Chapter 13

Defending Clients in Foreign Corrupt Practices Act Investigations

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The authors would like to thank Steven S. Michaels, formerly a Counsel at Debevoise & Plimpton LLP, Michael T. Leigh, formerly an Associate at Debevoise & Plimpton LLP, and Joshua J. Smith, an Associate at Debevoise & Plimpton LLP for their assistance in the preparation of this chapter.

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I. WHAT IS THE FCPA?

§ 13:1 Introduction

The U.S. Foreign Corrupt Practices Act (the FCPA) is a critical federal statute affecting U.S. and non-U.S. companies, as well as individuals, involved in international commerce affecting the United States. The FCPA regulates a broad range of conduct related to such international commerce in two fundamental ways.

First, the FCPA contains anti-bribery provisions that are applicable to issuers under the 1934 Securities Exchange Act (the 1934 Act), other U.S. companies, partnerships, legal entities, citizens and resident aliens, and their agents, directors, employees and shareholders when acting on their behalf, as well as any

other person or entity transacting business via U.S. interstate commerce. These anti-bribery provisions make it unlawful for regulated persons and entities to provide or promise, directly or indirectly, and with a corrupt intent, any thing of value to non-U.S. public officials for the purpose of obtaining or retaining business or improper business advantages or otherwise directing business to any person.[1]

Second, the statute's books and records, and internal controls provisions require issuers under the 1934 Act to maintain accurate corporate books and records and a system of effective internal controls to prevent the misuse of corporate funds and to assure that the accounting for transactions accords with Generally Accepted Accounting Principles (GAAP) or other accounting guidelines such as the International Financial Reporting Standards (IFRS).[2] The books and records, and internal controls provisions apply generally to such issuers in both bribery cases and cases involving other corporate misconduct, and are a recurring basis for U.S. government regulatory action. Individuals and nonissuer entities may be liable under the aiding, abetting, conspiracy and control person provisions of the FCPA, the 1934 Act and the U.S. criminal code for civil and criminal violations of the FCPA's books and records provisions; similar derivative liability may be imposed in a broad array of contexts for breaches of the FCPA's anti-bribery provisions.[3]

FCPA enforcement reached an apex in 2016, with a combined total of 27 civil and criminal enforcement actions collecting ap-

[Section 13:1]

[1]See 15 U.S.C.A. § 78dd-1 to 78dd-3.

[2]15 U.S.C.A. 78m(b)(2)(A) to (B).

[3]See 15 U.S.C.A. § 78t (control person and civil aiding and abetting liability); 18 U.S.C.A. § 2, 371 (aiding and abetting and conspiracy liability for criminal offenses). Potentially complex questions are raised by whether companies and nationals not otherwise covered by the FCPA and whose acts are entirely extra-territorial may be liable as aiders, abettors or co-conspirators. See U.S. v. Yakou, 428 F.3d 241, 251-54 (D.C. Cir. 2005) (aiding and abetting liability could not be imposed when Congress identified in the Brokering Amendments to the Arms Export Control Act which third parties could be held liable, barring 18 U.S.C.A. § 2 liability for non-U.S. persons not covered by such amendments). See also U.S. v. Hoskins, 123 F. Supp. 3d 316, 322-27 (D. Conn. 2015) (conspiracy liability could not be imposed on a nonresident foreign national who was not an agent of domestic concern and did not take actions in furtherance of a corrupt payment within the territory of the United States because Congress clearly did not intend such individuals to be subject to the FCPA).

proximately $2.41 billion for the U.S. treasury.[4] FCPA enforcement first peaked in 2010, with more than 150 criminal and 80 civil investigations underway during that year[5] and, altogether, nearly $1.8 billion paid or agreed to be paid by corporations and individuals to settle FCPA-related charges. While the overall number of enforcement actions and total amounts paid in settlement were lower from 2011 to 2015, this decrease did not signify a lessening of continued vigorous enforcement by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC).[6] Instead, this decline may be attributed in part to the efforts of many U.S.-based or U.S.-listed companies to enhance their compliance programs in response to the government's aggressive FCPA enforcement over the past decade.

Despite a transition of administration in 2017, the SEC and DOJ appear set to continue their aggressive law enforcement tactics of recent years, including through the use of industry-wide enforcement sweeps. These efforts build on the SEC's 2009 agency-wide reorganization that established a dedicated, 30-person FCPA enforcement unit in the Division of Enforcement,[7] as well as DOJ's creation in 2010 of a special FCPA Unit currently consisting of more than 35 prosecutors,[8] as well as DOJ's Kleptocracy Asset Recovery Initiative designed to recover ill-

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[4]Debevoise & Plimpton LLP, The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions 3, FCPA Update Vol. 8 No. 6 (Jan. 2017), http://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017.

[5]Organization for Economic Cooperation and Development, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 12 (Oct. 2010), http://www.oecd.org/dataoecd/10/49/46213841.pdf.

[6]See, e.g., Daniel Suleiman, DOJ Deputy Chief of Staff for the Criminal Division, Remarks at the Minnesota State Bar Association's 37th Annual International Business Law Institute (May 9, 2013), http://www.justice.gov/criminal/pr/speeches/2013/crm-speech-1305091.html. See also Lanny A. Breuer, Remarks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act, (Nov, 16, 2012), www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html (noting the number of FCPA enforcement actions in 2012 was still far higher than any seen in the first 30 years of the statute's existence).

[7]See Robert Khuzami, SEC Director of Enforcement, Address at the New York City Bar Association: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm.

[8]Press Release, SEC, Kara Novaco Brockmeyer, Chief of FCPA Unit, to Leave SEC After 17 Years of Service (June 28, 2010), https://www.sec.gov/news/press-release/2017-76.

gotten proceeds that were laundered through the United States.[9] Those specialized units have continued to add staff and resources over the past several years.

From 2004-2015, fines, disgorgements and penalties assessed against corporate entities far exceeded those for the entirety of the first 25 years of the FCPA's history. All of the top 10 most expensive FCPA-related corporate resolutions date from 2008 or more recently.

In late 2008 and early 2009, DOJ and the SEC recorded two of the largest criminal and civil settlements in history through resolution of cases against Siemens AG and Halliburton Company and its subsidiary Kellogg, Brown and Root LLC (KBR). In December 2008, Siemens AG agreed to pay a combined $800 million to settle charges by DOJ and the SEC that it violated the FCPA (and, on the same day, Siemens AG agreed to pay EUR 395 million in fines to Bavarian authorities, adding to a fine of EUR 201 million it had already paid in a settlement of corruption allegations relating to its COM division in October 2007).[10] On the heels of the Siemens settlement, Halliburton and KBR agreed to pay a total of $579 million for alleged FCPA violations in connection with a series of contracts in Nigeria.[11]

Several of the largest FCPA-related corporate resolutions occurred in 2010 alone. In March 2010, BAE Systems Plc (BAES) pleaded guilty to conspiring to defraud the United States by impairing and impeding its lawful functions, making false statements about its FCPA compliance program and violating the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR).[12] BAES incurred a $400 million criminal fine.[13] In June 2010, the French construction and engineering firm Technip SA, incurred a criminal fine of $240 million pursu-

[9] Lanny A. Breuer, Ass't Att'y Gen., Speech at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

[10] See Press Release, Siemens AG, Siemens AG reaches a resolution with German and U.S. authorities (Dec. 15, 2008), http://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2008/corporate_communication/axx20081219.htm.

[11] See SEC v. Halliburton Co., Civil Action No. 4:09-399, Litig. Release No. 20897A (S.D. Tex. Feb. 11, 2009).

[12] Press Release, DOJ, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

[13] Press Release, DOJ, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), available at http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

ant to a deferred prosecution agreement in DOJ's case stemming from allegations that Technip bribed Nigerian officials to win multi-billion dollar contracts in connection with a liquefied natural gas plant.[14] Technip also agreed to disgorge $98 million pursuant to a settlement with the SEC.[15]

The emphasis on large penalties continued through 2011 and 2012. In those years, DOJ resolved two cases that were remarkable for the size and scope of the remedies imposed. In April 2011, DOJ resolved its investigation into Japanese construction firm JGC Corporation, resulting in a fine of $218.8 million.[16] JGC neither traded shares on U.S. securities markets nor was a subsidiary of a U.S. issuer. Instead, DOJ alleged that JGC used bank accounts located in New York to make wire transfers of corrupt payments from the Netherlands to Switzerland.[17] In 2012, the $54.6 million settlement with the Marubeni Corporation marked not only the single largest criminal fine that year but also the culmination of DOJ's largest prosecution of a single bribery scheme, that of the TSKJ joint venture related to Bonny Island, Nigeria.[18] Enforcement actions brought against all the corporate entities and individuals associated with the alleged Nigerian bribery scheme have collectively resulted in over $1.7 billion in fines, penalties and disgorgement.[19]

In 2013, two corporate resolutions joined the FCPA top-ten list (though only one remains in the top 10), all of the nine corporate FCPA enforcement actions were resolved for at least $1 million between DOJ and the SEC assessments, and only two of those actions resulted in a fine below eight figures. In May 2013, the

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[14]Press Release, DOJ, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (Jun. 28, 2010), available at http://www.justice.gov/opa/pr/2010/June/10-crm-751.html.

[15]Press Release, SEC, SEC Charges Technip with FCPA Violations (June 28, 2010), available at http://www.sec.gov/news/press/2010/2010-110.htm.

[16]Press Release, DOJ, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (April 6, 2011), available at http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

[17]United States v. JGC Corp., Criminal No. 11-260, Information 17, 22 (S.D. Tex. Apr. 6, 2011).

[18]Press Release, DOJ, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty (Jan. 17, 2012), available at http://www.justice.gov/opa/pr/2012/January/12-crm-060.html.

[19]Cite to DOJ's Marubeni press release, which has the $1.7B total—https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546. It also has a nice run down of all the related cases.

France-based oil and gas company Total S.A. agreed to pay more than $398 million to settle charges in connection with the payment of bribes to intermediaries of an Iranian government official who then exercised his influence to help the company obtain valuable contracts to develop significant oil and gas fields in Iran.[20] In November 2013, the Swiss oil equipment and services corporation Weatherford International, settled FCPA violations that occurred from 2000 to 2011 for penalties and fines totaling $152.5 million.[21]

In April 2014, yet another corporate resolution joined the FCPA top-ten most-expensive list when Alcoa agreed to pay $384 million to settle charges stemming from its subsidiaries' repeated bribes to government officials in Bahrain.[22] Then, in December 2014, the French company Alstom SA and three of its subsidiaries entered into a $772 million settlement with DOJ, the largest criminal fine ever imposed for violations of the FCPA, the second-largest FCPA corporate resolution to date, and the largest FCPA settlement reached to date against a foreign entity that does not trade shares on U.S. securities markets.[23]

The year 2015 saw no large-scale corporate resolutions, with the aggregate monetary recovery falling just short of $140 million, a significant drop from previous years, and a total of only two corporate criminal matters brought by DOJ. However, the longer-term trend of large corporate fines in FCPA matters continued in 2016, as three enforcement actions joined the top-ten list. In February 2016, VimpelCom Ltd., the world's sixth-largest telecommunications company settled criminal and civil FCPA violations stemming from $114 million in payments to a Uzbek government official over six years for $795 million, split between the SEC and the Public Prosecution Service of the

[20]In re Total, S.A., Criminal No: 13-239, Deferred Prosecution Agreement (E.D. Va. May 29, 2013).

[21]United States v. Weatherford International Ltd., Criminal No. 13-00733, Deferred Prosecution Agreement (S.D. Tex. Nov. 26, 2013), available at http://www.justice.gov/criminal/fraud/fcpa/cases/weatherford-international-ltd/Weatherford-International-DPA.pdf. (In the same settlements, the company also agreed to pay another $100 million to settle charges by DOJ and the SEC that it also violated US sanctions and export control laws. See [cite to SEC and DOJ press releases].)

[22]Press Release, S.E.C. 13-4, SEC Charges Alcoa With FCPA Violations (Apr. 9, 2014).

[23]Press Release, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), available at https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

Netherlands.[24] In September 2016, Och-Ziff Capital Management entered into a deferred prosecution agreement with DOJ and settled with the SEC, paying a total of $412 million in fines and penalties.[25] And in December 2016, Teva Pharmaceuticals Industries Ltd. settled with DOJ and the SEC for $519 million for the bribery of government officials in Russia, Ukraine, and Mexico.[26] Furthermore, as of July 2016, more than 100 companies had disclosed open or ongoing FCPA investigations, and some that have not yet been resolved undoubtedly will be resolved with significant monetary settlements.[27]

More significantly, 2016 saw the introduction of DOJ's Foreign Corrupt Practices Act Plan and Guidance, more commonly referred to as the Pilot Program.[28] The Pilot Program is a 12-month experiment to encourage voluntary self-reporting of FCPA violations. Participants in the Pilot Program are eligible for mitigating credits to reduce fines up to 50% from the lower end of the penalty range in the U.S. Sentencing Guidelines. As a precondition, Pilot Program participants must disclose all relevant information about individuals involved in the alleged misconduct. Reductions in fines are based on a company's voluntary self-reporting, full cooperation, and timely remediation.[29] Under the Pilot Program, self-reporting led to three nonprosecution agreements and seven declinations.[30]

In the last eight years DOJ has committed itself to the aggres-

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[24] Press Release, DOJ, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

[25] Press Release, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016), https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213.

[26] Press Release, DOJ, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016), https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt.

[27] Many of these investigations were parallel. The Corporate Investigations List, The FCPA Blog (July 6, 2016), available at http://www.fcpablog.com/blog/2016/7/6/the-corporate-investigations-list-july-2016.html.

[28] DOJ, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance ("Pilot Program"), https://www.justice.gov/criminal-fraud/pilot-program.

[29] DOJ, Pilot Program 8, https://www.justice.gov/criminal-fraud/pilot-program.

[30] See DOJ, Declinations (June 29, 2017), https://www.justice.gov/criminal-f

sive pursuit of individuals as well as corporations. In 20092010 DOJ charged more than 50 individuals and achieved civil or criminal judgments or settlements requiring individuals to pay nearly $10 million.[31] In 2011 alone, more than 36 persons were indicted, charged civilly, tried, or sentenced on FCPA-related offenses.[32] In conjunction with a plea agreement reached in March 2011, Jeffrey Tesler agreed to forfeit $150 million—the largest FCPA-related monetary settlement ever reached with an individual.[33] Before settling the case, Tesler had unsuccessfully fought his extradition, arguing before the London High Court that there was an insufficient U.S. nexus to justify extradition.[34] After the flurry of activity in 2011, new prosecutions of individuals decreased in 2012, with criminal and civil charges initiated against only five individuals.[35] Yet that same year included the sentencing of 16 previously-charged defendants who either pleaded guilty or were convicted. In 2013, the number of enforcement actions against individuals rose again, to a total of 13.[36] In 2014, DOJ and the SEC each concluded six cases against individuals, while in 2015,

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raud/pilot-program/declinations (last visited July 6, 2017). See also Debevoise & Plimpton LLP, The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions 8, FCPA Update Vol. 8, No. 6 (Jan. 2017), http://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017.

[31] Lanny A. Breuer, Ass't Att'y Gen., Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html; see also Press Release, DOJ, Department of Justice Secures More Than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-085.html; Debevoise & Plimpton LLP, Prosecuting Foreign Middlemen: Jeffrey Tesler's Plea and $150 Million Forfeiture, and DOJ Theories to Prosecute Non-U.S. Individuals, FCPA Update Vol. 2, No. 7 (Mar. 2011), http://www.debevoise.com/~/media/files/insights/publications/2011/03/fcpa%20update/files/view%20the%20update/fileattachment/fcpaupdatemarch2011.pdf.

[32] See Richard L. Cassin, 2011 FCPA Enforcement Index, FCPA Blog (Jan. 2, 2012), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html.

[33] United States v. Tesler, No. H-09-098, Plea Agreement (S.D. Tex. Mar. 11, 2011), ¶ 1. In 2013, Uriel Sharef, a former officer and board member of Siemens AG, agreed to pay a $275,000 civil penalty to settle the SEC enforcement action, marking the second highest penalty assessed against an individual in an FCPA case. Former Siemens Executive Uriel Sharef Settles Bribery Charges, Litigation Release No. 22676 (Apr. 16, 2013).

[34] Jeffrey Tesler v. Government of the United States of America, [2011] EWHC 52 (Admin) (Eng.).

[35] See Richard L. Cassin, 2012 Enforcement Index, FCPA Blog (Jan. 2, 2013), http://www.fcpablog.com/blog/2013/1/2/2012-enforcement-index.html.

[36] See Richard L. Cassin, 2013 Enforcement Index, FCPA Blog (Jan. 2, 2014), http://www.fcpablog.com/blog/2014/1/2/2013-fcpa-enforcement-index.html.

eight individuals were sentenced for criminal FCPA charges and two individuals settled FCPA enforcement actions with the SEC.[37] Vigorous individual enforcement continued in 2016, with the settlement of 15 individual SEC enforcement actions and the guilty pleas of 10 individuals for criminal enforcement.[38]

In recent years, both DOJ and the SEC have experienced setbacks in enforcement actions against individuals. In 2011 alone, DOJ suffered trial court losses in three major FCPA prosecutions. In *U.S. v. Aguilar*, DOJ initially obtained convictions against Lindsey Manufacturing Company and its CEO and former CFO for conspiracy and substantive violations of the FCPA, the first conviction after trial of a company under the FCPA. However, the convictions were overturned by the federal district court based on findings of prosecutorial misconduct.[39] In *U.S. v. O'Shea*, DOJ charged a former manager of the Texas unit of ABB, Ltd., a Swiss electrical engineering company. The federal district court granted O'Shea's motion at the conclusion of trial to dismiss 12 counts of substantive FCPA violations and one charge of conspiracy to violate the FCPA.[40] In December 2011, a federal district court dismissed all of the conspiracy charges against six defendants in the so-called Africa-sting cases.[41] More recently, in an August 2015 ruling relating to DOJ's prosecution of Lawrence Hoskins in the Alstom matter, the U.S. District Court for the District of Connecticut granted a partial motion to dismiss that limited the scope of conspiracy and aiding-and-abetting charges in FCPA matters.[42] Similarly, in connection with the 2015 criminal trial of Joseph Sigelman, former CEO of PetroTiger, a key government witness admitted giving false testimony, leading the

[37]See Richard L. Cassin, 2014 Enforcement Index, FCPA Blog (Jan. 5, 2015), http://www.fcpablog.com/blog/2015/1/5/the-2014-fcpa-enforcement-index.html; Richard L. Cassin, 2015 Enforcement Index, FCPA Blog (Jan. 4, 2016), http://www.fcpablog.com/blog/2016/1/4/the-2015-fcpa-enforcement-index.html.

[38]See Richard L. Cassin, 2016 Enforcement Index, FCPA Blog (Jan. 3, 2016), http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html.

[39]U.S. v. Aguilar, Criminal No. 10-1031, Order Granting Motion to Dismiss (C.D. Cal. Dec. 1, 2011).

[40]Richard L. Cassin, O'Shea Acquitted On All Counts, FCPA Blog (Jan. 17, 2012), http://www.fcpablog.com/blog/2012/1/17/oshea-acquitted-on-all-counts.html.

[41]C.M. Matthews, Judge Tosses Conspiracy Charges in Landmark Bribery Case, Dow Jones Newswires (Dec. 22, 2011).

[42]United States v. Hoskins, Criminal No. 3:12-00238-JBA, Ruling on Defendant's Second Motion to Dismiss the Indictment (D.Conn. Aug. 13, 2015).

government to agree that Sigelman could plead guilty to a single conspiracy charge and receive no jail time.[43]

The SEC also has suffered losses as judicial scrutiny of the agency's actions has increased. In 2013, in *Gabelli v. SEC*, the Supreme Court rejected the SEC's argument that the "discovery rule" applies when the government brings an enforcement action for civil penalties, instead holding that the statute of limitations for filing civil penalty actions initiates when the alleged fraud or wrongful conduct is committed or finished.[44] In another case, a U.S. District Judge dismissed the SEC's complaint against Herbert Steffen, a former Siemens executive, on the basis that personal jurisdiction over the German national exceeded the limits of due process.[45]

As it has sought to charge individuals, the government has employed novel theories to support individual liability as they seek to charge individuals. In 2009, for example, the SEC charged two executives with control person liability for bribery-related books and records and internal controls violations, citing Section 20(a) of the 1934 Act.[46] The SEC had previously employed control person liability in an FCPA context less than a handful of times in the history of the FCPA's enforcement.[47] In 2010, the SEC announced the first-ever settlement with a corporate entity that was not an issuer or a subsidiary or other affiliate of an issuer under the 1934 Act—Panalpina, Inc.—holding Panalpina liable as the agent of the issuers. The SEC alleged that Panalpina paid bribes as an agent of its U.S.-based customers that were public

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[43]United States v. Sigelman, Criminal No. 1-14-00263, Sentencing Tr. (D.N.J. June 16, 2015).

[44]Gabelli v. S.E.C., 568 U.S. 442, 133 S. Ct. 1216, 185 L. Ed. 2d 297, Fed. Sec. L. Rep. (CCH) P 97299 (2013). The SEC suffered another recent loss before the Supreme Court in Kokesh v. S.E.C., 137 S. Ct. 1635, 198 L. Ed. 2d 86, Fed. Sec. L. Rep. (CCH) P 99733 (2017) (holding that the disgorgement remedy is punitive, and so may not be applied for conduct outside the five year statute of limitations for government actions set out in 28 U.S.C.A. § 2462).

[45]U.S. S.E.C. v. Sharef, 924 F. Supp. 2d 539, Fed. Sec. L. Rep. (CCH) P 97292 (S.D. N.Y. 2013). However, the Steffen loss can distinguished by unique facts relevant to him, particularly his advanced age, lack of personal involvement in the bribery scheme, and sanctions levied against him by the German government.

[46]See SEC v. Nature's Sunshine Products, Inc., Civil Action No. 2:09-0672 (D. Utah 2009).

[47]See, e.g., SEC v. Murphy, Litigation Release No. 17651 (Aug. 1, 2002); SEC v. Triton Energy Corp., Litigation Release No. 15266 (Feb. 27, 1997).

companies.[48] The SEC had never before used this theory of liability against a non-United States issuer.[49] In December 2009 and March 2010, DOJ demonstrated its willingness to utilize criminal statutes other than the FCPA to punish foreign bribe recipients.[50] And in August 2010, the SEC brought FCPA enforcement actions against non-U.S. citizens under a theory that merely causing an act in furtherance of a bribe in the United States (e.g., by sending e-mails to, or receiving e-mails from, the United States) was sufficient to establish jurisdiction.[51]

In addition to the cases cited above, several other enforcement actions highlight multiple trends in the FCPA regulatory enforcement arena: the focus on the prosecution of individuals, the rise in the severity of punishments imposed on those found to be in violation of the FCPA, the expansion of the breadth of DOJ's enforcement to include industry-wide investigations and prosecutions against non-U.S. citizens, and the promotion of cooperation by providing incentives to do so. In *SEC v. Summers*, the SEC filed several charges, including aiding and abetting Pride International, Inc.'s alleged bribes to secure an improper advantage in obtaining the payment of receivables, an act not typically a basis for SEC charges.[52] In January 2010, in a separate matter relating to the industry that sells to foreign military and police departments, a sting operation involving approximately 150 FBI agents led to the indictment of 22 individuals.[53] In *United States v. Esquenazi,* a U.S. District Judge sentenced Joel Esquenazi, the former president of a Florida-based telecommunications company who was found guilty of conspiracy to

[48]See Press Release, DOJ, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4. 2010), http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

[49]See Ashby Jones, With Panalpina Case, SEC Spreading its Wings on Foreign Corruption, WSJ Law Blog (Nov. 5, 2010), http://blogs.wsj.com/law/2010/11/05/with-panalpina-case-sec-spreading-its-wings-on-foreign-corruption; see also Thomas Huddleston, Jr., $236.5M Panalpina Settlement Shows SEC Spreading its Wings Overseas, Corporate Counsel (Nov. 17, 2010), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202474965088.

[50]See United States v. Esquenazi, Criminal No. 09-21010 (S.D. Fla. 2009).

[51]See SEC v. Turner, Civil Action No. 10-01309 (D.D.C. Aug. 4, 2010).

[52]See SEC v. Summers, Civil Action No. 4:10-02786, Complaint (S.D. Tex. 2010); SEC Charges Former Employee of Pride International with Violating the Foreign Corrupt Practices Act, Litigation Release No. 21617 (Aug. 5, 2010).

[53]See Press Release, DOJ, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

violate the FCPA as well as substantive FCPA and FCPA-related charges, to more than seven years in prison—the longest prison sentence for an FCPA violation to date.[54] In May 2014 the United States Court of Appeals for the Eleventh Circuit affirmed Esquenazi's conviction and sentence, and the U.S. Supreme Court later denied certiorari.[55]

Another trend in FCPA enforcement is the prevalent use of deferred prosecution agreements (DPAs) and nonprosecution agreements (NPAs) to settle cases. Without exception, every criminal enforcement action against corporate parent entities in 2012, 2013, and 2015 was resolved through one of these two mechanisms (there has been a recent break in this pattern, with the 2014 guilty pleas from Alstom S.A. and Marubeni Corporation and the 2016 guilty pleas of Odebrecht S.A. and Braskem S.A.).[56] Further signaling this expanded use of DPAs and NPAs, the SEC for the first time used a NPA to settle an FCPA case in its agreement with the Ralph Lauren Corporation in 2013,[57] and since then has occasionally used both NPAs and DPAs to resolve enforcement proceedings, including in FCPA matters, including last year's NPAs with Akamai and Nortek.[58] Given their popularity among corporate defendants and the leadership of the U.S. enforcement agencies,[59] it appears likely that DPAs and NPAs will continue to play an active role in the resolution of FCPA enforcement actions.

It also is worth noting that DPAs have become an important part of bribery and corruption enforcement in the United

[54]Press Release, DOJ, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

[55]U.S. v. Esquenazi, 752 F.3d 912, Fed. Sec. L. Rep. (CCH) P 97966 (11th Cir. 2014); Esquenazi v. U.S., 135 S. Ct. 293, 190 L. Ed. 2d 141 (2014). For discussion of United States v. Esquenazi's holding as to the definition of "government official," see *infra* § 13:6.

[56]Press Release, DOJ, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[57]Press Release, S.E.C. 13-65, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013).

[58]The SEC has also used NPAs to reward companies who self-report and provide full cooperation and remediation. Press Release, S.E.C. 16-109, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (Jun. 7, 2016).

[59]See, e.g., U.S. Department of Justice News, Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

Kingdom. In April 2013, the U.K. for the first time adopted a regime to permit corporations to resolve bribery and corruption investigations with a DPA.[60] It remains to be seen how prevalent DPAs will be in the U.K. Upon releasing a code of practice for the use of DPAs in the U.K., the Director of the U.K.'s Serious Fraud Office stated that while DPAs "provide a welcome addition to the prosecutor's tool kit . . . [p]rosecution remains the preferred option for corporate criminality."[61] As of May 2017, DPAs had been used three times for corporate resolutions in the U.K., most significantly in January 2017, when Rolls-Royce PLC settled with the SFO for £497.25 million.[62]

Two enforcement resolutions in recent years illustrate the extent to which companies will benefit from self-reporting, cooperating with officials and implementing a strong compliance program. In April 2012, DOJ and the SEC announced that a former Morgan Stanley managing director in China had pleaded guilty to conspiring to violate the FCPA by self-dealing in collaboration with a former chairman of a Chinese state-owned entity to acquire millions of dollars' worth of real estate investments from Morgan Stanley's funds and paying themselves at least $1.8 million disguised as finder's fees.[63] However, DOJ and the SEC both declined to bring enforcement action against Morgan Stanley because the company voluntarily self-disclosed the employee's potential misconduct, cooperated with the agencies' investigations, and, in particular according to DOJ's public statement, had a system of internal controls, which provided reasonable assurances that its employees were not bribing govern-

[60] Crime and Courts Act 2013, c. 17 (Eng.), http://www.legislation.gov.uk/ukpga/2013/22/contents/enacted.

[61] Press Release, Serious Fraud Office, Deferred Prosecution Agreements: New Guidance for Prosecutors (Feb. 14, 2014), https://www.sfo.gov.uk/2014/02/14/deferred-prosecution-agreements-new-guidance-prosecutors/.

[62] Press Release, Serious Fraud Office, SFO Completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC (Jan. 17, 2017), https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc/.

[63] Press Release, DOJ, Former Morgan Stanley Managing Director Pleads Guilty to Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html; United States v. Peterson, Criminal No. 12-224, (E.D.N.Y. Apr. 25, 2012); Press Release, S.E.C. 12-78, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Advisor Fraud (Apr. 25, 2012); SEC v. Peterson, Civil Action No. 12-2033, Complaint (E.D.N.Y. Apr. 25, 2012).

ment officials.[64] When enforcement agencies opt to decline prosecution or enforcement action, those factors often appear central to the decision, as evidenced by the SEC's September 2016 decision not to take action against the Harris Corporation.[65]

Similarly, in *United States v. Panalpina*,[66] in a settlement reached among DOJ, SEC, and seven companies in the freight-forwarding and oil-and-gas industries, Noble Corporation paid the lowest fine in part because of the existence of Noble's pre-existing compliance program and steps taken by Noble's Audit Committee to detect and prevent improper conduct from occurring.[67] Conversely, when Alstom S.A. pled guilty to FCPA violations in December 2014, DOJ noted that the $772 million fine reflected both the company's "failure to voluntarily disclose the misconduct" and its "refusal to fully cooperate with the department's investigation for several years."[68] With the establishment of the Pilot Program in 2016, DOJ has continued to emphasize the importance the department places on full cooperation when negotiating penalties.

In November 2012, DOJ and the SEC issued detailed guidance, in the form of a 120-page publication titled A Resource Guide to the U.S. Foreign Corrupt Practices Act, concerning their interpretation of the FCPA and their enforcement authority.[69] This development had long been desired by business compliance officers and FCPA practitioners. The Resource Guide presents the

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[64]Press Release, DOJ, Former Morgan Stanley Managing Director Pleads Guilty to for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/2012/April/12-crm-534.html; Press Release, S.E.C. 12-78, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Advisor Fraud (Apr. 25, 2012).

[65]Press Release, SEC, SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC (Sept. 12, 2016), https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf.

[66]See Press Release, S.E.C. 10-14, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010).

[67]United States v. Noble Corporation, Non-Prosecution Agreement (DOJ-Criminal Div.), https://www.justice.gov/criminal/fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf.

[68]See Press Release, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges(Dec. 22, 2014), available at https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

[69]See DOJ Criminal Division & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

views of the U.S. regulators on a wide range of FCPA issues, including the jurisdictional reach of the FCPA; the meaning of ";foreign official" the treatment of business hospitality and gifts; successor liability in mergers and acquisitions; the principles that govern enforcement decisions, including self-reporting, cooperation and remediation; the components of effective compliance programs; and reporting obligations under the Sarbanes-Oxley Act. The Resource Guide, which is nonbinding, provides greater clarity regarding the perspectives of DOJ and the SEC but does not fundamentally alter their interpretation of the FCPA.

In September 2015, DOJ announced a new focus on pursuing prosecutions of individuals in white collar cases. Deputy Attorney General Sally Quillian Yates issued a memorandum, often referred to as the "Yates Memorandum," detailing how DOJ expects prosecutors to hold individuals accountable for corporate wrongdoing.[70] In a related development, DOJ in April 2016 issued "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance," in which it elaborated on DOJ's standards with respect to voluntary disclosure, cooperation, and remediation, and launched a corresponding one-year pilot program aimed at encouraging self-reporting and cooperation in corporate investigations.[71]

§ 13:2 History of the FCPA

Congress passed the FCPA in 1977 following disclosures of extensive bribery of non-U.S. officials by U.S. corporations and businesses, first through the investigative activities of the Watergate Special Prosecutor and, later, through the actions and voluntary disclosure program of the SEC.[1] In 1976, the SEC identified the pervasive practice by U.S. businesses of making payments to non-U.S. government officials in order to win busi-

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[70] Memorandum of Deputy Attorney General Sally Quillian Yates (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

[71] DOJ Criminal Divison, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download.

[Section 13:2]

[1] See Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, S.E.C. Release No. 34-15570 (Feb. 15, 1979).

ness abroad, and issued a report—Questionable and Illegal Corporate Practices—to the Senate Banking Committee.[2]

Oversight committees in Congress, in turn, conducted their own investigations. More than 400 U.S. corporations admitted to having made questionable foreign payments exceeding, collectively, $300 million.[3] Payments ranged from small grease payments for routine clerical services to financing of non-U.S. political parties and candidates, and bribes paid directly to senior non-U.S. government officials.[4] Such payments, which were not recorded transparently in the companies' financial records, were so widespread in Congress's view that they represented a serious breach in the operation of the [SEC's] system of corporate disclosure and, correspondingly, in public confidence in the integrity of the system of capital formation.[5] In addition to identifying this challenge to U.S. capital markets, Congress emphasized the unethical nature of corruption, its antithesis to the rule of law and the manner in which it undermined free markets. The House report stated that corrupt payments had tarnished the image of American democracy and had even destabilized governments in Japan, Italy and the Netherlands.[6] Based on this record, Congress passed the FCPA in 1977 without a single vote in opposition in either house.

In passing the FCPA, the United States became the first industrialized country to adopt a statute that provided for criminal and civil liability for bribery of officials of other countries and imposed significant accounting and internal controls requirements on public companies that listed their securities on national stock exchanges. In signing the legislation, President Carter encouraged other countries to follow suit and pass laws in their own countries to combat international bribery.[7] For roughly two decades, however, most industrialized nations did not prohibit

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[2]See S. Rep. No. 95-114, at 1.

[3]See H.R. Rep. No. 95-640, at 4.

[4]See H.R. Rep. No. 95-640, at 4.

[5]S. Rep. No. 95-114, at 2.

[6]See H.R. Rep. No. 95-640, at 5. According to the report, to secure business in Japan, the aerospace giant Lockheed Corporation had made corrupt payments to senior government officials. Prince Bernhardt of the Netherlands resigned after it was determined that he had received $1 million in pay-offs from Lockheed. In Italy, revelations of payments by U.S. corporations to government officials undermined confidence in the Italian government and produced a crisis for the NATO alliance.

[7]See Statement on Signing S.305, 2 Pub. Papers 2157 (Dec. 20, 1977).

such bribery, and a number openly tolerated it.[8] In 1988, Congress clarified a number of the more stringent or less clear provisions of the statute to ameliorate this uneven playing field[9] while also urging the President to pressure other countries to adopt corresponding anti-bribery laws of their own.[10] These efforts led the Organization for Economic Cooperation and Development (OECD) in 1997 to adopt and submit to its members for ratification the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).[11] The Senate ratified the OECD Convention promptly and, to implement the treaty, Congress enacted amendments to the FCPA to conform to the OECD Convention's requirements. The amendments expanded the FCPA's enforcement jurisdiction over U.S. issuers and domestic concerns by criminalizing bribery regardless of whether any means or instrumentality of interstate commerce was utilized in furtherance of a prohibited act,[12] and by imposing criminal liability on non-U.S. nationals serving as agents or employees of issuers under the 1934 Act.[13] The 1998 amendments also broadened the definition of foreign official to include officers and employees of more than 75 public international organizations, such as the United Nations and U.N. entities, the World Bank, the African, Asian, and Inter-American Development Banks, the World Health Organization, and the International Committee of the Red Cross.[14] As a leader in fighting bribery, the United States became the first country to submit itself to a rigorous and transparent six-month peer review process by the OECD's Working Group on Bribery in International Business Transactions which involved

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[8]Indeed, as of 1995 a number of nations continued to permit companies to deduct payments to foreign officials from income calculations for local corporate income tax purposes, leading the Organization for Economic Cooperation and Development to adopt its Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, which called for the elimination of such subsidization of bribery of public officials in the international context. OECD/C(96)27/FINAL (1996), reprinted in 35 I.L.M. 1311 (1996).

[9]See Jennifer Dawn Taylor, Comment, Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?, 61 La. L. Rev. 861, 867-70 (2001).

[10]See Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 5003(d); 102 Stat. 1415, 1424-25.

[11]OECD Do. DAFFE/IME/BR(97)20, reprinted in 37 I.L.M. 1 (1998), http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html.

[12]See 15 U.S.C.A. §§ 78dd-1(g), 78dd-2(i).

[13]See 15 U.S.C.A. § 78ff(c).

[14]See 15 U.S.C.A. §§ 78dd-1(f)(1).

examinations by an evaluation team from Argentina and the United Kingdom that met with U.S. government officials and representatives from 19 companies in high-risk industries, business associations, accounting and auditing firms, as well as non-governmental legal experts.[15] Upon concluding its review of the United States, the OECD Working Group[16] Subsequently, other members of the OECD have acceded to the convention and enacted laws similar to the FCPA. In recent years, foreign prosecutors have also increasingly begun adopting U.S.-style investigations. The United Kingdom passed a landmark anti-bribery law, the U.K. Bribery Act 2010, which took effect on July 1, 2011,[17] and allows prosecution of any company that carries on business in the United Kingdom for failure to prevent bribery if an individual performing services for or on its behalf has participated in, or taken part in, bribery anywhere in the world.[18] In recent years, there has been a growth in cross-border cooperation in anti-corruption matters. The investigations into Alcatel-Lucent and Total, for example, involved cooperative investigations by both U.S. and French law enforcement agencies, and the Total resolution marked the first coordinated action on a major foreign bribery case by French and U.S. law enforcement agencies, resulting in a DPA, fines and disgorgement in the U.S. and referral to the criminal court in France.[19] The trend of cross-border cooperation has continued in recent years, with three significant 2016 FCPA enforcement actions (VimpelCom, Embraer,

[15]Lanny A. Breuer, Ass't Att'y Gen., Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

[16]Press Release, OECD, United States: OECD recognises anti-bribery enforcement and recommends enhancements (Oct. 20, 2010), http://www.oecd.org/unitedstates/unitedstatesoecdrecognisesanti-briberyenforcementandrecommendsenhancements.htm.

[17]Ministry of Justice, The Bribery Act 2010: Guidance (Mar. 30, 2011), http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[18]Debevoise & Plimpton LLP, U.K. Bribery Act Likely to Affect U.K. Listed Companies 1 (Oct. 1, 2010), http://www.debevoise.com/~/media/files/insights/publications/2010/10/uk%20bribery%20act%20likely%20to%20affect%20uk%20listed%20compan__/files/view%20client%20update/fileattachment/ukbriberyactlikelytoaffectuklistedcompanies.pdf (The corporate offence creates strict liability for commercial organisations for bribery anywhere in the world . . . .).

[19]Press Release, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt; Press Release, DOJ, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-613.html.

and Odebrecht/Braskem) involving coordinated resolutions between the United States and other countries.[20] And in 2017, Rolls Royce reached a coordinated resolution with the SFO, DOJ, and Brazil's Ministério Público Federal.[21]

The FCPA, the OECD Convention and implementing legislation in signatory countries, constitute critical features of an international legal architecture designed to prohibit, detect, punish and remediate bribery in international business transactions. In addition to the OECD Convention, other relevant treaties include the U.N. Convention Against Corruption,[22] the Inter-American Convention Against Corruption,[23] the European Union Convention on the Fight Against Corruption Involving Officials of the European Communities[24] and the Organization of African Unity Convention on Combating Corruption.[25] In 2013, major international law enforcement agencies banded together to create the International Foreign Bribery Taskforce as a means to enable police experts to share knowledge and skills about anti-corruption enforcement.[26]

The World Bank and other international lending institutions such as the African, Asian and Inter-American Development Banks have also implemented anti-corruption sanctions programs to deter corrupt behavior; these programs authorize and financially support investigation of corruption charges and proceed-

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[20] Debevoise & Plimpton LLP, The Year 2016 in Anti-Corruption Enforcement: Record-Breaking Activity and Many Open Questions 20, FCPA Update Vol. 8, No. 6 (Jan. 2017), http://www.debevoise.com/insights/publications/2017/01/fcpa-update-january-2017.

[21] Press Release, Serious Fraud Office, SFO completes £497.25m Deferred Prosecution Agreement with Rolls-Royce PLC (Jan. 17, 2017), https://www.sfo.gov.uk/2017/01/17/sfo-completes-497-25m-deferred-prosecution-agreement-rolls-royce-plc.

[22] G.A. Res. 58/4, reprinted in 43 I.L.M. 37 (2004), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

[23] Org. of Am. States [OAS] Doc. B-58, reprinted in 35 I.L.M. 724 (1996).

[24] European Union [EU], Official Journal C 195, 25/06/1997 (1997), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML.

[25] African Union [AU] (2003), https://www.au.int/web/sites/default/files/treaties/7786-file-african_union_convention_preventing_combating_corruption.pdf.

[26] Asia Pacific Security Magazine, New International Taskforce Combats Foreign Bribery—Austraialian Federal Police (June 13, 2013), http://www.asiapacificsecuritymagazine.com/new-international-taskforce-combats-foreign-bribery-australian-federal-police.

ings to debar offending firms.[27] In April 2010, the World Bank and four regional development banks each agreed to enforce the debarment decisions of the other institutions that are party to the agreement in cases in which, among other criteria, the original term of debarment by a development bank exceeds one year and the underlying debarment decision is made public.[28]

The international community, including countries in emerging markets, also has been pursuing other pro-transparency initiatives that have the potential to affect anti-bribery compliance. In 2011, China criminalized giving money or property to foreign officials, including officials of international organizations, in order to gain commercial advantage.[29] Russia bolstered its own internal anti-corruption laws in 2011, acceded to the OECD anti-bribery convention in 2012,[30] and in 2013 adopted a new law requiring companies to develop and adopt anti-corruption measures.[31] In 2012, Mexico enacted legislation authorizing administrative sanc-

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[27] World Bank, Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (Oct. 15, 2006), http://siteresources.worldbank.org/INTOFFEVASUS/Resources/WB_Anti_Corruption_Guidelines_10_2006.pdf; Inter-American Development Bank Group, Annual Report Annex III (2008), https://publications.iadb.org/bitstream/handle/11319/1675/Office%20of%20Institutional%20Integrity%20%28OII%29%20-%202008%20Annual%20Report.pdf?sequence=1 (sanctions process of the Inter-American Development Bank); African Development Bank, Sanctions, https://www.afdb.org/en/about-us/organisational-structure/integrity-and-anti-corruption/sanctions (last visited May 12, 2017) (same, African Development Bank); Asian Development Bank, Anticorruption and Integrity: Sanctions, http://www.adb.org/integrity/sanctions (same, Asian Development Bank).

[28] See African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group, and World Bank Group, Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010), http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf; see also Debevoise & Plimpton LLP, Multilateral Development Banks to Cross-Bar in Effort to Combat Corruption, FCPA Update, Vol. 1, No. 10 (May 2010), http://www.debevoise.com/~/media/files/insights/publications/2010/05/fcpa%20update/files/view%20the%20update/fileattachment/fcpaupdatemay2010.pdf.

[29] Debevoise & Plimpton LLP, China's New Push to Combat Foreign Bribery, FCPA Update, Vol. 2, No. 8 (Mar. 2011), http://www.debevoise.com/~/media/files/insights/publications/2011/03/fcpa%20update/files/view%20the%20update/fileattachment/fcpaupdatemarch2011.pdf.

[30] Gillian Dell, Russia Confirms Plans to Join the OECD Convention Against Bribery, Transparency International Blog (Feb. 6, 2012), http://blog.transparency.org/2012/02/06/russia-confirms-plans-to-join-the-oecd-convention-against-bribery.

[31] Federal Law No. 231-FZ on Amendment of Certain Legal Acts of the Russian Federation in Connection with the Adoption of the Law on Oversight of Conformity Between Expenditures and Income (Dec. 3, 2012).

tions against domestic and foreign companies or individuals who bribe Mexican officials. The law also prohibits Mexican individuals or companies from bribing foreign public officials in international commercial transactions.[32] India not only enacted the Companies Act in 2013 to improve corporate governance and strengthen internal controls but also established an independent ombudsman to investigate and prosecute corrupt federal officials.[33] In 2014, Brazil's major new anti-corruption law, the Clean Company Law, officially came into force, establishing offenses and corresponding penalties for entities that engage in corruption relating to Brazilian or foreign public officials or in fraudulent acts relating to public tenders and government contracts.[34] In 2016, France enacted the Law Regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life, known as Loi Sapin II, which established a new anti-corruption agency, expanded extraterritorial application of French law, introduced mandatory compliance procedures, and adopted a DPA process.[35] In many instances, these initiatives were responses to criticisms of the OECD working group, and were aimed at correcting the country's laws so that they were in compliance with the Convention.

§ 13:3 The FCPA's provisions

The FCPA makes illegal completed or attempted bribery of non-U.S. officials and the failure to maintain accurate books and records and a system of internal controls designed to reasonably ensure the disposition of assets in accordance with management directive. The provisions are interrelated in that, absent the unusual situation in which a bribe payment is recorded as such and not disguised as a commission, agency fee, cost of goods sold, or buried in some other manner as a legitimate cost, an improper payment by the subsidiary of an issuer under the 1934 Act will render the consolidated financial statements of the issuer inac-

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[32] Ley Federal Anticorrupción en Contrataciones Públicas (June 11, 2012), http://www.diputados.gob.mx/LeyesBiblio/pdf/LFACP_180716.pdf.

[33] The Companies Act, 2013, No., 18, Acts of Parliament, 2013 (India), http://egazette.nic.in/WriteReadData/2013/E_27_2013_425.pdf; The Lokpal and Lokayuktas Act, 2013, No. 1, Acts of Parliament, 2014 (India), http://www.egazette.nic.in/WriteReadData/2014/157689.pdf.

[34] Federal Law No. 12.846/2013 (Aug. 1, 2013).

[35] Loi No. 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Journal Officiel (Dec. 10, 2016) ("Loi Sapin II"), https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000033558528.

curate; such bribe payments, moreover, are frequently the result of some internal control failure at the issuer or one of the issuer's subsidiaries. Because of the lower standards of proof required for civil liability under the books and records, and internal controls provisions of the FCPA, virtually every FCPA case (and non-FCPA accounting or financial irregularity case) related to issuer liability will contain one or more allegations under the books and records requirements, the internal controls provisions of the statute, the civil aiding and abetting laws, or all three.

Although the books and records and internal controls provisions do not apply to companies that are not issuers under the 1934 Act,[1] firms subject to only the anti-bribery provisions will find these FCPA provisions relevant to maintaining a compliance environment necessary to protect against breaches of the statute's anti-bribery mandates. Indeed, without generally accurate books and records or a system of internal controls designed to prevent, detect, and punish foreign bribery, it may also be difficult for a nonissuer to demonstrate the limited nature of a violation of the anti-bribery rules, if such a violation is discovered, or to show that punishment under the anti-bribery provisions should be limited as the breach is an aberration in an otherwise sound control environment.

DOJ and the SEC share overlapping responsibility for enforcement of the FCPA. DOJ has jurisdiction over all criminal violations of the FCPA provisions, as well as civil jurisdiction over domestic concerns (e.g., private companies in the US) and individuals. The SEC has authority for civil enforcement of the anti-bribery and accounting and internal controls provisions against issuers, as well as against issuers' officers, directors, employees, agents, and certain shareholders. In August 2011, the SEC considerably increased the incentives for those with knowledge of FCPA and other securities law violations to blow the whistle; the new rules implemented the expanded whistleblower bounty program established by the Dodd-Frank Act.[2] The rules require the SEC to pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of

[Section 13:3]

[1] See 15 U.S.C.A. § 78m.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 922(a), 124 Stat. 1376, 1841-49 (2010) (codified at 15 U.S.C.A. § 78a); Securities and Whistleblower Incentives and Protections, 76 Fed. Reg. 34300 (June 13, 2011) (to be codified at 17 C.F.R. Pts. 240 & 249).

over $1 million.[3] Since passage of the Dodd-Frank Act's whistleblower provisions, tips related to FCPA violations have increased from 115 in fiscal year 2012 to 186 in fiscal year 2015 — an approximate 62% increase.[4] Whistleblower tips represent a significant source of evidence for FCPA cases brought by the agency.[5] An issue recently litigated under the whistle-blower mandates is whether the whistleblower provisions apply to individuals who blow the whistle on potential FCPA violations at a domestic concern or other entity potentially subject to the FCPA only by virtue of a corrupt scheme partially occurring in the territory of the United States.[6] One U.S. district court recently held that the provisions did not apply to such whistleblowers because the provisions of U.S. law governing those entities are not securities laws, despite being housed in the same federal statutory title as the Securities Act of 1933 and the 1934 Act.[7] The court's decision should not be read to render Dodd-Frank's whistleblower provisions wholly inapplicable to FCPA violations. For example, violations of the FCPA bribery provisions could lead to books and records violations by a U.S. issuer, which could be viewed by courts and the SEC as within the whistleblower provisions.

II. THE FCPA'S ANTI-BRIBERY PROVISIONS

§ 13:4 Overview

The FCPA's anti-bribery provisions make it unlawful to offer or

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[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 922(a), 124 Stat. 1376, 1841-48 (2010).

[4] See Andrew Ceresney, SEC Dir. of Enforcement, The SEC's Whistleblower Program: The Successful Early Years, Remarks at the 16th Annual Taxpayers Against Fraud Conference (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html.

[5] See Andrew Ceresney, SEC Dir. of Enforcement, The SEC's Whistleblower Program: The Successful Early Years, Remarks at the 16th Annual Taxpayers Against Fraud Conference (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html.

[6] 15 U.S.C.A. § 78dd-3.

[7] Nollner v. Southern Baptist Convention, Inc., 852 F. Supp. 2d 986, 997, Fed. Sec. L. Rep. (CCH) P 96952 (M.D. Tenn. 2012). In another recent decision limiting the applicability of the whistleblower provisions, a U.S. district court held that the provisions did not protect a former employee of a Jordan-based subsidiary of a U.S. issuer because the provisions did not apply extraterritorially; Asadi v. G.E. Energy (USA), LLC, 33 I.E.R. Cas. (BNA) 1837, Fed. Sec. L. Rep. (CCH) P 96929, 2012 WL 2522599, at *5 (S.D. Tex. 2012), aff'd, 720 F.3d 620, 36 I.E.R. Cas. (BNA) 241, Fed. Sec. L. Rep. (CCH) P 97565 (5th Cir. 2013) (rejected by, Wadler v. Bio-Rad Laboratories, Inc., 141 F. Supp. 3d 1005, 2015 I.E.R. Cas. (BNA) 350407, Fed. Sec. L. Rep. (CCH) P 98845 (N.D. Cal. 2015)).

provide anything of value to non-U.S. government officials, non-U.S. political parties, non-U.S. political party candidates or employees, or employees of designated nongovernmental organizations, with a corrupt intent to influence an official act or decision in order to obtain, retain or business or improper business advantages.[1] Criminal and civil liability may result from violations of the FCPA's anti-bribery provisions. The elements for criminal and civil liability are the same across cases against business entities; if the alleged violator is an individual, criminal liability requires proving the defendant acted willfully. In the case of a business entity, the intent of any employee acting within the scope of his or her authority will be deemed to be the intent of the business entity.[2] The imposition of individual criminal liability for violation of the anti-bribery provisions does not require knowledge on the part of the defendant (or, in the case of business entities, the defendant's authorized employee) that the conduct in question was in fact a violation of the FCPA, but simply an understanding that the actions were illegal at a general level.[3]

§ 13:5 Who is subject to the anti-bribery provisions?

The anti-bribery provisions apply to issuers and domestic concerns, as well as any person whose acts while in the territory of the United States facilitate an anti-bribery offense. Issuers are companies—based in the United States or abroad—whose securities are registered in the United States or that are required to

[Section 13:4]

[1]See 15 U.S.C.A. §§ 78dd-1 to 78dd-3.

[2]The U.S. Court of Appeals for the Fifth Circuit provided a useful itemization of all elements required for individual criminal liability under the anti-bribery provisions, which make it a crime to (1) "willfully;" (2) "make use of the mails or any means or instrumentality of interstate commerce;" (3) "corruptly;" (4) "in furtherance of an offer, payment, promise to pay, or authorization of the giving of anything of value to;" (5) "any foreign official;" (6) "for purposes of [either] influencing any act or decision of such foreign official in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage;" (7) "in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person." U.S. v. Kay, 513 F.3d 432, 439-40 (5th Cir. 2007). Pursuant to the alternative jurisdictional provisions adopted in the wake of the OECD Convention, liability may also attach for U.S. issuers and domestic concerns, and those who act for them, irrespective of whether U.S. interstate commerce is implicated in a transaction. See, e.g., 15 U.S.C.A. § 78dd-1(g).

[3]U.S. v. Kay, 513 F.3d 432, 446-51 (5th Cir. 2007).

file reports pursuant to the 1934 Act.[1] Domestic concerns include U.S. citizens and U.S. resident aliens, as well as business entities organized under U.S. law (including the law of the states or territories of the United States) or that maintain their principal place of business in the United States. In addition to imposing liability upon issuers, domestic concerns and any person other than an issuer or domestic concern utilizing instrumentalities of U.S. commerce or otherwise acting in the territory of the United States, the anti-bribery provisions also extend to any person employed by or connected with these entities, such as an officer, director, employee, or agent . . . or any stockholder thereof acting on behalf of an issuer, domestic concern or other person.[2]

As a result of amendments to the FCPA in 1998 expanding the basis of jurisdiction, U.S. issuers and domestic concerns committing a particular act entirely abroad and without any connection to the United States are nevertheless subject to the FCPA's anti-bribery provisions on the basis of their nationality.[3] Moreover, any person who is not an issuer or domestic concern—natural or legal—and who commits actions facilitating violations of the anti-bribery provisions while in U.S. territory is subject to the FCPA.[4] Foreign companies that are not issuers under the 1934 Act and their representatives and agents can incur liability under the anti-bribery provisions if they made use of any means or instrumentality of interstate commerce—a legal term of art describing loosely defined business activity taking place between different states within the United States or between the United States and a foreign country—in furtherance of any aspect of

[Section 13:5]

[1] Non-U.S. companies whose American Depository Receipts (ADRs) are traded on U.S. exchanges are issuers under the 1934 Act. An ADR, issued by U.S. depository banks, represents one or more shares of foreign stock or a fraction of a share.

[2] See 15 U.S.C.A. § 78dd-1(a).

[3] See 15 U.S.C.A. § 78dd-1(g)(1), 78dd-2(i)(1). Before the 1998 amendments to the FCPA, issuers and domestic concerns were liable under the FCPA for conduct taking place outside the United States only if some part of the conduct had a physical territorial connection to the United States, i.e., utilized the mails or any other means or instrumentality of the interstate commerce of the United States.

[4] See 15 U.S.C.A. § 78dd-3(a) ("It shall be unlawful for any person other than an issuer . . . or a domestic concern[,] . . . 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 . . .").

their proscribed actions.[5] For example, in the largest settlement to date against a foreign nonissuer without any U.S. subsidiary, JGC Corporation resolved allegations that it conspired to carry out a bribery scheme with joint venture partners that were domestic concerns or U.S. issuers, aided and abetted a domestic concern in bribery, and transmitted allegedly corrupt payments from the Netherlands to Switzerland through U.S. based bank accounts.[6] A strict reading of the statute suggests that acts by a foreign nonissuer, foreign citizen or foreign resident acting alone (i.e., not at the behest of an issuer, U.S. citizen or other domestic concern) are not subject to the anti-bribery provisions, unless the act was committed by a person present in the United States at the time.[7]

The application of the FCPA to a broad swath of international financial transactions is based on traditional notions of jurisdiction, namely, the idea that conduct having effects in the United States or conduct committed by U.S. citizens, residents and domiciliaries (legal and natural) anywhere in the world may properly be regulated by Congress. It is hardly controversial that a corporation, whose registered securities are traded on the New York Stock Exchange (NYSE), voluntarily subjects itself—and all of its employees and agents—to applicable U.S. laws, including the FCPA. By enjoying the benefits of the U.S. capital markets, the company accepts corresponding obligations to adhere to U.S. standards of conduct in the competition for business.

U.S. authorities' exercise of jurisdiction under the 1934 Act is grounded in these territorial effects of the acts taken by a company or its representatives, employees or agents, even if the physical acts themselves occurred elsewhere. If a foreign national's actions are in furtherance of a corrupt payment in

[5]See 15 U.S.C.A. § 78dd-3(a).

[6]United States v. JGC Corp., Criminal No. 11-260, Information ¶¶ 17, 22 (S.D. Tex. Apr. 6, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf. But See United States v. Hoskins, Criminal No. 3:12-00238-JBA, Ruling on Defendant's Second Motion to Dismiss the Indictment (D.Conn. Aug. 13, 2015) (rejecting application of accomplice liability against nonresident non-U.S. citizens).

[7]See 15 U.S.C.A. § 78dd-3(a). For example, liability under the anti-bribery provisions will also attach for a French nonissuer on whose behalf a Canadian middleman hands over in New York a suitcase destined for non-U.S. officials with black money, because the act was committed by an agent of the company while located in U.S. territory. On the other hand, the mere routing of an e-mail relevant in some way to the transaction through a U.S.-based server or the electronic wiring of funds via a U.S. bank account supplies a more tenuous jurisdictional basis under a narrow view of the FCPA's reach.

violation of the FCPA and have made use of U.S. mails or any means or instrumentality of interstate commerce, U.S. regulators may see a sufficient basis to exercise territorial jurisdiction.[8] Both DOJ and the SEC have taken the view that placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce-as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.[9] For example, a Russian agent working for a French issuer under the 1934 Act may violate the FCPA's anti-bribery provisions when he wires funds from Moscow through a New York bank account to Mexico in furtherance of a corrupt scheme, or when an e-mail is sent from Nigeria and runs through a U.S. server to a business consultant in the Cayman Islands discussing the corrupt payment of a foreign official.[10] Thus, acts such as the transmission of e-mail or faxes utilizing servers or phone lines in the United States or transfers of money via a U.S. correspondent bank can provide the requisite U.S. nexus even if U.S. commerce plays a small role in a transaction that is tainted by a corrupt payment or offer thereof to a non-U.S. official.

It should be kept in mind that many of DOJ's jurisdictional theories have not been tested in the courts, and may not survive trial court and appellate court review.[11] District courts have differed regarding the broad interpretation by DOJ and the SEC of

[8]See, e.g., U.S. v. Sapsizian, Criminal No. 1:06-20797-PAS, Indictment (S.D. Fla. Dec. 19, 2006) (indicting French citizen employed by French issuer).

[9]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 11 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[10]Indeed, many non-U.S. entities have been pursued by U.S. regulators for assisting issuers in this manner. See, e.g., United States v. KPMG Siddharta Siddharta & Harsono, Civil Action No. 01-3105 (S.D. Tex. Sept. 11, 2001) (holding Indonesian auditors liable in Baker Hughes matter); United States v. Magyar-Telekom, Plc, Criminal No. 11-597, Deferred Prosecution Agreement (E.D. Va. Dec. 29, 2011) (jurisdiction based, in part, on e-mail between two non-U.S. nationals, sent from and received at locations outside the U.S., but transmitted via a server located inside the U.S.).

[11]For example, a federal district court dismissed an FCPA charge against a U.K. citizen who operated a U.K.-based company and whose action sending a package via private mail service from the U.K. to the U.S. was the sole basis for jurisdiction. Significant dd-3 Development in Africa Sting Case, FCPA Professor (June 9, 2011), http://fcpaprofessor.blogspot.com/2011/06/significant-dd-3-development-in-africa.html. Because DOJ elected not to appeal this decision and indeed consented to dismissal of all of the charges in the case, one of the Africa-sting matters, appellate guidance on this topic remains sorely lacking.

their jurisdictional reach under the FCPA, and as yet there has been almost no guidance from the appellate courts. For example, alongside an enforcement action against Magyar Telekom, the SEC charged three senior non-U.S. nationals residing outside the U.S. with approving and executing bribery in Macedonia.[12] In 2013, in *SEC v. Straub*, the district court adopted the agency's expansive jurisdictional approach in rejecting defendants' motion to dismiss, holding that the use of e-mails routed through and/or stored on network servers located within the U.S. was sufficient to satisfy the personal jurisdiction requirement under the FCPA.[13] The court also held that the statute of limitations in a civil enforcement action does not run while the defendant is outside the U.S.[14] *Straub* suggests that once the government establishes personal jurisdiction over a foreign defendant, he could be held liable in perpetuity based on a single e-mail that merely traveled through a US server. The court subsequently ruled in favor of the SEC on the issue of personal jurisdiction at the summary judgment stage, citing the government's strong interest in enforcing its laws. The court also determined that many of the SEC's claims were not time-barred based on the reasoning laid out in the court's prior ruling on defendants' motion to dismiss. But perhaps most importantly, the court held that a certification pursuant to Sarbanes-Oxley provides a sufficient nexus for personal jurisdiction against a foreign defendant.[15]

§ 13:6 Who is a foreign official?

The statute defines the term foreign official (that is, non-U.S. official) in a broad manner. Foreign officials include public servants employed by any non-U.S. foreign state, in any branch and level of government. Rank and authority are not the determinative criteria.[1] The FCPA also categorizes as foreign officials candidates for political office, foreign political parties, political

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[12]SEC v. Straub, Civil Action No. 11-9645, Complaint (S.D.N.Y. Dec. 29, 2011), http://www.sec.gov/litigation/complaints/2011/comp22213-ex.pdf.

[13]S.E.C. v. Straub, 921 F. Supp. 2d 244, 262-64, Fed. Sec. L. Rep. (CCH) P 97295 (S.D. N.Y. 2013).

[14]S.E.C. v. Straub, 921 F. Supp. 2d 244, 259-61, Fed. Sec. L. Rep. (CCH) P 97295 (S.D. N.Y. 2013). The defendants' request for leave to appeal to the Second Circuit was denied. S.E.C. v. Straub, 2013 WL 4399042, at *7 (S.D. N.Y. 2013).

[15]Securities and Exchange Commission v. Straub, Fed. Sec. L. Rep. (CCH) P 99422, 2016 WL 5793398 (S.D. N.Y. 2016).

[Section 13:6]

[1]Foreign (non-U.S.) officials include employees of a government-owned bank in Argentina, SEC v. IBM Corp., Civil Action No. 1:00-03040 (D.D.C. Dec.

party employees, as well as employees of more than 75 intergovernmental and nongovernmental organizations.[2]

An individual will be considered a foreign (non-U.S.) official as long as he or she is employed, in any sense, by the foreign (non-U.S.) state's government. Unsurprisingly, central questions arising in the commercial context include whether a particular non-U.S. entity is in fact a state-owned enterprise or whether the foreign government exercises too little control over that entity for its employees to be considered public officials. Because the FCPA prohibits the bribery of only non-U.S. public officials and not private commercial bribery, the determination of whether particular joint ventures, consortia, universities, hospitals or other entities are public or private is important and not always immediately apparent.[3]

DOJ and the SEC have taken the view that whether an entity constitutes an instrumentality of a foreign government for purposes of the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function with no single factor being dispositive.[4] The key criterion is whether the govern-

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21, 2000); directors of a regional health fund in Poland, SEC v. Schering-Plough Corp., Civil Action No. 1:04-00945 (D.D.C. June 9, 2004); doctors at state-owned hospitals in Taiwan, United States v. Syncor Int'l Corp., Criminal No. 02-1244 (C.D. Cal. Dec. 10, 2002); officials at a national petroleum management service and engineers in Nigeria, Angola and Kazakhstan, SEC v. ABB, Ltd., Civil Action No. 1:04-1141 (D.D.C. July 6, 2004); the wife of a Nicaraguan politician, In re BellSouth Corp., Civil Action No. 1:02-0113 (N.D. Ga. Jan. 15, 2002); or Chinese journalists employed by a state-owned newspaper, DOJ FCPA Review Opinion Procedure Release No. 08-03 (July 11, 2008).

[2]See 15 U.S.C.A. §§ 78dd-1(a)(2), 78dd-1(f)(1)(A), 78dd-2(a)(2), 78dd-2(h)(2)(A), 78dd-3(a)(2), 78dd-3(f)(2)(A).

[3]The U.S. government has addressed commercial bribery with a U.S. nexus by charging violations of the U.S. wire and mail fraud statutes. See Press Release, DOJ, Schnitzer Steel Industries, Inc. Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay $7.5 Million Criminal Fine (Oct. 16, 2006), https://www.skadden.com/sites/default/files/ckeditorfiles/Schnitzer-DOJ-pr.pdf. Commercial bribery also can have implications under the FCPA's books and records, and internal controls provisions to the extent that there are liabilities associated with such bribery that have not been accurately recorded on the company's books or to the extent the payments reflect inadequate internal controls. See Press Release, S.E.C. 13-225, SEC Charges Diebold with FCPA Violations (Oct. 22, 2013). DOJ has also used the Travel Act, 18 U.S.C.A. § 1952, to prosecute commercial bribery in the context of an FCPA investigation. See United States v. Control Components, Inc., No. SACR-0900162, Information (C.D. Cal. July 22, 2009).

[4]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

ment exercises sufficient control over the actions of a business or institution to cause the entity to be considered a state-owned entity. A government's majority stake in a company's shares is almost always considered sufficiently indicative of government control. DOJ and the SEC have stated that as a practical matter, an entity is unlikely to qualify as an instrumentality [of a foreign government] if a government does not own or control a majority of its shares.[5] However, it is possible that DOJ or the SEC would consider an entity to be state-owned even when the government owns less than a majority stake, as long as it wields authority over the appointment of directors or officers or otherwise exercises control over the entity's day-to-day activities. Depending on the scope of veto rights held by a minority foreign government investor, for example, sufficient control may be retained by the foreign government so as to require categorizing the entity's employees as foreign officials under U.S. law, even absent majority equity ownership by the foreign government.[6] A key corollary to this analysis is that local law definitions of who is an official are not dispositive or controlling.

The Eleventh Circuit's May 2014 decision in *United States v. Esquenazi* represents the first appellate court case to articulate a definition of what constitutes an "instrumentality" under the FCPA. The two owners of a Florida-based company, Terra Telecommunications Corp., were convicted at trial for money laundering, conspiracy, and violations of the FCPA for paying bribes to officials of Telecommunications D'Haiti, S.A.M., which exercises a monopoly over telecommunications services in Haiti. On appeal, the defendants challenged the judge's instruction to the jury that a state-owned and controlled company was an instrumentality and its employees foreign officials.[7] The appellate court, however, affirmed their convictions and adopted a fact-intensive test that defined "instrumentality" as (i) "an entity controlled by the government of a foreign country" (ii) "that performs

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[5]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 21 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[6]Accounting standards for consolidation of an entity's financial statements may provide guidance; the general standard of control-in fact should be the touchstone. See Financial Accounting Standards Board EITF Issue No. 96-16, Investor's Accounting for an Investee when the Investor has a Majority of the Voting Interest but the Minority Shareholders Have Certain Approval or Veto Rights (June 2005).

[7]U.S. v. Esquenazi, No. 11-15331, Brief for Appellant 25-51 (11th Cir. May 9, 2012); U.S. v. Rodriguez, No. 11-15331, Brief for Appellant 39-47 (11th Cir. May 9, 2012).

a function the controlling government treats as its own."[8] Although the *Esquenazi* court's definition adopted the fact-intensive approach preferred by DOJ and the SEC,[9] the court specifically rejected DOJ's position that a foreign government's mere ownership stake in an entity is sufficient to render the entity an "instrumentality," and required that the entity also perform a governmental function.

The *Esquenazi* court's definition of "instrumentality," and its view that a broad array of activities potentially could constitute governmental functions for FCPA purposes, also was informed by the OECD Convention on Combating Bribery of Public Officials in International Transactions. The Convention provides that a foreign public official may exercise a public function for a public agency or public enterprise, with the latter defined in the Commentary to the Convention as any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence, for example if the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board . . . unless the enterprise operates on a normal commercial basis.[10] The Commentary to the Convention defines a "public function" as one not operated "on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges."[11] The court relied on the fact that Congress did not expand the FCPA's definition of foreign official to include officials of public enterprises when implementing the Convention in 1998 as supporting the argument that the FCPA already included them. To interpret instrumentality and foreign official otherwise would mean, the court found, would risk placing the U.S. out of compliance with

[8] U.S. v. Esquenazi, 752 F.3d 912, Fed. Sec. L. Rep. (CCH) P 97966 (11th Cir. 2014).

[9] See DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20-21 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[10] Organization for Economic Cooperation and Development, Convention on Combating Bribery of Public Officials in International Transactions, art. 1.4 & cmt. 14-15.

[11] Organization for Economic Cooperation and Development, Convention on Combating Bribery of Public Officials in International Transactions, art. 1.4 & cmt. 15.

its OECD Convention obligations, a result the court found Congress did not intend.[12]

The *Esquenazi* court's broad, fact-based approach to defining who constitutes a foreign official, is similar to the approach taken by several federal district courts in recent years. In *United States v. O'Shea, United States v. Noriega*, and *United States v. Carson*, defendants were accused of making corrupt payments to state-owned enterprises (SOEs)[13] and filed motions to dismiss on the basis that DOJ's definition of foreign official was inapplicable to their conduct, which involved questionable payments to employees of SOEs.[14] The defendants asserted that employees of SOEs do not qualify as public officials, because SOEs are not instrumentalities of foreign governments.[15] Drawing upon the FCPA's legislative history, the defendants argued that Congress did not intend to include employees of SOEs in the definition of foreign official.[16] The defendants also suggested that the government's interpretation, if carried to its logical conclusion, would lead to absurd results, e.g., that employees of General Motors could be considered government officials at relevant times because of the U.S-led bailout.[17] The motions further contended that the indictments should be dismissed because the definition of foreign official, even if interpreted to include employees of SOEs, was unconstitutionally vague, and thus deprived potential defendants of fair notice as to what conduct is prohibited by the FCPA.[18] In all three cases, the defendants' motions to dismiss were unsuccessful, with each court ruling that state-owned companies could

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[12] U.S. v. Esquenazi, 752 F.3d 912, 923-27, Fed. Sec. L. Rep. (CCH) P 97966 (11th Cir. 2014).

[13] United States v. Noriega, Criminal No. 10-0131(A)-AHM, Indictment (C.D. Cal. Oct. 21, 2010); United States v. O'Shea, Criminal No. H-09-629, Indictment (S.D. Tex. Nov. 16, 2009); United States v. Carson, Criminal No. SA-09-0077, Indictment (C.D. Cal. Apr. 8, 2009).

[14] United States v. O'Shea, Criminal No. H-09-629, Motion to Dismiss (S.D. Tex. Mar. 7, 2011); United States v. Noriega, Criminal No. 10-0131(A)-AHM, Motion to Dismiss (C.D. Cal. Feb. 28, 2011); United States v. Carson, Criminal No. SA-09-0077, Motion to Dismiss (C.D. Cal. Feb. 21, 2011).

[15] United States v. O'Shea, Criminal No. H-09-629, Motion to Dismiss 3-4 (S.D. Tex. Mar. 7, 2011); United States v. Noriega, Criminal No. 10-0131(A)-AHM, Motion to Dismiss 6-13 (C.D. Cal. Feb. 28, 2011); United States v. Carson, Criminal No. SA-09-0077, Motion to Dismiss 11-19 (C.D. Cal. Feb. 21, 2011).

[16] See, e.g., United States v. Carson, Criminal No. SA-09-0077, 21-29, Motion to Dismiss (C.D. Cal. Feb. 21, 2011).

[17] See, e.g., United States v. Carson, Criminal No. SA-09-0077, 21-29, Motion to Dismiss at 21 (C.D. Cal. Feb. 21, 2011).

[18] See, e.g., United States v. Carson, Criminal No. SA-09-0077, 21-29, Motion to Dismiss at 39-48 (C.D. Cal. Feb. 21, 2011).

be considered instrumentalities of a foreign government, and thus employees of state-owned companies could be foreign officials for FCPA liability purposes.[19]

§ 13:7 Corruptly

For there to be liability under the anti-bribery provisions of the FCPA, the relevant offer or transfer of a thing of value must have been undertaken corruptly—with an evil purpose and desire wrongfully to influence a non-U.S. government employee to misuse his official position.[1] Such corrupt intent need not be harbored by an entire organization or business; the actions of a small circle of employees—or even one employee—can trigger liability for an entire business as well as smaller groups. Even silent acquiescence by company management in the face of significant evidence of wrongdoing can be sufficient to find an issuer criminally liable for violations of the anti-bribery provisions.[2]

Moreover, the corrupt intent of a third party can be imputed to an issuer or domestic concern affiliated with that party. It is thus

[19]U.S. v. O'Shea, Criminal No. H-09-629, Management Order, (S.D. Tex. Jan 3, 2012); United States v. Carson, Criminal No. 09-77 (JVS), Criminal Minutes—General 6-13 (C.D. Cal. May 18, 2011); United States v. Aquilar, et al., Criminal No. 10-1031 (AHM), Criminal Minutes—General 4-16 (C.D. Cal. Apr. 20, 2011).

[Section 13:7]

[1]See H.R. Rep. No. 95-640, at 7 to 8 (connoting linkage to 18 U.S.C.A. § 201(b)). See also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 327 F.3d 173, 182, Fed. Sec. L. Rep. (CCH) P 97016 (2d Cir. 2003).

[2]Charging a criminal defendant with deliberately avoiding learning the truth allows the government effectively to substitute showing that circumstances were such that the defendant subjectively knew that a violation of the law was likely to occur, but closed his eyes nonetheless for proof of a defendant's direct and actual knowledge. Under this so-called ostrich doctrine, a jury is instructed that the legal definition of knowledge includes the purposeful avoidance of knowledge. See, e.g., U.S. v. Carrillo, 269 F.3d 761, 769 (7th Cir. 2001). Although deliberate avoidance, often referred to as willful blindness, is not to be equated with the mere lack of application of mental effort or negligence, see U.S. v. Ramirez, 574 F.3d 869, 877 (7th Cir. 2009), it is a recurring feature of FCPA prosecutions, which typically seek to show that the defendant ignored red flags by consciously casting aside suspicions of the illegal nature of particular acts. See U.S. v. Carani, 492 F.3d 867, 873 (7th Cir. 2007). The 2009 conviction of Frederic Bourke exemplifies the application of the conscious avoidance doctrine in the FCPA context. United States v. Kozeny, Criminal No. 1:04-00518 (S.D.N.Y. Nov. 11, 2009). Bourke's conviction was affirmed by the Second Circuit in December 2011 on grounds that Bourke ignored enough red flags to warrant the district court's ostrich jury instruction. U.S. v. Kozeny, 667 F.3d 122, 132-35, 87 Fed. R. Evid. Serv. 104 (2d Cir. 2011).

of no legal advantage to channel bribes to foreign officials through an indirect payment method in the hope of seeking insulation from FCPA liability. It is also no valid excuse that the issuer or domestic concern had not known with certainty that an improper payment would be made: as long as risks were consciously disregarded or management showed deliberate indifference to the actions of the intermediary or third party, liability attaches, especially in circumstances suggesting a substantial certainty or high probability that a bribe was offered or paid and there is the requisite U.S. nexus.[3] More than half of the SEC's cases reportedly involve misconduct of third-party intermediaries.[4]

Closely related to the obligation to maintain legal and practical oversight over the actions of third parties and intermediaries is an issuer's obligation to exercise control over its majority-owned subsidiaries. An issuer faces liability for unlawful payments by a subsidiary if it authorized or directed such payments or if it was willfully blind to the subsidiary's actions if undertaken as an agent on behalf of the issuer.[5] Correspondingly, if an executive or director of an issuer has knowledge of bribery committed by a subsidiary, and implicitly or explicitly permits or authorizes such bribery to occur, corporate and individual liability for the issuer and the executive or director could result.[6] In contrast, corrupt payments or offers of such payments to foreign officials made by non-U.S. citizens acting on behalf of a foreign subsidiary without a nexus to the United States and with no knowledge whatsoever of the issuer are not actionable under the FCPA's anti-bribery provisions (although the books and records and internal control provisions may still apply).[7]

§ 13:8 Obtaining, retaining or directing business or improper advantages

Whether a particular benefit or promise thereof was made cor-

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[3]See 15 U.S.C.A. §§ 78dd-1(f)(2) (issuers) (2009); 78dd-2(h)(3) (domestic concerns).

[4]See Kara Brockmeyer, Chief of SEC FCPA Unit, Remarks at Annual Conference on the U.S. Foreign Corrupt Practices Act, Just Anti-Corruption (Nov. 22, 2013), http://globalinvestigationsreview.com/article/1022341/remarks-of-charles-duross-and-kara-brockmeyer-at-the-abas-2013-fcpa-conference.

[5]See 15 U.S.C.A. § 78dd-1(a).

[6]See 15 U.S.C.A. § 78dd-1(a).

[7]Such acts can still be illegal under the laws of the place in which the subsidiary is incorporated or operates, particularly given that many countries other than the United States are increasingly enforcing anti-bribery mandates that overlap those in the FCPA.

ruptly to a foreign official for the purpose of obtaining or retaining business with a governmental body or third party or otherwise to gain an improper advantage or direct business is of great importance, because unless the payment was made or offered for such purpose it is not a violation of the anti-bribery provisions. However, both reality and common sense suggest that in all but the most rare instances corrupt payments to government officials are made precisely to obtain or retain business. Why, after all, would a business make or offer the payment or bestow or offer the benefit at all? Although general relationship building activities, undertaken with no expectation that business will be obtained or retained as a result, are not criminalized by the FCPA, companies and individuals that rely on the relationship building concept must proceed cautiously, as the line between lawful relationship building and impermissible quid pro quo transactions is a fine one even under the best of circumstances.[1]

The case law interpreting obtaining or retaining business or improper advantages makes it exceedingly difficult for a company or individual charged with a violation of the anti-bribery provisions to contend that a corrupt payment should be considered to fall outside of this definition. The leading case, *United States v. Kay*,[2] interprets obtaining or retaining business in such a broad manner that it is hard to conceive of a case in which corrupt payments can possibly be lawful. The *Kay* decision held that payments aimed at reducing import taxes and duties levied against the U.S. issuer, American Rice, Inc., were aimed at obtaining or retaining business, in that any corrupt payment with the likely effect of decreasing operational costs of a company provided an unfair business advantage over competitors, which in turn would make it easier for the company to obtain or retain business.[3] The decision by the United States Court of Appeals for the Fifth Circuit also rejected the argument that bribes are made to obtain or retain business only if they pertained to concretely identifiable business opportunities such as specific contracts or projects. Instead, the court held that bribes to reduce taxes and customs duties, in the particulars of the case, constituted one of the only guarantees of maintaining a successful business in Haiti in the

[Section 13:8]

[1]See U.S. v. Peleti, 576 F.3d 377, 383-84 (7th Cir. 2009) (describing corrupt intent).

[2]U.S. v. Kay, 513 F.3d 432 (5th Cir. 2007).

[3]See U.S. v. Kay, 359 F.3d 738, 751-56, Fed. Sec. L. Rep. (CCH) P 97025, 6 A.L.R. Fed. 2d 711 (5th Cir. 2004).

1990s: in the court's view, the payments were made for no other reason than to retain business.[4]

The language of the *Kay* decision, one of the few appellate cases interpreting the FCPA, seems likely to remain the standard interpretation of obtaining and retaining business. Absent contrary guidance from the courts, defendants will find it difficult to argue that corrupt payments to foreign officials, even if not intended to win a particular contract or bid, did not in some way produce an incremental benefit over competitors by reducing a company's costs or time delays, which appears to be the standard set by *Kay*. Indeed, given the amorphous nature of improper advantages, virtually any benefit corruptly obtained, including a meeting that an official should not have ethically entertained, or confidential information that it was improper for an official to divulge, could be the object of an FCPA charge.[5]

§ 13:9 Defenses under the anti-bribery provisions—Facilitating, expediting, or grease payments

The FCPA provides a narrow exception to liability and two affirmative defenses[1] to allegations that a payment to a foreign official breached the anti-bribery provisions.

The FCPA exempts from liability a "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

[4]The court also rejected the executives' constitutional due process argument that the FCPA's statutory language was too vague and ambiguous to be understood by ordinary citizens. The court stated [a] man of common intelligence would have understood that [American Rice, Inc.], in bribing foreign officials, was treading close to a reasonably-defined line of illegality . . . Defendants took this risk, and splitting hairs as to the illegality of one type of action . . . does not allow them to argue successfully that the FCPA's standards were vague. U.S. v. Kay, 513 F.3d 432, 442 (5th Cir. 2007).

[5]The broad definition of business or improper advantages is a counterpoint to the equally broad definition applied to anything of value that might be conveyed to an official and be considered an improper payment. Things of value that may be considered to be corrupt payments include not only cash and negotiable instruments but also a broad array of in-kind transfers, such as the provision of airline tickets, entry to sporting events or shows, other entertainment, meals, gifts, campaign contributions, employment for relatives or acquaintances or, even, donations to an official's favorite charity. See SEC v. Schering-Plough Corp., Civil Action No. 1:04-00945 (D.D.C. June 9, 2004).

[Section 13:9]

[1]See §§ 13:10, 13:11 (discussing affirmative defenses).

routine governmental action."[2] The FCPA defines routine governmental action as encompassing only those actions ordinarily and commonly performed by a foreign official, such as issuing permits and licenses, processing visas and work orders, providing police protection, mail-pick up, inspections of transit goods, phone service, power and water supply, or actions of a similar nature.[3] The FCPA provides that routine governmental action does not include decisions by a foreign official to award new business to or to continue business with a particular party.[4]

This narrow category of facilitating payments for routine governmental action, colloquially known as grease payments, is exempt from the FCPA because such payments are designed not to retain or obtain business or improper advantages, but merely to speed up a nondiscretionary ministerial or clerical duty—that is to obtain benefits to which the payor is clearly entitled.[5] By not prohibiting such payments, Congress sought to protect U.S. businesses against international competitors unconstrained by the FCPA in certain countries and as to a narrow class of transactions.[6]

The grease payment exception is narrow. Westinghouse Air Brake Technologies Corp. (Wabtech) paid a $300,000 penalty in 2008 for payments to railway regulatory officials that were intended, in addition to obtaining business with the Indian Railway Board, to schedule pre-shipping product inspections,

[2]See 15 U.S.C.A. § 78dd-1(b).

[3]15 U.S.C.A. § 78dd-1(f)(3)(A).

[4]15 U.S.C.A. § 78dd(1)(f)(3)(B).

[5]See H.R. Rep. No. 95-640, at 8.

[6]See H.R. Rep. No. 95-640, at 8 (While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.). The OECD has called on signatories that permit facilitation payments to develop policies to end corrosive ones, and encourage companies to prohibit or discourage the use of facilitation payments, in part because they usually are illegal in the country in which they are made. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997 (entered into force Feb. 15, 1999), 37 I.L.M. 1, http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html. The OECD also has criticized the U.S. for its policies on facilitation payments, most notably for a lack of clear guidance on the FCPA exception. OECD, United States: Phase 3, Report on Application of the Convention on Combating Bribery of Foreign Public Officials in Int'l Bus. Trans. and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions, 22-24 (Oct. 15, 2010), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf.

obtain the issuance of product delivery certificates and curb excessive tax audits.[7] Although several of these payments arguably would appear to fit within the grease payments exception, Wabtech agreed to the penalty and entered into a nonprosecution agreement with DOJ.[8] Indeed, many sophisticated multinational corporations ban facilitating payments entirely because of the costs of ensuring that permission to make such payments is not misconstrued as permitting improper payments, and because most countries ban such payments under local law or do not have a facilitation payment exception. Other companies ban the payments except in cases in which making such a payment is necessary to protect life or limb (a circumstance in which the company would likely be able to avail itself of a defense based on extortion).[9]

§ 13:10 Defenses under the anti-bribery provisions—Affirmative defenses—Legality under local law

In addition to the grease payment exemption, two enumerated affirmative defenses provide legal justification for payments, thereby insulating a party that successfully asserts these defenses from liability under the FCPA. First, if the payment or benefit in question was explicitly permitted by written law or regulation in the non-U.S. official's country, it is not considered illegal under the FCPA.[1] This defense is extremely narrow, as it requires not merely the absence of a local law or regulation prohibiting a particular payment or benefit, but instead the existence of a law or regulation affirmatively permitting the conduct in question, which, by definition, would include a payment made with corrupt intent. Because there appear to be no legal regimes that authorize bribery of foreign (or domestic) officials, a defendant accused of violation of the FCPA's anti-bribery provisions will be hard-pressed successfully to assert this defense. As a practical matter, the defense may have some very limited value in circumstances in which payments are required to be routed under local law to

[7]See Press Release, DOJ, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), http://www.usdoj.gov/opa/pr/2008/February/08_crm_116.html.

[8]See Press Release, DOJ, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), http://www.usdoj.gov/opa/pr/2008/February/08_crm_116.html.

[9]See U.S. v. Kozeny, 582 F. Supp. 2d 535, 540 n.31 (S.D. N.Y. 2008).

[Section 13:10]

[1]See 15 U.S.C.A. § 78dd-1(c)(1).

officials themselves, as opposed to government entities, where, for example, a local official is expressly authorized by local law to take a percentage of bridge tolls as a means by which the official is paid. Even if a payor harbored an improper motive, such a payment might be covered by the defense.

More often than not, however, the local law defense will have very little practical value. In 2008, the defense was offered by Frederic Bourke, a founder of the luxury handbag firm Dooney & Bourke, during his criminal prosecution in New York for conspiracy to violate the FCPA in connection with alleged payments to government officials in Azerbaijan. The prosecution claimed that Bourke invested more than $5 million of his own money in a scheme to bribe Azeri government officials to sell at a below-value price the country's state-owned oil company in the late 1990s to a group of investors to which Bourke belonged.[2] Bourke allegedly invested the funds with his neighbor Viktor Kozeny, a Czech national who is a fugitive from U.S. law enforcement residing in the Bahamas, with Bourke allegedly understanding that the money was to be used to bribe the officials, who would obtain a two-thirds share in the investment.[3]

Bourke sought dismissal of the FCPA charges by offering the affirmative defense that the payments were lawful under the laws of Azerbaijan, arguing that no criminal liability exists for bribes paid under duress of extortionate demands and for in circumstances in which there was self-reporting of the payments to Azeri authorities.[4] The district court rejected both arguments by finding that the bribes were not actually legal under Azeri law, but simply that no prosecution would ensue when bribes were self-reported; the court held that economic extortion on these facts, unlike true extortion, is not a valid FCPA defense.[5] Bourke was convicted, and the Second Circuit affirmed.[6]

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[2]United States v. Kozeny, Criminal No. 1:05-00518, Indictment (S.D.N.Y. May 12, 2005).

[3]United States v. Kozeny, Criminal No. 1:05-00518, Indictment (S.D.N.Y. May 12, 2005).

[4]U.S. v. Kozeny, 582 F. Supp. 2d 535, 537-38 (S.D. N.Y. 2008). Bourke's conviction also illustrates that bribes need not achieve their desired results for the FCPA to be implicated; the Azeri government never sold the oil company and thus Bourke lost all of his purported investments.

[5]U.S. v. Kozeny, 582 F. Supp. 2d 535, 540 (S.D. N.Y. 2008).

[6]U.S. v. Kozeny, 667 F.3d 122, 87 Fed. R. Evid. Serv. 104 (2d Cir. 2011). Subsequently, the Supreme Court denied Bourke's petition for certiorari. Bourke v. U.S., 569 U.S. 917, 133 S. Ct. 1794, 185 L. Ed. 2d 810 (2013). The Second Circuit later denied a second petition for rehearing and rehearing en banc.

§ 13:11 Defenses under the anti-bribery provisions—Affirmative defenses—Reasonable and bona fide expenditures

The second affirmative defense pertains to a payment or other benefit considered to be a reasonable and bona fide expenditure, such as travel and lodging expenses, as long as a direct relation exists to the promotion, demonstration or explanation of products or services or to the performance of a contract with a foreign government.[1] DOJ and the SEC have stated that they recognize that businesses, both foreign and domestic, are permitted to pay for reasonable expenses associated with the promotion of their products and services or the execution of existing contracts and have provided a nonexhaustive list of safeguards that may be helpful to businesses in evaluating whether a particular expenditure is appropriate or may risk violating the FCPA.[2]

The 2007 enforcement action by DOJ and the SEC against communications company Lucent Technologies, Inc. (Lucent) demonstrates that the bona fide expenditures affirmative defense is also interpreted narrowly and does not allow companies to shower foreign officials with excessive nonmonetary travel benefits. Lucent expended approximately $10 million for travel by approximately 1,000 Chinese government officials between 2000 and 2003.[3] Ostensibly designed to allow the officials—whose state-owned entities were either prospective or current Lucent customers—to conduct factory inspections and to be trained on equipment use, the SEC charged that little, if any, time was spent on such legitimate purposes and instead the trips consisted largely of leisure and sightseeing. During the three-year period, according to the SEC, Chinese officials took approximately 315 trips with excessive per diems to such locations as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City.[4] The trips were authorized and paid for by Lucent's wholly-owned Chinese subsidiary and then

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United States v. Bourke, 11-5390, Order (2d Cir. May 7, 2013).

[Section 13:11]

[1]See 15 U.S.C.A. § 78-dd1(c)(2).

[2]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 24 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[3]See SEC. v. Lucent Techs., Inc., Civil Action No. 1:07-02301, Complaint ¶ 1 (D.D.C. Dec. 21, 2007), http://www.sec.gov/litigation/complaints/2007/comp20414.pdf.

[4]See SEC. v. Lucent Techs., Inc., Civil Action No. 1:07-02301, Complaint at ¶ 1 (D.D.C. Dec. 21, 2007), http://www.sec.gov/litigation/complaints/2007/comp

logistically organized by personnel at Lucent's U.S. headquarters. The travel expenses were also inaccurately recorded and characterized in Lucent's corporate books as Services Rendered—Other Services, factory inspections, training, Transportation International or lodging.[5]

Because many of the travel expenditures were not deemed to be reasonable and bona fide and not directly related to the promotion, demonstration, or explanation of products or services, the benefits bestowed on the Chinese government customer representatives did not fall within the affirmative defense provided by the FCPA.[6] Lucent therefore agreed to pay a $1 million fine and a $1.5 million penalty for civil violations of the accounting and internal controls provisions of the FCPA. Lucent also entered into a deferred prosecution agreement with DOJ, pursuant to which Lucent would not be prosecuted if, over a two-year term, it improved internal controls procedures and developed a rigorous anti-corruption compliance code.[7]

The 2016 DOJ and the SEC enforcement actions against PTC, Inc. represent a more recent example of travel benefits serving as a basis for FCPA liability. PTC expended at least $1 million to fund travel for employees of various Chinese state-owned enterprises to the United States.[8] Ostensibly designed to allow the employees—whose state-owned employers purchased software from PTC—to train, DOJ and the SEC charged with respect to the travel expenses that the trips were primarily for recreational travel to other parts of the United States.[9]

20414.pdf.

[5]See SEC. v. Lucent Technologies, Inc., Civil Action No. 1:07-02301, Complaint ¶ 16 (D.D.C. Dec. 21, 2007), http://www.sec.gov/litigation/complaints/2007/comp20414.pdf. In 2009, the SEC settled charges with Avery Dennison Corporation over trips for Chinese officials to local resorts; the trips identified in the SEC's complaint were relatively inexpensive; the total costs for trips in calendar years 2002 and 2005 were under $20,000. See SEC v. Avery Dennison Corp., Civil Action No. 09-5493, Complaint ¶ 12 (C.D. Cal. July 28, 2009).

[6]See 15 U.S.C.A. § 78dd-1(c)(2)(A).

[7]Press Release, DOJ, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), http://www.usdoj.gov/opa/pr/2007/December/07_crm_1028.html.

[8]Press Release, DOJ, PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges (Feb. 16, 2016), https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-bribery-charges.

[9]Press Release, DOJ, PTC Inc. Subsidiaries Agree to Pay More Than $14 Million to Resolve Foreign Bribery Charges (Feb. 16, 2016), https://www.justice.gov/opa/pr/ptc-inc-subsidiaries-agree-pay-more-14-million-resolve-foreign-briber

Although the travel practices alleged in the Lucent and PTC cases represent a clear violation of the FCPA and obviously go beyond the parameters of the reasonable and bona fide expenditures defense, DOJ has clarified that, under appropriate circumstances, this affirmative defense may be invoked. In a 2008 FCPA Opinion Release,[10] DOJ analyzed a request by an anti-corruption watchdog group regarding the permissibility of paying travel-related expenditures (including modest cash stipends, transportation, and lodging) for Chinese journalists—who are employed by state-owned media—to attend an FCPA conference in Shanghai. DOJ responded by opining that the proposed payments fell within the reasonable and bona fide expenditures affirmative defense and therefore would not be subject to prosecution.[11] The joint implications of the Lucent settlement, DOJ and the SEC's November 2012 guidance regarding the FCPA and the 2008 FCPA Opinion Release suggest that DOJ and the SEC narrowly interpret the affirmative defense and, while allowing appropriate and necessary expenditures, will not tolerate attempts to expand this provision to include leisure travel and excessive incidentals or hospitality.

In response to the 1988 amendments, most companies subject to the FCPA have adopted policies and procedures to assure that travel, hospitality, meals and the like provided to non-U.S. officials are modest and genuinely incidental to truly legitimate business discussions. A general rule of thumb that many companies employ is to prohibit the provision of any sort of free entertainment, gifts or hospitality that it would also not want its own employees to receive from vendors seeking the company's business. Others use the newspaper rule, which asks employees to consider whether they would be embarrassed if the entertainment gift or hospitality provided to a customer were the subject of a page one story in the leading newspaper in the community. Many companies provide very strict dollar limitations on entertainment and hospitality for non-U.S. officials and require senior managers to give pre-approval for any such expenditures, subjecting expenditures that are ultimately made to close review by accounting personnel.

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y-charges.

[10]Under the FCPA, issuers may address to the Attorney General a specific inquiry on whether proposed business conduct comports with DOJ's current enforcement policy. Pursuant to such requests, DOJ publicly promulgates so-called Opinion Releases. See 15 U.S.C.A. § 78dd-1(e).

[11]See DOJ FCPA Procedure Opinion Release 08-03, at 3, https://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf.

III. THE FCPA'S BOOKS AND RECORDS AND INTERNAL CONTROLS PROVISIONS

§ 13:12 Overview

Whereas furnishing (or offering) a bribe can be described as the front line bribery operation, Congress deemed it important also to punish the back-office enablers of such crimes, and, most importantly, the entities for whom they work.

By requiring the maintenance of accurate corporate books and the development of a functional system of internal controls to ensure the proper disposition of assets, the accounting and internal controls provisions foreclose an issuer's temptation to look the other way and thereby feign ignorance of bribery by its employees or others on its behalf.[1] Civil liability for books and records breaches, and for internal controls violations, is essentially strict liability. If a bribe is paid and not recorded as such on an issuer's consolidated financial statements, or if an internal control reasonably could have prevented a bribe payment but was not instituted or properly implemented, civil liability ensues.

§ 13:13 Requirements of the accounting and internal controls provisions

To comport with the statute's books and records provisions, issuers under the 1934 Act must make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer.[1] Although it is not entirely clear which documents constitute records for purposes of the FCPA, the definition of records in the 1934 Act suggests a broad reading not merely limited to financial statements.[2] In other words, "records" means not only journal entries, but also supporting documentation such as invoices,

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[Section 13:12]

[1]See S. Rep. No. 95-114, at 11 (describing the extensive cover-up of bribery payments in corporate books, which prompted much stricter record-keeping requirements).

[Section 13:13]

[1]See 15 U.S.C.A. § 78m(b)(2)(A).

[2]See 15 U.S.C.A. § 78c(a)(37) (includes accounts, correspondence, memoranda, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language).

e-mails, and memoranda that would alert the SEC to potential improprieties.[3]

Compliance with the internal controls provision requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized, executed and recorded, that access to assets is permitted only through specific management authorization and that the recordation of assets is evaluated and monitored at reasonable intervals.[4] There are no specific prescriptions outlining the methods of internal controls; instead, the internal controls system as a whole must meet the objectives of the law.[5] Frequently, an issuer's audit committee is charged with providing oversight of internal controls and accounting to ensure compliance with the FCPA.[6] The Sarbanes-Oxley Act of 2002 further enhanced the mandate to maintain functional internal controls, effectively imposing on an issuer's management the obligation to issue an internal controls report verifying the existence of internal controls and assessing their effectiveness.[7]

An issuer's obligations under the books and records, and internal controls provisions are not limited to improper accounting relating to issues of bribery. In fact, the provisions encompass all aspects of an issuer's accounting, and a violation of the requirement that accounts are accurate and reasonably detailed occurs if the recipient of a payment or the purpose of the disposition of an asset is unclear, even if no act of bribery took place. This broad reach of the accounting portion of the FCPA was grounded in a determination by Congress—disturbed by the record-keeping abuses of the Watergate-era foreign bribery patterns—that accurate financial statements are a necessary precondition for transparent and honest corporate conduct.

The SEC also has independent books and records oversight authority over Registered Investment Advisers (RIAs) pursuant to the Investment Advisers Act of 1940.[8] The SEC could use these provisions to require production of information relevant to an

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[3]See Justin Seraffani, Foreign Corrupt Practices Act, 41 Am. Crim. L. Rev. 721, 727 (2004).

[4]See 15 U.S.C.A. § 78-m(b)(2)(B).

[5]See H.R. Rep No. 95-831, at 10 (Conf. Rep.).

[6]See Justin Seraffani, Foreign Corrupt Practices Act, 41 Am. Crim. L. Rev. 721, 728 (2004).

[7]See 15 U.S.C.A. § 7241 (holding corporate officers responsible for the accuracy of reports), 7262 (requiring management's assessment of internal controls functions to be included in annual reports).

[8]15 U.S.C.A. § 80b-4.

FCPA enforcement action. Under revisions to the securities laws made by the Dodd-Frank Act, many more entities now are required to register as RIAs, including most U.S.-based advisers to hedge funds and other private equity funds.[9]

§ 13:14 Liability under accounting and internal controls provisions

Non-conformance with the books and records, and internal controls provisions can result in civil or criminal liability of an issuer and its directors, officers, employees or agents.[1] The standard for criminal liability requires that an issuer has knowingly circumvent[ed] or knowingly fail[ed] to implement a system of internal accounting controls or knowingly falsif[ied] any book, record, or account.[2] Such liability can also result from improper actions on behalf of the issuer by a third party, such as agents, business consultants or distributors.[3] Criminal liability of the issuer or one of its officers or employees can further be established by a showing of knowledge of the issuer's directors, officers or employees, whose refusal to put a stop to improper conduct despite a duty to do so can be interpreted as an implicit authorization of misconduct.

Irrespective of its directors' or officers' awareness or knowledge of inaccuracies, an issuer is civilly liable for noncompliance with the books and records and internal controls provisions.[4] The same standard of virtual strict liability applies to misleading accounting inaccuracies of an issuer's majority-owned subsidiary whose financial statements are consolidated into those of the issuer.[5] This means that violations of the books and records provisions or inadequate internal controls of a majority-owned foreign subsidiary with or without a nexus to the United States—including inaccurate recording of bribe payments or tolerance of inadequate internal controls that permitted such payments—are automatically imputed to the parent issuer if the financial statements are consolidated, thereby imposing liability even if the

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[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 403, 124 Stat. 1376, 1571 (2010).

[Section 13:14]

[1] See 15 U.S.C.A. § 78m(b)(4) to (5).

[2] 15 U.S.C.A. § 78m(b)(5).

[3] See 15 U.S.C.A. § 78m(b)(4) to (5).

[4] See 15 U.S.C.A. § 78m(b)(2).

[5] See Accounting Provisions, FCPA, S.E.C. Release No. 34-17500 (Jan. 29, 1981).

conduct in question took place entirely without the issuer's knowledge. Compounding this risk is the sometimes counter-intuitive notion that the FCPA does not condition liability for accounting inaccuracies on a mis-booking that is material to the company's financial results. Any inaccuracy, no matter how small the monetary amount in question, may provide the basis for civil liability, regardless of whether a bribe payment or the business won was material to a firm's financial results.[6]

An example illustrating the virtual strict liability of an issuer for a subsidiary's FCPA violations is the SEC enforcement action against ITT Corporation, a United States issuer, which in February 2009 settled allegations under the books and records, and internal controls provisions. The SEC alleged that ITT's Chinese subsidiary, Nanjing Goulds Pumps, Ltd. (NGP), had paid $200,000 to Chinese officials in charge of designing specifications for large infrastructure projects favorable to NGP's bid prospects.[7] Payments were allegedly made directly by NGP to Chinese officials and via third party agents, without any involvement in or knowledge by parent company ITT.[8] The payments were then misleadingly recorded as commissions in NGP's corporate books, which were consolidated into ITT's financial statements.[9] ITT voluntarily disclosed the payments to the U.S. government after discovering them and agreed to pay a civil penalty of $250,000 and more than $1.4 million in disgorgement of improperly obtained profit and interest.[10] The ITT settlement is just one of dozens in which the SEC has used the books and records provisions of the FCPA to address underlying bribery.[11] In another example of the government's growing practice of imposing virtual

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[6]See H.R. Rep No. 95-831, at 10 (1977) (Conf. Rep.).

[7]See SEC v. ITT Corp., SEC Files Settled Charges Against ITT Corporation for Violations of the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 20896 (Feb. 11, 2009).

[8]See SEC v. ITT Co., SEC Files Settled Charges Against ITT Corporation for Violations of the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 20896 (Feb. 11, 2009).

[9]See SEC v. ITT Co., SEC Files Settled Charges Against ITT Corporation for Violations of the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 20896 (Feb. 11, 2009).

[10]See SEC v. ITT Co., SEC Files Settled Charges Against ITT Corporation for Violations of the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 20896 (Feb. 11, 2009).

[11]See, e.g., SEC v. Diebold, Inc., SEC Charges Diebold with FCPA Violations in China, Indonesia, and Russia, Litigation Release No. 22849 (Oct. 22, 2013); SEC v. Novo Nordisk A/S, SEC Files Settled Books and Records and Internal Controls Charges Against Novo Nordisk for Improper Payments to Iraq

strict liability, in April 2013 Ralph Lauren Corporation was held responsible for the anti-bribery violations of its subsidiaries, even though neither the SEC nor DOJ alleged that the parent authorized, directed, or controlled the subsidiary's corrupt conduct.[12] Finally, in 2016, SAP agreed with the SEC to disgorge $3.7 million in profits related to activities in Latin America for failure to verify or scrutinize an employee's request for discounts, which created a large slush fund to pay bribes, but failed to articulate how such a complex corporation could have prevented the activities of the individual employees responsible for the corrupt actions.[13]

Of course, errors in accounting entries and record-keeping may occur easily and often without any wrongful intent. Therefore, incorrect entries are not actionable, as long as an issuer prepares its records accurately based on GAAP; perfection, moreover, is not required to avoid both criminal and civil liability, and knowledge of making a false entry is a requisite for criminal liability.[14] The law defines reasonable detail—the standard of care imposed under the books and records provisions—and reasonable assurances—the standard of care imposed under the internal controls provisions—as such care as would satisfy prudent officials in the conduct of their own affairs.[15] This prudent officials standard was added to the law in 1988 to emphasize that the books and records and internal controls provisions do not connote an unrealistic

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Under the U.N. Oil for Food Program, Litigation Release No. 21033 (May 11, 2009); SEC v. Avery Dennison Co., SEC Files Settled Charges Against Avery Dennison Corporation for Violating the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, Litigation Release No. 21156 (July 28, 2009); SEC v. Ingersoll-Rand Co., SEC Files Settled Books and Records and Internal Controls Charges Against Ingersoll-Rand Company Ltd. For Improper Payments to Iraq Under the U.N. Oil for Food Program—Company Agrees to Pay Over $4.2 Million and to Make Certain Undertakings Regarding its Foreign Corrupt Practices Act Compliance Program, Litigation Release No. 20353 (Oct. 31, 2007); SEC v. Lucent Techs., Inc., SEC Files Settled Action Against Lucent Technologies Inc. in Connection With Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty, Litigation Release No. 20414 (Dec. 21, 2007).

[12] Press Release, DOJ, Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $882,000 Monetary Penalty (Apr. 22, 2013), http://www.justice.gov/opa/pr/2013/April/13-crm-456.html.

[13] See Press Release, S.E.C. 16-17, SEC Charges Software Company With FCPA Violations (Feb. 1, 2016).

[14] See S. Rep. No. 95-114, at 8 (1977).

[15] 15 U.S.C.A. § 78m(b)(7).

degree of exactitude or precision.[16] Along the same lines, the congressional conference committee report described the reasonableness requirement as being achieved through a balancing of various factors, including the cost of compliance.[17]

The virtual strict liability standard governing an issuer's—and by extension its subsidiaries'—accounting and internal controls functions creates a significant risk for issuers. The anti-bribery provisions simply proscribe commission of the relatively narrow act of making or offering a bribe, while the books and records and internal controls provisions place broad affirmative duties on issuers—to maintain accurate books and to develop an adequate system of internal controls. Whereas liability under the accounting and internal controls sections of the statute may arise for inaccurate entries irrespective of bribery, violations of the anti-bribery provisions are virtually always accompanied by misstatements in the books and records and presumptive deficiencies of an issuer's internal controls regime, unless the bribes in question were accurately recorded as such in the company's books and records. Recording a bribe as a fee or commission or some other innocent payment instead of a bribe violates the FCPA.[18]

IV. INHERITED LIABILITY IN THE MERGERS AND ACQUISITIONS CONTEXT

§ 13:15 Overview

Liability for FCPA violations may be triggered not only by conduct of a company's own past and current employees, but, in the context of mergers and acquisitions, even by conduct of an entity with which, at the time of the conduct, the acquiring entity was wholly unconnected. Both pre-merger and post-merger activity of a target entity may be attributed to an issuer or domestic concern, and structuring a transaction for the sale of a business as an asset-sale does little to change this outcome.

For these reasons, rigorous due diligence concerning potential FCPA violations should be carried out to avoid liability. DOJ and the SEC have recommended that an acquiring company conduct pre-transaction FCPA diligence (or post-transaction diligence, if pre-transaction diligence is impractical), voluntarily report any discovered violations to the U.S. regulators and take swift remedial actions, including enhancing compliance programs and

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[16]H.R. Rep. No. 100-576, at 917 (Conf. Rep.).

[17]H.R. Rep. No. 100-576, at 916 to 917 (Conf. Rep.).

[18]See, e.g., In re Baker Hughes, Inc., S.E.C. Release No. 34-4478 (Sept. 12, 2001).

internal controls.[1] DOJ, through Opinion Release 08-02, pursuant to a request by Halliburton Company, identified steps acquiring companies are expected to undertake to identify misconduct, preferably pre-closing, or, if the practical circumstances of the situation do not allow, promptly following closing.[2] DOJ has also insisted in enforcement resolutions on enhanced compliance programs and commitments to conduct FCPA-specific due diligence of potential acquisitions. In 2011, Johnson & Johnson reached a deferred prosecution agreement with DOJ in which the company resolved to consummate any acquisition only after thorough FCPA and anticorruption due diligence by legal, accounting, and compliance personnel; to apply Johnson & Johnson anticorruption compliance to new acquisitions as quickly as possible; to conduct training of employees from the lowest ranks to executives and Board members; and to conduct an FCPA-specific audit of any newly acquired business within 18 months of acquisition.[3] Similar terms have appeared in other recent enforcement resolutions, suggesting that corporate entities would be well advised independently to consider their FCPA diligence procedures for mergers and acquisitions.[4] In deciding not to charge the Harris Corporation with FCPA violations in 2016, the SEC explicitly considered Harris' "efforts at self-policing, . . . prompt self-reporting, thorough remediation, and exemplary

[Section 13:15]

[1]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 28-33 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[2]See DOJ FCPA Procedure Opinion Release 08-02 (June 13, 2008), https://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

[3]United States v. Johnson & Johnson, Criminal No. 11-99, Deferred Prosecution Agreement at 35-36 (D.D.C. Apr. 8, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf.

[4]United States v. Pfizer H.C.P. Corp., Criminal No. 12-169, Deferred Prosecution Agreement C.2-6-C.2-7 (D.D.C. Aug. 7, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf; United States v. Data Sys. & Solutions LLC, Criminal No. 1:12-262-LO, Deferred Prosecution Agreement, at C-6 (E D. Va. June 18, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-dpa.pdf; United States v. Bizjet Int'l Sales & Support, Inc., Criminal No. 12-1-CVE, Deferred Prosecution Agreement, at C-6 (N.D. Okla. Mar. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf; In re Lufthansa Technik AG, Non-Prosecution Agreement, at A4 (Dec. 21, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/lufthansa-technik/2011-12-21-lufthansa-npa.pdf.

cooperation with the SEC's investigation."[5] These steps taken by Harris may serve as a baseline for companies seeking to avoid liability in the future.

Sellers, as well as buyers, of course, may also suffer consequences arising from an entity's FCPA violations through the buyer's decision to call on contractual indemnities, representations and warranties virtually guaranteeing, except as disclosed, a bribe-free target company or asset, as well as material adverse condition clauses that can be triggered and blow up a deal in the event the discovered FCPA liability is substantial.[6]

V. FINES, SANCTIONS AND PENALTIES

§ 13:16 Overview

Penalties for violations of the FCPA's several provisions have steadily increased since the law's inception in 1977 and include the threat of substantial prison sentences for individuals and monetary sanctions for individuals and corporate entities. The FCPA authorizes imprisonment of individuals responsible for improper payments pursuant to the anti-bribery provisions for up to five years for each violation[1] and for up to 20 years for each violation of the accounting and internal controls provisions.[2] For criminal violations of the anti-bribery provisions, the law authorizes a fine of up to $2 million for each violation for corporations and business entities, as well as a $100,000 fine for officers, directors, stockholders, employees and agents of these businesses.[3] The law also authorizes fines for willful violations of the accounting and internal controls provisions of up to $25 million for each violation for a company and up to $5 million for an

[5] Press Release, SEC Charges Former Information Technology Executive with FCPA Violations; Former Employer Not Charged Due to Cooperation with SEC (Sept. 12, 2016), https://www.sec.gov/litigation/admin/2016/34-78825-s.pdf.

[6] For analyses of DOJ's relevant opinion releases and discussion of the FCPA in mergers and acquisitions, see Paul R. Berger & Erin W. Sheehy, Directors & Boards, Boardroom Briefing, The Legal Issue 2008, Closing Keynote: FCPA and the Halliburton Opinion, Vol. 5, No. 3 at 32; Debevoise & Plimpton LLP, FCPA Update, Vol. 6, No. 4 (Nov. 2014), http://www.debevoise.com/~/media/files/insights/publications/2014/11/fcpa_update_nov_2014.pdf.

[Section 13:16]

[1] 15 U.S.C.A. § 78dd-2(g)(2)(A).

[2] 15 U.S.C.A. § 78ff(a).

[3] 15 U.S.C.A. § 78ff(c)(1) to (2)(A).

individual.[4] If the offense resulted in a pecuniary gain to any person or a pecuniary loss to any person other than the defendant, criminal violations of the FCPA are subject to the Alternative Fines Act, which provides for fines of up to twice the amount of gains or losses (with amounts of bribes paid construed as losses) derived from improper payments.[5]

Penalties for civil violations of the anti-bribery provisions may be imposed against a business or individual in amounts up to $16,000 per violation.[6] For civil violations of the accounting and internal controls provisions, courts may impose fines per violation equal to the greater of $160,000 per individual and $775,000 per company or the gross monetary gain of the defendant.[7] The SEC's ability to pursue monetary penalties was expanded by the Dodd-Frank Act to include penalties in administrative actions against entities and individuals even if they are not affiliated with a regulated trade.[8] The SEC began exercising this new authority in four such settlements in 2011,[9] and its use of administrative proceedings has increased since,[10] perhaps as a result of the federal judiciary's increased scrutiny of SEC settle-

[4] 15 U.S.C.A. § 78ff(a).

[5] 18 U.S.C.A. § 3571(d). Chapter 8 of the Federal Sentencing Guidelines Manual provides guidance on the sentencing of organizations, e.g., corporations that have violated the FCPA. The Sentencing Guidelines can dramatically affect the potential criminal fines that are imposed in FCPA cases. See U.S. Sentencing Guidelines Manual, 8.

[6] 15 U.S.C.A. § 78dd-2(g)(1)(B) to (2)(B). Although the statute prescribes a $10,000 penalty, the SEC has increased this amount to $16,000 pursuant to the Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. See Adjustments to Civil Monetary Penalties Amounts, 17 C.F.R. 201.

[7] 15 U.S.C.A. § 78u(d)(3)(B)(iii). These penalty amounts reflect adjustments for inflation. See Adjustments to Civil Monetary Penalties Amounts, 17 C.F.R. § 201.1001.

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 929P, 124 Stat. 1376, 1862-65. Prior to passage of the Dodd-Frank Act, the SEC's authority to impose civil penalties in administrative actions was limited to entities and individuals associated with regulated trades, such as investment companies and firms, or brokers.

[9] In re Watts Water Techs., Inc., S.E.C. Release No. 34-65555 (Oct. 13, 2011) ($225,000 civil penalty in cease and desist order); In re DIAGEO plc, S.E.C. Release No. 34-64978 (July 27, 2011) ($3 million civil penalty in cease and desist order); In re Rockwell Automation, Inc., S.E.C. Release No. 34-64380 (May 3, 2011) ($400,000 civil penalty in cease and desist order); In re Ball Corp., S.E.C. Release No. 34-64123 (Mar. 24, 2011) ($300,000 civil penalty in cease and desist order).

[10] Robert Khuzami, SEC Director of Enforcement, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), http://www.sec.gov/News/PublicStmt/

ments over the past few years. For example, 89% of FCPA actions filed by the SEC in the first half of 2015 were filed as administrative proceedings,[11] and the Total settlement marks the first time since the passage of the Dodd-Frank Act where the SEC pursued an administrative proceeding at the same time that DOJ pursued a related criminal action. The SEC's longstanding general authority includes the ability to seek equitable relief, e.g., injunction, disgorgement and payment of prejudgment interest.[12] Injunctive relief, which requires the discontinuation of an alleged business practice in violation of the FCPA, and disgorgement of illegally obtained profits, constitute additional available and often very costly remedies.

In May 2012, the United States Court of Appeals for the Eleventh Circuit dealt a blow to the SEC's long-standing practice of seeking broad federal court injunctions, known as obey-the-law injunctions, directing defendants to refrain from any future violations of securities laws. The court of appeals held that the injunctions entered against the defendant in the case at hand, restraining and enjoining any violation of certain provisions of the 1934 Act, did not satisfy Fed. R. Civ. P. 65(d)(1), which requires that injunctions describe, in reasonable detail . . . the act or acts [sought to be] restrained or required.[13] It remains to be seen whether the decision will prompt other courts to revisit the permissibility of broad obey the law injunctions, including in the FCPA context.

In a policy change announced in January 2012, the SEC stated it will no longer permit enforcement targets to neither admit nor deny the factual allegations underlying SEC charges when settling SEC cases in certain circumstances, most notably in cases in which the settling party is subject to parallel DOJ and the SEC actions with overlapping facts and the settling party was convicted of a crime or made admissions or acknowledged com-

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Detail/PublicStmt/1365171489600; see, e.g., In re IBM Corp., S.E.C. Release No. 34-43761, (Dec. 21, 2000); SEC v. Tyco Int'l Ltd., Litigation Release No. 19657 (Apr. 17, 2006).

[11] Gideon Mark, SEC and CFTC Administrative Proceedings, 19 J. Const. Law 45, 54 (2016).

[12] 15 U.S.C.A. § 78u(d)(5); see, e.g., SEC v. Titan Corp., Litigation Release No. 19107 (D.D.C. Mar. 1, 2005) (disgorgement and prejudgment interest amounting to more than $15 million).

[13] S.E.C. v. Goble, 682 F.3d 934, Fed. Sec. L. Rep. (CCH) P 96833 (11th Cir. 2012).

mitting criminal misconduct in any resolution.[14] In September 2013, the SEC went a step further in announcing that it would seek admissions in certain "cases not involving any parallel criminal case where there is a special need for public accountability and acceptance of responsibility."[15] The agency has since sought admissions in a number of cases.[16]

In the June 2017 case of *Kokesh v. SEC*, the Supreme Court ruled that the disgorgement remedy is punitive in nature, and so may not be applied where the conduct at issue is outside the five year statute of limitations for government actions set out in 28

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[14]Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), http://www.sec.gov/news/speech/2012/spch010712rsk.htm. The policy change followed U.S. District Judge Jed Rakoff's November 2011 decision in SEC v. Citigroup—a non-FCPA case—in which Judge Rakoff rejected a proposed $285 million settlement agreement in which Citigroup was to neither admit nor deny the charges against it, which the court held was neither fair, nor reasonable, nor adequate, nor in the public interest. U.S. S.E.C. v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328, 332, Fed. Sec. L. Rep. (CCH) P 96597 (S.D. N.Y. 2011), stay pending appeal denied, 827 F. Supp. 2d 336 (S.D. N.Y. 2011), supplemented, (Dec. 29, 2011) and vacated and remanded, 752 F.3d 285, Fed. Sec. L. Rep. (CCH) P 97983 (2d Cir. 2014). After both the SEC and Citigroup appealed, the Second Circuit overturned Judge Rakoff's decision, finding that he abused his discretion in requiring, as a condition of approving the settlement, that the SEC establish the "truth" of the allegations against Citigroup. U.S.S.E.C. v. Citigroup Global Markets, Inc., 752 F.3d 285, Fed. Sec. L. Rep. (CCH) P 97983 (2d Cir. 2014).

[15]Mary Jo White, SEC Chair, Deploying the Full Enforcement Arsenal (Sept. 26, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539841202 (stating that the SEC will be seeking admissions in cases: (1) involving egregious conduct harming large numbers of investors; (2) where the markets or investors were placed at significant risk; (3) where the wrongdoer poses a particular future threat to investors or the markets; or (4) where the defendant unlawfully obstructs the SEC's process or investigation).

[16]See, e.g., SEC v. Parker Drilling Co., Civil Action No. 1:13-00461, Consent of Defendant Parker Drilling Company, ¶ 2 (E.D.Va. Apr.16, 2013) ("Defendant has entered into a deferred-prosecution agreement that acknowledges responsibility for criminal conduct relating to certain matters alleged in the complaint in this action."); SEC v. Diebold, Inc., Civil Action No. 1:13-01609, Consent of Defendant Diebold, Inc., ¶ 2 (D.D.C. Oct. 22, 2013); SEC v. Weatherford Int'l Ltd., Civil Action No. 4:13-03500, Consent of Defendant Weatherford International Ltd., ¶ 2 (S.D. Tex. Nov. 26, 2013) ("Weatherford has entered into [DPAs with DOJ and the U.S. Attorney's Office for the Southern District of Texas], in which it admits, accepts, and acknowledges responsibility for criminal conduct relating to certain matters alleged in the Complaint in this action"); SEC v. Archer-Daniels-Midland Co., Civil Action No. 2:13-02279, Consent of Defendant Archer-Daniels-Midland Company, ¶ 2 (C.D. Ill. Dec. 20, 2013) ("Defendant acknowledges as true and accurate the facts set forth in the attached Statement of Facts, entered into in connection with its [NPA with DOJ], which is attached as Exhibit A to this Consent.").

U.S.C.A. § 2462.[17] In determining whether a remedy is punitive, courts will now utilize a two-part analysis, looking to whether 1) the wrong committed was against the public or an individual, and 2) the remedy is meant to punish or deter future action.[18] In rejecting the government's argument that disgorgement is remedial because it "restor[es] the status quo,"[19] the Court found that disgorgement is a penalty because "disgorgement orders go beyond compensation, are intended to punish, and label defendants as wrongdoers."[20]

The *Kokesh* ruling may have far-reaching effects on future FCPA enforcement, "as virtually every FCPA settlement in 2016 included disgorgement and prejudgment interest and the difficulties involved in those years-long investigations often result in proceedings concerning aged alleged violations."[21] These consequences may include, among others, reduced leverage for the SEC in settlement negotiations; fewer investigations involving old conduct; increased focus by the SEC on seeking tolling agreements to extend the statute of limitations; preclusion of individuals from seeking reimbursement or indemnification for disgorgement payments (as the SEC does not allow indemnification for penalties, and this is also true of many insurance policies); challenges to other remedies sought by the SEC, such as injunctive relief; and challenges to the use of disgorgement in any SEC enforcement action, a question specifically left open by the Court in *Kokesh*.[22]

§ 13:17 Collateral effects of FCPA violations

The consequences of a conviction under the FCPA extend far beyond the statutory punishments and civil remedies identified by law and imposed in DOJ and the SEC proceedings. Perhaps the most serious potential consequence of a conviction under the FCPA arises from debarment from participation in U.S. federal

[17] Kokesh v. S.E.C., 137 S. Ct. 1635, 198 L. Ed. 2d 86, Fed. Sec. L. Rep. (CCH) P 99733 (2017).

[18] Kokesh v. S.E.C., 137 S. Ct. 1635, 1643, 198 L. Ed. 2d 86, Fed. Sec. L. Rep. (CCH) P 99733 (2017).

[19] Kokesh v. S.E.C., 137 S. Ct. 1635, 1644, 198 L. Ed. 2d 86, Fed. Sec. L. Rep. (CCH) P 99733 (2017).

[20] Kokesh v. S.E.C., 137 S. Ct. 1635, 1645, 198 L. Ed. 2d 86, Fed. Sec. L. Rep. (CCH) P 99733 (2017).

[21] Mary Jo White, et al., What Kokesh v. SEC Means For Enforcement Actions, Law 360 (Jun. 8, 2017, 4:54 PM), https://www.law360.com/articles/932661/what-kokesh-v-sec-means-for-sec-enforcement-actions.

[22] *Id*.

government business. The U.S. Office of Management and Budget may bar any entity indicted for or convicted of violating the FCPA from procuring any business from the U.S. government.[1] Pursuant to an Executive Order, no company is allowed to contract with executive governmental agencies if it has been debarred, suspended or otherwise excluded from participation. In addition, firms convicted of violations of the FCPA may also be ineligible to receive export licenses, participate in securities businesses or conduct business with other governmental agencies, such as the Department of Defense, the Commodities Futures Trading Commission or the Overseas Private Investment Corporation.[2] These restrictions and bans often represent a more potent danger to the health and viability of multinational corporations than criminal liability itself. Companies in industries conducting significant business with the U.S. government must be acutely aware of this risk. Pharmaceutical businesses may lose their ability to take part in U.S.-government health insurance programs such as Medicare or Medicaid, financial services firms may be denied access to federal funding, and defense contractors may be prohibited from bidding on lucrative procurements, to name a few examples.[3]

Revelations that the U.S. government is investigating a company for possible FCPA violations may spawn civil lawsuits in the United States by shareholders, competitors or even foreign governments. Although the FCPA has been interpreted not to provide for a private right of action,[4] plaintiffs have alleged securities fraud, tort claims or breach of fiduciary duties claims as vehicles for redress of FCPA violations. Suits by competitors for unfair trade practices pursuant to the Racketeer Influenced and

[Section 13:17]

[1]See 48 C.F.R. §§ 9.406-1(b), 9.406-2(a)(3), (5); DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 70 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[2]DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 69-71 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[3]Companies convicted by final judgment of corruption, among other crimes, are excluded from participation in tenders for public contracts in the European Union, pursuant to Article 45 of the EU's Public Procurement Directive from 2004. See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134), at 114-240.

[4]See Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1027-30, Fed. Sec. L. Rep. (CCH) P 95510, 1990-2 Trade Cas. (CCH) ¶ 69209 (6th Cir. 1990).

Corrupt Organizations Act (RICO) may also be brought under the RICO statute's treble-damages private enforcement and nationwide service of process provisions.[5]

For example, derivative claims were filed by a pension fund against directors of Baker Hughes for breach of fiduciary duty after it had settled enforcement actions by the SEC and DOJ by paying $44 million in April 2007 for alleged bribes of Kazakh officials. Although the Baker Hughes action was dismissed,[6] just before a settlement with DOJ and the SEC over charges of FCPA violations in June 2008, FARO Technologies, Inc. settled a lawsuit brought by investors pursuant to § 10(b) of the 1933 Securities Act for recklessly or knowingly attesting to having adequate internal controls. Similarly, in April 2009, FARO also settled a derivative suit by shareholders against its officers and directors for breach of fiduciary duty. Likewise, KBR, which settled FCPA liability with the government in 2009, faced derivative suits filed in a Texas state court by KBR and Halliburton shareholders, who argued that wrongdoing by the companies cost shareholders more than $650 million.[7] Instead of constituting the conclusion of an FCPA matter, settlements with DOJ and the

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[5]See 18 U.S.C.A. §§ 1961 to 1968; Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, R.I.C.O. Bus. Disp. Guide (CCH) P 6938, 1988-1 Trade Cas. (CCH) ¶ 67994, 25 Fed. R. Evid. Serv. 1021 (3d Cir. 1988), judgment aff'd, 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816, R.I.C.O. Bus. Disp. Guide (CCH) P 7399, 1990-1 Trade Cas. (CCH) ¶ 68894 (1990); Dooley v. United Technologies Corp., 803 F. Supp. 428 (D.D.C. 1992).

[6]Midwestern Teamster Pension Tr. Fund v. Baker Hughes Inc., No. H-08-1809, Final Judgment (S.D. Tex. May 26, 2009).

[7]See Policemen and Firemen Ret. Sys. of the City of Detroit v. Cornelison, Civil Action No. 09-29987 (Tex. Dist. Ct. Harris Cty. May 14, 2009) (shareholder derivative action; the parties filed a stipulation of settlement on June 4, 2012); see also Cent. Laborers' Pension Fund v. Lesar, Civil Action No. 09-32262 (Tex. Dist. Ct. Harris Cty. May 9, 2009) (shareholder derivative action). There are numerous other shareholder suits against boards of directors of companies implicated in alleged FCPA violations. See, e.g., Holt v. Golden, Civil Action No. 3:11-30200 (D. Mass. July 20, 2011) (shareholder derivative suit; dismissed for demand failure on July 25, 2012); Strong v. Taylor, Civil Action No. 2:11-392 (E.D. La. Feb. 16, 2011) (shareholder suit; dismissed for demand failure on July 12, 2012, with permission to file an amended complaint; dismissed with prejudice on March 5, 2013); Ferguson v. Raspano, Civil Action No. 10-23805 (Tex. Dist. Ct. Harris Cty. Apr. 15, 2010) (shareholder derivative action; case dismissed March 1, 2012 with prejudice (plaintiff's motion)); Arnold v. Bragg, Civil Action No. 09-66082 (Tex. Dist. Ct. Harris Co. Oct. 14, 2009) (shareholder derivative action; case dismissed following plaintiff's notice of nonsuit filed October 16, 2009); Alverson v. Caldwell, Civil Action No. 6:08-00045 (M.D. Fla. Jan. 10, 2008) (shareholder action against board of directors of FARO Technologies, Inc. in connection with alleged FCPA violations in China; the parties subsequently settled); Bezirdjian v. O'Reilly, et al., Civil Action No. 07-01144

SEC frequently may signal only the beginning of a new round of litigation, burden and cost.

Finally, companies settling FCPA matters will routinely find themselves subject to either a government-imposed compliance monitor, an independent compliance consultant, or some sort of self-monitoring requirement. This is particularly true where the government does not believe that the company has remediated fully by fixing its compliance program.[8] In years past it was routine in FCPA settlements with DOJ or the SEC, as exemplified by the settlements with Daimler AG, BAES, Innospec Inc. and Nexus Technologies, Inc., for the agreement to require as a condition the mandatory retention of an independent compliance monitor for a period of several years,[9] a remedy that also has begun to

(Cal. Super. Ct. May 22, 2007) (shareholder derivative action against members of Chevron Corporation's board of directors in connection with improper payments under Iraq's Oil for Food program; case dismissed April 17, 2009; dismissal affirmed Mar. 30, 2010); Sheetmetal Workers' Nat'l Pension Fund v. Deaton, Civil Action No. 4:07-01517 (S.D. Tex. May 4, 2007) (shareholder action against directors of Baker Hughes Inc. in connection with FCPA violations; case was dismissed on jurisdictional grounds).

[8]Sometimes this belief may even result in a second monitor. In the case of Biomet, continued FCPA violations after the appointment of an independent compliance monitor led to the appointment of a second monitor, along with a fine of $17.46 million. Press Release, S.E.C. 17-8, Biomet Charged With Repeating FCPA Violations (Jan. 12, 2017).

[9]See United States v. Daimler AG, Criminal No. 1:10-00063, Deferred Prosecution Agreement (D.D.C. Mar. 22, 2010), https://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimlerag-agree.pdf; United States v. BAE Sys. plc, Criminal No. 1:10-035, Plea Agreement (D.D.C. Mar. 1, 2010), https://www.justice.gov/criminal/fraud/fcpa/cases/bae-system/03-01-10baesystems-plea-agree.pdf; Press Release, DOJ, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba, (Mar. 18, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-278.html; Press Release, DOJ, Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials, (Mar. 16, 2010), https://www.justice.gov/opa/pr/nexus-technologies-inc-and-three-employees-plead-guilty-paying-bribes-vietnamese-officials; see also SEC v. Alcatel-Lucent, S.A., Litigation Release No. 21795 (Dec. 27, 2010); SEC v. Alliance One Int'l, Litigation Release No. 21618 (Aug. 6, 2010); SEC v. Universal Corp., Litigation Release No. 21618 (Aug. 6, 2010); SEC v. Halliburton Co., Litigation Release No. 20897A (Feb. 11, 2009); SEC v. Siemens Aktiengesellschaft, Litigation Release No. 20829 (Dec. 15, 2008); SEC v. Baker Hughes Inc., Litigation Release No. 20094 (Apr. 26, 2007); SEC v. The Titan Corp., Litigation Release No. 19107 (Mar 1, 2005); SEC v. GE InVision, Inc., Litigation Release No. 19023 (Feb. 14, 2005); SEC v. Schering-Plough Corp., Litigation Release No. 18740 (June 9, 2004); SEC v. ABB Ltd., Litigation Release No. 18775 (July 6, 2004). Enforcement actions that did not result in compliance monitors include those against Snamprogetti, even though KBR and Technip were required to retain monitors in related

appear in U.K. bribery enforcement resolutions.[10] The provisions in these agreements typically have granted the monitor wide-ranging authority to institute any changes deemed necessary to ensure the company's continued compliance. If a monitor is appointed, he or she will often be assisted by an independent law firm and, if necessary, forensic accountants, imposing costs in addition to the burden of adhering to the monitor's authoritative demands for often extensive changes in compliance policies or potential restructuring policies. The monitor may also be empowered to obtain documents and information from company personnel and usually is required to report to the government further violations encountered. Independent compliance consultants, when required, are generally less intrusive, but can be granted significant and largely unreviewable going-forward responsibilities and authority with respect to revamping compliance programs.[11]

On May 25, 2010, acting Deputy Attorney General Gary G. Grindler issued a memorandum outlining two model provisions for prosecutors to consider when drafting agreements. Under them, if a company believes a monitor's recommendation is impractical, burdensome or too costly, the company can propose an alternative. If the monitor and the company ultimately disagree on which approach to take, DOJ will consider the monitor's recommendation and the company's views when assessing the company's compliance with the nonprosecution or deferred prosecution agreement.

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cases, see Press Release, DOJ, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-780.html, and the Panalpina settlement group. See Press Release, SEC, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), http://www.sec.gov/news/press/2010/2010-214.htm.

[10] See, e.g., Press Release, SFO, Oxford Publishing Ltd to Pay Almost £1.9 million as Settlement After Admitting Unlawful Conduct in Its East African Operations (July 3, 2012), https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/; Press Release, SFO, Action on Macmillan Publishers Limited (July 22, 2011), https://www.foley.com/files/macmillanpublisherslimitednewsrelease.pdf; Comsure Group, Innospec Limited Prosecuted for Corruption by the SFO (Mar. 22, 2010), http://www.comsuregroup.com/innospec-limited-prosecuted-for-corruption-by-the-sfo/; David Leigh & Rob Evans, British Firm Mabey and Johnson Convicted of Bribing Foreign Politicians, The Guardian (Sept. 25, 2009), https://www.theguardian.com/business/2009/sep/25/mabey-johnson-foreign-bribery.

[11] See SEC v. Schering-Plough Corporation, Litigation Release No. 18740 (June 9, 2004).

Second, DOJ and company representatives should meet at least annually to discuss how to improve the monitorship, including its scope and costs.[12]

Following the issuance of the Grindler memorandum and continued criticism of the costs of monitorships, the government in 2011 departed from the general longstanding pattern of requiring external monitors. Only one FCPA resolution, DOJ's deferred prosecution agreement with JGC Corporation, required the appointment of an external monitor.[13] In every other corporate resolution in 2011, the government permitted entities to self-monitor and report back either periodically or if any new violations occurred or internal investigations were initiated. In 2012, monitors were required to be retained by medical device makers Smith & Nephew plc and Bio-Met,[14] while other companies were permitted to resolve their FCPA matters by taking on obligations to monitor their own behavior and self-report FCPA violations to the government.[15] In 2013, three of the four corporate enforcement settlements that mandated an independent compliance

[12]Gary G. Grindler, Acting Deputy Att'y Gen., Memorandum from Gary G. Grindler to the Heads of DOJ Components and United States Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (May 25, 2010), http://www.justice.gov/dag/dag-memo-guidance-monitors.html.

[13]United States v. JGC Corp., Criminal No. 11-260, Deferred Prosecution Agreement (Apr. 6, 2011), http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf.

[14]See United States v. Biomet, Inc., Criminal No. 12-080-RBW, Deferred Prosecution Agreement (Mar. 26, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-dpa.pdf; SEC v. Biomet. Inc., Litigation Release No. 22306 (Mar. 26, 2012); United States v. Smith & Nephew, Inc., Criminal No. 12-030-RBW, Deferred Prosecution Agreement (Feb. 1, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/smith-nephew/2012-02-01-s-n-dpa.pdf; SEC v. Smith & Nephew PLC, Litigation Release No. 22252 (Feb. 6, 2012).

[15]See United States v. Orthofix Int'l, N.V., Criminal No. 4:12-00150-RAS-DDB-1, Deferred Prosecution Agreement (July 10, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf; SEC v. Orthofix Int'l N.V., Litigation Release No. 22412 (July 10, 2012); United States v. Pfizer H.C.P. Corp., Criminal No. 12-169, Deferred Prosecution Agreement (Aug. 7, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf; SEC v. Pfizer Inc., Civil Action No. 1:12-01303 (D.D.C. Aug. 7, 2012) and SEC v. Wyeth LLC, Litigation Release No. 22438 (Aug. 7, 2012); United States v. Data Sys. & Sols. LLC, Criminal No. 1:12-262, Deferred Prosecution Agreement (E.D. Va. June 18, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-dpa.pdf; In re The NORDAM Grp., Non-Prosecution Agreement (July 6, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/nordam-group/2012-07-17-nordam-npa.pdf; United States v. Bizjet Int'l Sales and Support, Inc., Criminal No. 12-061-CVE, Deferred Prosecution Agreement (N.D. Okla. Mar. 14, 2012), http://www.justice.gov/criminal/fraud/fcp

monitor involved the imposition of a so-called "hybrid" monitorship, which is imposed for a shorter term followed by self-reporting by the company if the independent monitor certifies the further independent monitoring is no longer needed.[16] While the use of such hybrid monitorships is less burdensome and costly than a full monitorship, the dominant trend appeared to be moving against the use of monitors at all in most cases, until 2016 and 2017, when several monitors were appointed.[17]

§ 13:18 Individual liability includes threat of significant prison terms

A conviction pursuant to the FCPA can be devastating for an individual. In addition to U.S. citizens, who may be held liable under the FCPA for violations committed anywhere in the world, others associated with an issuer or domestic concern, such as officers, directors, employees, shareholders or agents are subject to liability.

As previously mentioned, individuals have become more frequently targeted by enforcement agencies. In September 2015, DOJ issued a memorandum by Deputy Attorney General Sally Q. Yates detailing how DOJ expects prosecutors to focus on individual wrongdoing from the outset of any investigation of corporate misconduct and to hold individuals accountable for criminal conduct.[1] DOJ's Pilot Program built upon the Yates Memo by increasing transparency in corporate FCPA charging decisions,

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a/cases/bizjet/2012-03-14-bizjet-deferred-prosecution-agreement.pdf; United States v. Marubeni Corp., Criminal No. 12-022, Deferred Prosecution Agreement (S.D. Tex. Jan. 17, 2012), http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf.

[16] See Press Release, DOJ, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html; Press Release, DOJ, German Engineering Firm Bilfinger Resolves Foreign Corrupt Practices Act Charges and Agrees to Pay $32 Million Criminal Penalty (Dec. 11, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1297.html; Press Release, DOJ, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), http://www.justice.gov/opa/pr/2013/October/13-crm-1118.html.

[17] See Jeffrey Benzing, Self-Monitoring and Hybrids More Common as U.S. Credits FCPA Compliance, Just Anti-Corruption (May 10, 2013), http://globalinvestigationsreview.com/article/1022099/self-monitoring-and-hybrids-more-common-as-us-credits-fcpa-compliance (noting that "in the recent years, companies that self-disclosed conduct have avoided monitors").

[Section 13:18]

[1] Memorandum of Deputy Attorney General Sally Quillian Yates (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

which DOJ believed would "encourage voluntary corporate self-disclosure of overseas bribery, and thus more prosecutions of the individuals responsible for those crimes."[2]

Individuals who have pled guilty to the FCPA's anti-bribery provisions have increasingly been sentenced to significant prison terms. Albert Stanley, the former CEO of KBR, a subsidiary of Halliburton Company, reached a plea agreement in September 2008 in a prosecution over his role in orchestrating large-scale systematic bribery of Nigerian officials and agreed to a prison term of not more than seven years and restitution to KBR in the amount of $10.8 million.[3] Stanley also reached a civil settlement with the SEC over violations of the anti-bribery provisions. In July 2010, Juan Diaz, who had previously plead guilty to violations of the FCPA anti-bribery provisions, was sentenced to 57 months.[4] This came merely months after a judge handed down an 87-month prison sentence to Charles Jumet after the defendant pled guilty to violating the FCPA.[5] Others who have chosen not to settle with the government and instead proceed to trial have not had much success. Three jury convictions in the Haiti Telecom prosecutions resulted in similarly long prison sentences. Joel Esquenazi, the former president of Terra Telecommunications Corp., was sentenced to 15 years in prison—the longest FCPA-related sentence to date. His co-defendant, Carlos Rodriguez, former executive vice president, was sentenced to 84 months in prison.[6] In May 2012, former director of international relations for Telecommunications D'Haiti S.A.M. Jean Rene Duperval was sentenced to serve nine years in prison and pay $497,331 in

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[2]Press Release, DOJ, Criminal Division Launches New FCPA Pilot Program (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[3]See Press Release, DOJ, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges (Sept. 3, 2008), http://www.justice.gov/opa/pr/2008/September/08-crm-772.html.

[4]United States v. Diaz, No. 09-cr-20346 (S.D. Fla. Aug. 5, 2010), https://www.justice.gov/criminal/fraud/fcpa/cases/diazj/08-05-10diaz-judgment.pdf; Press Release, DOJ, Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme (Jul. 30, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-883.html.

[5]Press Release, DOJ, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-442.html.

[6]Press Release, DOJ, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html.

restitution.[7] Frederic Bourke was convicted in July 2009 for violations of the FCPA[8] and was subsequently sentenced to 366 days in prison.[9] In August 2009, former U.S. Congressman William Jefferson was convicted of 11 out of 16 counts related to allegations that he conspired to violate the FCPA by bribing Nigerian telecommunications officials in return for kickback payments to Jefferson and his family; he was not convicted of the substantive FCPA charge.[10] Jefferson was sentenced to 13 years in prison.[11] In September 2009, Gerald and Patricia Green, two Los Angeles film executives, were found guilty of violating the FCPA and money laundering for paying $1.8 million in bribes to Thai officials to obtain the right to manage and operate the Bangkok film festival.[12] DOJ has increasingly made use of anti-money laundering laws in FCPA-related matters, in part because a money laundering conviction can significantly enhance an individual's sentence.[13] Moreover, given that the FCPA does not cover receipt of a bribe, money laundering may be the only U.S. federal offense with which to charge "foreign officials" who receive

[7]Press Release, DOJ, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (May 21, 2012), http://www.justice.gov/opa/pr/2012/May/12-crm-656.html.

[8]Press Release, DOJ, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), http://www.justice.gov/opa/pr/2009/July/09-crm-677.html.

[9]Press Release, DOJ, Connecticut Investor Frederic Bourke Sentenced to Prison for Scheme to Bribe Government Officials in Azerbaijan (Nov. 11, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1217.html. The appeal in the Bourke case was argued on February 10, 2011 and was affirmed after a denial of a petition for rehearing en banc. See United States v. Bourke, No. 11-5390 (2d Cir. May 16, 2013).

[10]See Press Release, DOJ, Former Congressman William J. Jefferson Convicted of Bribery, Racketeering, Money Laundering and other Related Charges (Aug. 5, 2009), http://www.usdoj.gov/opa/pr/2009/August/09-crm-775.html.

[11]See Press Release, DOJ, Former Congressman William J. Jefferson Sentenced to 13 Years in Prison for Bribery and Other Charges (Nov. 13, 2009), http://www.justice.gov/opa/pr/2009/November/09-crm-1231.html. Jefferson's conviction and 13-year prison sentence were affirmed by the Fourth Circuit Court of Appeals. U.S. v. Jefferson, 674 F.3d 332 (4th Cir. 2012), as amended, (Mar. 29, 2012).

[12]See Press Release, DOJ, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009), http://www.usdoj.gov/opa/pr/2009/September/09-crm-952.html.

[13]See, e.g., U.S. v. Esquenazi, 752 F.3d 912, Fed. Sec. L. Rep. (CCH) P 97966 (11th Cir. 2014) (affirming sentence of 15 years for FCPA anti-bribery and money laundering offenses).

bribes.[14] More prosecutions of individuals remain, as DOJ seeks to utilize all of the tools available for exposing misconduct at companies, including pressuring culpable individuals in senior positions to cooperate by identifying the full scope of company misconduct as well as misconduct at other companies in the relevant industry.

Sentences imposed against non-U.S. citizens have likewise included terms of incarceration. In 2008, Christian Sapsizian, a French citizen employed by the French telecom company Alcatel pled guilty and was sentenced to 30 months in prison for a bribery scheme relating to a Costa Rican mobile telephone contract.[15] In 2007, the former ITXC Corporation's employee Yaw Osei Amoako received an 18-month prison sentence after pleading guilty to criminal violations of the FCPA in various African countries for activities relating to telephone network contracts.[16] Misao Hioki, a Japanese executive of a rubber products manufacturing company, was sentenced to two years in prison and fined $80,000 for misconduct including making corrupt payments to Latin American and other officials.[17]

VI. REDUCING THE RISK OF FCPA LIABILITY

§ 13:19 Overview

In the current enforcement environment, sophisticated companies will recognize the importance of maintaining and testing compliance programs and other internal controls to reduce the risk of FCPA violations. For issuers under the 1934 Act, violations of the anti-bribery provisions and the accounting and internal controls provisions almost universally occur in tandem.

[14] See United States v. Esquenazi, et. al, Criminal No. 1:09-21010-MGC, Indictment (S.D. Fla. Dec. 8, 2009) (charging a foreign official with money laundering charges in an FCPA case).

[15] See Press Release, DOJ, Former Alcatel CIT Executive Sentenced for Paying $2.5 Million in Bribes to Senior Costa Rican Officials (Sept. 23, 2008), http://www.usdoj.gov/opa/pr/2008/September/08-crm-848.html.

[16] See Press Release, DOJ, Two Former Executives of Itxc Corp Plead Guilty and Former Regional Director Sentenced In Foreign Bribery Scheme (July 27, 2007), http://www.usdoj.gov/opa/pr/2007/July/07_crm_556.html.

[17] See Press Release, DOJ, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine House and Related Products (Dec. 10, 2008), https://www.justice.gov/archive/atr/public/press_releases/2008/240307.htm. In addition to prison sentences, individuals have had to forfeit large sums in connection with FCPA cases. As mentioned above, Jeffrey Tesler agreed to forfeit $150 million in March 2011—the largest individual forfeiture to date. See United States v. Tesler, No. H-09-098, Plea Agreement ¶ 1 (S.D. Tex. Mar. 11, 2011).

FCPA compliance programs for issuers should address both of these distinct aspects of the law under a joint framework, although, as noted above, even nonissuers will, as a matter of good business management, want to ensure that internal controls address both primary anti-bribery as well as books and records matters.

Compliance programs typically focus on five mutually-dependent but individually critical aspects of the so-called internal control environment, namely (1) tone at the top; (2) enunciation of policies, rules and practical guidance; (3) communication and training; (4) auditing and testing of compliance programs; and (5) remediation, including, as needed, revisions to policies and retraining or discipline of errant employees.[1] Prudent managers will periodically undertake a company-wide risk assessment to ensure that compliance resources are appropriately allocated; a comprehensive risk assessment for a company first setting out to establish a global compliance program is essential.

An effective compliance program should take into account the following key aspects of the FCPA: (1) the broad definitions of foreign officials and covered payments or benefits; (2) the broad reach of the anti-bribery provision, which provides jurisdiction over a nonissuer for conduct that has some connection to the United States; (3) the fact that payments by agents, distributors or intermediaries fall within the FCPA; (4) the rule that books and records violations are viewed under a virtual strict liability standard without a materiality requirement; and (5) the impact of the FCPA on mergers and acquisitions.[2]

Companies should seek to implement a code of conduct for all

[Section 13:19]

[1]In November 2012, DOJ and the SEC issued detailed guidance describing what they consider to be the hallmarks of an effective compliance program. See DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 57-62 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf. Additionally, the Committee of Sponsoring Organizations of the Treadway Commission (COSO), a leading international compliance and internal controls organization, has long championed and refined advice and systems for anti-fraud and anti-bribery controls. Helpful materials are available at http://www.coso.org. See also OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, (Nov. 26, 2009), http://www.oecd.org/daf/anti-bribery/44176910.pdf.

[2]See IBA Legal Practice Division, Litigation Committee Newsletter (Sept. 2006), Bruce E. Yannett & Steven S. Michaels, Challenges for Non-US Based Companies under the US Foreign Corrupt Practices Act: A Blueprint for Compliance Programmes 13.

employees aimed at increasing awareness and knowledge of FCPA requirements; this code of conduct should also impart knowledge about key anti-bribery laws in the particular jurisdictions in which employees conduct business, require training on those topics, or both. The code of conduct should identify permissible and impermissible dealings with potential government customers from an anti-bribery perspective and should emphasize the requirements for accounting and internal controls. Moreover, a detailed and practical set of anti-corruption training materials, including template contract language to use in agreements with third-party payees and suppliers, should be disseminated to provide employees at all levels with instruction on compliance policies and tools. Training should include real-world examples of situations employees are likely to face and should be repeated in online and in-person training sessions. Sales and marketing employees—those dealing most directly with customers—need to be schooled in particular about the applicable standards for dealing with non-U.S. officials and third parties, while accounting and finance employees must be well-versed in the books and records and internal controls provisions of the FCPA and other applicable anti-bribery and accounting laws. Processes should be implemented and tested to assure that legal and compliance personnel are promptly consulted about *any* doubtful activities or red flag situations.

Compliance programs should also implement due diligence procedures for dealing with third parties, such as agents, consultants, distributors or other intermediaries. Before any contracts are formed with such parties, especially in countries known to suffer from corruption problems, a detailed checklist should be completed to verify the identity of the third party and to ensure that no obvious compliance concerns are apparent, with an acute sensitivity for potential red flags. DOJ and the SEC have warned that the following suspicious red flags may indicate a potential FCPA violation associated with a third party: (1) excessive commissions to third-party agents or consultants; (2) unreasonably large discounts to third-party distributors; (3) third-party "consulting agreements" that include only vaguely described services; (4) the third-party consultant is in a different line of business than that for which it has been engaged; (5) the third party is related to or closely associated with [a] foreign official; (6) the third party became part of the transaction at the express request or insistence of [a] foreign official; (7) the third party is merely a shell company incorporated in an offshore jurisdiction; and (8) the third party requests payment to offshore bank

accounts.[3] Companies should also insist, to the extent commercially feasible, on the inclusion in third-party contracts of audit clauses that allow the company to review the third party's relevant records and documents to ensure its adherence to anti-bribery requirements and related laws, such as anti-money-laundering rules. Companies must also implement appropriate due diligence programs for mergers and acquisitions.[4]

Even the most sophisticated compliance literature, innovative training simulations and prudent procedures with respect to third parties will not guarantee absolute conformance with applicable laws and regulations governing corruption and bribery. Requirements that employees sign declarations at regular intervals with a promise to abide by the FCPA's requirements, although necessary, are not sufficient. A crucial element to limit the risk of serious compliance violations is a corporate culture that provides ethical leadership and has zero tolerance for bribery and corruption. The key institutional component to foster such an environment is a company's top management, which sets the tone at the top and thereby establishes behavioral directives for employees. How seriously management takes compliance can be measured in part by the extent to which compensation structures and promotion policies reward compliant behavior and simultaneously impose disciplinary actions upon violators.

In addition, companies should install compliance and internal audit watchdogs with an explicit mandate to investigate potentially problematic conduct and to report compliance violations to company management and/or the audit or compliance committee of its board of directors in a transparent and direct manner. For compliance and audit departments to be effective, they need to be given appropriate resources and authority to carry out their missions. The example of Siemens AG illustrates the consequences of insufficient funding and a lack of clear responsibility over the central compliance function. Following its complete overhaul of the compliance organization as a result of its internal investigation, Siemens now has hundreds of compliance personnel worldwide, with control and accountability resting with the Chief Compliance Officer, who reports directly to the company's

[3] DOJ Criminal Divison & SEC Enforcement Divison, A Resource Guide to the U.S. Foreign Corrupt Practices Act 22-23 (2012), https://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

[4] Paul R. Berger & Erin W. Sheehy, FCPA and the Halliburton Opinion: What the DOJ's Guidance Means for M&A Due Diligence and Post-Merger Compliance, Boardroom Briefing (2008).

General Counsel and Chief Executive Officer.[5] The resolution of France-based telecommunications company Alcatel-Lucent in 2010 provides an example of how inadequate global compliance systems can cost a company. Alcatel-Lucent paid $137 million and DOJ criticized the company's de-centralized structure as permit[ting] corruption to occur.[6]

Steps taken to strengthen compliance have been recognized by U.S. authorities in determining sentences, fines, civil penalties, disgorgement, debarment and related issues in enforcement actions. The resolution of the Siemens AG matter with a very favorable result for the company, considering the potential fines, disgorgement, penalties and collateral consequences, for example, partially depended on the company's substantial reorganization and strengthening of compliance processes, including significant financial investments in and empowerments of the compliance and audit departments.[7] Similarly, AB Volvo benefited significantly from its transparent cooperation and commitment to improve its compliance program in reaching a deferred prosecution agreement with DOJ, which cited the company's implementation of enhanced compliance policies and procedures as important factors in settling charges under the Oil-for-Food investigation concerning corrupt payments to the Iraqi government.[8] Similarly, Tenaris S.A., a Luxembourg-based pipe manufacturer, received significant credit by the SEC for its voluntary disclosure, cooperation with authorities, and remediation efforts, ultimately paying only $5.4 million in disgorgement and interest but no civil penalty.[9] Lastly, Morgan Stanley's success in avoiding an enforcement action warrants emphasis. The company provided in-depth training for employees, featuring in-person and web-based

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[5]See U.S. v. Siemens AG, Criminal No. 08-867, DOJ Sentencing Memorandum at 22 (D.D.C. Dec. 12, 2008), https://www.justice.gov/archive/opa/documents/siemens-sentencing-memo.pdf.

[6]United States v. Alcatel-Lucent France S.A., Criminal No. 10-20906, 12 (S.D. Fla. Dec. 27, 2010), http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf.

[7]See U.S. v. Siemens AG, Criminal No. 08-867, DOJ Sentencing Memorandum at 22-24 (D.D.C. Dec. 12, 2008), https://www.justice.gov/archive/opa/documents/siemens-sentencing-memo.pdf.

[8]See Press Release, DOJ, AB Volvo to Pay $7 Million Penalty for Kickback Payments to the Iraqi Government under the U.N. Oil for Food Program (Mar. 20, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_crm_220.html; Press Release, DOJ, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

[9]Press Release, S.E.C. 11-112, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011).

seminars, and frequent written reminders throughout the year of the company's anti-corruption policies; required employees annually to certify compliance with company policies and procedures; provided a compliance hotline for addressing compliance issues; employed over 500 compliance officers worldwide between 2002 and 2008; and conducted risk-based internal audits to detect potential FCPA issues; and updated policies and procedures.[10]

In 2017, DOJ issued guidance on compliance programs intended as "neither a checklist or a formula," laying out "common questions" regarding an organization's pre-existing compliance programs and its remedial efforts.[11] The guidance highlighted 11 topics totaling almost 120 questions to consider an entity's compliance regime. Topics included Analysis and Remediation of Underlying Misconduct, Senior and Middle Management, Autonomy and Resources, Policies and Procedures, Risk Assessment, Training and Communications, Confidential Reporting and Investigation, Incentives and Disciplinary Measures, Continuous Improvement, Periodic Testing, and Review, Third Party Management, and Mergers and Acquisitions. While the guidance did not break new ground, it is instructive as to how DOJ will assess a company's compliance efforts.

Developing an effective compliance program—especially in the case of a large multi-national company—can generate some costs and quite possibly require a reorientation of corporate resources and priorities. Experience has taught that such expenditures are small, if not infinitesimal, compared to the substantial costs of internal investigations by law firms and accounting firms, in addition to fines and penalties resulting from settlements by public authorities and potentially years of collateral litigation. The SEC has wisely advised senior managers of regulated companies not to succumb to the temptation to cut compliance programs even in the face of economic downturns, given the risk of catastrophic losses from weak compliance programs.[12]

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[10]United States v. Peterson, Criminal No. 12-cr-224, Criminal Information (E.D.N.Y. Apr. 25, 2012); see also Debevoise & Plimpton LLP, Hints and Olive Branches in the Morgan Stanley Declinations, FCPA Update, Vol. 3, No. 10 (May 2012), http://www.debevoise.com/~/media/files/insights/publications/2012/05/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_may_2012.pdf.

[11]DOJ, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/compliance-initiative.

[12]See Lori A. Richard, Dir. SEC Office of Compliance Inspections and Examinations, Open Letter to CEOs of SEC-Registered Firms (Dec. 2, 2008), ht