliament passed the Crimes Legislation Amendment Act of 2010, which increased financial penalties for bribery.605 Individuals may face imprisonment of up to ten years or a fine up to AU$ 1.1 million.606 Companies now may face up to AU$ 11 million, or an amount three times the value of the benefit received, whichever is greater.607

Brazil

Brazil, which has criminalized foreign bribery since 2002, has pending legislation (PL 6826/2010 or the Clean Company Act) that would criminalize corruption and fraud in the procurement of contracts with the Brazilian government. The bill has faced opposition with regard to three provisions: successor liability, strict liability for the acts of employees and agents, and the method for calculating penalties.608 A special committee of the Brazilian legislature’s lower house was scheduled to vote on the bill on May 23, 2012, but the vote has been postponed indefinitely, drawing concern from international observers that Brazil’s commitment to combatting corruption may be wavering.609

China

On May 1, 2011, the National People’s Congress of the People’s Republic of China amended the Criminal Law to prohibit the bribery of foreign officials, extending China’s anti-corruption laws beyond its own borders. The amendment prohibits individuals and companies organized under PRC laws from providing “money or property to any foreign party performing official duties or an official of international public organizations” for the purpose of “seeking illegitimate business benefits.” Violations of the amendment may result in fines and imprisonment for up to ten years.

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602 See United States v. Opportunity Fund, 613 F.3d 1122, 1127 (D.C. Cir. 2010).
606 Id.
607 Id.
India

In 1988, India enacted the Prevention of Corruption Act, which criminalized the acceptance of bribes by public servants, but notably failed to criminalize bribe-giving.610 Currently pending before India’s Parliament is the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, which would criminalize the bribery of foreign public officials and officials of public international organizations.611 The pending bill would subject offenders to both fines and imprisonment. India’s prime minister has indicated that the pending bill would also close the loophole under India’s current anti-corruption laws by enabling prosecution of the bribe giver.612

Mexico

On June 12, 2012, Mexico’s Federal Law Against Corruption in Public Procurement (Ley Federal Anticorrupción en Contrataciones Públicas) entered into effect, which imposes administrative sanctions on individuals and companies engaged in bribery relating to Mexico’s federal government contracts.613 The law also prohibits Mexican nationals and companies from bribing foreign officials. Mexico’s new law imposes fines rather than imprisonment. Individuals may face fines of up to $250,000 and companies may face fines of up to $10 million, and maximum fines may be increased by up to 50% if the benefit obtained by the bribe exceeds the maximum fine.614 Individuals may also be barred from participation in public contracts for eight years, and companies may be barred for ten years.615

Russia

On May 4, 2011, Russian President Dmitry Medvedev signed a bill outlawing foreign official bribery.616 Russia’s new law focuses on fines rather than imprisonment.617 The fines are imposed against individuals under a four-tiered system based on the size of the bribe, with a very large bribe allowing for a fine of ninety times the amount of the bribe.618 Foreign officials who accept bribes—and companies who offer them—are subject to fines as much as 100 times the amount of the bribe.619 In March 2012, the OECD expressed concerns with Russia’s anti-corruption law, including its failure to clearly criminalize the offer or promise of a bribe, and its exclusion of third parties from the bribery offense.620

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613 Available at http://www.diputados.gob.mx/LeyesBiblio/ref/ltacp.htm.


615 Id.


617 Id.

618 Id.

619 Id.

Switzerland

In October 2010, the Swiss government passed the Return of Illicit Assets Act (“RIAA”), which entered into effect on February 1, 2011. The Act allows the Swiss government to seize funds held in Switzerland by an alleged corrupt official upon a showing that (1) the amount is larger than what he could have credibly earned in office, and that (2) the victim country is known to be corrupt. Prior to the RIAA’s enactment, Switzerland had remedies for restitution of stolen assets, and had returned the equivalent of $1.57 billion (U.S. dollars) over the fifteen preceding years. However, the victimized jurisdiction was required to (1) have a mutual legal assistance agreement in place with Switzerland and (2) actively contribute to that assistance (such as reciprocal prosecutions). This disproportionately affected poor and developing nations.

Additionally, prior to the RIAA, the politically exposed person needed to be convicted in Switzerland before the assets were confiscated. Now, the Swiss government is empowered to confiscate the assets before the Federal Administrative Court convicts the person in question. Under the statute, confiscated assets will then be returned to the country of origin through the financing of public interest programs.

United Kingdom (“UK”)

Perhaps the most notable recent anti-bribery legislation in the UK. The Bribery Act of 2010 received Royal Assent on April 8, 2010 and entered into force on July 1, 2011, in the UK. The Bribery Act is addressed extensively in Chapter 7. In brief, it criminalizes bribery, and holds commercial organizations liable for bribery committed by associated persons if the commercial organization lacked adequate procedures in place to prevent associated persons from engaging in bribery. The Bribery Act creates a separate offense for bribery of foreign public officials. The Bribery Act was intended to enhance prosecution of bribery by providing “robust offences,” increasing maximum prison sentences from seven years to ten years, and granting courts “wide jurisdictional powers.”

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625 Id.
627 Id.
628 Fed. Dep’t of Foreign Affairs, supra note 622.
629 MOJ Guidance at 6.
630 Id. at 10, 15.
631 Id. at 11.
632 Id. at 8.
E. Corruption Rankings

Near the end of 2011, TI released its 2011 Corruption Perceptions Index, which measures corruption around the world.\(^633\) New Zealand, Denmark, Sweden, Norway, and Singapore were given the highest score (least corrupt), while North Korea and Somalia were found to be the most corrupt.\(^634\) The U.S. and UK were ranked 24th and 16th, respectively.\(^635\)

F. Enforcement Round-Up

The following is a summary of some of the more notable recent non-U.S. anti-bribery enforcement cases.

Australia

In July 2011, the Australian Federal Police charged two related companies, Securency International and Note Printing Australia, and six individuals with bribing foreign public officials in Indonesia, Malaysia, and Vietnam in order to secure banknote contracts.\(^636\) This is the first prosecution brought under Australia’s foreign bribery law, introduced in 1999.\(^637\) In addition, there are eight investigations of corruption currently pending in Australia, seven of which were initiated in 2011.\(^638\) In 2012, TI observed that Australia had enhanced its enforcement of anti-corruption laws, revising its characterization of Australia from a “little enforcement” jurisdiction to a “moderate enforcement” jurisdiction.\(^639\)

Canada

Although Canada’s Corruption of Foreign Public Officials Act (“CFPOA”) has been in effect since 1999, enforcement has lagged somewhat. In 2011, however, Canada made vigorous strides toward greater enforcement of its anti-corruption laws. Notably, in June 2011, Canadian oil and gas P & E company Niko Resources pled guilty to bribing a Bangladeshi official.\(^640\) The court imposed a significant fine on the company—C$9.5 million.\(^641\) This prosecution was the result of a six-year bribery investigation that found that Niko had given the Bangladeshi State Minister for Energy and Mineral Resources the use of a C$190,984 vehicle.\(^642\)

The recent conviction of Niko Resources stands in sharp contrast to Canada’s first successful prosecution against an oil pipeline maintainer in 2005, which resulted in a C$25,000 fine, an amount less than the bribe given to an immigration official.\(^643\) Canada’s growing commitment to enforcement is also reflected...
by a larger prosecution that commenced in August 2010. In this pending action, Canadian entrepreneur Nazir Karigar has been charged with bribing India’s aviation minister in order to secure an Air India contract. Karigar’s alleged bribery activities were committed while working for U.S. firm CryptoMetrics.

In light of Canada’s recent enforcement efforts, in 2012 TI upgraded Canada’s rating to a “moderate enforcement” jurisdiction, noting that “[in] addition to the substantial increase in enforcement activity in 2011, the government has taken significant steps to review various aspects of the CFPOA enforcement in 2011,” including government consultations with various stakeholders.

While promising, it is too early to tell whether these recent steps mark the beginning of a more aggressive enforcement of the CFPOA. For example, in February 2011, the Royal Canadian Mounted Police raided SNC-Lavalin’s Montreal headquarters, also in connection with the bribery of Bangladeshi officials. However, that investigation may have been prompted by Swiss officials, rather than the RCMP itself. Another investigation, in 2010, resulted in a team of Mounted Police raiding the offices of mining company Blackfire Exploration for its alleged bribery of a Chiapas, Mexico official. Since then, no prosecutions have commenced.

France

On September 5, 2012, a French criminal tribunal issued its first conviction against a legal entity for corruption, finding that the aerospace and defense group Safran was guilty of bribing Nigerian civil servants to win a $214 million contract for the production of identification cards. The French tribunal fined Safran €500,000 for bribing foreign public officials, but two former managers who each faced eighteen-month suspended prison sentence and a fine of €15,000 were acquitted.

The Safran case marks France’s most significant prosecution of foreign corruption to date; prior to the tribunal’s decision, French tribunals had issued only three minor convictions for foreign bribery since the adoption of France’s foreign-bribery law in 2000. In October 2012, the OECD Working Group on Bribery issued a highly critical report of France’s anti-corruption enforcement activities, which “deplor[e]d the very low number of convictions for bribery of foreign public officials handed down in France—four final convictions and one conviction under appeal since the offense entered into force more than 12 years ago.”

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645 Id.
646 Id.
648 Id.
652 Id.
654 Id. at 11.
Germany

There have been 176 cases of foreign bribery since the OECD Convention entered into force in Germany, with fifteen cases initiated in 2011, as well as forty-three ongoing investigations. While the OECD has praised Germany for its crackdown on bribery, with sixty-nine people sanctioned between 2005 and the end of 2010, it has also raised concerns that these sanctions are often treated as “commercial bribery” or “breach of trust,” rather than bribery of a foreign official. For example, in June 2011, a former Siemens AG board member was charged with “breach of trust” for alleged bribery in order to secure an Argentine government contract. Previously, in 2008, Siemens had settled joint charges brought in the U.S. and Germany for over $2 billion for the same bribery in Argentina. On occasion, however, German courts have convicted individuals and firms for bribery. For instance, in December 2009 a German court ordered two MAN SE subsidiaries to pay a combined €150 million fine for various bribes paid in Germany and elsewhere in the sale of trucks and buses. Moreover, Heinz Jürgen Maus, chief executive of MAN Turbo AG, was indicted and subsequently convicted in June of 2010.

While generally lauding Germany’s strong enforcement efforts, the OECD has also recently observed that the level of imprisonment and fines imposed in practice by German courts appear to be low in comparison to the maximum, and expressed concern that “the sanctions actually imposed to date may not be fully effective, dissuasive and proportionate.”

Nigeria

In December of 2010, Halliburton settled bribery charges filed by the Nigerian government for $32.5 million. Halliburton allegedly paid more than $180 million in bribes to Nigerian government officials between 1994 and 2004 in order to obtain contracts to build natural-gas facilities on Bonny Island. The fine was paid in lieu of prosecution of Halliburton, former Vice-President Dick Cheney, and three other Halliburton executives.

In May of 2012, it was reported that Nigeria’s president and anti-corruption agencies—the Economic and Financial Crimes Commission (“EFCC”) and the Independent Corrupt Practices Commission (“ICPC”)—have been asked to prosecute corruption found in the country’s fuel sector. President Goodluck Jonathan has expressed a commitment to strengthening these agencies.
Nigeria’s domestic anti-corruption efforts have been criticized in recent years. Human Rights Watch noted that although the EFCC had arraigned thirty prominent political figures from its 2003 founding to August 2011, only four have been convicted, and with little or no prison time. The ineffective prosecution can be attributed to “political interference, institutional weakness, and inefficiency in the judiciary.” A People’s Democratic Party governorship candidate was recently put on trial for allegedly bribing a government official with N60 million in exchange for a meeting with the vice president and is pending resolution.

While domestic prosecution of Nigerian government officials has proved challenging, there has been prosecution of Nigerian officials for corruption abroad. In April 2012, former Nigerian state governor James Ibori received a thirteen-year sentence after admitting embezzlement of £50 million in government funds. The United Kingdom’s international development secretary said of the conviction, “[c]orruption is a cancer in developing countries and the [UK] coalition government has a zero-tolerance approach to it.”

Switzerland

In November 2011, the Swiss Attorney General sanctioned French conglomerate Alstom the equivalent of $2.72 million for corporate negligence. The fines resulted from improper payments made by its employees to civil servants in Latvia, Malaysia and Tunisia. This marks the first time Switzerland has successfully convicted a company for foreign bribery since foreign bribery was made a crime in 2003. The OECD congratulated Switzerland on its recent conviction, but expressed concern at the scarcity of other convictions, noting that “Switzerland is particularly exposed to the risks of bribery of foreign public officials due to its important financial sector and the large number of multinational enterprises based there.”

World Bank Group

Since July 2008, Leonard McCarthy has served as the Bank’s Integrity Vice President (“INT”). In that capacity, McCarthy is charged with investigating allegations that sanctionable practices have occurred in connection with Bank financing. McCarthy’s goals include providing greater transparency of his...
office’s efforts and increasing the speed of imposing high-value sanctions. Additionally, McCarthy expressed that it is his goal to see more frequent referrals of wrongdoing to member nations, in order that the wrongdoing be prosecuted domestically.

In 2009, Siemens’ Russian subsidiary was debarred for four years in connection with fraudulent and corrupt practices, and Siemens AG—its German corporate parent—entered into an agreement to pledge €100 million to support anticorruption activities. In 2010, the Bank debarred Macmillan Publishers for six years due to alleged bribes tied to an education project in southern Sudan. On October 19, 2011, the Bank announced a six-month debarment against United Kingdom company The Crown Agents for Oversea Governments and Administration for misrepresenting the availability of a key consultant on an awarded Bank project.

On February 22, 2012, the Bank announced the debarment of Alstom Hydro France and Alstom Network Schweiz (Switzerland) for a period of three years for making an improper payment of €110,000 million to a former senior government official in connection with a Bank-financed project. Additionally, Alstom, their corporate parent, was fined $9.5 million by the Bank as part of the settlement. These penalties come in addition to penalties imposed by Switzerland (see Section on Switzerland, supra).

The Bank publishes a list of all currently debarred/sanctioned individuals and firms, as well as a chronological list of recent debarments. In 2011, the Bank debarred a total of ninety individuals and firms, sixteen of which were cross-debarments to enforce the decisions of other MDBs pursuant to the Agreement for Mutual Enforcement of Debarment Decisions. As of November 16, 2012, the Bank had in 2012 debarred a total of 122 individuals and firms, fifty-nine of which were cross-debarments to enforce the decisions of other MDBs pursuant to the Agreement for Mutual Enforcement of Debarment Decisions.

**Conclusion**

Congress has long recognized that U.S. companies would be at a competitive disadvantage if the U.S. was alone in punishing foreign bribery. However, a survey of recent developments in international and transnational anti-corruption efforts reveals an increase in enforcement. In short, the U.S., long the global leader in punishing foreign corruption, is not alone in the fight.
VII. THE UK BRIBERY ACT

A. Introduction

The UK Bribery Act came into force on July 1, 2011, replacing the UK’s previous legal bribery regime. Substantively, it goes further than the FCPA, prohibiting not only bribery of foreign government officials, but also bribery of private parties and domestic (UK) government officials, and also includes the receipt of bribes. Like the FCPA, it has a broad extraterritorial jurisdictional reach. The Serious Fraud Office (“SFO”) and other UK authorities have signaled an intent to enforce this law vigorously. Although there have so far been few prosecutions under the new law, its enactment has prompted companies potentially covered by the law to strengthen their anti-corruption and compliance regimes.

The Bribery Act comprises four separate offenses:

(i) Section 1 prohibits offering, promising or giving a bribe;
(ii) Section 2 prohibits the request for, agreement to receive, or acceptance of, a bribe;
(iii) Section 6 prohibits the offering or promise of a bribe to a foreign public official to obtain or retain business; and
(iv) Section 7 applies only to commercial organizations, holding them strictly liable for failing to prevent parties acting on their behalf (“associated persons”) from engaging in bribery under Sections 1 or 6, with intent to obtain or retain a business advantage for the commercial organization. A commercial organization can avoid such liability, however, if it proves that it had implemented “adequate procedures” designed to prevent the proscribed conduct.

As discussed below, many aspects of the law are uncertain despite some clarifications offered in the MOJ Guidance concerning the new law. Until the law is further clarified (either through additional government guidance or through court decisions) companies and individuals subject to its provisions have been assuming that the SFO will adopt an expansive interpretation of the law.

B. The Elements of a Violation of the UK Bribery Act

1. Commercial Bribery

One of the principal differences between the FCPA and the UK Bribery Act is that the latter extends beyond bribery of government officials, prohibiting commercial bribery generally.

The Section 1 Offense—Active Bribery

Section 1 of the Bribery Act prohibits offering, promising or providing a financial or other advantage to another person in two circumstances:

(i) Where a person intends the advantage to bring about an improper performance of a relevant function or an activity by another person or to reward such improper performance (Section 1(2)); or
(ii) Where a person knows or believes that the acceptance of the advantage offered, promised or given, in itself constitutes the improper performance of a relevant function or activity (Section 1(3)).

689 The Bribery Act, 2010, c. 23 (UK).
690 The Bribery Act 2010 § 9.
Neither of these offenses requires a nexus between the bribe and obtaining or retaining business. The MOJ Guidance explains that in assessing whether conduct outside the UK is unlawful, UK authorities will disregard local customs or practices, unless such practices are clearly permitted under local written laws. This approach is analogous to the local law defense under the FCPA.

The Section 2 Offense—Passive Bribery

Section 2 of the Bribery Act makes it an offense to receive a bribe in a number of situations:

(i) The recipient “requests, agrees to receive or accepts” a financial or other advantage in return for performing a relevant function or activity improperly.

(ii) The recipient “requests, agrees to receive or accepts” a financial or other advantage and the request, agreement or acceptance itself constitutes improper performance of a relevant function or activity. It does not matter whether the recipient knows or believes that the performance of the function or activity is improper.

(iii) The recipient “requests, agrees to receive or accepts” a financial or other advantage as a reward for the improper performance of a relevant function or activity. It does not matter if the improper performance is by the recipient or by another person, or whether the recipient knows or believes that the performance of the function or activity is improper.

In all of these cases, it does not matter whether it is the recipient, or someone else through whom the recipient acts, who requests, agrees to receive or accepts the advantage. In addition, the advantage can be for the benefit of the recipient, or another person. Furthermore, there is no requirement that the payment lead to a specific instance of improper performance. Instead, the offense is complete once the recipient makes the request or agrees to accept the advantage.

2. The Section 6 Offense—Bribery of Foreign Public Officials

Section 6 of the Bribery Act prohibits the bribery of foreign public officials. To establish liability under this provision, the government must show both “fault” (or intent) and prohibited “conduct.”

Fault Element: The fault element of the offense is met when a person intends to:

(1) Influence a foreign public official in his capacity as a foreign public official (including in the performance of his functions); and

(2) Obtain or retain business or an advantage in the conduct of business.

Conduct Element: The conduct element is met where that person:

(1) Offers, promises or gives, directly or through a third party, any financial or other advantage to a foreign public official or to another person at that foreign public official’s request, assent or acquiescence; and

(2) The foreign public official is neither permitted nor required by applicable written law to be influenced in his capacity as a foreign public official by the offer, promise or gift.

A foreign public official is defined to include any person who: (i) holds a legislative, administrative or judicial position of any kind; or (ii) exercises a public function on behalf of a country or territory (or subdivision thereof), or for any public agency or public enterprise of that country. (Section 6(5)). This definition is similar to the FCPA definition and can likewise be interpreted to apply to employees of state-owned enterprises.

MOJ Guidance at 10.
There is overlap between Section 1 and Section 6 in that they both prohibit the payment of bribes to induce improper conduct. Section 6 does not require proof of intent to induce improper conduct, however. The MOJ Guidance explains that this lower threshold is in recognition of the fact that “the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the cooperation of the state in which any such official serves.”

3. The Section 7 Offense—Corporate Liability

Section 7 holds commercial organizations strictly liable for the failure to prevent those acting on their behalf (so-called “associated persons”) from engaging in bribery intended to obtain or retain a business advantage for the commercial organization. Section 7 of the Bribery Act provides:

(v) A relevant commercial organization (“C”) is guilty of an offense under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or
(b) to obtain or retain an advantage in the conduct of business for C.

(vi) But it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

The UK Bribery Act states that a person—“A”—is associated with a company if “A” “performs services for or on behalf of the company. The law also states that it is “to be presumed” that employees are associated with their employers and that associated persons “may” include agents and subsidiaries. This is not an exhaustive list and the test is whether the person is performing services for and on behalf of the commercial organization. The MOJ Guidance focuses on two factors in its discussion of what constitutes an associated person. This discussion, which addresses a company’s supply chain, joint ventures and subsidiaries, suggests that whether a person is an associated person turns on the degree of control exercised by the relevant commercial organization, and also on whether the person in question intends to perform services for the benefit of the relevant commercial organization.

In its discussion of subsidiaries as associated persons, the MOJ Guidance further elaborates on the intent to benefit requirement, stating that benefits conferred indirectly, simply by the fact of ownership or investment (for example, benefits conferred to a parent company by its subsidiary such as payment of dividends) are unlikely to satisfy the test for intention; rather, the bribe must be specifically intended to confer a direct benefit on the organization. This guidance suggests that the benefit must have been intended to be directly received by the parent company. The MOJ Guidance states:

“The fact that an organization benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offense. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries.”

692 Id. at 11.
693 Id. ¶ 42.
In summary, whether someone or some entity acting on behalf of a commercial organization is an associated person turns not upon the corporate relationship *per se* but, rather, on the circumstances of the relationship and the subjective purpose of any potentially illegal payments. One of the key questions to be considered is whether the subsidiary, agent or employee actually provided services for or on behalf of the commercial organization and if so, did it do so with the requisite specific intent to retain business or an advantage in the conduct of business on behalf of that organization? This non-categorical, circumstances-based definition will create compliance challenges in situations where the answers to these questions are unclear, or varies depending on the particular transaction at hand.

A commercial organization is liable under Section 7 if it failed to prevent conduct by the associated person that would amount to an offense under Sections 1 or 6. Although a conviction under Sections 1 or 6 is not a predicate for Section 7 liability, the prosecution must prove beyond a reasonable doubt that a Section 1 or 6 offense has been committed in order to succeed on a Section 7 charge.

As discussed further below, one of the most notable and debated aspects of Section 7 is its extra-territorial reach. Under Section 7(3), a commercial organization can be liable for conduct amounting to a Section 1 or 6 offense by a person who is neither a UK national or resident in the UK, nor an entity incorporated or formed in the UK. Section 12(5) in turn provides that the acts or omissions underlying a Section 7 offense need not occur in the UK. Therefore, if the organization is incorporated or formed in the UK, or carries on a business or part of a business in the UK, it is subject to Section 7, and by extension the conduct of an associated person anywhere in the world can also trigger liability.


   a. Adequate procedures

Where a company has been charged because an associated party (e.g., agent or employee) violated the law, the company may raise the defense that it had “adequate procedures” designed to prevent such conduct. It is therefore essential for companies conducting business in the UK to review their anti-corruption policies and procedures to ensure that they have sufficient “adequate procedures.”

Section 9 of the UK Bribery Act directs the UK Government to provide illustrative guidance as to what amounts to “adequate procedures.” The MOJ Guidance is the most recent iteration, and is discussed below with respect to Section 7 jurisdiction and also in Chapter Four, concerning UK Bribery Act compliance programs.

   b. Facilitation Payments

The UK Bribery Act is more stringent than the FCPA in its treatment of facilitation or “grease payments” (small bribes meant to facilitate routine government action). As the UK Bribery Act offers no exception for such payments, such payments can form the basis for a Section 1 or 6 offense, and therefore in turn trigger liability under Section 7. Consistent with the lack of an express mention in the statute, the MOJ Guidance states that there will be no exemptions for facilitation payments. The Guidance recognizes that if there is no alternative but to make a payment in order to protect “life, limb, or liberty,” however, the common law defense of duress will likely be available.
c. Promotional Expenses

The MOJ Guidance provides limited guidance on the risks associated with the payment of promotional and hospitality expenses, a challenging area for any anti-bribery compliance program. However, the law itself, provides no guidance or affirmative defense. The MOJ Guidance recognizes that such payments can be vehicles for bribery. It notes, however, that business expenditures that seek “to improve the image of a commercial organization, better to present products and services, or establish cordial relations” are important to the conduct of business and are not the target of the law. The MOJ Guidance concludes that whether such payments are intended to improperly secure business or a business advantage will turn on a number of factors, such as the relative level of the expenditure in question, and whether the expenditures were necessary to fulfill a legitimate business purpose. The MOJ Guidance provides two contrasting examples to illustrate this point, stating that providing fine dining and attendance at a sporting event for an official and the official’s partner will not alone create an inference of bribery, provided that these activities occur within the context of legitimate business activity. Such inferences will arise, however, where the entertainment is very lavish and wholly unrelated to business (such as providing the official a holiday in a five-star hotel).\(^{694}\)

C. Extraterritorial Jurisdiction of the UK Bribery Act

1. Territorial Jurisdiction

The UK Bribery Act, in the first instance, applies to acts or persons with direct territorial ties to the UK. Sections 1, 2 and 6 apply to acts or omissions in the UK. This territorial approach to jurisdiction is similar to that under the FCPA’s anti-bribery provisions. The UK law also applies to bribery outside the UK (if it would constitute an offense if carried out in the UK) where the person offering, promising, giving, requesting, accepting or agreeing to receive the bribe has a “close connection” with the UK (for example, where that person is a UK citizen, resides in the UK or is a body incorporated under UK law) (Section 12). This is closer to the nationality jurisdiction under the FCPA.

2. Extra-territorial Application to Commercial Organizations

Section 7 applies to commercial organizations incorporated or carrying on any part of a business in the UK, wherever the bribery takes place. While the law’s application to companies incorporated in the UK is clear, there is some uncertainty around what constitutes carrying on a business or part of a business in the UK. This is a significant question for companies that have a presence in the UK but are not based or incorporated there.

Section 7 states that “for the purposes of this Section, a trade or profession is a business.” It does not, however define what constitutes “carries on a business or part of a business.” According to the MOJ Guidance, whether an organization carries on a business, or part of a business, in the UK remains a question for the courts, and judges will have the answer using “a common sense approach” on a case-by-case basis.\(^{695}\) The MOJ Guidance further elaborates that a common sense approach entails having a “demonstrable business presence” within the UK. The Guidance does not explain what activities give rise to such a demonstrable business presence, but it does provide two examples of what does not alone constitute such a presence. First, it notes that the mere fact that a company is admitted to the UK Listing Authority’s (“UKLA”) Official List and to trading on the London Stock
Exchange, is insufficient to qualify it as carrying on a business in the UK. Thus, being an issuer alone is insufficient. Second, the fact that a non-UK entity has a UK subsidiary does not alone trigger jurisdiction over the parent. The MOJ Guidance’s stated basis for this conclusion is that the subsidiary can act independently of its parent company; the implication being that if the subsidiary engages in actions in the UK under the parent company’s direction, then such activity will trigger a finding that the parent has a demonstrable business presence in the UK and is thus subject to Section 7.

Thus, while the MOJ Guidance provides some parameters for companies with UK subsidiaries, it remains unclear what UK actions or presence will trigger Section 7 jurisdiction over non-UK commercial organizations. The UK prosecutorial authorities have stated that they intend to interpret their jurisdiction broadly.

Another important question that remains unanswered is whether the non-UK subsidiaries of a parent company subject to UK jurisdiction will be subject to the Bribery Act, even where no conduct occurs in the UK. For example, it is not clear whether a French company that sells products in the UK through a London branch (and is thereby deemed a commercial organization subject to Section 7), would face liability in the UK for acts of its associated person in India, even where such acts do not involve a UK subsidiary or other acts in the UK. The MOJ Guidance does not directly address this issue, although the statute can reasonably be interpreted to reach such activities. If Section 7 is deemed to reach such activities, the UK Bribery Act’s extra-territorial jurisdiction over acts of bribery are a significant expansion of the territorial reach of UK bribery laws.

D. Potential Consequences of an UK Bribery Act Violation

1. Fines, Imprisonment and Other Penalties

The potential consequences of being convicted of a UK bribery offense include criminal penalties for both individuals and companies. There is no statutory maximum penalty either for individuals or companies, and individuals also face ten years imprisonment.

Accordingly, fines for companies could potentially be substantial. The UK Government has not yet provided guidance on the appropriate level of fines, but a recent judgment in the Crown Court against a company that had bribed foreign public officials stated that fines for corruption should be in the tens of millions of pounds or more. A director convicted of a bribery offense is also likely to be disqualified from holding a position as a director for up to 15 years.

E. Enforcement

1. Guidance and Policy Approach to Enforcement

On March 30, 2011, the SFO published the Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (“Prosecution Guidance”), which describes the SFO’s approach to prosecutorial decision-making under the UK Bribery Act. According to the Prosecution Guidance, before a prosecutor may pursue a case, he/she must first be satisfied that he/she has sufficient evidence to ensure that a prosecution has a reasonable chance of success and that the public interest warrants a prosecution.

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696 R v Innospec [2010] EW Misc 7 (EWCC), per Lord Justice Thomas.
In October 2012, the SFO amended its Prosecution Guidance by issuing revised statements of policy (the “Policy Revisions”) directly following the appointment of David Green CB QC as Director of the SFO. The new Director of the SFO has adopted a tougher approach to anti-corruption and bribery than his predecessor. The Policy Revisions specifically address: (i) self-reporting; (ii) facilitation payments; and (iii) business expenditures, and expressly supersede any previous statement of policy or practice on these issues.

a. New approach to facilitation payments

In line with its tougher stance, the SFO has reaffirmed that a facilitation payment constitutes a bribe. Whether or not the SFO prosecutes facilitation payments will depend on whether the Full Code Test is satisfied, namely: “(a) whether it is a serious or complex case which falls within the SFO’s remit and, if so, (b) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted.”

The Full Code Test requires authorities to assess, amongst other things, whether the prosecution is in the public interest. Organizations should not assume that nominal facilitation payments will not be prosecuted.

It is notable that, in 2011, UK authorities prosecuted a court clerk under the Bribery Act for accepting £500 (approximately $770) for removing minor driving offenses from official records.

However, even if the requirements of the Full Code Test are not met, this does not mean that organizations will be exonerated. Instead, the SFO has stated that it will consider civil recovery orders in such circumstances.

b. New approach to self-reporting

The SFO has adopted a new approach to self-reporting primarily as a consequence of the OECD’s criticism in 2012 of the UK’s progress in implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In its report, the OECD criticized the SFO’s stated policy of settling self-reported cases of bribery “civilly wherever possible.” The OECD’s view was that anything less than criminal sanctions for bribery or corruption undermines the seriousness of the offense. The OECD recommended that if a company self-reports, it should be rewarded with a reduced criminal penalty, not no criminal penalty.

The SFO has now taken a harder line towards self-reporting, clarifying that self-reporting is not a get-out-of-jail card. The SFO’s previous self-reporting guidance which outlined that a company may be treated more leniently if it self-reported to the SFO should no longer be relied on by companies as a safe harbor. According to the SFO’s Policy Revisions, self-reporting is “no guarantee that a prosecution will not follow,” and “each case will turn on its own facts.” Instead, self-reporting may constitute a relevant consideration against a criminal prosecution on the basis that it forms a “genuinely proactive approach adopted by the corporate management team when the offending is brought to the [notice of the SFO].” The SFO has stated that “there will be no presumption in favor of civil settlements in any circumstances.”
c. **New approach to business expenditures**

The new statement of policy expressly reaffirms that *bona fide* hospitality, promotional or other legitimate business expenditure is recognized as “an established and important part of doing business.” David Green, CB, QC, has stated that the SFO will not be interested in prosecuting companies for *bona fide* hospitality payments such as for sporting tickets and moderate amounts of alcohol. Nevertheless, the revised policy statement does not provide guidance on what may be deemed to be a *bona fide* hospitality expenditure or when a business expenditure may be subject to prosecution. The SFO has simply stated that it will prosecute if: (i) “on the evidence there is a realistic prospect of conviction”; and (ii) “it is in the public interest to do so.” The revised policy statement warns that any attempt to disguise a bribe as a legitimate business expenditure will be the subject of prosecution.

2. **Proposed Deferred Prosecution Agreements Bill**

There are currently two possible resolutions of an anti-bribery enforcement action: (a) criminal prosecution of the organization; or (b) civil recovery proceedings under the Proceeds of Crime Act 2002. However, both of these enforcement measures have been criticized as either not being sufficiently punitive or for being too expensive to justify usage of public funds. The UK Parliament and government are accordingly considering giving organizations the option of entering into a DPA.

The terms and conditions of a DPA would be tailored to individual cases, but would include some or all of the following:

- A financial penalty (commensurate with guidelines), to be paid within a specified time period;
- Disgorgement of profits or benefit (the financial benefit to the organization) to be paid within a specified time period;
- Reparation to victims which may comprise repayment of monies, a charitable donation or actions such as reinstatement of a terminated employee, to be paid or carried out within a specified time period;
- An obligation to use all reasonable efforts to make available to the prosecutor all relevant non-privileged information and material such as the factual findings of an internal investigation and interviews given as part of an investigation, and to provide access to witnesses in relation to investigations against individual wrongdoers;
- An obligation to replace implicated individuals, or to pull out from the market in which the wrongdoing is admitted; and
- An obligation to put in place anti-corruption or anti-fraud policies, procedures or training where none exist. The organization would be required to certify that these anti-fraud policies, procedures or training had been successfully instituted and regularly reviewed and modified, and the organization could be requested to provide periodic reports detailing the review of the policies, procedures and training, and the level of compliance. In more serious cases, an independent monitor may be appointed.

The calculation of any financial penalty will likely be at the discretion of the presiding judge, who will be expected to take into account the relevant facts and the views of the prosecutor. The final hearing will be held in open court and the final agreement will be published by the prosecutor. Should an organization fail to comply with the DPA, it may be exposed to potential prosecution.
### F. Key Differences Between the FCPA and the UK Bribery Act

The main differences between the FCPA and the UK Bribery Act are summarized below:

<table>
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<tr>
<th>PROVISION</th>
<th>FCPA</th>
<th>UK Bribery Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is being bribed</td>
<td>Only bribes (&quot;anything of value&quot;) paid or offered to a &quot;foreign official&quot; are prohibited</td>
<td>Prohibits bribes paid to any person to &quot;induce&quot; them to act &quot;improperly&quot; (and is not limited to foreign officials)</td>
</tr>
<tr>
<td>“Active offense” vs. &quot;passive offense&quot;</td>
<td>Only the act of payment, rather than the receipt/acceptance of payment, is prohibited</td>
<td>Creates two offenses: (1) offense of bribing another (&quot;active offense&quot;) and (2) offense of being bribed (&quot;passive offense&quot;)</td>
</tr>
<tr>
<td>Corporate strict liability</td>
<td>Civil strict liability only under accounting provisions for public companies (failure to maintain adequate systems of internal controls and or maintaining inaccurate books and records)</td>
<td>Creates a new strict liability corporate offense for the failure of a commercial organization to prevent bribery (subject to defense of having “adequate procedures” in place designed to prevent bribery)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>U.S. companies and citizens, foreign companies listed on U.S. stock exchange, or any person acting while in the U.S.</td>
<td>Individuals who are UK nationals or who ordinarily reside in the UK and organizations that are either established in the UK or conduct some part of their business in the UK</td>
</tr>
<tr>
<td>Business promotion expenditures</td>
<td>Affirmative defense for reasonable and bona fide expenditure directly related to the business promotion or contract performance</td>
<td>No similar defense (but arguably such expenditures are not &quot;improper&quot; and therefore not a Bribery Act violation)</td>
</tr>
<tr>
<td>Allowable under local law</td>
<td>Affirmative defense if payment is lawful under written laws/regulations of foreign country</td>
<td>No violation if permissible under written laws of foreign country (applies only in case of bribery of foreign public official; otherwise a factor to be considered)</td>
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<td>Facilitating payments</td>
<td>Exception for payment to a foreign official to expedite or secure the performance of a routine (non-discretionary) government action</td>
<td>No facilitating payments exception</td>
</tr>
<tr>
<td>Civil/criminal enforcement</td>
<td>Both civil and criminal proceedings can be brought by the DOJ and the SEC</td>
<td>Criminal enforcement only by the UK SFO</td>
</tr>
<tr>
<td>Potential penalties</td>
<td>Bribery: for individuals, up to five years imprisonment and fines of up to $250,000; for entities, fines of up to $2 million Books and records/internal control violations: for individuals, up to 20 years imprisonment and fines of up $5 million; for entities, fines of up to $25 million</td>
<td>Up to 10 years imprisonment and potentially unlimited fines</td>
</tr>
</tbody>
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O’MELVENY & MYERS FCPA CONTACT SHEET

O’Melveny & Myers LLP hopes that this Seventh Edition of the FCPA Handbook has been informative. If you have additional questions on Foreign Corrupt Practices Act issues, please contact any of these lawyers.

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APPENDIX A

TEXT OF THE FOREIGN CORRUPT PRACTICES ACT


UNITED STATES CODE

TITLE 15. COMMERCE AND TRADE
CHAPTER 2B—SECURITIES EXCHANGES

§ 78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe. Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) Form of report; books, records, and internal accounting; directives

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall —

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management’s general or specific authorization;
(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms “reasonable assurances” and “reasonable detail” mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.
§ 78dd-1. Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

1. any foreign official for purposes of—
   (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
   (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

2. any foreign political party or official thereof or any candidate for foreign political office for purposes of—
   (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or
   (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

3. any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—
   (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or
(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice’s present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice’s present enforcement policy regarding the preceding provisions of this section.
The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice’s present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.
(f) Definitions

For purposes of this section:

(1) (A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive Order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3) (A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.
(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;
(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or
(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.
(e) **Guidelines by Attorney General**

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

1. guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice’s present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

2. general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice’s present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) **Opinions of Attorney General**

1. The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice’s present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.
(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice’s present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1) (A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.
(h) Definitions

For purposes of this section:

(1) The term “domestic concern” means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) (A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections
associated with contract performance or inspections related to transit of goods
across country;

(iv) providing phone service, power and water supply, loading and unloading cargo,
or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official
whether, or on what terms, to award new business to or to continue business with a
particular party, or any action taken by a foreign official involved in the decision-making
process to encourage a decision to award new business to or continue business with a
particular party.

(5) The term “interstate commerce” means trade, commerce, transportation, or communication
among the several States, or between any foreign country and any State or between any State
and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United
States in furtherance of an offer, payment, promise to pay, or authorization of the payment of
any money, or offer, gift, promise to give, or authorization of the giving of anything of value to
any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the
purposes set forth therein, irrespective of whether such United States person makes use of the
mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift,
payment, promise, or authorization.

(2) As used in this subsection, a “United States person” means a national of the United States
(as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any
corporation, partnership, association, joint-stock company, business trust, unincorporated
organization, or sole proprietorship organized under the laws of the United States or any State,
territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities
Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act, or for any officer,
director, employee, or agent of such person or any stockholder thereof acting on behalf of such
person, while in the territory of the United States, corruptly to make use of the mails or any means
or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.
(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.
(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term “person,” when referring to an offender, means any natural person other than a national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2) (A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means —

(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
(3) (A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if —

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of —

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

§ 78ff. Penalties
(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1) (A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.
APPENDIX B

INDEX OF U.S. DEPARTMENT OF JUSTICE OPINION AND REVIEW PROCEDURE RELEASES:

1980-2012

Subject Areas:

1. Third-Party Agreements: Agents, Sales Representatives, Distributors and Consultants
2. Charitable Donations
3. Payments of Government Fees and Regulatory Approvals
4. Employment of Foreign Officials
5. Joint Ventures and Consortium Agreements
6. Due Diligence and Compliance Programs in the Context of Mergers and Acquisitions
7. Promotional Expenses and Trainings
8. Definition of a “Foreign Official”

This index is designed for quick reference, and the summaries are not intended to be comprehensive. Before relying on such opinions, we therefore recommend that readers review the opinions in their entirety at http://www.usdoj.gov/criminal/fraud/fcpa/review/ and http://www.usdoj.gov/criminal/fraud/fcpa/opinion/.

1. Third-Party Agreements: Agents, Sales Representatives, Distributors and Consultants

   a. No. 10-03, September 1, 2010: A U.S. partnership sought to retain a consultant to advise on negotiations with a foreign government, and the consultant had an existing contract with that same foreign government. The U.S. partnership described safeguards to ensure that no conflict of interest would arise as a result of the consultant’s parallel representations.

   b. No. 06-02, December 31, 2006: A foreign subsidiary of a U.S. company sought to engage a foreign law firm to assist it in obtaining foreign currency from the local government. The law firm would be paid by commission, rather than an hourly rate. The U.S. company described its due diligence on the law firm, as well as the FCPA measures it would implement in connection with the proposed engagement agreement.

   c. No. 01-03, December 11, 2001: A U.S. company’s subsidiary placed a bid through a dealer to sell equipment to a foreign government. The company received an allegation that the dealer had bribed a government official in connection with the bid. The company continued to pursue the business after an internal investigation did not confirm the allegation, and it obtained from the dealer both a certification that it had made no improper payments and audit rights.
d. No. 98-02, August 5, 1998: A U.S. company sought to enter into agreements with a privately-owned company in the foreign country for consulting and teaming services. The U.S. company conducted due diligence and obtained FCPA assurances after a previous agreement with the privately-owned foreign company was determined to be invalid under local law.

e. No. 97-01, February 27, 1997: After due diligence and implementing various compliance measures, a U.S. company entered into a representative agreement with a foreign company that was alleged to have bribed a government official fifteen years before. Additional due diligence was conducted and other anti-corruption measures implemented.

f. No. 96-02, November 25, 1996: A U.S. company sought to renew a marketing agreement with a foreign country’s state-owned enterprise to serve as the U.S. company’s exclusive sales representative, after obtaining certain representations and warranties and determining that the foreign enterprise was not in a position to influence procurement decisions.

g. No. 93-02, May 11, 1993: A U.S. company was required to pay a commission on its military equipment sales to a foreign government-owned enterprise that was the procurement agent for that country’s military. The U.S. company signed an agreement that provided that it would pay its commission to the government directly, in lieu of paying the government-owned business.

h. No. 87-01, December 17, 1987: A U.S. company obtained FCPA representations and warranties from a UK company in connection with sales to the Nigerian Government.

i. No. 85-03, January 20, 1987: A U.S. company sought to hire a former foreign government official to act as its agent in negotiating a settlement of a claim it had against the foreign government, where the agent entered into a written agreement to comply with the FCPA.

j. No. 84-02, August 20, 1984: A U.S. company took various compliance steps after learning of an allegation that its foreign agent was considering the payment of a small bribe in connection with efforts to obtain a regulatory approval.

k. No. 83-01, May 12, 1983: A U.S. company sought to retain a Sudanese communications corporation as a sales agent. The director of the Sudanese entity was appointed by the president of Sudan, but was operationally independent of the Sudanese Government.

l. No. 82-04, November 11, 1982: A U.S. company sought to pay a commission to a foreign agent in connection with a sale to a foreign government. The agent’s brother was a government official. The agent and his brother signed affidavits pledging to adhere to the FCPA and agreed to other FCPA compliance measures.

m. No. 82-03, April 22, 1982: A U.S. company was required by a foreign government military procurement agency to retain a government sub-unit as its agent and pay a commission for such services. No payments would be made to individual foreign officials.

n. No. 82-02, February 18, 1982: A U.S. company that sold voting machines sought to pay a commission to a low-level government employee for assistance in concluding a contract between the company and the foreign government’s election commission. The proposed agent’s employment duties were unrelated to the election commission.

p. No. 80-03, October 29, 1980: A U.S. company requested the DOJ review a contract with an attorney in West Africa that included two provisions requiring the attorney to follow the FCPA with regard to gifts and his own political activities. The DOJ found that reviewing such contractual provisions, absent further facts and a circumstance that would reasonably cause concern, was not one of its functions.

q. No. 80-02, October 29, 1980: A foreign employee of a U.S. subsidiary running for part-time public office unrelated to his duties as an employee, sought to continue his employment, if elected. The company obtained a local law opinion regarding the legality of continuing to employ the foreign employee, and the employee agreed to disclose his position to his party and the legislature.

2. Charitable Donations

a. No. 10-02, July 16, 2010: A U.S.-based non-profit microfinance institution sought approval from a local regulator to convert its local operations to commercial entities to be licensed as financial institutions. In the context of reviewing that request, the local regulator urged the requestor's local subsidiary to make a grant to a local microfinance institution. Due diligence revealed that current and former officials held positions on the board of that institution. The requestor described the measures undertaken to ensure that the grant was awarded to a legitimate candidate and that the grant funds were dedicated to legitimate purposes.

b. No. 09-01, August 3, 2009: A U.S. medical device manufacturer sought to provide a significant volume of product samples to a foreign government in order to gain government endorsement of its product. The products were to be donated to the foreign government, not to individual government officials, and thus fell outside the scope of the FCPA.

c. No. 06-01, October 16, 2006: A U.S. company sought to make a donation to a regional anti-bribery fund that rewarded customs officials for enforcing anti-counterfeiting laws and adopted various compliance measures to safeguard against improper uses of the contribution.

d. No. 97-02, November 5, 1997: A U.S. company sought to assist in the funding of the construction of an elementary school in a foreign country. The company sought various written assurances from the foreign government in connection with the donation.

e. No. 95-01, January 11, 1995: A U.S. company sought to donate money to a foreign medical complex adjacent to a plant it was in the process of acquiring. The company proposed making its donation through a U.S. charitable organization and a public limited liability company in the foreign country, and sought written assurances from those entities in connection with the donation.

f. No. 80-01, October 29, 1980: A U.S. law firm sought to establish a fund to pay for the American education of a foreign official's children. The parents were not in a position to make or influence decisions that would affect the law firm.
3. Payments of Government Fees and Regulatory Approvals

a. No. 07-03, December 31, 2007: A U.S. permanent resident involved in judicial proceedings in a foreign country for the disposition of real and personal property in a deceased relative’s estate sought the DOJ’s review of a payment requested by the family court judge.

b. No. 98-01, February 23, 1998: A U.S. company believed that a portion of a proposed contractor fee for environmental clean up would actually be paid to foreign government officials. The DOJ reviewed the facts and stated that it would commence an investigation to determine if a criminal prosecution was warranted if the company paid the contractor.

c. No. 88-01, May 12, 1988: In order to participate in a foreign government-sponsored debt-equity swap program, a U.S. company was required to pay a fee to the foreign government and its U.S. financial agent. The U.S. company sought assurances that the fee payments would not be used for any purpose prohibited by the FCPA and were lawful under local law.

d. No. 84-02, August 20, 1984: A U.S. company took various compliance steps after learning of an allegation that its foreign agent was considering the payment of a small bribe in connection with efforts to obtain regulatory approval.

e. No. 84-01, August 16, 1984: A U.S. company sought to retain a foreign marketing firm. The marketing firm’s principals were related to the head of state, and one of the principals managed the head of state’s private business affairs and investments. The U.S. company implemented various FCPA compliance measures with the marketing firm.

4. Employment of Government Officials

a. No. 12-01, September 18, 2012: A U.S. lobbying firm that wished to represent a foreign embassy sought to enter into a consulting agreement where one of the partners of the consulting company was a member of the royal family. The partner was not deemed to be a foreign official because he did not directly or indirectly represent that he acted on behalf of the royal family.

b. No. 10-01, April 19, 2010: A U.S. company entered into a contract with a U.S. agency to construct a facility in a foreign country and wished to employ a person who was also a local foreign official as the facility’s director. The individual was selected by the foreign government, and the U.S. Government also directed that the individual be hired. The individual’s position in government did not relate to the facility, or permit the individual to make procurement decisions favorable to the requestor or the facility.

c. No. 01-02, July 18, 2001: A U.S. company sought to enter into a consortium agreement with a foreign company. The foreign company’s chairman and shareholder acted as advisor to the country’s top officials and was a senior official in public education in that country. The U.S. company proposed to implement various FCPA compliance measures to circumscribe the chairman’s activities within the consortium.

d. No. 00-01, March 29, 2000: A U.S. law firm’s partner in a foreign country was appointed to a high government position. The firm sought to pay certain benefits during the partner’s tenure in government. The law firm took various steps to ensure that the partner was recused from all government matters involving the firm.
e. No. 94-01, May 13, 1994: A U.S. company sought to hire the director of a state enterprise as a consultant to assist the company to obtain permits for construction utilities. The director would enter into the agreement as a private actor and not influence the permits in his capacity as a government official. The company affirmed a number of commitments to comply with the FCPA in its arrangements with the government official.

f. No. 86-01, July 18, 1986: The DOJ reviewed three cases of U.S. corporations that sought to employ members of parliaments in various foreign localities to represent their business interests. In each of the cases, the members of parliament agreed to accept reasonable compensation for their services, fully disclose their relationship with the U.S. corporation, and not use their office to influence acts or decisions to benefit the corporation.

g. No. 85-03, January 20, 1987: A U.S. company sought to hire a former foreign government official to act as its agent in negotiating a settlement of a claim it had against the foreign government, where the agent entered into a written agreement to comply with the FCPA.

h. No. 84-01, August 16, 1984: A U.S. company sought to retain a foreign marketing firm. The marketing firm’s principals were related to the head of state, and one of the principals managed the head of state’s private business affairs and investments. The U.S. company implemented various FCPA compliance measures with the marketing firm.

i. No. 83-01, May 12, 1983: A U.S. company sought to retain a Sudanese communications corporation as a sales agent. The director of the Sudanese entity was appointed by the president of Sudan, but was operationally independent of the Sudanese Government.

j. No. 82-02, February 18, 1982: A U.S. company that sold voting machines sought to pay a commission to a low-level government employee for assistance in concluding a contract between the company and the foreign government’s election commission. The proposed agent’s employment duties were unrelated to the election commission and numerous other preventive measures were adopted.

k. No. 80-04, October 29, 1980: A U.S. defense contractor planned to enter into an agreement with a Saudi Arabian financial firm to engage in a prospective business transaction with the Government of Saudi Arabia and the government-owned Saudi Arabian Airlines Corporation. The Chairman of the Saudi financial firm was an outside director of the Airlines, but held no government position and agreed to abstain from voting in his board position when the U.S. firm’s interests would be involved.

l. No. 80-02, October 29, 1980: A foreign employee of a U.S. subsidiary running for part-time public office unrelated to his duties as an employee sought to continue his employment if elected. The company obtained a local law opinion regarding the legality of continuing to employ the foreign employee, and the employee agreed to disclose his position to his party and the legislature.

5. Joint Ventures and Consortium Agreements

a. No. 08-01, January 15, 2008: A U.S. company sought to purchase a controlling interest in a foreign concern with a majority owner state-owned company, and a minority owner was deemed to be a foreign official. The U.S. company conducted extensive due diligence to confirm that all proposed payments in connection with the acquisition were consistent with the FCPA, and stipulated to a number of FCPA compliance measures.
b. No. 01-02, July 18, 2001: A U.S. company sought to enter into a consortium agreement with a foreign company. The foreign company’s chairman and shareholder acted as advisor to the country’s top officials and was a senior public education official. The U.S. company proposed to implement various FCPA compliance measures to circumscribe the chairman’s activities within the consortium.

c. No. 01-01, May 24, 2001: A U.S. and French company each contributed certain pre-existing contracts and transactions to a joint venture. The contracts contributed by the French company were entered into before that country enacted its current anti-bribery laws. The French company represented that no corruption was involved in their procurement. The companies agreed to various compliance measures in connection with agency agreements. The DOJ caveated its decision not to take any enforcement action, noting that the French company’s representations were potentially too narrow, and declining to endorse the joint venture agreement’s “materially adverse effect” provision (allowing under certain circumstances the termination of the agreement if bribes are discovered), judging it to be too restrictive.

d. No. 93-01, April 20, 1993: A U.S. company entered into a joint venture with a state-owned enterprise. The board overseeing the joint venture included several directors who were employees of the state-owned enterprise. The foreign partner would ultimately pay the directors’ fees, and the directors would be trained on the FCPA.

e. No. 83-02, July 26, 1983: A U.S. company sought to extend the U.S. vacation of a general manager of a government-owned joint venture partner so that he could tour the company’s U.S. facilities. The company intended to pay for lodging, travel expenses, and entertainment for the employee and his spouse.

6. Due Diligence and Compliance Programs in the Context of Mergers and Acquisitions

a. No. 08-02, June 13, 2008: A U.S. company was prevented under local legal restrictions from performing due diligence on its foreign target until after closing the transaction. The U.S. company sought temporary protection post-acquisition from liability for FCPA violations by the target until it could perform appropriate due diligence. The DOJ stated that it would not take any enforcement action against the company for certain post-acquisition violations of the FCPA by the foreign target during the 180 days following closing, provided that the buyer immediately implemented specific FCPA compliance measures, performed due diligence, and fulfilled certain other conditions.

b. No. 04-02, July 12, 2004: An investment group sought to acquire entities that had previously pled guilty to FCPA violations. The investment group and the entities to be acquired held independent investigations to review FCPA compliance. The investment group described in detail the elements of an FCPA program it intended to implement post-closing. The DOJ described the program as “significant precautions,” although it did not endorse any specific aspect of the program.

c. No. 03-01, January 15, 2003: A U.S. company sought to proceed with an acquisition of a U.S. company with foreign subsidiaries after discovering likely FCPA violations in its due diligence. The DOJ reported that it would not take any enforcement action against the U.S. company for the pre-acquisition conduct of the company, but added a caveat that its decision would not apply to payments made after the acquisition making or authorizing the payments.
d. No. 95-02, September 14, 1995: Two U.S. companies were establishing a new foreign entity that would have business with a foreign military, and which would have minority shareholders with a passive ownership interest. The companies described various safeguards they intended to implement to ensure that no illegal payments were made to such shareholders.

7. Promotional Expenses and Trainings

a. No. 12-02, October 18, 2012: A group of U.S. non-profit adoption agencies sought to pay the travel expenses of visiting foreign officials for the purpose of explaining the agencies’ business practices. The adoption agencies described multiple measures to ensure the reimbursed expenses were reasonable and legitimate, including business class airfare for high-ranking officials only, no stipends, and no reimbursement for family members’ expenses.

b. No. 11-01, June 30, 2011: A U.S. adoption services provider sought to pay travel expenses for visiting foreign officials for the purpose of explaining the adoption services’ business practices. The service provider described multiple measures to ensure the reimbursed expenses were reasonable and legitimate, including no side trips, no cash payments, and hospitality gifts limited to nominal value souvenirs.

c. No. 08-03, July 11, 2008: A U.S. organization that provided assistance to its members in complying with anti-bribery laws proposed to pay defined expenses for all Chinese journalists that planned to attend a press conference in China. Most of the journalists that would attend the conference were employees of the Chinese Government. The organization did not have any business pending with any Chinese Government agency, and the payments were not contingent on receiving favorable press coverage. The DOJ concluded that the payments fell within the FCPA’s promotional expenses affirmative defense.

d. No. 07-01, July 24, 2007: A U.S. company sought to pay the domestic expenses of foreign officials for a promotional tour in the United States. The purpose of the tour was to familiarize the visitors with the American company’s operations and reputation. The company described various guidelines for the payments to ensure that they were reasonable and consistent with the promotional expenses affirmative defense, and the DOJ agreed that the defense applied.

e. No. 07-02, September 11, 2007: A U.S. insurance company sought to pay the domestic expenses of foreign officials for a domestic promotional tour that would take place at the conclusion of a broader U.S. business visit by the foreign officials. The company described various guidelines for the payments to ensure that they were reasonable and consistent with the promotional expenses affirmative defense, and the DOJ agreed that the defense applied.

f. No. 04-04, September 3, 2004: A U.S. company proposed to pay expenses for a study tour for foreign officials. The U.S. company did not have a presence or business in the country in question. The company described various guidelines for the payments to ensure that they were reasonable and consistent with the promotional expenses affirmative defense.

g. No. 04-03, June 14, 2004: A U.S. company sought to sponsor the trip of twelve Chinese Government officials to the United States for meetings with U.S. public-sector officials to discuss labor and employment issues and dispute resolution. The company described various guidelines for the payments to ensure that they were reasonable and consistent with the promotional expenses affirmative defense.
h. No. 04-01, January 6, 2004: A U.S. company intended to organize a seminar in China on U.S. employment practices and pay for Chinese Government officials to attend. The company described various guidelines for the payments to ensure that they were reasonable and consistent with the promotional expenses affirmative defense.

i. No. 96-01, November 25, 1996: A U.S. non-profit sought to sponsor government representatives to attend environmental training in the United States. The non-profit did not intend to do business with the foreign governments. The company described various guidelines for the payments, limiting them to basic travel expenses, and granting funds based on financial need and other objective factors.

j. No. 92-01, February 1992: A U.S. company entering into a joint venture in Pakistan’s Ministry of Petroleum and Natural Resources was required by Pakistan’s law to provide funding to train government officials. The company requested the DOJ to review its plans to provide funding and hold trainings in the United States and Europe and pay for government officials’ travel, lodging, meals, and seminar fees.

k. No. 85-01, July 16, 1985: A U.S. company proposing to build a chemical plant in France intended to invite and subsidize a U.S. inspection tour for French government officials responsible for issuing required permits.

l. No. 83-03, July 26, 1983: A U.S. company in association with the Missouri Department of Agriculture sought to pay the expenses of a Singapore government official for a promotional tour in Missouri for site inspections, demonstrations and meetings.

m. No. 83-02, July 26, 1983: A U.S. company sought to extend the U.S. vacation of a general manager of a government-owned joint venture partner so that he could tour the company’s U.S. facilities. The company intended to pay for lodging, travel expenses, and entertainment for the employee and his spouse.

n. No. 82-01, January 27, 1982: The Missouri Department of Agriculture sought to pay for officials from the Mexican Government to attend a series of meetings on agricultural business in Missouri and furnish them with lodging, entertainment, and samples of their products.

o. No. 81-02, December 11, 1981: The Iowa Beef Packers sought to provide free samples of its packaged beef products to Soviet officials in the Ministry of Foreign Trade for testing, inspecting, and sampling and to make the officials aware of the quality of its products.

8. **Definition of Foreign Official**

   a. No. 12-01, September 18, 2012: A U.S. lobbying firm who wished to represent the Embassy of a foreign country sought to enter into a consulting agreement and one of the partners of the consulting company is a member of the royal family. The partner was not deemed to be a foreign official because he did not directly or indirectly represent that he acted on behalf of the royal family. Other factors considered were how much control or influence the individual has in government decision-making and whether that government identifies such individual as having power within the government.
APPENDIX C

SAMPLE FCPA REPRESENTATIONS AND WARRANTIES

The following are examples of representations and warranties relating to compliance with the FCPA and other anti-bribery laws. These examples are illustrative. As with all sample clauses, the clauses below would require tailoring to fit a specific transaction.

Example One:

This form has been used in a distributor agreement, although it might be adapted for other contexts. The clause covers both bribery and books and records. It includes many elements that are typically found in an agency agreement, including a right to audit and a commitment to comply with Supplier’s FCPA policy.

Anti-Bribery.

(a) Distributor, including any shareholder in Distributor, parent, subsidiary, affiliate, employee or agent thereof, shall neither offer, nor make, nor promise to make, nor authorize the making of any gift or payment of money or anything of value either directly or indirectly to any officer or employee of a non-U.S. government or any department, agency, or instrumentality thereof, which shall include any state-owned enterprise formed in the Territory, or to any person acting in an official capacity for or on behalf of any such non-U.S. government or department, agency or instrumentality or to any political party or candidate for political office (all of the foregoing individuals being individually and collectively referred to herein as “Foreign Officials”) for purposes of (i) influencing any act or decision of such Foreign Official in his official capacity, or (ii) inducing such Foreign Official to do or omit to do any act in violation of the lawful duty of such official, or (iii) inducing such Foreign Official to use his influence with a non-U.S. government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality in order to obtain, retain or direct or assist in obtaining, retaining or directing business to Distributor, its parent, or any subsidiary or affiliate thereof. Distributor represents and warrants that no present or future owner, shareholder, partner, officer, director or employee of Distributor, or any holder of any financial interest in Distributor or any parent, subsidiary or affiliate thereof, is or will be a Foreign Official during the term of the Agreement.

(b) Distributor, including any parent, subsidiary, or affiliate thereof, warrants that it is fully in compliance with and agrees to comply fully at all times with all applicable laws, including without limitation the U.S. Foreign Corrupt Practices Act and all applicable laws, regulations and other statutory law of the Territory, except to the extent that such laws, regulations or other statutory law conflict with applicable U.S. laws.

(c) Distributor, including any parent, subsidiary or affiliate thereof, warrants that its books and records are complete and accurate, and that all records, information, and representations that it has provided to Supplier before the signing of this Agreement and will provide to Supplier in the future, including any parent, subsidiary, or affiliate thereof, are and will be complete and accurate.
(d) Distributor will, when and as may be requested by Supplier from time to time, provide to Supplier a certificate in form and substance satisfactory to Supplier signed by its Legal Representative that Distributor is in compliance with this Section.

(e) Distributor agrees to comply with relevant provisions of the Supplier’s Foreign Corrupt Practices Compliance Policy, a copy of which shall be made available to Distributor upon the signing of this Agreement.

(f) Distributor will, when and as may be requested by Supplier from time to time, provide Supplier with access to its books and records pertaining to Distributor’s business in connection with Distributor’s performance of this Agreement.

(g) Distributor represents and certifies that it has not been convicted of or pleaded guilty to a criminal offense, including one involving fraud, corruption, or moral turpitude, that it is not now, to the best of its knowledge, the subject of any government investigation for such offenses, and that it is not now listed by any government agency as debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for government programs.

Example Two:

Where appropriate, these clauses can be adapted to apply not only to the FCPA, but also to other applicable bribery laws as well as other laws and regulations that may govern cross-border trade and investment. This example covers the Canadian corruption laws and the FCPA, as well as applicable export control and economic sanctions laws.

Section 1 Anti-bribery, Economic Sanctions and Export Control Laws

If and to the extent applicable, each company entity has complied in all material respects with applicable anti-bribery, export control, and economic sanctions laws, including the Corruption of Foreign Public Officials Act and, to the extent applicable, the U.S. Foreign Corrupt Practice Act (“FCPA”), and Export Administration Regulations. No company entity has made any payment not specifically permitted by the Corruption of Foreign Public Officials Act, or, with the corrupt intent to obtain or retain business, directly or indirectly offered, paid or promised to pay, or authorized the payment of, any money or other thing of value (including any fee, gift, sample, travel expense or entertainment with a value in excess of US$100 in the aggregate to any one individual in any year) or any commission payment to: (i) any Person who is an official, officer, agent, employee or representative of any Governmental Entity; (ii) any political party or official thereof; or (iii) any candidate for political or political party office in violation of applicable laws (including applicable anti-bribery laws). Each transaction is properly and accurately recorded in all material respects on the books and records of the applicable company entity, and each document upon which entries such books and records are based is complete and accurate in all material respects. Each company entity maintains a system of internal accounting controls reasonably designed to insure that such company entity maintains no off-the-books accounts and such company entity’s assets are used only in accordance with such company entity’s management directives. Each company entity has at all times been in compliance with all applicable laws relating to export controls and economic sanctions.
Example Three:

This clause is similar to Example Two, but offers some explanatory language and definition of Government Entity.

**FCPA and anti-bribery laws:** The U.S. Foreign Corrupt Practices Act ("FCPA") and the anti-corruption laws of many other countries prohibit bribery of foreign officials and require accurate and complete books and records and a system of internal controls designed to prevent such bribery. Violators of the FCPA are subject to civil and criminal penalties.

(i) Neither the Company, the Company’s subsidiary or any director, officer, agent, employee, nor any other person acting for or on behalf of the foregoing (individually and collectively, a “Company Affiliate”) have violated the U.S. Foreign Corrupt Practices Act or any other applicable anti-bribery or anti-corruption laws, nor has any Company Affiliate offered, paid, promised to pay, or authorized the payment of any money, or offered, given, promised to give, or authorized the giving of anything of value, to any officer, employee or any other person acting in an official capacity for any Government Entity, as defined below, to any political party or official thereof or to any candidate for political office (individually and collectively, a “Government Official”) or to any person under circumstances where such Company Affiliate knew or was aware of a high probability that all or a portion of such money or thing of value would be offered, given or promised, directly or indirectly, to any Government Official, for the purpose of:

(a) (1) influencing any act or decision of such Government Official in his official capacity, (2) inducing such Government Official to do or omit to do any act in violation of his lawful duty, (3) securing any improper advantage, or (4) inducing such Government Official to influence or affect any act or decision of any Government Entity, or

(b) assisting the Company or its subsidiary in obtaining or retaining business for or with, or directing business to, the Company or its subsidiary.

(ii) “Government Entity” as used in the previous paragraph means any government or any department, agency or instrumentality thereof, including any entity or enterprise owned or controlled by a government, or a public international organization.
Example Four:

In cases where the party offering the representation and warranty is not subject to U.S. law, and/or objects to U.S. law references in general, the clause can be drafted to cover conduct that is prohibited under the FCPA, without the non-U.S. party agreeing to comply with the FCPA directly.

1. Anti-bribery

The Company has not, and to the Sellers’ knowledge no Representatives of the Company or Sellers or any other Person on the Company’s behalf, no joint venture partner, teammate or other Person associated with the Company or Sellers has, offered or given anything of value to: (i) any official, member, employee or customer of a governmental entity, any political party or official thereof, or any candidate for political office; (ii) any customer or member of the government; or (iii) any other Person, in any such case while knowing or having reason to know that all or a portion of such money or thing of value may be offered, given or promised, directly or indirectly, to any customer, member of the government or candidate for political office for the purpose of the following: (A) influencing any action or decision of such Person, in his or its official capacity, including a decision to fail to perform his or its official function; (B) inducing such Person to use his or its influence with any government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality to assist the Company in obtaining or retaining business for, or with, or directing business to, any Person; (C) securing any improper advantage; (D) where such payment is or was contingent upon the award of any Government Contract to the Company or that would otherwise be in violation of any applicable law; or (E) where such payment would constitute a bribe, kickback or illegal or improper payment to assist the Company in obtaining or retaining business for, or with, or directing business to, any Person. The Company has made all payments to third parties by check mailed to such third parties’ principal place of business or by wire transfer to a bank located in the same jurisdiction as such party’s principal place of business. Each such transaction is (and has been since inception) properly and accurately recorded on the books and records of the Company, as the case may be, and each document upon which such entries in each of the Company books and records are based is complete and accurate in all respects. The Company maintains a system of internal accounting controls adequate to insure that the Company maintains no off-the-books accounts and that the Company’s assets are used only in accordance with the Company’s management directives.
## APPENDIX D

### WHO IS A ‘FOREIGN OFFICIAL’ UNDER THE FCPA?

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>CASE &amp; YEAR</th>
<th>ALLEGED VIOLATOR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>07-cv-1408 (S.D. Tex. 2007)</td>
<td>Baker Hughes Inc.</td>
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<tr>
<td></td>
<td>In re Ball Corporation (2011)</td>
<td>Ball Corporation</td>
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<td></td>
<td>08-cr-795 (S.D. Tex. 2008)</td>
<td>Bridgestone Corporation - Misao Hioki</td>
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<td></td>
<td>00-cv-3040 (D.D.C., 2000)</td>
<td>IBM Corporation</td>
</tr>
<tr>
<td></td>
<td>11-cr-1056 (S.D.N.Y. 2011); 11-cv-9073 (S.D.N.Y. 2011)</td>
<td>Siemens - Ulrich Bock; Miguel Czysh; Carlos Sergi; Uriel Sharef; Bernd Regendantz et al.</td>
</tr>
<tr>
<td></td>
<td>03-cr-290 (S.D.N.Y. 2003)</td>
<td>Thomas Farrell</td>
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<tr>
<td></td>
<td>05-cr-518 (S.D.N.Y. 2005)</td>
<td>Victor Kozeny</td>
</tr>
<tr>
<td></td>
<td>03-cr-930 (S.D.N.Y. 2003)</td>
<td>Clayton Lewis</td>
</tr>
<tr>
<td></td>
<td>In re Omega Advisors, Inc. (2007)</td>
<td>Omega Advisors, Inc.</td>
</tr>
<tr>
<td></td>
<td>05-cr-518 (S.D.N.Y. 2005)</td>
<td>David Pinkerton</td>
</tr>
<tr>
<td>Agency &amp; Enforcement Action</td>
<td>Foreign Official</td>
<td></td>
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<tr>
<td>-----------------------------</td>
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<td></td>
</tr>
<tr>
<td>SEC: $5.9M in disgorgement and $10.5M in civil penalties</td>
<td>Engineers from Sonangol, the Angolan state-owned oil company</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA and $92M penalty</td>
<td>Two companies, whose major shareholders were relatives of a high-ranking Angolan executive branch official</td>
<td></td>
</tr>
<tr>
<td>SEC: $23M in disgorgement and $10M in civil penalties</td>
<td>Officials of the Angolan state owned oil company, Sonangol</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA and fine of $70M</td>
<td>Angolan customs and immigration officials</td>
<td></td>
</tr>
<tr>
<td>SEC: $11M in disgorgement and injunction</td>
<td>Angolan military officials, customs officials, immigration officials, economic police, and port authority officials</td>
<td></td>
</tr>
<tr>
<td>SEC: Cease-and-desist (settlement not stated)</td>
<td>Argentine customs officials</td>
<td></td>
</tr>
<tr>
<td>SEC: $300K civil penalty</td>
<td>Argentine customs officials</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA, Compliance Monitor, and a fine of over $17M; SEC: Injunction/Cease and desist and $5M in disgorgement</td>
<td>Doctors employed by publicly owned and operated hospitals</td>
<td></td>
</tr>
<tr>
<td>DOJ: Imprisonment, fine of over $80K, and plea agreement</td>
<td>Government officials employed by state-owned enterprises</td>
<td></td>
</tr>
<tr>
<td>DOJ: NPA and fine of $1M; SEC: Cease-and-desist and $375K in disgorgement</td>
<td>Customs officials</td>
<td></td>
</tr>
<tr>
<td>SEC: Injunction/cease and desist, $300K in civil penalties</td>
<td>Directors of Banco de La Nacion Argentina</td>
<td></td>
</tr>
<tr>
<td>DOJ/SEC: [Regendantz alone was ordered to pay $40K in civil penalties]</td>
<td>Senior government officials including Presidents and cabinet ministers, Argentine government officials in the Ministry of the Interior, Argentine candidates for office, members of the opposition party/</td>
<td></td>
</tr>
<tr>
<td>DOJ: Compliance monitor, plea, and a fine of over $448M; SEC: $350M in disgorgement</td>
<td>Unspecified Argentine government officials</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and imprisonment</td>
<td>Argentine government procurement officer</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and 500K fine</td>
<td>Senior officials of State Oil Company of Azerbaijan Republic, Azerbaijan’s State Property Committee, and a senior Azeri government official</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea</td>
<td>Senior officials of State Oil Company of Azerbaijan Republic and Azerbaijan’s State Property Committee</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA and fine of $70M</td>
<td>Azeri government officials responsible for assessing and collecting duties and tariffs on imported goods</td>
<td></td>
</tr>
<tr>
<td>SEC: Injunction/cease and desist, $8M in disgorgement and 200K in civil penalties; DOJ: DPA and over $7M in fines</td>
<td>Officials at the Ministry of Taxes for the Republic of Azerbaijan</td>
<td></td>
</tr>
<tr>
<td>DOJ: (fugitive)</td>
<td>Senior officials of State Oil Company of Azerbaijan Republic, Azerbaijan’s State Property Committee, and a senior Azeri government official</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea</td>
<td>(as above)</td>
<td></td>
</tr>
<tr>
<td>DOJ: Conviction, $1M fine and imprisonment</td>
<td>(as above)</td>
<td></td>
</tr>
<tr>
<td>DOJ: NPA and $500K civil forfeiture</td>
<td>(as above)</td>
<td></td>
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<tr>
<td>DOJ: Dismissal</td>
<td>(as above)</td>
<td></td>
</tr>
<tr>
<td>COUNTRY</td>
<td>CASE &amp; YEAR</td>
<td>ALLEGED VIOLATOR</td>
</tr>
<tr>
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<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>08-cr-369 (D.D.C., 2008)</td>
<td>Siemens Bangladesh, Ltd.</td>
</tr>
<tr>
<td>Brazil</td>
<td>12-cr-00080 (D.D.C. 2012)</td>
<td>Biomet, Inc.</td>
</tr>
<tr>
<td>Brazil</td>
<td>08-795 (S.D. Tex. 2008)</td>
<td>Bridgestone Corporation - Misao Hioki</td>
</tr>
<tr>
<td>Brazil</td>
<td>08-336 (C.D. Cal. 2008)</td>
<td>Control Components Inc. - Mario Covino</td>
</tr>
<tr>
<td>Brazil</td>
<td>10-cr-769 (S.D. Tex., 2010)</td>
<td>Panalpina World Transport (Holding) Ltd.</td>
</tr>
<tr>
<td>China</td>
<td>08-cr-172 (D. Minn. 2008)</td>
<td>AGA Medical Corp.</td>
</tr>
<tr>
<td>China</td>
<td>05-cr-482 (C.D. Cal. 2005)</td>
<td>DPC (Tianjin) Co. Ltd.</td>
</tr>
<tr>
<td>China</td>
<td>In re InVision Technologies, Inc. (2004);</td>
<td>InVision Technologies, Inc.</td>
</tr>
<tr>
<td>Country &amp; Case</td>
<td>Alleged Violator</td>
<td>Alleged Violator Details</td>
</tr>
<tr>
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</tr>
<tr>
<td>Bahrain</td>
<td>York International Corp.</td>
<td>DOJ: DPA and $10M fine; SEC: Compliance monitor and $10 in disgorgement and $2M in civil penalties. Employees and contractors of government customers in Bahrain.</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Siemens Bangladesh, Ltd.</td>
<td>DOJ: Total fines of over $500K. The Minister and other officials of the Bangladesh Ministry of Posts and Telecommunications; the Director of procurement and other officials of the state-owned Bangladesh Telegraph &amp; Telephone Board.</td>
</tr>
<tr>
<td>Benin</td>
<td>Titan Corp.</td>
<td>DOJ: Guilty plea, compliance monitor, probation and $13M fine; SEC: $15.5M disgorgement. The election campaign for the President of Benin, an advisor to the President of Benin, the President's wife, a World Bank official, the Director General of Benin's telecommunications agency and three Benin consultants.</td>
</tr>
<tr>
<td>Brazil</td>
<td>Biomet, Inc.</td>
<td>DOJ: DPA, Compliance Monitor, and a fine of over $17M. Doctors employed by publicly owned and operated hospitals.</td>
</tr>
<tr>
<td>Maxwell Technologies, Inc.</td>
<td>DOJ: DPA, including $93.6M penalty. Officials of state-owned energy companies Sinopac, the Bureau of Geophysical Prospecting, and Changhai Petroleum Exploration Bureau.</td>
<td></td>
</tr>
<tr>
<td>China Petroleum Materials and Equipment Corporation, PetroChina, Jiangsu Nuclear Power Corp., Guohua Electric Power, and China National Offshore Oil Company</td>
<td>DOJ: Plea, compliance monitor and fines of over $18M. Employees of various state-owned entities, including</td>
<td></td>
</tr>
<tr>
<td>China</td>
<td>LG Electronics Inc.</td>
<td>DOJ: DPA, including $400M and $1B in disgorgement. Officials of LG Electronics Inc.</td>
</tr>
<tr>
<td>China</td>
<td>DaimlerChrysler China Ltd.</td>
<td>DOJ: DPA, over $1B in criminal fines. Officials of state-owned energy companies Sinopec, the Bureau of Geophysical Prospecting, and Changqing Petroleum Exploration Bureau.</td>
</tr>
<tr>
<td>China</td>
<td>In re Lucent Technologies, Inc. (2007); 07-2301 (D.D.C. 2007)</td>
<td>DOJ: DPA and $8M fine; SEC: $1.5 civil penalty. Heads of state-owned telecommunications companies and provincial subsidiaries; officers and engineers of state-owned telecommunications service provider.</td>
</tr>
<tr>
<td>China</td>
<td>In re InVision Technologies, Inc. (2004); InVision Technologies, Inc.</td>
<td>DOJ: NPA and $800K penalty. Officials of Chinese state-owned general construction company and importing company.</td>
</tr>
<tr>
<td>COUNTRY</td>
<td>CASE &amp; YEAR</td>
<td>ALLEGED VIOLATOR</td>
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<tr>
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<td>-------------------------------------------------------</td>
</tr>
<tr>
<td>Cote d’Ivoire</td>
<td>01-cr-221 (W.D. Mo. 2001)</td>
<td>Richard K. Halford</td>
</tr>
<tr>
<td></td>
<td>In re United Industrial Corp. (2009)</td>
<td>United Industrial Corp.</td>
</tr>
<tr>
<td>France</td>
<td>In re Micrus Corp (2005)</td>
<td>Micrus Corp.</td>
</tr>
<tr>
<td>Germany</td>
<td>90-cv-29 (D. Conn., 1990)</td>
<td>F.G. Mason Engineering, Inc.</td>
</tr>
<tr>
<td></td>
<td>In re Micrus Corp (2005)</td>
<td>Micrus Corp.</td>
</tr>
<tr>
<td>Country &amp; Year</td>
<td>Alleged Violator</td>
<td>Agency &amp; Enforcement Action</td>
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<tr>
<td>In re Paradigm B.V. (2007)</td>
<td>Paradigm B.V.</td>
<td>DOJ: NPA, compliance monitor, $1M penalty</td>
</tr>
<tr>
<td>12-cr-224 (E.D.N.Y. 2012)</td>
<td>Garth R. Peterson</td>
<td>DOJ: Imprisonment and $3.8M judgement</td>
</tr>
<tr>
<td>08-cr-194 (E.D. Va. 2008)</td>
<td>Quan-Sheng Shu</td>
<td>DOJ: Plea and imprisonment</td>
</tr>
<tr>
<td>In re The NORDAM Group, Inc. (2012)</td>
<td>The NORDAM Group, Inc.</td>
<td>DOJ: NPA and $2M penalty</td>
</tr>
<tr>
<td>U.S. v. UTStarcom, Inc. (2009)</td>
<td>UTStarcom, Inc.</td>
<td>DOJ: NPA and $1.5M fine</td>
</tr>
<tr>
<td>09-cv-272 (D.D.C. 2009)</td>
<td>ITT Corporation</td>
<td>SEC: $1.4 civil fine and 250K in civil penalties</td>
</tr>
<tr>
<td>In re Rockwell Automation, Inc. (2011)</td>
<td>Rockwell Automation, Inc.</td>
<td>SEC: $2.3M in disgorgement and $400K in civil penalties</td>
</tr>
<tr>
<td>01-cr-221 (W.D. Mo. 2001)</td>
<td>Richard K. Halford</td>
<td>DOJ: Plea, probation</td>
</tr>
<tr>
<td>12-cr-169 (D.D.C. 2012)</td>
<td>Pfizer H.C.P. Corp.</td>
<td>DOJ: DPA and $15M fine</td>
</tr>
<tr>
<td>In re United Industrial Corp. (2009)</td>
<td>United Industrial Corp.</td>
<td>DOJ: DPA, compliance monitor, fine of over $20M</td>
</tr>
<tr>
<td>94-cr-226 (N.D. Ga. 1994)</td>
<td>Lockheed Corp.</td>
<td>DOJ: Plea and penalties of over $24M</td>
</tr>
<tr>
<td>09-cv-272 (D.D.C. 2009)</td>
<td>ITT Corporation</td>
<td>DOJ: NPA and fine of over $13M</td>
</tr>
<tr>
<td>France</td>
<td>Micrus Corp</td>
<td>DOJ: DPA, compliance monitor and $450K penalty</td>
</tr>
<tr>
<td>Germany 90-cr-29 (D. Conn., 1990)</td>
<td>F.G. Mason Engineering, Inc.</td>
<td>DOJ: Plea and $29.1M fine</td>
</tr>
<tr>
<td>Greece</td>
<td>Comverse Technology, Inc.</td>
<td>DOJ: DPA, compliance monitor and fine of $13M fine</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Wilbros Group, Inc.</td>
<td>DOJ: Plea and $29.1M fine</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>Pfizer H.C.P. Corp.</td>
<td>DOJ: DPA and $15M fine</td>
</tr>
<tr>
<td>Croatia</td>
<td>Daimler Export and Trade Finance GmbH</td>
<td>DOJ: Plea and $29.1M fine</td>
</tr>
<tr>
<td>Egypt</td>
<td>UTStarcom, Inc.</td>
<td>DOJ: Plea and $15M fine</td>
</tr>
<tr>
<td>France</td>
<td>Micrus Corp</td>
<td>DOJ: DPA, compliance monitor and $450K penalty</td>
</tr>
<tr>
<td>France</td>
<td>Micrus Corp</td>
<td>DOJ: DPA, compliance monitor and $450K penalty</td>
</tr>
<tr>
<td>Germany</td>
<td>Daimler Export and Trade Finance GmbH</td>
<td>DOJ: Plea and $29.1M fine</td>
</tr>
<tr>
<td>Egypt</td>
<td>UTStarcom, Inc.</td>
<td>DOJ: Plea and $15M fine</td>
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<tr>
<td>COUNTRY</td>
<td>CASE &amp; YEAR</td>
<td>ALLEGED VIOLATOR</td>
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<tr>
<td>Haiti</td>
<td>H-01-914-S (S.D. Tex. 2004)</td>
<td>David Kay</td>
</tr>
<tr>
<td></td>
<td>09-cr-21010 (S.D. Fla. 2009)</td>
<td>Joel Esquenazi</td>
</tr>
<tr>
<td>Honduras</td>
<td>10-cr-20906 (S.D. Fla. 2010)</td>
<td>Alcatel Centroamerica, S.A.</td>
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<td></td>
<td>09-cv20239 (S.D. Fla. 2009)</td>
<td>Latin Node, Inc.</td>
</tr>
<tr>
<td>India</td>
<td>10-cr-771 (S.D. Tex. 2010)</td>
<td>Pride Forasol S.A.S.</td>
</tr>
<tr>
<td></td>
<td>In re Westinghouse Air Brake Technologies Corp. (2008)</td>
<td>Westinghouse Air Brake Technologies Corporation</td>
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<td></td>
<td>07-cv-01699 (D.D.C. 2007)</td>
<td>Chandramowil Srinivasan</td>
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<tr>
<td></td>
<td>In re Diageo plc (2011)</td>
<td>Diageo plc</td>
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<tr>
<td></td>
<td>In re Paradigm B.V. (2007)</td>
<td>Paradigm B.V.</td>
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<tr>
<td></td>
<td>12-cv-01304 (D.D.C. 2012)</td>
<td>Pfizer - Wyeth LLC</td>
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<td>In re Allianz SE (2012)</td>
<td>Allianz SE</td>
</tr>
<tr>
<td>Iran</td>
<td>06-cr-00960 (S.D.N.Y. 2006)</td>
<td>Statoil ASA</td>
</tr>
<tr>
<td></td>
<td>12-cr-00418 (E.D. Va. 2012)</td>
<td>Tyco Valves &amp; Controls Middle East, Inc.</td>
</tr>
<tr>
<td>Iraq</td>
<td>In re AB Volvo (2008)</td>
<td>AB Volvo</td>
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<td></td>
<td>In re ABB Ltd. (2012)</td>
<td>ABB Ltd.</td>
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<td></td>
<td>09-12C (D.D.C. 2009)</td>
<td>Novo Nordisk A/S</td>
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<td>Israel</td>
<td>1-94-29 (S.D. Ohio 1994)</td>
<td>Steindler, Herbert B.</td>
</tr>
<tr>
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<td>In re Immucor Inc. (2007)</td>
<td>Immucor, Inc.</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>07-cr-00130 (S.D. Tex. 2007)</td>
<td>Baker Hughes Inc.</td>
</tr>
<tr>
<td>AGENCY &amp; ENFORCEMENT ACTION</td>
<td>FOREIGN OFFICIAL</td>
<td></td>
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<tr>
<td>DOJ: DPA, compliance monitor and fine of $16.8M</td>
<td>Greek healthcare providers, including doctors, working at publicly-owned hospitals in Greece</td>
<td></td>
</tr>
<tr>
<td>DOJ: Conviction</td>
<td>Haitian customs and tax officials</td>
<td></td>
</tr>
<tr>
<td>DOJ: Conviction and forfeiture</td>
<td>Telecommunications officials, including the Director General of Telecommunications D'Haiti (the state-owned telecommunications company)</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and $500K fine</td>
<td>Officials of state-owned entities and government agencies, including Empresa Hondurena de Telecomunicaciones and Comision National de Telecomunicaciones</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and $2M fine</td>
<td>Officials at Hondutel, the Honduran state-owned telecommunications company</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and fines of over $30M</td>
<td>Judges of the Customs, Excise, and Gold Appellate Tribunal, an administrative tribunal in India</td>
<td></td>
</tr>
<tr>
<td>DOJ: NPA and fine of $300K</td>
<td>Employees of the Indian Railway Board, government inspection agents and customs and excise officials</td>
<td></td>
</tr>
<tr>
<td>SEC: Civil settlement</td>
<td>Senior employees of two companies partially owned by the Indian government</td>
<td></td>
</tr>
<tr>
<td>SEC: $13M in disgorgement and $3M in civil penalties</td>
<td>Employees of Indian Government liquor stores, employees of Indian military canteen stores department, and other Indian government officials</td>
<td></td>
</tr>
<tr>
<td>SEC: $325K penalty</td>
<td>An official of India's Central Insecticides Board, product licensing officers, and Indian sales and excise tax and customs officials</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA, compliance monitor, and $1M fine</td>
<td>Senior Indonesian Ministry of Environment official</td>
<td></td>
</tr>
<tr>
<td>DOJ: NPA, compliance monitor, $1M penalty</td>
<td>Officials of Pertamina, the Indonesian national oil company</td>
<td></td>
</tr>
<tr>
<td>SEC: Injunction/cease and desist, $23M in disgorgement and $10M in civil penalties</td>
<td>Indonesian tax official representing the Directorate General</td>
<td></td>
</tr>
<tr>
<td>SEC: $26M in disgorgement</td>
<td>Employees of government owned hospitals</td>
<td></td>
</tr>
<tr>
<td>SEC: Injunction/cease and desist, and sanctions of $300K</td>
<td>Indonesian finance ministry and state oil company auditors</td>
<td></td>
</tr>
<tr>
<td>SEC: Cease and desist, $7M in disgorgement and $5M in civil penalties</td>
<td>Officials responsible for procuring the government insurance contracts</td>
<td></td>
</tr>
<tr>
<td>DOJ: DPA, compliance monitor, and fine of over $10M</td>
<td>The head of the Iranian Fuel Consumption Optimizing Organization, a subsidiary of the National Iranian Oil Company, and an advisor to Iran's Minister of Oil</td>
<td></td>
</tr>
<tr>
<td>DOJ: Plea and fine of over $2M</td>
<td>Officials of National Iranian Gas Company, a state-owned entity in Iran</td>
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<td>DOJ: DPA and $7M penalty</td>
<td>Iraqi state-owned companies, and government, including Ministry of Housing &amp; Construction, Ministry of Transport &amp; Communication and Finance Department of the Ministry of Oil</td>
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<td>DOJ: DPA and $17.1M fine</td>
<td>Regional companies of the Iraqi Electricity Commission, the Baghdad Mayoralty, and State Company Baghdad Electricity Distribution</td>
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<td>DOJ: Plea and fine of $250K</td>
<td>Officials of the Iraqi state-owned trading organization</td>
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<td>DOJ: DPA and $9M penalty</td>
<td>Representatives of the Iraqi State Company for Drugs and Medical Appliances</td>
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<td>DOJ: Plea and over $1.7M in penalties</td>
<td>Israeli Military Officer</td>
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<td>SEC: Civil settlement, injunction/cease and desist</td>
<td>Director of a public hospital</td>
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<td>DOJ: Plea and $500K fine</td>
<td>An advisor to the Jamaican Tourist Board and the Jamaican Minister of Tourism</td>
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<td>DOJ: Plea and $11M fine</td>
<td>State oil company (Kazakhoil)</td>
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<td>COUNTRY</td>
<td>CASE &amp; YEAR</td>
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<td>03-cr-406 (S.D.N.Y. 2003)</td>
<td>Williams, J. Bryan</td>
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<td>Liberia</td>
<td>No. 05-180-LRS-3 (E.D. Wa. 2005)</td>
<td>Novak, Richard John</td>
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<td>Mexico</td>
<td>10-cr-00664 (S.D. Tex. 2010)</td>
<td>ABB Inc.</td>
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<td>In re Orthofix Internatıon N.V. (2012)</td>
<td>Orthofix International N.V.</td>
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<td>In re Paradigm B.V. (2007)</td>
<td>Paradigm B.V.</td>
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<td>09-cv-03963 (S.D. Tex. 2009)</td>
<td>Benton, Bobby</td>
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<td>Nicaragua</td>
<td>No. 02-0113 (N.D. Ga. 2002)</td>
<td>BellSouth Inc.</td>
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<td>No. 09-071 (S.D. Tex. 2009); In re Halliburton Co. &amp; KRG, Inc. (2009)</td>
<td>Halliburton - Kellogg Brown &amp; Root LLC</td>
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<td>07-cr-00004 (S.D. Tex. 2007)</td>
<td>Vetco Gray Controls Ltd.</td>
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<td>AGENCY &amp; ENFORCEMENT ACTION</td>
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<tr>
<td>DOJ: Imprisonment, plea, and fine of over $3.5M</td>
<td>President and former Prime Minister of Kazakhstan</td>
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<td>DOJ: DPA and $15M fine</td>
<td>Publically-employed doctors</td>
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<td>SEC: Compliance monitor, injunction/cease and desist, $5.9M disgorgement and $10.5M fine</td>
<td>Official employed in the state oil and gas companies</td>
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<tr>
<td>DOJ: Plea and imprisonment</td>
<td>An official in the Kenyan Project Implementation Unit</td>
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<tr>
<td>SEC: Compliance monitor, injunction/cease and desist, and $10M in disgorgement</td>
<td>Tax officials, government officials within the Kyrgyz Tamekisis (entity regulating the sale and export of Kyrgyz tobacco), and regulators of regional tobacco growers</td>
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<tr>
<td>DOJ: Plea</td>
<td>Two Liberian embassy officials, the Director of the National Commission of Higher Education and the Director General of Education of Liberia</td>
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<tr>
<td>SEC: Injunction/cease and desist and civil settlement of over $19M</td>
<td>Libyan social security agency officials</td>
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<td>DOJ: DPA and fine of over $8M</td>
<td>Officials at the state-owned Ignalina Nuclear Power Plant</td>
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<tr>
<td>SEC: Civil penalty of $500K</td>
<td>Government hospital administrators and doctors</td>
<td></td>
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<tr>
<td>DOJ: Plea and $500K fine</td>
<td>Officials of state-owned Telekom Malaysia Berhad</td>
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<td>DOJ: DPA and fine of over $17M</td>
<td>Officials at a Mexican state-owned utility company (Comision Federal de Electricidad)</td>
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<tr>
<td>DOJ: DPA and fine of over $11M</td>
<td>Officials and employees of the Mexican Policia Federal Preventiva, Mexican Coordinacion General de Transportes Aereos Presidenciales, and Gobierno del Estado de Sinaloa</td>
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<td>DOJ: DPA</td>
<td>Customs Administrator Operations Assistant for the Mexican customs service</td>
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<td>DOJ: DPA and fine of over $2M</td>
<td>Officials and employees at Instituto Mexicano del Seguro Social, a Mexican government-owned healthcare and social services organization</td>
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<td>DOJ: DPA, compliance monitor and $1M penalty</td>
<td>Official of Pemex, the Mexican national oil company</td>
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<td>DOJ: DPA and fine of $4M</td>
<td>Mexican veterinarians responsible for certifying meat exports</td>
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<td>SEC: Civil penalty</td>
<td>Mexican customs officials</td>
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<td>SEC: Civil penalty of $150K</td>
<td>Chairman of the Nicaraguan legislative committee with oversight of Nicaraguan telecommunications</td>
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<td>DOJ: Plea and fine of over $5M</td>
<td>Officials of the Nigerian National Petroleum Investment Management Services</td>
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<td>DOJ: Plea and imprisonment</td>
<td>Official with the Independent National Election Commission of Nigeria</td>
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<td>DOJ: NPA and fine of over $2.5M</td>
<td>Nigerian customs officials</td>
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<td>DOJ: Compliance monitor, plea and fine of over $400M; SEC: $177M in disgorgement</td>
<td>Executive branch officials, officials of Nigerian National Petroleum Company, and officials of the government-controlled company formed to develop the Bonny Island Project</td>
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<td>DOJ: Compliance monitor, plea and fine of $8M</td>
<td>Officials of the Nigerian Customs Service</td>
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<td>DOJ: DPA, compliance monitor and $22M fine</td>
<td>Officials of state-owned Nigerian National Petroleum Corporation (NNPC), officials of NNPC's majority-owned joint venture operator, a senior official in the Nigerian executive branch, officials in the dominant political party in Nigeria</td>
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<td>COUNTRY</td>
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<td>In re Bristow Group Inc. (2007)</td>
<td>Bristow Group Inc.</td>
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<td>12-cv-01304 (D.D.C. 2012)</td>
<td>Pfizer - Wyeth LLC</td>
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<td>09-cr-00397 (E.D. Va. 2009)</td>
<td>Jumet, Charles Paul Edward</td>
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<td>Poland</td>
<td>11-cr-00099 (D.D.C. 2011)</td>
<td>Johnson &amp; Johnson</td>
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<td>12-cv-2045 (D.D.C. 2012)</td>
<td>Eli Lilly and Company</td>
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<td>Romania</td>
<td>11-cr-00099 (D.D.C. 2011)</td>
<td>Johnson &amp; Johnson</td>
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<td>Russia</td>
<td>10-cr-64 (D.D.C. 2010)</td>
<td>DaimlerChrysler Automotive Russia SAO</td>
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<td>12-cv-2045 (D.D.C. 2012)</td>
<td>Eli Lilly and Company</td>
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<td>08-cv-02167 (D.D.C. 2008)</td>
<td>Siemens - Siemens Aktiengesellschaft</td>
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<td>Saudi Arabia</td>
<td>01-cr-687 (S.D.N.Y. 2001)</td>
<td>Cantor, Joshua C.</td>
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<td>12-cr-00418 (E.D. Va. 2012)</td>
<td>Tyco Valves &amp; Controls Middle East, Inc.</td>
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<td>12-cv-01304 (D.D.C. 2012)</td>
<td>Pfizer - Wyeth LLC</td>
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<td>09-cr-00162 (C.D. Cal. 2009)</td>
<td>Control Components Inc.</td>
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<td>06-cr-00398 (D. Ore. 2006)</td>
<td>SSI International Far East, Ltd.</td>
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<td>In re Diageo plc, No. 34-64978 (2011)</td>
<td>Diageo plc</td>
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<td>In re Micrus Corp (2005)</td>
<td>Micrus Corp.</td>
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<td>Taiwan</td>
<td>07-cv-01735 (D.D.C. 2007)</td>
<td>Fu, Monty</td>
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<td>08-cr-00059 (C.D. Cal. 2009)</td>
<td>Green, Gerlad</td>
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<td>In re Diageo plc (2011)</td>
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<td>In re Micrus Corp (2005)</td>
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<td>SEC: Injunction/ Cease and desist</td>
<td>Tax officials in Nigerian Delta State government and Nigerian Lagos State government</td>
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<td>SEC: Injunction/ Cease and desist and civil penalty of $40K</td>
<td>Officials of the Nigerian National Petroleum Investment Management Services</td>
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<td>SEC: Injunction/ Cease and desist</td>
<td>Equerry of the Sultan of Oman</td>
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<td>SEC: $26M in disgorgement</td>
<td>Employees of government-owned hospitals</td>
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<tr>
<td>DOJ: DPA and fine of over $11M</td>
<td>Officials and employees of the Republica de Panama Autoridad Aeronautica Civil</td>
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<tr>
<td>DOJ: Plea and imprisonment</td>
<td>Deputy Administrator of Panama’s Maritime Ports Authority and other officials</td>
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<td>SEC: Injunction/ Cease and desist and civil penalty of $300K</td>
<td>Officials at the Phillippines Bureau of Customs, officials at the Phillippine Economic Zone Area, and officials at state-owned airlines that conducted business in the Phillippines</td>
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<tr>
<td>DOJ: DPA and fine of over $21M</td>
<td>Publically-employed doctors and hospital administrators</td>
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<tr>
<td>SEC: Injunction/ Cease and desist, $20.6M in disgorgement and $8.7M in civil penalties</td>
<td>Officials at regional government health authorities</td>
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<tr>
<td>SEC: Injunction/ Cease and desist, compliance monitor and civil penalty of $500K</td>
<td>Director of the Silesian Health Fund, a regional government authority</td>
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<tr>
<td>DOJ: DPA and fine of over $21M</td>
<td>Publically-employed doctors and pharmacists</td>
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<tr>
<td>DOJ: Plea</td>
<td>Employees and agents of state owned enterprises</td>
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<td>DOJ: DPA and fine of over $27.36M fine</td>
<td>Russian federal and municipal government officials, and Russian military officials</td>
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<td>DOJ: DPA and $70M fine</td>
<td>Russian customs officials</td>
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<td>DOJ: DPA and $15M fine</td>
<td>Publically-employed doctors</td>
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<td>SEC: Injunction/ Cease and desist and civil penalty of over $29M</td>
<td>Member of Russian parliament</td>
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<td>SEC: Compliance monitor and civil penalty of $350M</td>
<td>Unspecified officials at state-owned medical entities</td>
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<td>DOJ: Plea</td>
<td>Director of the Issues and Vaults Department of the Saudia Arabian Monetary Agency</td>
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<td>DOJ: Plea and fine of over $2M</td>
<td>Officials of Saudi Aramco, an oil and gas company that was wholly owned, controlled and managed by the government</td>
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<tr>
<td>SEC: $26M in disgorgement</td>
<td>Customs official</td>
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<td>DOJ: Compliance monitor, plea and fine of over $18M</td>
<td>Employees of Korea Hydro Nuclear Power</td>
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<td>DOJ: Plea and fine of $7.5M</td>
<td>Managers of government-owned steel production companies</td>
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<td>SEC: Injunction/ Cease and desist, and sanctions of over $16M</td>
<td>Korean customs service official and Korean military officers</td>
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<td>DOJ: Civil penalty of $450K</td>
<td>Doctors at public hospitals</td>
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<td>SEC: Injunction/ Cease and desist and civil penalty of $75K</td>
<td>Government doctors</td>
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<td>DOJ: Plea and $500K fine</td>
<td>Officials of the Taiwan Railway Administration and Taiwanese legislators</td>
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<td>DOJ: NPA, compliance monitor and fine of over $5M</td>
<td>Official of the Thai government-owned tobacco industry</td>
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<td>DOJ: Imprisonment</td>
<td>A senior official of the Tourism Authority of Thailand and deputy chair of Thai political party</td>
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<td>SEC: Injunction/ Cease and desist, and sanctions of over $16M</td>
<td>Thai customs officials and members of Thai parliament</td>
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<td>DOJ: NPA, compliance monitor and $450K penalty</td>
<td>Doctors at public hospitals</td>
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<td>COUNTRY</td>
<td>CASE &amp; YEAR</td>
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<td>UAE</td>
<td>09-cr-00162 (C.D. Cal., 2009)</td>
<td>Control Components Inc.</td>
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<td>United Kingdom</td>
<td>08-cr-110 (C.D. Cal., 2008)</td>
<td>Self, Martin Eric</td>
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<td>Uzbekistan</td>
<td>In re Tenaris, S.A. (2011)</td>
<td>Tenaris S.A.</td>
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<td>10-cv-2849 (N.D. Cal. 2010)</td>
<td>Veraz Newtows, Inc.</td>
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<td>SEC: Injunction/Cease and desist and civil penalty of $300K</td>
<td>Officials of the Turkish Ministry of Agrcultural and Rural Affairs</td>
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<td>DOJ: DPA</td>
<td>Turkmen customs, immigration, tax and labor officials</td>
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<td>DOJ: Compliance monitor, plea and fine of over $18M</td>
<td>Employees of National Petroleum Construction Company</td>
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<td>DOJ: Plea, probation and fine</td>
<td>Ministry of Defense official</td>
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<td>DOJ: NPA and $3.5M fine</td>
<td>Officials of a subsidiary of the state-owned holding company of Uzbekistan’s oil and gas industry</td>
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<tr>
<td>DOJ: DPA</td>
<td>Officials and members of the Board of Directors of a Venezuelan-owned oil company</td>
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<td>DOJ: Plea, fine and probation</td>
<td>Government agency officials (including Ministries of Transport, Industry and Public Safety)</td>
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<td>SEC: Injunction/Cease and desist and civil penalty of $300K</td>
<td>CEO of a government-controlled telecommunications company</td>
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<td>DOJ: Plea and fine of over $2M</td>
<td>Vice-President of Operations and other officials at TeleYemen (the state-owned telecommunications company), officials from the Ministry of Telecommunications</td>
<td></td>
</tr>
</tbody>
</table>
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