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## A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act

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## ARTICLES

### A LITTLE LESS CONVERSATION, A LITTLE MORE ACTION: EVALUATING AND FORECASTING THE TREND OF MORE FREQUENT AND SEVERE PROSECUTIONS UNDER THE FOREIGN CORRUPT PRACTICES ACT

*Justin F. Marceau\**

In the wake of increasingly common, creative, and severe prosecutions under the Foreign Corrupt Practices Act (“FCPA”), scholars and practitioners must acknowledge that the time for talk—i.e., non-punitive voluntary disclosures and abstract debate—has given way to an era of aggressive enforcement actions by the Department of Justice and the Securities Exchange Commission. The bare numbers tell much of the story: the Department of Justice has initiated four times more prosecutions over the last five years than over the previous five years.<sup>1</sup> Also instructive are prosecutors’ growing use of novel and ever more broad theories of liability under the FCPA.

This Article outlines and discusses in particular the anti-bribery provisions of the FCPA, then identifies recent controversial cases that illustrate the government’s departure from its usual passive approach, and how the government has embraced a more aggressive, or legal, action position. In addition, this Article forecasts other forthcoming theories of FCPA-liability that, although not yet advanced by the

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1. Dan Newcomb, *Digests of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977* (Feb. 28, 2006), available at [http://www.shearman.com/lt\\_022806/](http://www.shearman.com/lt_022806/).

Department of Justice, are likely forthcoming from prosecutors based on their recent zealous theories of liability.

### I. INTRODUCTION TO THE FCPA

Based upon information regarding corporate corruption uncovered during the Watergate investigations, the Securities and Exchange Commission conducted a series of investigations designed to evaluate how widespread the practice of corporate bribery to foreign officials had become.<sup>2</sup> The Securities and Exchange Commission's investigation resulted in disclosures by over 400 companies that had engaged in bribes or other corrupt payments.<sup>3</sup> Of these, some 200 companies admitted to making bribe-type payments to foreign government officials.<sup>4</sup> Following these investigations, Congress held hearings to assess the severity of the bribery problem, and possible solutions.<sup>5</sup> Shortly thereafter, in December 1977, Congress, perceiving this to be an epidemic, responded by passing the FCPA.<sup>6</sup>

From its inception, the FCPA was a bold and unique piece of legislation in that it criminalized conduct that Congress itself deemed unethical, regardless of the customs and practices of the foreign country where the company was doing business.<sup>7</sup> The Act's impact in early years was marred by controversies regarding the appropriateness of legislating morals,<sup>8</sup> but corporate scandals in the 1990s readied the public for the government's taking a more direct role in enforcing

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2. Dan Zarin, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1-1 (2005); see also *Abuses of Corporate Power: Hearings Before the Subcomm. On Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. 16-18 (1976) (testimony of Roderick M. Hills, Chairman of the SEC); Wallace Timmeny, *An Overview of the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 235, 236-37 (1982).

3. Zarin, *supra* note 2.

4. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 116-18 (1977).

5. SEC. & EXCH. COMM'N, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, 94th Cong., 1st Sess., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 14, 1976).

6. 15 U.S.C. § 78 (1977).

7. Zarin, *supra* note 2, 1-2.

8. *Id.* at 1-2 (explaining that Congress justified the legislation, in part, by noting that a prohibition on bribery would ensure that the market was functioning properly and reward efficient business practices).

ethical business practices.<sup>9</sup> Taking advantage of the public interest in policing corporations more closely, the Department of Justice has demonstrated, both through prosecutions and public statements, a commitment to aggressively prosecute corporate bribery.<sup>10</sup> Moreover, the unwillingness of many corporate defendants to challenge the Justice Department's theory of liability in court, opting instead to accept a quick plea agreement in order to minimize negative publicity, has left prosecutors with an almost unchecked authority to define the contours of FCPA liability. Accordingly, not until very recently has it become possible to appreciate just how drastic and far reaching the Department of Justice's use of the FCPA will be.

The short and relatively straightforward text of the Act belies the scope of liability sought by federal prosecutors. The Department of Justice's recent aggressive enforcement of the FCPA's provisions has served to illustrate numerous unanticipated theories of liability. This article argues that corporate defendants are now faced with a "Hobson's Choice": either accept the Department of Justice's broad and unprincipled application of the FCPA, or confront the prolonged negative press that is sure to accompany a legal challenge to various theories of FCPA liability. Specifically, in light of the recent upswing in prosecutions, and interpretations being made by the Department of Justice, parent companies, franchisors, non-U.S. residents, and other persons or entities with attenuated links to public officials face the risk of being charged under the FCPA. As discussed below, not all of these theories of liability are the product of a reasoned interpretation of the FCPA.

## II. FCPA LIABILITY GENERALLY

The FCPA makes it unlawful to bribe foreign government officials in order to obtain or retain business.<sup>11</sup> The FCPA applies to individuals,

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9. Marie Leone, *Coming Clean about Bribery*, CFO.com, Apr. 03, 2006 available at <http://www.cfo.com/article.cfm/6764209?f=related> (quoting a senior Department of Justice attorney as saying that there is "a new vigilance at the Department of Justice in terms of identifying and prosecuting FCPA violators").

10. *Id.*

11. See 15 U.S.C. § 78dd-2(a) (2005). The statute states that:

[i]t shall be unlawful for any domestic concern . . . , or for any officer, director, employee, or agent of such domestic concern . . . , to make use of the mails or any

firms, officers, directors, employees, agents of a firm, and any stockholder acting on behalf of a firm. In order to obtain a conviction under the anti-bribery portion of the statute, the government must prove, beyond a reasonable doubt, that the defendant is:

1. *a domestic concern*<sup>12</sup> (any corporation, partnership, association, . . . which has its principal place of business in the U.S., or which is organized under the laws of a state),<sup>13</sup>
2. that made use of a means or *instrumentality of interstate commerce*,<sup>14</sup>
3. *corruptly*,<sup>15</sup>
4. *in furtherance*<sup>16</sup> of an offer or payment of anything of

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means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, [or] promise to pay . . . anything of value to . . . (3) any person, while knowing that all or a portion of such money . . . will be offered, given, or promised, directly or indirectly, to any foreign official . . . for purposes of (A)(i) influencing any act or decision of such foreign official . . . in his . . . official capacity.

*Id.*

12. Issuers, defined as entities that have a class of securities registered pursuant to § 12 of the Securities Exchange Act, are also liable for violations of the FCPA. *See* 15 U.S.C. § 78c(a)(8) (2005). Issuers are subject to the same requirements under the FCPA as domestic concerns; however, because a company's status as an issuer is easily determined and uncontroversial, this article focuses on the liability of domestic concerns. *Id.*

13. The complete definition of "domestic concern" covers an even larger group of persons and entities: individual U.S. citizens (wherever located), U.S. resident aliens, corporations, and other business entities organized under the laws of a state of the United States or having their principal place of business in the United States, and officers, directors, employees, and agents of these entities, regardless of their nationality. *See* 15 U.S.C. § 78dd-2(h)(1).

14. Generally speaking, courts have taken a very broad interpretation of "interstate commerce" such that this jurisdictional requirement will, in most cases, be easily satisfied. The Act itself provides an exhaustive definition of interstate commerce. 15 U.S.C. § 78dd-1(a), 2(a), 2(h)(5).

15. The term "corruptly" was explained in the legislative history of the FCPA: "[the term] is used to make clear that the offer, payment, promise, or gift must be intended to induce the recipient to *misuse his official position* in order wrongfully to direct business to the payor or his client." S. REP. NO. 95-114, at 10 (1977) (emphasis added). In other words, there must be some sort of evil motive or purpose behind the payment. For a complete discussion of the interpretation of "corruptly," *see generally* Gary M. Elden & Mark S. Sablemann, *Negligence Is Not Corruptive: The Scierter Requirement of the Foreign Corrupt Practices Act*, 49 GEO. WASH. L. REV. 819 (1981). Notably, it is the subjective intent of the payor that is determinative, and the bribe need not be successful in order for liability to exist. Zarin, *supra* note 2, at 4-15.

16. The "in furtherance" language was included to emphasize that the use of the

- value to any person,
5. while *knowing*<sup>17</sup> that *anything of value*<sup>18</sup> would be offered or given directly or indirectly to any *foreign official*, and<sup>19</sup>
  6. *for purposes of influencing* any act or decision of such foreign official in his official capacity.

In the straightforward context of a single company or individual directly involved in the challenged payments, FCPA liability likely exists if these elements are satisfied and an exception or defense does not apply. However, as the following discussion of three recent prosecutions under the FCPA illustrates, determining whether the elements of liability are satisfied when applied to a complicated

instrumentality of commerce did not have to be essential to the scheme of corrupt payments. *See Schmuck v. United States*, 489 U.S. 705, (1989) (recognizing that the use of an instrumentality of commerce need only be incident to an essential part of the scheme).

17. Knowledge, for purposes of the FCPA, does not require actual knowledge. The relevant portions of the Act, 15 U.S.C. §§ 78dd-1(f)(2), -2(h)(3), provide for liability in circumstances where the individual or entity consciously disregards impropriety. H.R. REP. NO. 100-576, at 918-19, (1988) (Conf. Rep.) *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1951-52. Commentators have suggested that this applies to both past and future corrupt payments. *See, e.g., Zarin, supra* note 2, at 4-38.

18. *Zarin, supra* note 2, at 4-29 (noting that, as used in other statutes, the term has been construed broadly to include “both tangible and intangible benefits that an official subjectively believes to be of value”).

19. The definition of “foreign official” is somewhat broader than the term implies. For purposes of the FCPA, a “foreign official” is “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for on behalf of any such public international organization.” 15 U.S.C. § 78dd-2(h)(2). In the past, the Department of Justice has suggested using the FCPA Opinion Procedure for particular questions as to the definition—i.e., whether a member of the royal family, or a member of legislative body, or an official of a state-owned business constitute foreign officials. Without requesting Department of Justice guidance, however, the obvious take-away point is that prosecutors are taking a liberal view as to what constitutes a foreign official. Dep’t of Justice brochure, *available at* <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>; *see, e.g., FOREIGN CORRUPT PRACTICES ACT v.1*, 106.020 (2005) (explaining that the FCPA “has broad coverage and can apply to individuals whose ‘official’ status may not be readily apparent”); FCPA Op. No. 03-01 (Jan. 15, 2003) (assuming without discussing “that payments to individuals employed by foreign state-owned entities to obtain or retain business” constitute payments to foreign officials for purposes of FCPA liability); FCPA Op. No. 94-01 (May 13, 1994).

corporate entity is far from mechanical.

### III. THREE RECENT FCPA ACTIONS

Previous prosecutorial actions by government attorneys must be analyzed in order to develop the new concepts of liability I will discuss in this article. I will discuss the following three anti-corruption enforcement actions: (1) the Oily Rock indictment; (2) the “NatWest Three” case; and (3) the Diagnostic Products plea. These three will provide the basis necessary for understanding why I propose the new theories of possible liability.

In October 2005, the United States Attorney for the Southern District of New York indicted three individuals for their respective roles in an alleged bribery scheme relating to the privatization of the Azerbaijani oil industry.<sup>20</sup> These indictments raise rather novel issues regarding culpability, in that at least one of the individuals, David Pinkerton, was not alleged to have been involved in making any of the bribe payments or in negotiating any of the bribes.<sup>21</sup>

In 2002, three citizens of the United Kingdom who lived and worked in England, the now infamous “NatWest Three,” were indicted and extradited for their role in a complicated accounting scheme involving their employers NatWest and Enron.<sup>22</sup> The criminal charges against these men has stirred considerable controversy regarding the Department of Justice’s decision to prosecute persons who are not residents or citizens of the United States, or responsible for any harm to a U.S. company. Nonetheless, the trials of these men will likely be scheduled within the next few months.<sup>23</sup>

The final example used to illustrate the Department of Justice’s

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20. Press Release, Dep’t of Justice, *U.S. Announces Charges in Massive Scheme to Bribe Senior Government Officials in The Republic Of Azerbaijan* (Oct. 6, 2005), available at [www.usdoj.gov/usao/nys/Press%20Releases/October%2005/Kozeny%20et%20al.%20Indictment%20PR.pdf](http://www.usdoj.gov/usao/nys/Press%20Releases/October%2005/Kozeny%20et%20al.%20Indictment%20PR.pdf).

21. *Id.*

22. Indictment, *U.S. v. David Bermingham, Giles Darby, and Gary Mulgrew*, (Sept. 12, 2002), available at [news.findlaw.com/hdocs/docs/enron/usbrmngm91202ind.pdf](http://news.findlaw.com/hdocs/docs/enron/usbrmngm91202ind.pdf).

23. *Id.* Similarly, in July 2006, a case was brought against three former employees of a Swiss Company, ABB. All three are U.K. citizens. Litigation Release, Sec. & Exch. Comm’n, SEC Files FCPA Charges Against Four Former Senior Employees of ABB Ltd. Subsidiaries (July 5, 2006) available at <http://www.sec.gov/litigation/litreleases/2006/lr19754.htm>.

aggressive FCPA posture is the guilty plea by a wholly owned Chinese subsidiary to anti-bribery charges. In 2005, Diagnostic Products Corporation, a wholly owned Chinese subsidiary, pled guilty to a violation of the anti-bribery provision of the FCPA. This plea was made despite the fact that the foreign entity, on the face of the pleading, appears not to have committed a single act in furtherance of the corrupt payments while in the United States. These three examples are illustrative of recent FCPA cases being brought by federal prosecutors, and serve as a meaningful starting point for assessing the likelihood of prosecution in several historically controversial FCPA fact patterns. These three cases will be discussed in more detail below.

#### *A. Oily Rock Charges*

In October 2005, federal prosecutors announced charges in what was called a “massive scheme to bribe senior government officials in the republic of Azerbaijan.”<sup>24</sup> The indictments charged that Viktor Kozeny, along with his attorney and associate, carried out a scheme to bribe Azeri officials in order to induce privatization of the country’s state-owned oil company.<sup>25</sup> According to the indictment, Kozeny’s ultimate purpose in offering the bribes was to ensure that his investment company, Oily Rock, gained a controlling interest in what was to become a lucrative private oil company.<sup>26</sup> Kozeny’s bribery scheme, though unique in magnitude,<sup>27</sup> does not raise any particularly interesting FCPA issues. However, the indictment of several U.S. investors who had invested substantial amounts of money in Kozeny’s privatization scheme, either on their own, or for the investment funds they managed, is a notable example of the Justice Department’s aggressive application of the FCPA.

Over time, Kozeny recruited other individual and institutional

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24. Press Release, Dep’t of Justice, *U.S. Announces Charges in Massive Scheme to Bribe Senior Government Officials in The Republic Of Azerbaijan* (Oct. 6, 2005), available at [www.usdoj.gov/usao/nys/Press%20Releases/October%2005/Kozeny%20et%20al.%20Indictment%20PR.pdf](http://www.usdoj.gov/usao/nys/Press%20Releases/October%2005/Kozeny%20et%20al.%20Indictment%20PR.pdf).

25. *Id.* at 4.

26. *Id.*

27. The indictment alleged that Kozeny had flown “millions of dollars of cash [for use in the bribery scheme] into Azerbaijan on [his] private jet.” *Id.* at 3.



investors to join in the scheme.<sup>28</sup> One such investor was David Pinkerton, who was responsible for overseeing AIG's investments in Azerbaijan. The indictment alleges that Pinkerton, in his capacity as a managing director for AIG, invested around \$15,000,000 in Kozeny's scheme.<sup>29</sup>

By charging Pinkerton for his investment in Kozeny's companies, including Oily Rock, the Department of Justice has demonstrated a willingness to spend government resources to prosecute individuals who were not in any way involved in negotiating or paying bribes to foreign officials.<sup>30</sup> The government does not allege that Pinkerton himself was engaged in any unsavory conduct; indeed, it seems that Pinkerton simply invested some of AIG's assets in Kozeny's various entities. The government does allege, however, that Pinkerton had knowledge of the fact that Kozeny "entered into a corrupt financial relationship," and that this knowledge constitutes a sufficient nexus to the scheme to give rise to FCPA liability.<sup>31</sup>

The implications of the Oily Rock indictment are fairly obvious. Consistent with the Department of Justice's clearly stated intent to "hone in on FCPA violators,"<sup>32</sup> the indictment of individuals like Pinkerton reflects the trend of aggressive and unflinching enforcement actions under the FCPA. Pinkerton, a managerial investment banker, had what can only be described as an attenuated connection to Kozeny's scheme. Pinkerton did not pay any bribes, nor did he negotiate or facilitate any of those bribes. It seems that he did not even directly authorize the improper payments to Azeri officials.<sup>33</sup> Pinkerton's 2005 indictment demonstrates the Department of Justice's willingness to pursue and prosecute not just the key players in a bribery scheme, but anyone who facilitates a scheme, and is subject to federal FCPA jurisdiction. Though not at odds with the text of the Act, prosecutions like this are

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28. *Id.*

29. *Id.*

30. *Id.*

31. Pinkerton continues to deny any knowledge of Kozeny's bribery scheme. His lawyer was recently quoted as saying, "Pinkerton first heard this allegation [of bribery] in response to his efforts to chase Viktor Kozeny around the globe to recoup AIG's investment." Rob Urban & David Glovin, *Capturing the Pirate of Prague*, Bloomberg Market Reports (Mar. 2006).

32. Marie Leone, *Coming Clean About Bribery*, CFO.com, Apr. 3, 2006, available at [http://www.cfo.com/article.cfm/6764209/c\\_2984290/?f=archives](http://www.cfo.com/article.cfm/6764209/c_2984290/?f=archives).

33. *Id.*

indicative of the willingness of prosecutors to devote precious time and effort to prosecute those who have only a secondary role in a corrupt scheme.

*B. The NatWest Three Case*

In 2002, the United States Attorney for the Southern District of Texas issued an indictment that is illustrative of the Department of Justice's willingness to doggedly pursue corruption prosecutions despite serious foreign sovereignty issues.<sup>34</sup> Though the prosecution was for wire fraud, federal prosecutors exhibited no compunction about prosecuting persons and entities who had only minimal or secondary connections to the United States.<sup>35</sup> Giles Darby, David Bermingham, and Gary Mulgrew, ("the NatWest Three,") were indicted on charges relating to their role in the Enron scandal. Specifically, the NatWest Three are charged with persuading their employer, NatWest, to sell an investment company at a fraction of its value to the CFO of Enron, who in turn split the profits with the three men.<sup>36</sup> All three of the NatWest defendants were United Kingdom nationals. All three resided and worked in England, and the harm caused by the corrupt deal, it appears, was visited only upon NatWest, a United Kingdom bank. Therefore, what makes this prosecution interesting is its total lack of connection to the United States.

Despite the lack of a clear connection to U.S. interests in the case, federal prosecutors deemed the individuals conduct, viewed as "in furtherance" of the corrupt scheme that occurred in the U.S., a sufficient basis for prosecution. This makes clear that the Department of Justice will prosecute non-U.S. citizens whose corrupt behavior does not directly harm U.S. interests on the theory that corruption, be it indirect or otherwise, must be prosecuted in order to establish the appropriate international culture of deterrence. As one commentator put it, the "NatWest Three" case is a "particularly dramatic example of the aggressive extension of U.S. law beyond its borders."<sup>37</sup>

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34. Indictment, *U.S. v. David Bermingham, Giles Darby, and Gary Mulgrew*, (Sept. 12, 2002), available at [news.findlaw.com/hdocs/docs/enron/usbrmngm91202ind.pdf](http://news.findlaw.com/hdocs/docs/enron/usbrmngm91202ind.pdf).

35. *Id.*

36. *Id.*

37. Matt Morley, *Bung Patrol*, Aug. 31, 2006, available at <http://www.>

*C. The Diagnostics Guilty Plea*

A final example of the Department of Justice's increasingly aggressive approach to corruption is a 2005 FCPA enforcement action against DPC.<sup>38</sup> The DPC enforcement action is perhaps the clearest example of the willingness of federal prosecutors to pursue criminal charges in cases where either jurisdiction, or liability, or both, is anything but obvious. That is to say, DPC is indicative of a growing body of enforcement actions featuring federal prosecutors willing to expend resources investigating and prosecuting corruption cases where the statutory authority for such prosecutions is, at best, strained.

DPC, a producer and seller of diagnostic medical equipment, was charged with violating the FCPA for its role in the payment of \$1.6 million in bribes to physicians and laboratory personnel employed by government-owned hospitals in China.<sup>39</sup> The alleged bribes were paid between 1991 and 2002 in order to obtain and retain business relationships with these hospitals.<sup>40</sup> Specifically, it was alleged that DPC "made cash payments to laboratory personnel and physicians employed in certain hospitals . . . in exchange for agreements that the hospitals would obtain [DPC's products and services]."<sup>41</sup> What makes this enforcement action significant is the theory of jurisdiction that prosecutors adopted in this case.

Following the 1998 amendments to the FCPA, foreign national employees and subsidiaries were subject to independent FCPA liability for the first time.<sup>42</sup> Under the amendments, foreign nationals and corporations were subject to liability under the FCPA so long as the person or entity committed an act in furtherance of the corrupt payment "while in the territory of the United States."<sup>43</sup> It is clear from both the plain text of amendments,<sup>44</sup> and the legislative history<sup>45</sup> that the exercise

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thelawyer.com/cgi-bin/item.cgi?id=121582.

38. Press Release, Dep't of Justice, *DPC (Tianjin) Ltd. Charged with Violating The Foreign Corrupt Practices Act* (May 20, 2005), available at [www.usdoj.gov/criminal/fraud/press/dpcfcpa.pdf](http://www.usdoj.gov/criminal/fraud/press/dpcfcpa.pdf).

39. *Id.*

40. *Id.*

41. *Id.*

42. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998).

43. *Id.*

44. *Id.*

45. Zarin, *supra* note 2, at 4-8 (citing H.R. REP. No. 105-802 to accompany H.R.

of independent jurisdiction over a foreign entity was limited to those situations where the foreign entity committed an act in furtherance of the bribe while in the United States. However, DPC was a wholly owned Chinese subsidiary of a California company that had not itself committed any acts within the United States.<sup>46</sup>

Prior to this case, commentators and practitioners had agreed that liability would not exist on these facts because there was no indication that DPC satisfied the prerequisites for FCPA liability under the 1998 amendments. Based on the text of the plea agreement, it appears that the prosecutors charged DPC with violations of the FCPA on the theory that DPC was acting as an “agent” of its U.S.-based parent company.<sup>47</sup> Prosecuting DPC as an agent of its parent company, however, is inconsistent with legislative history suggesting that the 1998 Amendments provided the first and only basis for foreign subsidiary liability, and is in direct tension with the only case law on point.<sup>48</sup> Indeed, courts had concluded that permitting foreign subsidiary liability under the provisions of the FCPA allowing for “agent” liability contravened the clear legislative history on the question of foreign entity liability.<sup>49</sup> Congress had specifically considered extending liability to foreign entities and declined to do so.<sup>50</sup>

Whether right or wrong, the DPC prosecution represented a dramatic departure from previous norms regarding the appropriate scope of FCPA prosecutions, and signals an increasingly aggressive policy of prosecution that individuals and entities must deal with. The remainder of this Article will use cases like DPC, ultimately resolved through a guilty plea,<sup>51</sup> as a weathervane to predict how federal prosecutors will respond to many of the remaining or common questions regarding FCPA liability.

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4353, International Anti-Bribery and Fair Competition Act of 1998, 21 (Oct. 8, 1998)).

46. Press Release, *supra* note 37; Zarin, *supra* note 2, at 4-9, 4-10.

47. Zarin, *supra* note 2, 4-10 (citing Plea Agreement, United States v. DPC (Tianjin) Co. Ltd., (C.D. Cal. 2005)).

48. See *supra* note 45 (regarding the relevant legislative history); Dooley v. United Techs. Corp., 803 F. Supp. 428 (D.D.C. 1992).

49. *Id.*

50. *Id.*

51. Press Release, *supra* note 37.

IV. BEYOND THE PLAIN TEXT OF THE STATUTE:  
THE LONG ARM OF THE FCPA

Given the tenor and scope of recent FCPA indictments, several theories of liability under the FCPA seem to be gaining traction. This Article discusses situations in which liability does not appear to be obvious from the plain text of the FCPA.

*A. Parent Company Liability Under the FCPA*

The least controversial, and most routinely accepted extension of FCPA liability concerns parent company liability. Although the FCPA does not contain specific provisions regarding parent company liability, commentators and the Department of Justice have conclusively established that parent companies may face liability for the actions of their foreign or domestic subsidiaries based on three somewhat overlapping theories: (1) direct liability, (2) indirect liability, and (3) agency liability, with parent company liability under the FCPA being triggered if the relationship between the parent and the improper payments at issue satisfies the requirements for liability under any one of the three.<sup>52</sup>

*1. Direct Liability*

The first basis for parent company liability turns on whether or not the parent was directly involved in the improper conduct.<sup>53</sup> The FCPA specifically provides for direct parent liability in several circumstances: (1) the commission of an act “in furtherance of” the improper payment by the parent entity; (2) the “authorization” by the parent company of the subsidiary’s action; or (3) a direct offer, promise or transfer of value by the parent.<sup>54</sup> Stated more succinctly, the parent corporation may be held liable for the acts of its foreign subsidiaries when the parent authorizes, directs, or controls the activity in question.<sup>55</sup>

Because the FCPA does not provide a specific basis for parent

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52. See, e.g., Lowell Brown, *Parent-Subsidiary Liability Under The Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1 (1998).

53. See H.R. REP. No. 95-831, at 14 (1977) (Conf. Rep.).

54. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2005).

55. U.S. Dep’t of Justice, *Foreign Corrupt Practices Act Anti-Bribery Provisions 3* (1999).

company liability, each of the elements discussed above must be present. Accordingly, as with any other entity or individual, liability under the FCPA is predicated on “knowledge.” The parent is not liable absent knowledge of the corrupt purpose of the payment.<sup>56</sup> For purposes of the FCPA, a person acts with “knowledge” if: (1) the person is aware that he or she is engaging in the conduct; (2) the person has a firm belief that a result is substantially certain to occur,<sup>57</sup> or (3) “if a person is aware of a high probability of the existence of such circumstance . . . .”<sup>58</sup> While the requisite state of mind under the FCPA includes conscious disregard, or willful blindness,<sup>59</sup> the legislative history is clear in reflecting that mere negligence does not provide a basis for liability. Congress was instead concerned with the “head-in-the-sand problem.”<sup>60</sup>

## 2. Indirect Liability

The FCPA prohibits a domestic concern, or its agent, from giving anything of value to another person while “knowing that this third party will make an improper payment to a foreign official.”<sup>61</sup> This broad definition of knowledge for purposes of the FCPA, allows criminal liability to be grounded on acquiescence in the subsidiary’s corrupt payment.<sup>62</sup> Mere inaction on the part of the parent company may

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56. 15 U.S.C. § 78dd-2(h)(3)(A). The statute does not appear to criminalize innocent knowledge of a payment that turns out to be improper. Parent liability under the FCPA only exists where all of the elements of the crime are satisfied, and the knowledge element cannot be separated from the corrupt payment element. Thus, although a parent can be liable for the actions of its subsidiaries, the plain text of the statute dictates that liability only exists when the domestic concern has knowledge of the corrupt purpose of the payment. The FCPA provides in relevant part that the domestic concern is only liable if it has “*know[ledge]* that all or a portion of [the] money . . . will be offered . . . for purposes of . . . (A)(i) influencing any act or decision of [a] foreign official.” 15 U.S.C. § 78dd-2(a). In other words, a “corrupt payment” is one that is made to influence a foreign official and there cannot be liability under the FCPA unless the domestic concern had knowledge, not just of the payment, but of the fact that payment was made “for purposes of” influencing a foreign official. *Id.*

57. 15 U.S.C. §78dd-2(h)(3)(A)(I).

58. 15 U.S.C. §78dd-2(h)(3)(B).

59. *See* U. S. v. Jacobs, 475 F.2d 270, 277-88 (2d Cir. 1977) (applying a similar mental state requirement in a separate context).

60. H.R. Rep. No. 100-579, at 920 (1988) (Conf. Rep.).

61. 15 U.S.C. §78dd-2(h)(3)(A).

62. *See* United States v. Wilshire Oil Co. of Texas, 427 F.2d 969, 971 (10th

provide a basis for FCPA liability because the parent may be treated as having implicitly authorized the payment. For example, if the parent became aware of an improper payment and did not do anything to stop it, a court may consider this acquiescence in the payments to be a sufficient basis for FCPA liability.

It is important to note that where a parent company exercises control over a subsidiary or affiliate, the failure to address red flags regarding corrupt payments presents a real risk that the parent may be charged with knowledge of said corrupt payment.<sup>63</sup> In the alternative, if the parent company can show that it did not have any knowledge of the corrupt payments, liability under the FCPA does not attach.<sup>64</sup>

As discussed above, acquiescence in corrupt payments made by a subsidiary may create liability exposure for the parent. A critical issue for parent companies facing FCPA liability will be the extent to which suspicious payments made by a subsidiary were documented and discussed with the parent. If the putatively improper payments were documented in a manner that should have raised red flags, there is a strong argument that the parent is indirectly liable under a conscious disregard theory of knowledge.

### 3. Agency Law and the FCPA

One theory of parent company liability that has remained beyond the scope of the Justice Department's broad reading of the FCPA is a strict application of common law principles of agency. If the Department of Justice sought to apply agency law to FCPA prosecutions, a court could find that the parent company had constructive knowledge if the subsidiary is deemed to be acting as an agent of the parent. Basic agency law treats a "master or other principal . . . [as] liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does

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Cir.1970) (imputing knowledge of domestic conspiracy charge based on conduct of a recently acquired company).

63. See, e.g., ABA Center for Continuing Legal Education, *Parent Company Liability Under the FCPA*, (2002) (providing the following example: "if management of the subsidiary reports to the parent a request for payments by local officials, the failure of the parent to react to that information—even if it is mentioned in cryptic terms as an aside at a management meeting or late at night over drinks in a bar to a single parent official—may create a situation of arguable 'knowledge' for the parent.").

64. 15 U.S.C. §78dd-2(h)(3)(A).

not personally violate a duty.”<sup>65</sup> Where corporate liability is concerned, the agent’s act must be intended, at least in part, to benefit the corporation.<sup>66</sup> According to agency law, if a foreign entity is found to be an agent of a domestic concern, the domestic concern may be held vicariously liable for the corrupt practices of that foreign affiliate.<sup>67</sup>

Courts have held that the existence of an agency relationship between a parent and a subsidiary is a question of fact to be determined at trial.<sup>68</sup> As one commentator has noted, “[t]he touchstone of parent/subsidiary agency liability is the involvement of the parent in the affairs of the subsidiary.”<sup>69</sup> The question of whether or not an agency relationship exists depends on the degree of control that the parent enjoys over the subsidiary, not on whether a majority of voting shares are held by the parent.<sup>70</sup>

To date, the Department of Justice appears to use the control inherent in an agency relationship merely as indicia of the culpable knowledge required for criminal liability. However, if agency law was truly extended to the FCPA, in circumstances where sufficient authority and control over the foreign affiliate is found,<sup>71</sup> the parent corporation

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65. RESTATEMENT (SECOND) OF AGENCY § 216 (1958); *U.S. v. Armour & Co.*, 168 F.2d 342 (3rd Cir. 1948).

66. William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 4877.

67. *Id.*

68. *See, e.g., Royal Indus. v. Kraft Foods, Inc.*, 926 F.Supp. 407 (S.D.N.Y. 1996).

69. Brown, *supra* note 52, at 36.

70. As a practical matter, practitioners have identified several indicia of an agency relationship: (1) The entity owns all or a majority of the stock of the foreign affiliate; (2) The entity and the foreign affiliate have common directors or officers; (3) The entity finances the foreign affiliate; (4) The foreign affiliate has grossly inadequate capital; (5) The entity pays the salaries or expenses or losses of the foreign affiliate; (6) The foreign affiliate has substantially no business except with the entity or no assets except those conveyed to it by the entity; (7) The entity formally refers to the foreign affiliate as a subsidiary, department, or division; (8) The directors or management of the foreign affiliate do not act independently in its interests but take direction from the entity. *See THE FOREIGN CORRUPT PRACTICES ACT*, Georgetown Univ. Law Center, Continuing Legal Education, 2003 WL 22002142 (2003).

71. Although the factors outlined above are useful, the best indicator as to whether an agency relationship exists is practical control. In the words of one commentator, “Practical control will have much greater bearing than technical legal considerations [in determining whether a foreign company is an agent of the domestic concern.]” Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 35



may be liable for any violations of the FCPA regardless of actual knowledge or conscious disregard. A domestic concern that exerts a sufficient level of control over a foreign affiliate to establish an agency relationship faces the same responsibility for preventing improper payments by the foreign affiliate as it does with its own employees.<sup>72</sup> Although it does not appear that there have been any federal prosecutions based on this agency theory of liability alone, given the Justice Department's relatively unchecked approach to FCPA liability, companies need to anticipate FCPA liability for the conduct of its agent-subidiaries.

In sum, a parent corporation is liable for the corrupt payments made by its subsidiary if: (1) the parent is directly responsible for the subsidiary's action—i.e., authorizes the payment; (2) the parent has knowledge of the corrupt payment<sup>73</sup>—i.e., impliedly authorizes the payment; or, theoretically, (3) an agency relationship exists between the parent and the subsidiary such that the subsidiary is deemed acting as an agent of the parent. While the third theory of liability remains theoretical, insofar as no prosecutions have utilized this basis, it is more consistent with the indirect liability provisions of the FCPA than other theories advanced by the Department of Justice.<sup>74</sup>

### B. Liability of a Franchisor

In light of the Justice Department's overall aggressive posture toward bribery payments, it appears highly likely that the Department of Justice will be willing to prosecute, under FCPA law, a franchisor for the acts of a franchisee. Vicarious franchisor liability traditionally arises from a franchisor's interest in protecting its franchise name. Protection for the franchise name is accomplished by actively prohibiting unsavory

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(2005).

72. If an agency relationship exists and the domestic concern learns that the foreign affiliate has made corrupt payments, the domestic concern must affirmatively repudiate the unlawful conduct and take significant measures to prevent its recurrence in order to avoid FCPA liability. *Id.*

73. The FCPA's imputation of knowledge to one who consciously disregards information establishes a standard of knowledge considerably broader than actual knowledge. Under this standard, if an individual or entity becomes aware of questionable conduct by a related third party, it must be diligent in undertaking its own inquiry. A failure to inquire when red flags exist could result in the imputation of knowledge to an individual or entity regarding the improper conduct.

74. *See supra* note 38 (regarding the DPC charges).

businesspersons from obtaining a license to sell products under that name. Based on previous Justice Department action, franchisor liability, much like indirect parent liability, appears to be premised on conscious disregard of the wrongdoers' actions, and the presumption that significant due diligence occurred in determining whether a particular entity is or is not worthy of a franchise license. This expectation of due diligence is premised, in large part, on provisions of The Lanham Act.<sup>75</sup> Under the Lanham Act, a trademark may be deemed abandoned if said mark is used in such a manner so as to cause a loss of significance. In order to avoid losing the benefits of the trademark, companies must protect against deceptive uses by other persons or companies. It appears likely that, if litigated, the Department of Justice will argue a company's protection of its trademark gives rise to an agency relationship, and therefore, vicarious liability.

Courts, without more, have been unwilling to equate this defense of image to the control and accountability that renders it vicariously liable for the acts of its franchisee;<sup>76</sup> that said, however, this relationship may dictate that vicarious liability is appropriate.<sup>77</sup> Terms of the franchise agreement, as well as their course of dealings, may determine whether the franchisor enjoyed a level of control over the franchisee sufficient to justify vicarious liability.<sup>78</sup> The Fifth Circuit has found sufficient evidence of control by the franchisor where the franchisee, among other things, agreed to abide by the "rules of operation" promulgated by the

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75. 15 U.S.C. §§ 1051 et seq. An oft cited example of the need for franchisor due diligence is the recent anti-terrorism laws. For example, Executive Order 13224 prohibits transactions with suspected terrorists and although the order is silent as to franchisor liability, franchise lawyers have suggested that the franchisor has duties under this law. According to some practitioners, franchisors are responsible for conducting thorough due diligence in order to assess whether the prospective franchisee is at risk for violating this law. *Id.* If this executive order, and other provisions of the PATRIOT ACT, which make no specific reference to franchisor liability, are understood to require extreme caution on the part of the franchisor in determining whether a specific company would conduct the franchise in a manner consistent with these laws, it is reasonable to conclude that the FCPA also could be applied to companies involved in international franchising.

76. *See, e.g., Kaplan v. Coldwell Banker Inc.*, 59 Cal. App 4th (1997) (holding that franchisor's receipt of royalty payment did not create true agency relationship such that franchisor could be liable for acts and omissions of franchisee's broker).

77. *See* discussion of indirect liability, *supra* Part IV.A.2.

78. *Id.*

franchisor, built and maintained the premises and decorations in a manner consistent with the franchisor's specifications, and agreed to allow inspection of the facility by the franchisor.<sup>79</sup> This case shows that a court can hold a franchisor vicariously liable for the FCPA violations of its franchisee if said franchisor retains a certain level of control and authority over the franchisee.<sup>80</sup> There is little doubt that the Department of Justice will attempt to assert franchisor liability; when, however, evidence of actual knowledge of corrupt payments is lacking, a strong argument can be made that a franchisor cannot be held liable under the FCPA. It is highly probable that the Department of Justice will, until deprived of the argument by published opinion, consider franchisors liable for improper payments made by a franchisee.

### C. Successor Liability

It is becoming increasingly clear that the Department of Justice will attempt to prosecute domestic companies for acquiring a foreign entity if said foreign entity has escaped FCPA liability solely because it was not a U.S. company at the time the improper payments were made. In certain circumstances, the actions of a foreign company prior to its acquisition by a domestic corporation may raise FCPA issues for the acquiring company. This stems from the fact that the Department of Justice does not want to create incentives for foreign companies to bribe public officials by allowing U.S. companies to acquire them at such a price and in such a manner so as to effectively reimburse the foreign company for its corrupt payments. The indirect liability provisions of the FCPA trigger a U.S. acquirer company's liability.<sup>81</sup> Consistent with liability in normal circumstances, the U.S. successor company's FCPA liability turns on whether it had knowledge of, or authorized, a corrupt payment.

Generally, commentators seem to agree that a "U.S. company should not be liable for the activities of a foreign partner or related

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79. Wood v. Holiday Inns, Inc. 509 F.2d 167 (5th Cir. 1975). See also Nichols v. Arthur Murray, Inc., 248 Cal. App. 2d 610 (1967).

80. At this point, companies are still left to speculate as to what sort of control would be sufficient to justify franchisor vicarious liability. It seems clear, however, that the Department of Justice will be willing to prosecute a franchisor who, rather than simply passively receiving quarterly financials, plays an active role in the day-to-day management of the franchisee's business.

81. 15 U.S.C. §78dd-2(a)(3) (2005).

company prior to entering the relationship.”<sup>82</sup> However, neither the text of the statute, the annotations, or case law, provides guidance on this issue. Given the Department of Justice’s aggressive application of the FCPA, U.S. companies may face liability if circumstances are such that the Department of Justice can reasonably argue that the FCPA’s knowledge requirement has been satisfied. Specifically, if a bribe was paid in order to secure a benefit that the acquiring U.S. company will share, and the acquiring U.S. company authorized the payment, or was aware of and consciously disregarded the probability of such a payment occurring, then the company can be charged as vicariously liable.<sup>83</sup> The limited authority available on this topic suggest two significant factors in determining possible successor liability for past actions: (1) the extent of due diligence conducted to identify and address potential issues; and (2) the extent and effectiveness of safeguards adopted to foreclose reimbursement by the U.S. company for past improper actions and to prevent the acquired company from taking improper action in the future.<sup>84</sup>

Viewed in light of the totality of the circumstances, a successor company may face liability for bribes paid by an acquired company when it is reasonable to conclude that the successor company is effectively reimbursing the acquired company for prior bribes, or where the successor acquires a company with knowledge of the fact that the acquired company will make such payments in the future. Successor liability shares a critical common denominator with the theories of parent company indirect liability discussed above: where the U.S. parent or successor company authorizes a bribe, FCPA liability attaches.<sup>85</sup> Accordingly, an acquiring company’s first obligation must be to conduct sufficient due diligence in order to document the fact that they are not aware of, or consciously disregarding, any past corrupt payments. If the acquiring company learns that the acquired entity paid bribes in the past, the acquiring company faces additional hurdles required to remain clear of FCPA liability.<sup>86</sup>

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82. FOREIGN CORRUPT PRACTICES ACT v.1, 106.013, (2005).

83. *Id.*

84. *Id.*

85. Zarin, *supra* note 2, at 4-35 n.133 (noting that knowledge of the illicit payment is an implicit predicate to “authorization”).

86. Specifically, the Department of Justice and Securities and Exchange Commission have emphasized that acquiring companies that discover FCPA issues in

D. Controlling and Non-Controlling Investors

A related but distinct issue of parent company liability is whether a domestic company with an ownership interest in a foreign company may face FCPA liability. While a parent-subsidary relationship dictates a degree of control authority in favor of the parent, companies with an investment interest in foreign companies—e.g, investment funds—may not enjoy the same effective control over the business operations of that foreign company; in spite of this difference, it is likely that federal prosecutors will bring charges in these circumstances.

The plain text of the FCPA does not distinguish between a controlling and non-controlling affiliation.<sup>87</sup> As with the other theories of liability discussed in this Article, the company's liability will hinge on whether the U.S. company had knowledge of, and authorized, the improper conduct; not on a formal arrangement of control or a majority stake ownership. Accordingly, it is possible that an investment company owning a majority of shares in a foreign company might not face FCPA liability for improper payments made by the foreign company, while an investment company owning a minority of shares in the same company might, based on its knowledge of the foreign company's conduct. This question is one of function over form: a majority shareholder is more likely to face FCPA liability because the majority shareholder is more likely to have knowledge of any corrupt relationship between the foreign company and public officials, not because it owns a majority of the

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pre-transaction due diligence are expected to commit to implement "rigorous" anticorruption compliance programs. FCPA Opinion Procedure Rel. 04-02. An illustrative example is FCPA Opinion Procedure Release 03-01 (January 15, 2003). In this opinion the Department of Justice addressed the concerns of a requestor who had intended to purchase the stock of a company, when during its due diligence the requestor learned that officers of a foreign subsidiary of said company had authorized payments to foreign officials to obtain business benefits. The Department of Justice concluded that the following actions by the requestor were sufficient to alleviate concern that by acquiring the company it would also acquire criminal and civil liability for the past acts of the company's employees: (1) continued cooperation and reporting to the Securities and Exchange Commission and the Department of Justice regarding the details of the past transactions, (2) discipline employees and officers who authorized corrupt payments, (3) disclose any additional pre-acquisition payments to foreign officials made by the acquired company, (4) a compliance program will be implemented in the acquired company and all of its subsidiaries, and (5) requestor ensures that acquired company implements a system of internal controls and makes and keeps accurate books.

87. Zarin, *supra* note 2, at 6-11.

shares of a company engaged in corrupt payments.<sup>88</sup>

The question of FCPA liability for affiliating with foreign companies will generally turn on whether the U.S. company had knowledge of the improper conduct. This makes it particularly important for companies to consider whether any employees of the U.S. company are acting as officers or directors for the foreign affiliate.<sup>89</sup> If a foreign company is involved in bribery payments, and employees of the U.S. shareholder are acting as officers or directors, it is likely that these officers or directors have knowledge of the bribes. Whether the U.S. company is a controlling shareholder or not, it is likely that the U.S. company will face FCPA liability. In order to avoid liability, the U.S. company has to, at a minimum, disavow the acts of bribery and take affirmative steps to avoid a reoccurrence.<sup>90</sup> Particularly in the case of a U.S. majority owner of a foreign entity, however, FCPA liability likely exists and these remedial measures, as well as continued self-reporting, serve only as an olive branch designed to mitigate harm and minimize penalties.<sup>91</sup>

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88. *Id.*

89. The common law concept of constructive knowledge dictates that the “knowledge of the employees is the knowledge of the corporation.” *Apex Oil Co. v. United States*, 550 F.2d 1291, 1295 (8th Cir. 1976). No one employee or officer must have all of the requisite knowledge. Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 38 (2005). Moreover, “[r]egardless of how disparate the knowledge may be within an entity, the collective knowledge of employees of the entity . . . can serve as the basis for establishing knowledge.” *Id.*; see also *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951) (attributing knowledge to entity despite the fact that “[n]o single agent or representative in the offices of the company had actual knowledge of [the] conflicts and falsities); *United States v. LBS Bank*, 757 F.Supp. 496, 501 n.7 (E.D. Pa. 1990) (“[k]nowledge possessed by employees is aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees . . .”). Thus, if an H&Q officer had knowledge of the corrupt payments, the failure, at a minimum, to disavow the conduct may be construed as authorization or acquiescence on the part of H&Q. Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 39 (2005).

90. Zarin, *supra* note 2, at 6-13; see also Donald R. Cruver, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT* 38-39, 54-55 (1999) (acknowledging that domestic concerns may face FCPA liability where “there is ongoing voting or operation control . . . , or where the parent and subsidiary have common officers or directors”).

91. It is also worth noting that business affiliations with foreign governments are particularly fertile ground for FCPA problems. As one treatise has commented, “the

E. Complicated Arrangements with Consultants

By now, commentators and corporations are well aware that semantics do not dictate liability; accounting for bribery as “consulting expenses” fools no one.<sup>92</sup> The line separating legal and legitimate consulting agreements from mere conduits of bribery can be sketched out using details of the Justice Department’s own aggressive pursuit of FCPA prosecutions, as well as elements of emerging and increasingly complex consulting agreements. Certain factors, such as the reputation of the agent, the agent’s compensation, and any suspicious accommodation requests, are relevant when determining whether a domestic company’s decision to hire a particular agent will trigger FCPA liability.<sup>93</sup> If the consultants hired have a reputation for bribing officials, or other corrupt behavior, a presumption of knowing impropriety exists.<sup>94</sup> Similarly, unreasonably large consulting fees in light of services provided will trigger a suspicion that part of the fee went toward an improper bribe.<sup>95</sup> Moreover, the more likely it is that officers of the U.S. company knew of suspicious requests by the consultant,<sup>96</sup> the easier the government’s decision to impute knowledge

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mere formation of a joint venture or establishment of an investment relationship with certain parties—for example, a foreign government official or someone closely connected to such an official—can raise FCPA issues.” FOREIGN CORRUPT PRACTICES ACT v.1, 106.003 (2005). The FCPA does not distinguish between government officials acting in a sovereign capacity and a government agency acting in a commercial capacity. Accordingly, “virtually any transaction between a person subject to the FCPA and the employees of a state-owned entity . . . can raise FCPA issues.” *Id.* Relationships with state-owned entities will not always give rise to FCPA liability; however, this sort of relationship raises issues that “must be addressed and [dictates that] risk mitigation steps need to be taken.” *Id.* Given the extremely limited role that San Yuan played in the management of BMD, a strong argument can be made that this relationship, though suspicious, was not ultimately prohibited under the FCPA.

92. The payment of fees to “consultants” who perform no services has been described as a paradigmatic example of an FCPA violation. FOREIGN CORRUPT PRACTICES ACT v.1, 106.002 (2005).

93. Donald R. Cruver, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT* 47 (1999).

94. *See id.* at 48.

95. *Id.* at 49.

96. Suspicious requests would include any sort of payment or business practice that is particularly unusual. A request for an all cash payment, or that part of the payment be made out to a certain government official are obvious examples.

of this impropriety to the company.<sup>97</sup>

Even though they are not clearly prohibited by the text of the statute, these factors suggest that the third-party provisions of the FCPA implicitly prohibit many consulting agreements. Consider the following example: a consultant was hired by a U.S. company to use his or her “connections” to help secure a contract with the government of the consultant’s home country. While it is not the case that consulting agreements based on one’s connections are per se illegal, it is quite clear that consulting agreements based on a financial, rather than personal, relationship between said consultant and foreign officials can create FCPA problems. If the hypothetical consultant described above made routine payments to the foreign official in order to protect, or establish, his or her relationships, the U.S. company’s knowledge of this arrangement likely satisfies the FCPA’s knowledge requirement, and suggests liability. Even though the U.S. company is not making direct payments to the foreign official, and even though the consultant is not just passing along a percentage of the U.S. company’s payment to the public official, knowledge of an ongoing connection to a public official based on periodic payments is likely a sufficient basis for FCPA liability.

In short, consulting agreements will subject an entity to FCPA liability if the “consultant” is in a corrupt relationship with the foreign official. This is true even if the money being paid cannot be traced directly to the consulting payments made by the entity. This theory of liability is consistent with a plain text of the FCPA. A company in this situation will be well served by an early guilty plea.

#### F. Foreign Entity Liability

One of the most surprising developments in the Department of Justice’s implementation of the FCPA is the charging of foreign entities. The 2005 charging of Diagnostic Products was the first occurrence. This charge, and subsequent guilty plea, signals a potentially monumental shift in the prosecution of bribery: and one that lacks a solid legal basis. More so than the other theories of FCPA liability discussed in this Article, the Justice Department’s newly clarified theory of foreign entity liability must be challenged in court. The prosecution

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97. *Id.* at 50.



of foreign entities, outside of certain narrowly defined statutory parameters, must be struck down by federal courts. This conclusion is grounded in both textual interpretation and the extensive legislative history of the act.

Prior to 1998, the FCPA did not apply to foreign companies other than “issuers” and foreign nationals. The 1998 amendments expanded the FCPA to provide that a foreign company or person is now subject to liability if it causes, either directly or through an agent, an act in furtherance of the corrupt payment to take place while within the territory of the United States.<sup>98</sup> It is, however, generally accepted that the FCPA’s anti-bribery provisions do not apply to foreign subsidiaries of U.S. companies who are acting on their own behalf, and not as agents of covered persons.<sup>99</sup>

Prior to the *Diagnostics* charging,<sup>100</sup> the Department of Justice had enforced the Act in a manner consistent with its unambiguous legislative history concerning foreign entity liability. The Department of Justice, through a refusal to prosecute, had implicitly recognized that a foreign subsidiary of a U.S. issuer or domestic concern can not be an agent of its U.S. parent for FCPA purposes.<sup>101</sup> Accordingly, until the *Diagnostics* case, it was safe to assume that foreign subsidiaries were not subject to FCPA liability unless the entity committed an act in furtherance of a prohibited payment while in the United States.

Following the enforcement action in the *Diagnostics* case, foreign

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98. 15 U.S.C. §78dd-3(a) (2005).

99. See H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.). The fact that foreign subsidiaries that do not satisfy the requirements for liability under the 1998 amendments do not generally face prosecution under the FCPA is evidenced by the legislative history. As enacted by the House, domestic concerns were specifically defined to include foreign subsidiaries of U.S. companies. The House viewed the exercise of jurisdiction over foreign subsidiaries as necessary in order to foreclose “a massive loop-hole.” H.R. REP. NO. 95-640, at 11-12 (1977) (Conf. Rep.). The Senate, however, took a more restrictive approach to FCPA jurisdiction, and, in Conference, the House conformed to the Senate such that the final legislation did not extend the FCPA’s jurisdiction to foreign subsidiaries. The feared loophole was minimized, according to the Conference Report, because the legislation made clear that “any issuer or domestic concern which engages in bribery [] indirectly through any other person or entity would [] be liable.” H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.).

100. See *supra*, notes 38-51 and accompanying text, discussing Diagnostic Products Corporation’s guilty plea to FCPA charges.

101. Stanley J. Marcuss, *The OECD Anti-Bribery Convention*, 1057 PLI/CORP 1223, 1232 (1998).

entities that do not commit any acts within the U.S. must now face the possibility of charges under the FCPA. Few commentators or practitioners have suggested that the Department of Justice's position in charging Diagnostics is reasonable.<sup>102</sup> Given the opportunity, courts will almost certainly strike such enforcement actions down as an unjustified extension of federal jurisdiction. But until this happens, foreign companies engaged in dealings resembling an agency relationship with a U.S. company face the possibility of charges under the FCPA. Realistically, the tandem effect of the ripeness doctrine barring defendants from seeking an advisory opinion resolving this question, and the priority that many directors will place on secreting these issues as much as possible, may prevent a much needed judicial check on these prosecutions.

#### V. CONCLUSION

The examples of recent FCPA charges discussed in this Article prove that the expanding scope of the FCPA can no longer be viewed as theoretical. Although the FCPA was born out of an SEC investigation based on voluntary disclosures, and featured an adolescence characterized by largely esoteric debate over ambiguous questions of statutory interpretation, the scope of the now-maturing FCPA is becoming alarmingly clear to U.S. companies and officers. Through the Department of Justice's aggressive enforcement of provisions and principles previously considered academic, the FCPA has come of age. It is finally possible to understand the severity and robustness of FCPA liability. What began as a financial irritant for large companies has become the Justice Department's primary tool in preventing corruption.

In light of the aggressive stance taken by Justice Department officials in the cases discussed above, it is becoming increasingly clear that the Department of Justice is willing to prosecute entities and individuals for conduct that is not obviously actionable under a plain text reading of the FCPA. The Department of Justice's cavalier approach to FCPA liability is inconsistent with basic principles of

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102. See, e.g., H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 463 (1999) ("[i]t would appear to be equally implausible that Congress would establish agency liability for foreign individuals while at the same time excluding foreign entities from liability under the same circumstances").

federal jurisdiction, the plain text of the statute, and its extensive legislative history. Unless a party is willing to litigate these issues, the Department of Justice's assertion of prosecutorial force will continue to expand.

Corporate defendants have a strong interest in resolving these matters quickly, given the flurry of unwanted media attention and the corresponding depreciation in stock value that accompanies a bribery scandal. It is of great benefit to federal prosecutors that the incentive to litigate these cases is unusually low. Corporate defendants will continue to operate under a regime in which prosecutors obtain guilty pleas to meritless charges unless there is a challenge to the Department of Justice's authority to prosecute under the FCPA. The FCPA presents a classic economic dilemma—the tragedy of the commons problem: although virtually all corporations stand to benefit from an aggressive litigation of these cases and the favorable case law that will likely result, no single corporate defendant has been willing to risk its reputation and the costs of litigating an issue that, in the normal context of public criminal defense, would have been heavily litigated by now.

Distinct from the protracted appeals and habeas corpus proceedings that ensure the integrity of ordinary criminal prosecutions, FCPA prosecutions are characterized by self-reporting and guilty pleas. Though it is hard to muster much sympathy for American corporations charged with bribing foreign officials, the overwhelming incentive to plead these cases out has provided the Department of Justice with an unusual and unfair interpretive role over the FCPA. The Department of Justice's role as final interpreter must be stopped. A creative collaboration, or courageous corporate defendant, is necessary in order to bring the FCPA back in line with traditional criminal statutes and basic principles of statutory interpretation. There is no question that the FCPA's incubation period—defined by more conversation and controversy than actual prosecution—has given way to an era of aggressive enforcement. However, emboldened by early success, and likely aware of the free-rider dilemma the defendants are facing, the Department of Justice has begun to pursue unreasonable theories of FCPA liability. Just as the FCPA has evolved from talk to action, it is time for FCPA defendants to take an active stance in opposing the unreasonable extensions of FCPA liability. Only if defendants challenge the validity of these theories of FCPA liability will aggressive and unchecked prosecutions be brought under control.