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The Foreign Corrupt Practices Act: Taking A Bite Out Of Bribery In International Business Transactions

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ABSTRACT

Enforcement of the Foreign Corrupt Practices Act ("FCPA") has reached an all-time high. FCPA violations can result in many significant costs, both monetary and non-monetary. FCPA compliance has become a top corporate governance issue and has triggered shareholder litigation, tax investigations, and money laundering probes. While many corporate managers, financial officers, board members, internal and external auditors, and forensic accountants are aware of the FCPA's basic objectives and mandates, many may not do an adequate job of protecting their firms and/or clients from the dangerous consequences that can result from FCPA non-compliance. The purposes of this paper are to: (1) analyze and describe bribery and FCPA case filings, sanctions, payments (bribes), and value of business to be obtained; (2) describe and analyze the important provisions of the FCPA; and (3) make recommendations to help firms improve their compliance with the FCPA.

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INTRODUCTION

In February 2010, BAE Systems reached settlements with the U.S. Department of Justice ("DOJ") and the United Kingdom Serious Fraud Office totaling $450 million.[1] The settlements involved an alleged violation of the Foreign Corrupt Practices Act ("FCPA")[2] in connection

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1. Steven Tyrell, *DOJ Prosecution of BAE Heralds Continued Aggressive FCPA Enforcement Environment,* WEIL GOTSHALL & MANGES LLP BRIEFING (Feb. 8, 2010), *available at* http://www.weil.com/news/pubdetail.aspx?pub=9725.

2. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff (2006)), amended by Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. § 78dd-1 to 78dd-3, 78ff (2006) and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006)).

with the sale of a radar system to Tanzania.[3] In January 2010, the DOJ arrested 22 employees and executives of firms in the military products industry.[4] They were indicted on charges of bribing government officials in an African country to obtain a presidential guard business.[5] In April of 2010, Charles Jumet of Virginia was "sentenced to 87 months in prison for paying bribes to former Panamanian government officials to secure maritime contracts."[6] In May of 2011, "a jury convicted Lindsey Manufacturing Co., two of its executives, and a Mexican sales agent in a bribery case."[7] This marked the first time a company has been convicted at trial for violations of the FCPA.[8]

In 2000, there was one FCPA case pursued by the federal government. In 2009, there were 67 cases filed by the DOJ and the Securities and Exchange Commission ("SEC") (see Table 1). These facts highlight the growing priority given to FCPA enforcement by the DOJ and the SEC. The Assistant Attorney General Lanny A. Breuer, insists that aggressive prosecution of the FCPA "should make clear to every corporate executive, every board member, and every sales agent that [the DOJ] will seek to hold you personally accountable for FCPA violations."[9] "The increase in FCPA prosecutions over the past several years can be attributed to an increase in voluntary reporting by corporations . . . increased international law enforcement cooperation, . . . a renewed focus on internal controls, the Sarbanes-Oxley requirement

3. Press Release, BAE Sys., BAE Sys. PLC Announces Global Settlement with U.S. Dep't of Justice and U.K. Serious Fraud Office, (Feb. 23, 2010), *available at* http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html.

4. *Government Sting Snares 22 Individuals Employed by Military Equipment Suppliers,* FOLEY AND LARDNER LLP (Jan. 2010), http://www.foley.com/publications/pub_detail.aspx?pubid=6752 [hereinafter *Government Sting Snares*]; Press Release, Dep't of Justice, *Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme* (Jan. 19, 2010).

5. *Id.*

6. Press Release, Dep't of Justice, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Gov't Official, Office of Public Affairs (Apr. 19, 2010).

7. Samuel Rubenfeld, *Conviction in Foreign Bribery Case is First in U.S. Trial,* WALL ST. J., May 11, 2011, *available at* http://online.wsj.com/article/SB10001424052748703730804576315573205511018.html

8. *Id.*

9. George Terwilliger III et al., *2010: All Signs Point to a Record-Breaking Year for FCPA Enforcement,* WHITE & CASE LLP (Mar. 1, 2010), http://www.whitecase.com/alerts-03022010/.

of executive certifications," proactive law enforcement investigations, and the global anti-fraud climate.[10]

U.S. firms competing for international business need to pay close attention to several trends. First, the number of FCPA cases and the severity of penalties will increase as the DOJ and SEC emphasize enforcement. Second, FCPA compliance will become a top corporate governance issue leading to more rigorous compliance. Third, international harmonization of antifraud and anticorruption regulation will lead to more parallel investigations and increased penalties. Fourth, "FCPA investigations may trigger other actions such as shareholder litigation, tax investigations, and money-laundering probes."[11] While many corporate managers, financial officers, general counsels, compliance officers, and internal and external auditors are aware of the FCPA, "companies could benefit considerably from both increasing their knowledge and awareness of the FCPA and improving their capabilities to mitigate the risk of bribery and corruption."[12]

This Article provides a close look at the requirements imposed on U.S. and some foreign firms by the FCPA in the context of the emerging trends noted above. The purposes of this article are to: (1) analyze and describe bribery and FCPA case filings, sanctions, payments (bribes), and value of business to be obtained; (2) describe and analyze the important provisions of the FCPA; (3) analyze vicarious liability under the FCPA; and (4) make recommendations to help firms improve their compliance with the FCPA.

I. WHAT IS BRIBERY?

A bribe is an illegal and/or unethical business transaction that involves "the offering, promising, or giving something in order to

10. Patrick Taylor, *Strategic FCPA Compliance: The Role of Continuous Monitoring as a Proactive Control,* CORP. FIN. REV., Sept./Oct. 2009, at 20, 21.

11. Christopher Sulavik, *Corruption Crackdown: How the FCPA is changing the way the world does business,* PRICEWATERHOUSECOOPERS, 3 (July 2009), http://www.pwc.com/us/en/foreign-corrupt-practices-act/publications/assets/pwc-corruption-crackdown-fcpa-2009.pdf.

12. Survey, *Corruption or Compliance-Weighing the Costs-10th Global Fraud Survey*, ERNST & YOUNG, 2 (2008), http://www2.eycom.ch/publications/items/fraud_report_10/ey_global_fraud_survey_10.pdf.

influence a public official in the execution of his/her official duties."[13] A key element that distinguishes unacceptable payments is the corruption of a relationship of trust.[14] In the public sector, "a bribe is an inducement that influences a public official to perform his or her duties in a manner contrary to the course that might otherwise be adopted."[15]

One distinctive element of bribery is the *quid pro quo*—the sense that office is abused in exchange for the benefit conferred.[16] Two types of benefits may be conferred upon bribe-givers: (1) "according-to-rule" and (2) "against-the-rule" benefits.[17] "According-to-rule benefits confer something on the bribe-giver that the briber should have received under the rules; the bribe-taker acts in a manner that he or she should have done anyway."[18] According-to-rule benefits are "grease" or "facilitation" payments. "These payments consist of small payments to a

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13. International business firms engage in bribery for three reasons. First, in certain countries, normal business transactions cannot be initiated or completed without paying bribes. The firm may justify such conduct on the grounds of business necessity and that it is merely doing what is the norm in the country. Second, although a firm may recognize bribery as morally wrong, it may engage in it because other firms do it. Third, firms in desperate need of business may resort to bribery to obtain it. *See* Rajib Sanyal, *Determinants of Bribery in International Business: The Cultural and Economic Factors,* 59 J. BUS. ETHICS 139 (2005).

14. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM 42 (Cambridge Univ. Press 1999).

15. Wayne Hamra, *Bribery in International Business Transactions and the OECD Convention: Benefits and Limitations,* 35(4) BUS. ECON. 34 (2000).

16. Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?: Increasing Global Security by Controlling Transnational Bribery,* 20 MICH. J. INT'L. L. 451, 476 n.54 (1999). An example of the quid pro quo are the bribery activities of Siemens A.G., a German engineering firm. In late 2008 and early 2009, the firm settled bribery cases in the U.S. and Germany by paying penalties and fines of more than $1.6 billion. Siemens managers and sales staff used a bribery slush fund to gain favors from foreign officials on a global scale. Siemens paid $5 million in bribes to the son of Bangladesh's prime minister and other senior officials to win a mobile phone contract. In Argentina, a Siemens' subsidiary paid more than $40 million in bribes to obtain a $1 billion agreement to produce national identity cards. In Venezuela, Siemens paid $16 million to obtain urban rail lines. *See* Siri Schubert & T. Christian Miller, *At Siemens, Where Bribery Was Just a Line Item,* N.Y. TIMES, Dec. 21, 2008, at B1.

17. *See* Philip Oldenburg, *Middlemen in Third World Corruption: Implication of an Indian Case,* 39 WORLD POLITICS 508, 525 (1987); Nichols, *supra* note 16, at 460.

18. Carl Pacini et al., *The Role of the OECD and EU Conventions in Combating Bribery of Foreign Public Officials,* 37 J. BUS. ETHICS 385, 386 (2002); *see also* Nichols, *supra* note 16, at 460.

person to obtain a favor such as expediting an administrative process; obtaining a permit, license, or service; or avoiding an abuse of power."[19]

An against-the-rule benefit is more egregious and "is exemplified by the award of a contract to a party who should not have won the contract. The abuse of office here-usually occurring in exchange for large sums of money-involves the discretion of the public official. Bribes paid to secure this type of benefit are referred to as 'kickbacks' or 'grand corruption.'"[20] Political or grand corruption involves relatively large sums paid to alter policy formulation, legislation, and major contract awards, which are tailored to favor narrowly defined private interests. "When the payment involves relatively large sums of money given with the aim of enticing the official to commit an illegal act to the advantage of the person making the payment, 'subornation' occurs."[21] "Subornation is a request for officials to 'look the other way,' not to do their jobs, to do the job more quickly, or even to knowingly break the law."[22] "The degree of abuse tends to rise with the rank of the official involved."[23]

A second distinctive element of bribery involves the institutional positions of bribe-payers and bribe recipients. Are they agents or

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19. Antonio Argandona, *Corruption and Companies: The Use of Facilitating Payments,* 60 J. BUS. ETHICS 251 (2005); Pacini et al., *supra* note 18. One school of thought maintains that small-scale grease payments may perpetuate and nurture the culture of bribery. Officials who expect to be—and are—paid relatively small bribes by large companies will come to expect such payments from everyone merely to do their official duties. *See* Alexander Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments,* 25 PENN ST. INT'L L. REV. 251 (2006). According to the "broken windows" hypothesis, low level grease payments can spread to upper levels of government when corrupt officials are promoted and higher-level officials are emboldened to ask for larger, more destructive bribes. *See* Thomas Dunfee & David Hess, *Getting from Salbu to the "Tipping Point": The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies,* 21 NW. J. INT'L L. BUS. 471, 477 (2001).

20. *See* Carl Pacini, Hudson Rogers & Judyth Swingen, *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: A New Tool To Promote Transparency in Financial Reporting,* 15 ADVANCES IN INT'L ACCT. 121, 123 (2002); Nichols, *supra* note 16, 460-461

21. *See* Pacini, Rogers & Swingen, *supra* note 20.

22. P.R. CATEORA & J.L. GRAHAM, INTERNATIONAL MARKETING 137 (10th ed. 1999).

23. *See* Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 38 (K. Elliott ed., 1997); Pacini et al., *supra* note 18, at 387.

principals? Only payments made to agents can be classified as bribes.[24] The possibility of bribery arises from the divergent interests of agents and principals and from information asymmetry, which gives agents a great deal of discretionary power. "Opportunities for corruption depend on the size of rents in the control of public agents, the discretion they have in allocating them, and their lack of a sense of accountability to society."[25] Moreover, the trade of public goods illegally against payoffs creates a market for corruption at the risk of having to pay a penalty.[26]

Bribery is a crime of calculation: public officials weigh the expected benefits from corrupt behavior against the punishment imposed by society if they get caught. The transaction costs of illegal exchanges are important for maintaining secrecy. As bribery arrangements confer no property rights, the bribe-giver may fail to provide the service as agreed, may provide low quality goods and/or services, or may charge inflated prices. Such contracts are risky because agents have no court of law to which they can resort to in the event of a dispute.[27] Bribery is even more distortive than excessive taxes because bribery must be done in secret.[28]

II. THE EXTENT OF BRIBERY

Precise quantitative estimates of the dollar amount of bribery are impossible to obtain since neither bribe-givers nor bribe-takers disclose the extent of their activities. The World Bank Institute has estimated that the total amount of bribes paid per year may be $1 trillion.[29] According to Ernst & Young's 10th Global Fraud Survey, about 23% of almost 1200 corporations across 33 nations admitted their organizations had been approached to pay a bribe to retain or obtain business during the

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24. Susan Rose-Ackerman, *Bribes, Patronage and Gift-Giving*, *in* CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 93 (S. Rose-Ackerman ed., 1999).

25. Jean Cartier-Bresson, *The Causes and Consequences of Corruption: Economic Analyses and Lessons Learnt, in* NO LONGER BUSINESS AS USUAL 11, 12 (2000).

26. *See id.*

27. *See*, *e.g.*, Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUDIES 807, 808 (2006); Cartier-Bresson, *supra* note 25.

28. Andrei Shleifer & Robert Vishny, *Corruption,* 108 Q. J. ECON. 599, 600 (1993).

29. BBC News, *One in 10 Families Pays Bribes,* Dec. 9, 2004, http://news.bbc.co.uk/go/pr/fr/-/2/hi/in_depth/4080995.stm.

prior two years.[30] In the 2010 *Report to the Nations on Occupational Fraud and Abuse,* corruption schemes were found in one-third of fraud situations and represented a median loss of $250,000.[31]

Another indication of the extent of the bribery problem is the number of bribery scandals reported by the press. Huang Guangyu, a Chinese business tycoon who founded Gome Electrical Appliances, was formally charged with bribery, insider trading, and illegal business dealings.[32] Another Chinese investigation uncovered construction project-related bribery activities that occurred over an 18-month period from 2009 to 2011 involving around three billion Yuan in construction contracts.[33] Former Prince George's County executive Jack B. Johnson admitted in federal court that he accepted over $400,000 in bribes.[34] According to a RCMP search warrant, Adriano Furgiuele, a former "auditor at the Canada Revenue Agency received $150,000 from the president of a company shortly after it got a favourable tax ruling."[35] Tay Ee Tiong, a seafood supplier in Singapore, pled guilty to twenty counts of bribery for paying almost $1 million in kickbacks to nineteen chefs at high-end Chinese restaurants.[36]

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30. Sara Brandfon, *Company Executives Risk Fines and Jail by Ignoring AntiBribery Laws,* BUSINESS WIRE (May 15, 2008), *available at* http://www.businesswire.com/news/home/20080515005983/en/Company-Executives-Risk-Fines-Jail-Ignoring-Anti-Bribery.

31. *2010 Report to the Nations on Occupational Fraud and Abuse,* ASS'N OF CERTIFIED FRAUD EXAM'RS, 4 (2010)*, available at* http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf.

32. Saibal Dasgupta, *Charges Framed Against One-Time Richest Man in China,* TIMES OF INDIA, Feb. 17, 2010, *available at* http://articles.timesofindia.indiatimes.com/2010-02-16/china/28129165_1_charge-sheet-richest-man-huang-guangyu.

33. Toh Han Shih, *Vice-Minister Unveils 156000 Corruption Cases With 5698 Offenders Punished,* SOUTH CHINA MORNING POST, May 18, 2011, at 6.

34. Ruben Castaneda & Miranda S. Spivack, *Johnson, ex-county executive in Prince George's, pleads guilty to taking bribes,* WASH. POST, May 17, 2011, *available at* http://www.washingtonpost.com/local/johnson-ex-county-executive-in-prince-georges-pleads-guilty-to-taking-bribes/2011/05/17/AF0pP75G_story.html.

35. Daniel Leblanc, *RCMP Alleges Ex-Auditor Received Payment,* THE GLOBE AND MAIL (Canada), May 17, 2011, at A8.

36. Elena Chong, *Seafood Supplier Admits Bribing Chefs,* THE STRAITS TIMES (SING.), May 16, 2011, *available at* http://www.straitstimes.com/BreakingNews/Singapore/Story/STIStory_669245.html.

III. ANALYSIS OF AND TRENDS IN FCPA CASES

Available data on FCPA cases filed by the SEC and the DOJ for the years 2000-2009 was extracted and analyzed. The analysis considers the number of cases filed by the SEC and the DOJ, cases disposed of and pending, cases against corporations and individuals, and cases against foreign corporations. This paper also assesses SEC and DOJ monetary sanctions, total and mean value of business obtained, total and mean amount of bribes (or payments), and ratio of bribes to value of business obtained. In numerous instances, insufficient or no data was available. The assessment of FCPA cases is outlined below and is based on the data in Table 1.

One distinct trend is that SEC and DOJ enforcement efforts have become more aggressive. Table 1 indicates that 232 FCPA cases were initiated during the years 2000-2009. The number of FCPA cases filed annually escalated considerably after 2004. Over 80% of case filings in the decade ending in 2009 occurred during the years 2005-2009. In 2005, 14 cases were initiated compared to 67 in 2009. Approximately 64% of FCPA cases in the years 2000-2009 were initiated by the DOJ. Specifically, the majority of the cases filed contributing to this rise have involved DOJ criminal cases. In 2006, seven DOJ criminal cases were filed. In 2009, that number rose to 52. Moreover, slightly more than 80% of FCPA cases have been resolved without going to trial. The SEC and DOJ today have between 70 and 80 FCPA investigations underway at any given time.[37] The DOJ and SEC have shown an increased willingness to bring enforcement actions against individuals. In fact, Table 1 shows that, in sum, more cases have been brought against individuals than corporations during the years 2000-2009. In 2007 and 2008, more FCPA cases were initiated against corporations than individuals. In 2009, however, almost three times as many cases were brought against individuals as compared to corporations (50 vs. 17). The SEC and DOJ are sending a clear message that individuals will be held liable for FCPA violations even when acting within the scope of their employment.

A review of the enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials ("OECD Anti-Bribery Convention") by Transparency International shows that the U.S. is the

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37. *2010 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (Jan. 3, 2011), http://www.gibsondunn.com/publications/Documents/2010YearEndFCPA Update.pdf.

most aggressive country in prosecuting bribery. Although enforcement by the other 37 member nations is improving, the U.S. accounted for 41% of criminal case sanctions (including deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs)) from 1999 to 2009 among all 38 parties to the OECD Anti-Bribery Convention.[38] From 1999 to 2009, twenty-three OECD countries imposed no criminal sanctions on individuals or legal persons for foreign bribery.[39] Despite increased FCPA enforcement, U.S. corporations continue to pay bribes out of business necessity because of the leniency of other countries.[40]

Table 1 demonstrates a pattern of increasing monetary sanctions in both SEC and DOJ cases during the last decade. Both total and mean monetary sanctions have increased considerably. In 2004, total SEC monetary sanctions were $16.4 million. In 2007, SEC monetary sanctions exceeded $86 million. Total SEC monetary sanctions were over $200 million in 2008 and 2009. For 2008, the mean sanction was over $33 million. Moreover, total DOJ monetary sanctions climbed significantly throughout the last decade. In 2004, total DOJ monetary sanctions were just over $6 million. In 2008 and 2009, such sanctions exceeded $400 million. Mean monetary sanctions escalated from $3 million in 2004 to over $30 million in 2008 and 2009. Total monetary sanctions have increased for two reasons. First, the rise in the number of FCPA cases has increased the total monetary sanctions collected by the government. Second, the size or amount of the fines levied has also escalated.

Table 1 presents a summary of data on total and mean values of business obtained by bribers, the amount of bribes or payments, and the mean ratio of payments to business obtained in SEC cases. A lack of available data makes it virtually impossible to draw any conclusions about the value of business obtained for the years 2000-2004. However, in the second half of the last decade, a steady increase occurred in the total value and mean value of business obtained, except from 2008 to 2009. This decline may be attributable to the severe global recession.

38. *Working Group on Bribery Data on Enforcement of the Anti-Bribery Convention,* OECD (2010), http://www.oecd.org/dataoecd/11/15/45450341.pdf.

39. *Id.*

40. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem,* 41 CORNELL INT'L. L.J. 307, 313 (2008).

Table 1 highlights an increase in the mean amount of bribes paid to foreign public officials since 2005. One cannot conclude, however, that more money is being spent on bribes to obtain or retain a dollar's worth of business. One must consider the mean ratio of bribes paid to business obtained. Since 2005, this ratio has varied from 1.3% to over 27%. From 2005 to 2009, the weighted average ratio of bribes paid to business obtained was about .1533. This means that, on average, bribe-givers spend just over $0.15 in bribes for each $1 in business obtained or retained in SEC cases.

Table 1 also summarizes the total and mean values of business obtained by bribe-givers, the amount of bribes or payments, and the mean ratio of payments to business obtained in DOJ cases. Since 2005, the total value of business obtained rose from about $751 million to $6.5 billion in 2009. A decrease occurred from $9.5 billion in 2008 to $6.5 billion in 2009. This reflects a similar decline in the total value of business obtained in SEC cases. The mean value of business obtained increased from $37.3 million per case in 2005 to $225 million per case in 2009. The mean value of business obtained per case was lower in 2009 than it was in 2007 and 2008, but still significantly higher than in 2005.

In 2005, the total amount of bribes paid increased exponentially compared to the early 2000s (except 2004). Total bribery payments then tailed off significantly in 2006 for DOJ cases. A look at total bribery payments for the years 2006-2009 shows both a substantial increase and great volatility. The same pattern exists for the mean amount of bribery payments in DOJ cases.

An interesting statistic is the mean ratio of bribery payments to business obtained for DOJ cases. This ratio shows a relatively steady increase for the years 2004-2009. The weighted average ratio of bribes to the value of business obtained for 2000 to 2009 (excluding 2000 and 2003 for lack of data) is .1390 for DOJ cases. This is slightly lower than the weighted average of .1533 for SEC cases. This means that bribe payers spend about $0.14 for each $1 in business obtained or retained in DOJ cases.

Another clear trend in FCPA enforcement is increased cooperation between U.S. and foreign law enforcement authorities.[41] The DOJ is working closely with its sister agencies, especially in Western Europe,

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41. Taylor, *supra* note 10, at 20-25; Jeff Everett, D. Neu, & A. S. Rahman, *Accounting and the Global Fight Against Corruption,* 32 ACCT., ORGS., & SOC'Y. 513, 526 (2007); *Government Sting Snares*, *supra* note 4.

"to share evidence and theories and obtain access to witnesses."[42] "The Norwegian energy company Statoil ASA became the subject of the first criminal FCPA enforcement action against a non-U.S. company over a plan to bribe an Iranian government official in exchange for oil and gas development contracts."[43] There have been other cases involving FCPA prosecution of foreign firms since Statoil ASA. Other cases include *United States v. Vetco Gray Controls, Inc.*,[44] *United States v. Technip S.A.,*[45] and *United States v. Naaman*.[46] The trend towards increased global FCPA enforcement continues unabated with numerous actions against foreign companies, sending the message that businesses must stop engaging in bribery to obtain or retain business. "Among the developments that are anticipated are widespread multi-jurisdictional anti-bribery efforts with facilitated cross-border evidence gathering, asset seizures, speedy extradition, and increased scrutiny of American firms abroad, often without constitutional safeguards."[47]

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42. Mark Miller, *Corruption Cases Go International,* NAT'L. L. J., Mar. 26, 2007, at 1.

43. Michael Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act-1977 to 2010,* 12 SAN DIEGO INT'L L.J. 89, 113 (2010).

44. United States v. Vetco Gray Controls, Inc., No. 4:07-CR-00004-001-003 (S.D. Tex. Feb. 17, 2007).

45. United States v. Technip S.A., No. 4:10-CR-00439 (S.D. Tex. June 28, 2010). Jean Fourcand, President, Fourcand Enterprises, Inc., pleaded guilty on Feb. 19, 2010 to engaging in monetary transactions involving property derived from a scheme to bribe former Haitian government officials to gain telecommunication contracts. The Haitian government provided substantial assistance in gathering evidence during the investigation. *See* Press Release, Dep't of Justice, Florida Businessman Pleads Guilty to Money Laundering in Foreign Bribery Scheme (Feb. 19, 2010).

46. United States v. Naaman, No. 08-246-(ESH) (D.D.C. Aug. 7, 2008). A Canadian /Lebanese citizen named Ousama M. Naaman pleaded guilty to participating in an eight-year conspiracy to defraud the U.N. Oil for Food Program and bribe Iraqi officials in connection with the sale of a chemical additive used in the refining of leaded fuel. He was arrested in Germany and extradited to the U.S. Investigative assistance was provided by the U.K.'s Serious Fraud Office. *See* Press Release, Dep't of Justice, Innospec Agent Pleads Guilty to Bribing Iraqi Officials and Paying Kickbacks Under the Oil for Food Program (June 25, 2010).

47. Rollo C. Baker, *Foreign Corrupt Practices Act,* 47 AM. CRIM. L. REV. 647, 678 (Spring 2010).

IV. ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT

Two central themes are captured by the FCPA. The first is that no entity or person may offer or pay anything of value to the official of a foreign government or certain international organizations that would cause the official to misuse power or influence to benefit a business interest of any entity or person.[48] The second is that if any payment is made to an official, whether the purpose is proper or corrupt, the payment must be reported in the payer's financial statements according to generally accepted accounting principles (GAAP).[49]

In 1998, Congress amended the FCPA anti-bribery provisions, implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[50] The amendments extended the jurisdictional reach of the anti-bribery provisions to U.S. persons or entities acting outside the U.S. and non-U.S. persons acting within U.S. territory.[51] The amendments also added the words "securing any improper advantage" as a prohibited purpose to the FCPA's existing list, defined "foreign official" to include officials of public international organizations (e.g., the World Bank), and extended criminal penalties of the FCPA anti-bribery provisions to foreign employees and agents of U.S. entities.[52]

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48. William Athanas, *When Doing Business Internationally Becomes a Crime: Assisting Clients in Understanding and Complying with the Foreign Corrupt Practices Act,* 71 ALA. LAW. 382, 383-384 (2010); Stuart Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act,* 96 J. CRIM. & CRIMINOLOGY 465, 467 (2006).

49. *Id.*

50. In November 1997, 34 nations signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Signatory nations "have bound themselves to prevent bribery by multinational firms by criminalizing 'active' bribery of other nations' officials, whether or not those countries are signatories to the OECD Convention. The 1997 convention distances itself from the traditional model of penal law conventions in that its norms are self-executing . . . . Some nations have enacted legislation with more lenient standards than others thereby putting the nations with stricter standards at a competitive disadvantage." Pacini et al., *supra* note 18, at 390, 397.

51. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78ff(c) (2006); Amy Dean Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 502 (2011); Baker, *supra* note 47, at 657-58.

52. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302, 15 U.S.C. §§ 78dd-1 to -3 (2006).

In July 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act.[53] Section 922 grants significant protections and rewards to individuals who voluntarily provide the SEC with original information relating to the violation of the FCPA (and other securities laws). Individuals (apart from certain ineligible persons such as law enforcement officers) who provide original information that leads to the assessment of monetary sanctions in excess of $1 million are entitled to receive between 10% and 30% of the sanction amount as a reward.[54] No award will be made, however, to any whistleblower who gains the information through an audit of financial statements of a publicly traded firm.[55] The law provides a private right of action in federal court for whistleblowers regardless of administrative delay.[56] Dodd-Frank also increases the statute of limitations for whistleblower protection actions to six years following the alleged violation.[57]

It is not yet certain that the new whistleblower provisions will increase the quality of reporting and improve fraud detection.[58] In addition, the 10% floor on rewards might not be cost effective. "There is little evidence in the legislative history of Dodd-Frank that Congress contemplated whether the law's costs might exceed the residual amount of fraud enforcement proceeds in the Investor Protection Fund once bounties are paid from the Fund."[59] Also, the reward or bounty program may lead to unnecessary litigation as the law entitles whistleblowers to appeal the amount of any award granted by the SEC.[60]

A. ANTI-BRIBERY PROVISIONS

The basic elements of any FCPA bribery violation are: (1) a private or publicly traded firm or any foreign person in the U.S.; (2) who

53. Mara V.J. Senn & Rachel L. Frankel, *Wall Street Reform Law Creates Foreign-Payment Legal Hazards,* OIL & GAS J., Sept. 6, 2010, at 24.

54. 15 U.S.C. §§ 922(a), 21F(b)(1) (2006).

55. *Id*. §§ 922(a), 21F(c)(2)(a).

56. *Id* §§ 922(a), 21F(h)(1)(B)(i).

57. *Id*. §§ 922(a), 21F(h)(1)(B)(iii)(aa).

58. Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 127 (2011).

59. *Id.* at 142.

60. *Id.* at 143; Dodd-Frank Wall Street Reform and Consumer Protection Act, §§ 922(a), 21F(f).

corruptly; (3) pays or offers to pay money or anything of value; (4) to a foreign official or a foreign political party or to any person while knowing that all or part of the payment will be offered or paid to a foreign official; (5) for the purpose of influencing the official to obtain, retain, or direct business to any person or to secure an improper advantage.[61] All elements must be proven by credible evidence for the SEC and/or DOJ to prevail in a case.

V. WHO IS COVERED BY THE ANTI-BRIBERY PROVISIONS?

The anti-bribery provisions are broader than the accounting/internal control provisions of the FCPA. The former apply to "issuers," "domestic concerns" and "foreign persons" acting within the U.S.[62] An "issuer" is a public company subject to the registration or reporting requirements of the Securities Exchange Act of 1934, which includes firms using American Depositary Receipts (that are listed on an American exchange).[63] A "domestic concern" is any business (including those privately or family owned) that has its principal place of business in the U.S. or is organized under the laws of the U.S., its states, territories or possessions.[64] In addition, citizens, nationals, or residents of the U.S. are "domestic concerns."[65] Officers, directors, employees, agents and stockholders of foreign persons are also subject to the FCPA if they commit a violation while in the U.S. The FCPA provides that a foreign citizen, who is an agent of a domestic concern, is subject to the anti-bribery provisions even for acts committed outside the U.S.[66] A recent FCPA enforcement action demonstrated the government's willingness to prosecute U.S. companies and executives for business

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61. 15 U.S.C. §§ 78dd-1 to -3 (2006).

62. The FCPA is intended to cover all foreign persons who commit any act in furtherance of a bribe while in the U.S. S. REP. NO. 105-277, at 3 (1998).

63. 15 U.S.C. § 78dd-1(a).

64. *Id.* § 78dd-2(h)(1)(B).

65. *Id.* § 78dd-2(h)(1)(A). Instances of an individual indicted as a "domestic concern" occurred in United States v. Ott, Crim. No. CR 07-608 (D.N.J. Jul. 25, 2007) and United States v. Steph, Crim. No. CR H07-307 (S.D. Tex. Jul. 19, 2007).

66. 15 U.S.C. § 78dd-2. In United States v. Bodmer, 342 F. Supp. 2d 176, 176, 181-82 (S.D.N.Y. 2004), the district court dismissed an indictment against a Swiss citizen based on the wording of the FCPA before some 1998 amendments. The district court decision makes clear that the FCPA, as amended, applies to such individuals. *See also* United States v. DPC Tianjin, Ltd., No. 05-CR-282 (C.D. Cal. May 20, 2005).

activity occurring entirely abroad, despite domestic-based personnel's lack of direct knowledge and participation.[67]

Generally, the activities of a foreign subsidiary or joint venture of a U.S. corporation are not subject to the FCPA.[68] The U.S. government "could have jurisdiction over acts (and those who authorize such acts) that occur outside the U.S. if such acts trigger or cause further acts to occur within the territory of the United States."[69] Moreover, a U.S. parent may be held liable for the foreign subsidiary's acts if the relationship between the parent and affiliate is legally close.[70] Monitoring of all international business activity is vital to U.S.-based international business.

Two possible means exist to reach foreign affiliates under the FCPA: (1) through the direct liability of either the affiliate or its officials or both; (2) holding either the parent, its officials or both, liable for the actions of the affiliate. As to the first means, the FCPA provides for direct liability of the foreign affiliate of a U.S. firm (or any officer, director, employee, agent or stockholder acting on the affiliate's behalf) if the affiliate is publicly traded or causes an act in furtherance of the bribe to occur in a U.S. territory.[71] In *U.S. v. DPC Tianjin, Ltd.,*[72] for example, the DOJ treated a Chinese subsidiary as an agent of the U.S. parent for purposes of anti-bribery violations. DPC Tianjin paid about $1.6 million in "improper commissions," over an 11-year period, to doctors and laboratory personnel of state-owned hospitals.[73] The

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67. Litigation Release, Exchange Act No. 21162 ¶¶ 66-69 (July 31, 2009) (announcing settlement against two executives for liability as "control persons" who failed to supervise employees who made illegal bribes to Brazilian customs officials and falsified accounts to conceal the bribes), *available at* http://www.sec.gov/litigation /complaints/2009/comp21162.pdf.

68. *See*, *e.g.*, Dooley v. United Technologies Corp., 803 F. Supp. 428, 439 (D.D.C. 1992).

69. Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act,* 35 OHIO N.U.L. REV. 959, 962 (2009); DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 4-29 (1st ed. 1995).

70. *See In re* Schnitzer Industries, Inc., AAER No. 2493 (Oct. 16, 2006), *available at* http://fcpa.shearman.com/files/91b/91bf8f0a302071c4b846d8b92bd9c8a9.pdf?i=45 26294.

71. 15 U.S.C. §§ 78dd-1(a), 3(a) (2006).

72. United States v. DPC Tianjin, Ltd., No. CR 05-482, at 1 (C.D. Cal. May 20, 2005).

73. *Id.* at 2-5.

commissions were approved by the general manager of DPC Tianjin and booked in that firm's financial statements as "selling expenses."[74] DPC Tianjin routinely sent these financial statements to its parent's headquarters in Los Angeles where they were included in consolidated financial statements. Acts that occurred in U.S. territory in furtherance of bribes included faxes, telephone calls and emails with the U.S. parent. The FCPA's reach over agents of issuers requires merely the use of interstate commerce related to some act in furtherance of an improper payment. This is one of a few cases that demonstrates the ability of enforcement agencies to reach the activities of foreign affiliates despite their technical exclusion from the statute's coverage.

It is more common for a U.S. parent, venture, or personnel to be liable for the corrupt practices of foreign affiliates. One basis for parent company liability turns on whether or not the parent participated in the improper conduct. The FCPA itself provides for direct parent liability under these conditions or scenarios: (1) the commission of an act in furtherance of an improper payment by the parent; (2) the "authorization" by the parent of the affiliate's action; or (3) a direct offer, promise or transfer of value by the parent.[75] The parent is not liable absent knowledge of the corrupt purpose of the payment.[76]

Given the broad definition of "knowledge" accepted by the courts, criminal liability may be based on parent acquiescence (which is less than direct knowledge) in an affiliate's corrupt payments. "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."[77] If the books and records of the affiliate accurately reflect the use of assets to make bribery payments to foreign officials, then the parent has notice of corrupt behavior.[78] If the parent takes no action then it may be deemed to have constructive knowledge of the payments.[79]

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74. *Id.* at 5.

75. 15 U.S.C. §§ 78dd-1(a), 2(a) (2006).

76. *Id.* §§ 78dd-2(h)(3)(A).

77. *See* Justin F. Marceau, *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,* 12 FORDHAM J. CORP. & FIN. L. 285, 298 (2007).

78. *See* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act,* 50 BAYLOR L. REV. 1, 28 (1998).

79. *Id.*

VI. WHEN IS A PAYMENT MADE "CORRUPTLY?"

The FCPA renders it illegal to make a payment "corruptly" to a foreign official or to "corruptly" commit any act within the U.S. in pursuit of prohibited conduct. The statute itself does not define the term "corruptly." The lack of a statutory definition presents problems for corporate counsel, corporate executives, board members, and regulators. The legislative history of the FCPA provides some guidance.

The statute's legislative history indicates Congress' intent:

> [T]he word 'corruptly' is used in order to make clear that the offer, payment, promise or gift must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer . . . or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipients.[80]

Case law also yields insight into the meaning of "corruptly." One leading case that analyzes the meaning of "corruptly" under the FCPA is *United States v. Liebo.*[81] The Eighth Circuit Court of Appeals upheld the trial court's jury instruction regarding the meaning of "corruptly":

> [T]he offer, promise to pay, payment, or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone to do so and that an act is "corruptly" done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or lawful end or result by some unlawful method or means.[82]

A defendant need not be aware of the actual statutory provision nor know of the FCPA's existence to be found guilty of an anti-bribery violation.[83] The statute does require either the intent to influence an

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80. H.R. REP. NO. 95-640, at 8 (1977); S. REP. NO. 95-114, at 10 (1977).

81. 923 F.2d 1308, 1312 (8th Cir. 1991). The federal appellate court found that a jury could infer corrupt intent where the evidence showed: (i) a close temporal link between the gift of airline tickets and the approval of a contract; (ii) a close relationship between the recipient of the gift and influential government officials; and (iii) a classification of the gift by the giver as a commission in company records. *Id.*

82. *Id*.

83. United States v. Kay, 513 F.3d 432, 448 (5th Cir. 2007). In this case, the federal government charged two executives of a Texas rice exporter with bribing Haitian customs officials to reduce customs duties. The defendants argued that bribes paid for tax avoidance fell outside the ambit of the FCPA because the customs officers

official act or a quid pro quo element.[84] The bribe or illegal gratuity must be linked to a specific government action or meet the requirement that some particular official act be identified and proved.[85]

VII. ANYTHING OF VALUE

Although the FCPA does not define the term "anything of value," the law prohibits not only consummated bribes but also unaccepted offers of bribes. Recent enforcement actions indicate that there are virtually no limitations on what can be considered "anything of value." In the enforcement action against Kellogg, Brown and Root LLC and various other Halliburton Company affiliates, "things of value" provided to Nigerian officials included cash-stuffed briefcases and/or cash-loaded vehicles left in hotel parking lots.[86] In contrast to this case, a FCPA action against UTStarcom, Inc. involved providing executive training programs at U.S. universities to Chinese officials even though the programs "were not specifically related to [the company's] products or business."[87] The payment or offer of payment of "anything of value" includes employment of officials as consultants, expense paid travel, loans with favorable interest rates and repayment terms, golf outings, sports equipment, transportation of household goods, discounts and college scholarships.[88] Courts often consider whether the defendant subjectively attached value to the item in question.[89]

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were not involved in facilitating the defendants' business contracts. Although this argument prevailed at the district court level, the Fifth Circuit reversed on appeal holding that the statute's legislative history indicates Congress intended to find a violation when a bribe improved business opportunities. *Id.* at 749-50. The *Kay* decision, however, does not address payments made in connection with an expectation of business. Furthermore, the Court's opinion does not address instances where there is a substantial temporal gap between the payment and the foreign official's act; *see also* Allen R. Brooks, Comment, *A Corporate Catch-22: How Deferred and Non-Prosecution Agreements Impede the Full Development of the Foreign Corrupt Practices Act,* 7 J. L. ECON. & POL'Y. 137, 146 (2010).

84. *See* United States v. Quinn, 359 F. 3d 666, 673 (4th Cir. 2004).

85. United States v. Sun-Diamond Growers of California, 526 U.S. 398, 406 (1999).

86. United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. Feb. 6, 2009).

87. SEC v. UTStarcom, Inc., No. CV 09-6094, at 1 (N.D. Cal. Dec. 31, 2009).

88. United States. v. Sawyer, 85 F.3d 713, 721 (1st Cir. 1996); United States v. Foley, 73 F.3d 484, 486 (2nd Cir. 1996); United States v. Liebo, 923 F.2d 1308, 1309-10 (8th Cir. 1991); United States v. Hare, 618 F.2d 1085, 1086 (4th Cir. 1980); United

VIII. WHO IS A "FOREIGN OFFICIAL?"

The FCPA broadly defines a "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.[90]

The *OECD Convention* defines a "foreign public official" as any person in a foreign country who holds a legislative, administrative, or judicial office, or who exercises a public function, including a public agency or enterprise. The term also covers officials of public international organizations.[91]

Under the FCPA, "a foreign official is anyone who acts in an official capacity for a foreign government and who exercises some discretionary authority," which includes "an officer of a foreign government" and even "an officer in its armed forces."[92] The term also covers any person acting in an official capacity for or on behalf of a state-owned enterprise or business.[93]

The FCPA does not provide guidance concerning what types of entities are "instrumentalities" of a foreign government such that their employees are "foreign officials."[94] It remains unclear what level of government ownership or control will make a business an "agency or instrumentality" of the state. Despite the lack of guidance, the DOJ and

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States v. McDade, 827 F. Supp. 1153, 1161 (E.D. Pa. 1983), *aff'd in part*, 28 F.3d 283 (3rd Cir. 1994).

89. *See* Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 658-59 (2010).

90. 15 U.S.C. § 78dd-2(h)(2)(A) (2006).

91. *See supra* text accompanying note 50.

92. Robert A. Youngberg, *A Guide to the Foreign Corrupt Practices Act,* 18 UTAH B.J. 22, 23 (2005).

93. *See* Roger M. Witten et al., *Prescription for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies,* 64 BUS. LAW. 691, 697 (2009).

94. Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?* 63 BUS. LAW. 1243 (2008).

SEC broadly interpret the definition of "foreign official" in application to state-owned enterprises.[95]

One of the most aggressive agency interpretations of "foreign official" in the context of a state-owned enterprise occurred in the KBR/Halliburton case.[96] The SEC and DOJ claimed that officers and employees of Nigeria LNG Limited ("NLNG") were "foreign officials" even though NLNG was 51% owned by multinational oil companies and 49% owned by Nigerian National Petroleum Corporation (NNPC).[97] The enforcement agencies claimed that effective control of NLNG belonged to NNPC.[98] The DOJ has indicated that the totality of the circumstances must be analyzed, including "the precise percentage of government ownership, whether the government has veto power of shareholder decisions, and the extent to which the government participates in day-to-day administration of the entity."[99]

The DOJ and SEC interpretation(s) of "foreign official" have yet to be tested in a federal appellate court. The significance of such a test is growing since the agency interpretation has become central to many enforcement actions in recent years.[100] Indeed, a clear federal appellate court interpretation would reduce uncertainty for business, although the high settlement rate for FCPA cases nevertheless evidences a reluctance on the part of U.S. businesses to litigate such difficult issues.

The need for a clear court interpretation increases as business ownership arrangements evolve on a global scale. For example, government efforts around the globe to stimulate economies may have created a new type of foreign official. Government ownership has

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95. Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,* 43 IND. L. REV. 389 (2010).

96. Bass, Berry & Sims LLP, *Halliburton and KBR Bring FCPA Settlement Total to Over $1.3 Billion in the Last 60 Days Alone,* ANTITRUST & TRADE PRACTICES ALERT, Feb. 12, 2009. In February 2009, Kellogg Brown & Root (KBR), a former subsidiary of Halliburton, agreed to pay the DOJ "a fine of $402 million to settle FCPA charges related to the payment of about $180 million to foreign officials in Nigeria from 1994 to 2004." Nigerian officials awarded KBR four contracts worth $6 billion to build natural gas facilities. *See* Press Release, Dep't of Justice, *Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine* (Feb. 12, 2009), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2009/02/02-11-09Kellogg-guilty.pdf.

97. *Id.*; United States v. Kellogg Brown & Root LLC, No. H-09-071 (S.D. Tex. Feb. 6, 2009).

98. Bass, Berry & Sims LLP, *supra* note 96.

99. Witten et al., *supra* note 93, at 697.

100. Koehler, *supra* note 95, at 410-12.

increased substantially in many economies. Financial institutions, sovereign wealth funds and other organizations involve heavy government ownership positions.[101] Are employees of these firms "foreign officials" under the FCPA?

IX. THE KNOWLEDGE REQUIREMENT

The FCPA criminalizes both direct bribes and payments to intermediaries for the purpose of bribing foreign officials. While proving that a FCPA defendant knew or had knowledge that a payment to a foreign official was unlawful is often not an issue in direct bribery cases, it often becomes a contentious point in cases involving third party agents. In such cases, the FCPA outlaws payments to any person "*while* '*knowing*' that all or a portion of such money or thing of value will be offered, given, or promised, to any foreign official for a purpose prohibited by the FCPA."[102]

The FCPA itself provides that a person has knowledge or is "knowing" when (1) "such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur," or (2) "such person has a firm belief that such circumstance exists or that such result is substantially certain to occur."[103] The statute defines conscious avoidance as "knowledge of the existence of a particular circumstance," established by being "aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[104]

Clearly, the statutory definition of "knowing" is much broader than just actual knowledge. Until recently, the SEC and DOJ believed that the knowledge requirement could be met by a showing that a FCPA

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101. *Id.* at 414. Westbrook, *supra* note 51, at 535-536. For example, the Royal Bank of Scotland is 68.4% owned by the U.K. government. BNP Paribas is partially owned by the government of France. Sovereign wealth funds make large cross-border investments in various firms and are sometimes directly owned by their home country governments (*e.g.*, The China Investment Corporation).

102. Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance of Due Diligence to the FCPA's Knowledge Requirement,* 4 CORP. ACCOUNTABILITY REPORT 2, Nov. 13, 2009 (emphasis added), *available at* http://www.foley.com/files/Publication/c03363c0-d03a-46e7-9015-c857d46e82fa/Presentation/PublicationAttachment/64e3d2de-9003-4ab0-b224-c8b5bfad536b/CorporateAccount2009.pdf.

103. 15 U.S.C. § 78dd-2(h)(3)(A) (2006).

104. *Id.* § 78dd-2(h)(3)(B).

defendant had failed to perform adequate due diligence (with regard to red flags that a third party could possibly make improper payments). Such a "knowing" standard is intended to capture business managers or owners who fail to take action when red flags of a FCPA violation arise.

In *United States v. Kozeny*,[105] a federal district court ruled that this was an incorrect interpretation of the "knowledge" requirement. Bourke, a designer of handbags, had invested $8 million in a business venture (formed by Czech expatriate Victor Kozeny) that contemplated purchasing an Azerbaijani oil company.[106] Kozeny purportedly paid bribes to Azerbaijani government officials in a failed effort to buy the state-owned oil company.[107] A jury convicted Bourke of conspiring to violate the anti-bribery provisions.[108] In a court brief, the government argued that Bourke's failure to conduct adequate due diligence, plus awareness of a high probability that there were bribes, satisfied the knowledge requirement.[109] Nevertheless, the district court found that the knowledge requirement cannot be met merely by a failure to perform adequate due diligence.[110] Bourke could be found to have knowledge only because he took affirmative steps to avoid knowledge, and he possessed awareness of a high probability that there were bribes.[111]

The Second Circuit opinion in *United States v. Jacobs*[112] and the legislative history of the 1988 amendments to the FCPA[113] support the *Kozeny* court's analysis of the knowledge requirement. The *Kozeny* decision rejected the efforts of the DOJ and SEC to return the FCPA to the more lax standard of "reason to know" that prevailed before the 1988 amendments to the FCPA.[114] Mere negligence in not performing due diligence does not satisfy the FCPA knowledge requirement.

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105. United States v. Kozeny, 664 F. Supp. 2d 369, 374 (S.D.N.Y. 2009).

106. Winer & Husisian, *supra* note 102, at 2.

107. *Kozeny*, 664 F. Supp. 2d at 374-77.

108. *Id.* at 371.

109. Winer & Husisian, *supra* note 102, at 2.

110. *See Kozeny*, 664 F. Supp. 2d at 385-88.

111. *Id.* at 374, 385-89.

112. United States v. Jacobs, 475 F.2d 270, 287 (2d Cir. 1973), *cert. denied sub. nom.*, Lavelle v. United States, 414 U.S. 821 (1973). In *Jacobs,* the government alleged that the defendants had knowingly dealt in stolen securities. 475 F.2d at 273-74. The court noted the important distinction between recklessness and willful blindness. *Id.* at 287. Reckless disregard by itself is not enough to satisfy the knowledge requirement. *Id.*

113. H.R. REP. NO. 100-576, at 919-20 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1952.

114. Winer & Husisian, *supra* note 102, at 4, 5, 7.

X. INFLUENCING AN OFFICIAL TO OBTAIN OR RETAIN BUSINESS OR SECURE AN IMPROPER ADVANTAGE

The fifth element of the anti-bribery provision—also called the business nexus requirement—requires that a FCPA violator must take some action to influence a foreign official to "obtain or retain . . . , to direct business to any person, or to obtain an improper advantage."[115] Congress did not define these terms, but limited judicial guidance supports a broad interpretation. "Business" is not limited to foreign government contracts but includes any commercial activity.[116] In *U.S. v. Kay*,[117] the issue before the court concerned whether payments to Haitian officials for lowering customs duties and sales taxes satisfied the business nexus requirement. In its decision, the Fifth Circuit Court of Appeals considered the FCPA's legislative history, deeming the words "obtain or retain business" to be ambiguous.[118] Although the court held that making payments to foreign officials to lower customs duties and taxes *could* provide an unfair advantage and assist the payer in obtaining or retaining business,[119] such payments do not automatically satisfy the business nexus element of the FCPA.[120] The Fifth Circuit noted that the FCPA's legislative history shows that Congress intended to extend liability to situations where bribes improved business opportunities (in addition to allowing an entity to obtain or retain business).[121] The *Kay* decision broadened the scope of the business nexus element to cover payments made to gain a comparative advantage or improve business opportunity (or obtain an improper advantage).[122]

Indeed, the SEC and DOJ continue to interpret the fifth element broadly to include payments intended to influence governmental decisions having a positive impact on a defendant's business. For

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115. 15 U.S.C. § 78dd-2 (2006).
116. Youngberg, *supra* note 92, at 24.
117. United States v. Kay, 359 F.3d 738 (5th Cir. 2004).
118. *Id.* at 743-44.
119. *Id.* at 755-56.
120. *Id.* at 741.
121. *Id.* at 749-50.
122. *See* Juscelino F. Colares, *The Evolving Domestic and International Law Against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOB. STUD. L. REV. 1, 13-14 (2006).

example, in *U.S. v. Vetco Gray Controls, Inc.*,[123] various subsidiaries of Vetco Gray paid a $26 million fine for paying bribes to customs officials in Nigeria to obtain preferential treatment in the customs clearance process and in the importation of equipment. The charges did not specifically allege that the payments were made to "obtain or retain business."[124] Nevertheless, Vetco Gray did not contest the government's interpretation of the phrase.[125]

A. Exceptions and Limitations

1. Facilitating or Expediting Payments

Congress created a "facilitating payments" exception to the FCPA in recognition of the fact that small "grease" payments are "a cost of doing business" in many countries.[126] The exception was created in 1988 when corporations complained that international business with the United States would suffer substantially without these payments.[127] The FCPA's legislative history includes a four-factor test to help distinguish between facilitating payments and illegal payments for "obtaining or retaining business."[128] With regard to payment purpose, Congress sought to criminalize: (1) payments intended to alter discretionary decision-making so as to increase the payer's business; (2) payments that are unusually large in relation to the government action done; (3) payments that directly affect competition in contracts; and (4) payments in exchange for services to which the bribe-giver is not entitled.[129] Various courts that have considered the "facilitating payments" exception have

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123. Plea Agreement at 16, United States v. Vetco Gray Controls, Inc., No. 07-CR-0004 (S.D. Tex. Feb. 6, 2007), *available at* http://www.justice.gov/criminal/fraud /fcpa/cases/vetco-controls.html.

124. *Id.* at 36.

125. *See* Plea Agreement, *supra* note 123, at 33-55.

126. Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L. & COMP. L. REV. 379, 383-85 (2005); Bixby, *supra* note 43, at 110-11.

127. H.R. REP. NO. 100-576, at 916 (1988).

128. *Id.* at 921, 1547, 1954.

129. H.R. REP. NO. 100-40, at 77 (1987); Charles B. Weinograd, *Clarifying Grease: Mitigating the Threat of Overdeterrence by Defining the Scope of the Routine Governmental Action Exception*, 50 VA. J. INT'L. L. 509, 518-519 (2010).

noted the importance of these four factors; and the test was actually adopted in *U.S. v. Kay*.[130]

Moreover, SEC administrative proceedings provide some insight into how that agency evaluates this exception. The SEC's treatment of the "facilitating payments" exception provides guidance for understanding its application within organizations covered by the antibribery provisions. SEC publications emphasize the significance of two factors: "the discretionary nature of the acts performed and the degree to which the payor was entitled to the benefits of the payee's performance."[131] In 2004, for example, BJ Services Company entered into a settlement agreement with the SEC concerning several alleged bribes, including a $10,000 payment to a representative of Argentina's Secretary of Industry and Commerce.[132] BJ Services paid the official to hasten the importation of business equipment held up for delivery.[133] A payment made to expedite the customs process is an example of a facilitating payment and is permissible under the FCPA.[134] Although the SEC did not expressly state that the payment fell within the FCPA exception, the SEC's separate treatment of the payment shows the agency considered it distinguishable.[135]

The FCPA indicates that payments to expedite the following routine governmental actions are deemed "facilitating payments":

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

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130. United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004); Weinograd, *supra* note 129, at 525.

131. Weinograd, *supra* note 129, at 521.

132. *In re* BJ Servs. Co., Securities Exchange Act Release No. 49-390 (Mar. 10, 2004), *available at* http://www.sec.gov/litigation/admin/34-49390.htm.

133. *Id*.

134. Weinograd, *supra* note 129, at 522-23.

135. *Id*.

> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration . . . .[136]

The FCPA contains no cap on the amount of a "facilitating payment," but in practice those permitted have been under U.S. $1000.[137] Moreover, it is imperative that any "facilitating payment" be accurately recorded on the payer's books.[138] Great care must be exercised in making "facilitating payments" given the amorphous nature of the exception.[139]

XI. AFFIRMATIVE DEFENSES

One affirmative defense is if a payment is "lawful under the written laws and regulations" of the foreign official's country.[140] Notably, "lawful under written law" is different from being consistent with local custom and practice.[141] Likewise, the defense is also not activated by the lack of or non-existence of written laws in the foreign official's country.[142] In *United States v. Kozeny,* Frederic Bourke attempted to invoke this defense by contending that payments made to Azeri officials were lawful under the laws of Azerbaijan because they were self-reported and no Azeri prosecution would ensue.[143] The claim that failure to prosecute bribery is tacit approval of such activity was dismissed by the trial court.[144] No country in the world—even those with the most pervasive cultures of corruption—authorizes bribes under its written laws.[145]

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136. 15 U.S.C. §§ 78dd-1(f)(3)(A), -2(h)(4)(A) (2006).

137. Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 575, 587 (2006).

138. Youngberg, *supra* note 92, at 25.

139. One source of trouble for businesses is the meaning of the word "routine." A U.S. business can interpret the word to mean "frequently," or "ordinary" or "commonplace." Although the FCPA sets forth examples of "routine" governmental actions, the statute provides sparse guidance when questionable situations arise that are not listed in the law. Koch, *supra* note 126, at 389-90.

140. 15 U.S.C. § 78dd-2(c)(1).

141. Athanas, *supra* note 48, at 385.

142. Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 357 (2011).

143. United States v. Kozeny, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008).

144. *Id.* at 539.

145. Athanas, *supra* note 48, at 385.

A second affirmative defense is available for "reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official" that are directly related to "(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government."[146] The government strictly construes this defense, knowing that firms will use it as a means of hiding excessive payments under the guise of reasonable promotional expenses.[147] In *U.S. v. Metcalf & Eddy, Inc.*,[148] the DOJ found that expenses were excessive. An engineering firm submitted a bid for work on an Egyptian infrastructure project. On two occasions, the engineering firm paid for first-class airfare from Egypt and luxury hotel accommodations for an Egyptian official, his wife and children.

Affirmative defenses are just that; they are not exceptions. A party charged with a FCPA violation must prove that the payments satisfy the affirmative defense.

A. LACK OF A PRIVATE RIGHT OF ACTION

The FCPA itself has no private right of action. Further, case law has held that no private right of action is implied by the FCPA statute.[149] FCPA enforcement actions, however, have given rise to FCPA-derived lawsuits by plaintiffs, including shareholders, other governments and business partners. In *In re Immucor Inc. Securities Litigation,*[150] shareholder-plaintiffs brought a §10(b) lawsuit after Immucor's stock price fell upon the initiation of a FCPA investigation by the SEC.

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146. 15 U.S.C. § 78dd-2(c)(2) (2006).

147. Brooks, *supra* note 83, at 146-47; Baker, *supra* note 47, at 663-64; Maris & Singer, *supra* note 137, at 588-89; Arthur Aronoff, *Foreign Corrupt Practice Act Anti-Bribery Provisions, in* CORPORATE COMPLIANCE 503, 509, 512-13 (PLI Corp. L. & Practice Course Handbook Series No. 943, 1997).

148. United States v. Metcalf & Eddy, Inc., No. 1: 99CV12566 (D. Mass. Dec. 14, 1999); Jones Day, *The Foreign Corrupt Practices Act: Walking the Fine Line of Compliance in China,* 5 (Sept. 2008), *available at* http://www.jonesday.com/the-foreign-corrupt-practices-act-walking-the-fine-line-of-compliance-in-china-09-26-2008/.

149. Lamb v. Philip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 498 U.S. 1086 (1991).

150. *In re* Immucor Inc. Secs Litigation, No. 1:05-CV-2276-(WSD), 2006 U.S. Dist. LEXIS 72335 (N.D. Ga. Oct. 4, 2006).

Immucor agreed to settle the suit for $2.5 million.[151] In February 2008, technology firm FARO settled a class-action securities fraud lawsuit brought by shareholders for $6.9 million in connection with payments made by the company in its Chinese operations.[152] In another case, Las Vegas Sands shareholders filed a derivative lawsuit against various company officers in federal court alleging breach of fiduciary duty, abuse of control, waste of corporate assets, and conspiracy involving alleged improper bribes in violation of the FCPA.[153] Conduct that violates the anti-bribery provisions may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organization Act (RICO),[154] or to actions under other federal or state laws.

B. USE OF RELATED STATUTES

The BAE Systems case (in which the company plead guilty to conspiracy and violations of the Arms Export Control Act and the FCPA) demonstrates that federal enforcement agencies sometimes rely on other statutes that are complementary to the FCPA.[155] Complementary statutes such as export control laws,[156] false statement statutes,[157] mail and wire fraud[158] and money laundering laws[159] may be employed in bringing bribery-related charges. In essence, the FCPA is not the only anti-corruption statute on which U.S. businesses should be focused. Indeed, complementary statutes also permit regulatory authorities to seek harsher penalties.

151. Sulavik, *supra* note 11, at 16.
152. *Id.* at 16.
153. Steve Green, *Shareholders Sue Over Probes Facing Las Vegas Sands,* LAS VEGAS SUN, Apr. 1, 2011, *available at* http://www.lasvegassun.com/news/2011/apr/01/shareholders-sue-over-probes-facing-las-vegas-sand/.
154. Maris & Singer, *supra* note 137, at 589; Sulavik, *supra* note 11, at 16. The text of RICO can be found at 18 U.S.C. §§ 1961-1968 (2006).
155. *See supra* text accompanying notes 1-3.
156. 15 C.F.R. §§ 730-774 (2009); 22 C.F.R. §§ 120-130 (2009).
157. 18 U.S.C. §§ 1001, 287, 1621, 1623.
158. *Id*. §§ 1341, 1343.
159. *Id*. §§ 1956, 1957.

C. ACCOUNTING AND INTERNAL CONTROL PROVISIONS

1. Keep Accurate and Complete Books and Records

Publicly traded firms are required to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company."[160] The recordkeeping provisions are intended to prevent three types of improprieties: (1) the failure to record illegal transactions; (2) the falsification of records to conceal illegal transactions; and (3) the creation of records that are quantitatively accurate but fail to specify qualitative aspects of the transaction.[161] No materiality requirement applies with regard to making and keeping accurate financial records.

Although the FCPA does not define "books, records, and accounts," the statute applies to a wide variety of corporate records. For FCPA purposes, records include "accounts, correspondence, memorandums, tapes, disks, papers, books, and other documents or transcribed information of any type whether expressed in ordinary or machine language."[162] One federal court has observed that "virtually any tangible embodiment of information made or kept by an issuer is within the scope of [the accounting provisions]."[163] Hence, not only internal corporate records, such as ledgers and journal entries, but also records of corporate transactions with third parties, such as agreements with third-party vendors, are covered. The FCPA's recordkeeping provision also includes minutes of board of director meetings and board resolutions, but would not encompass every memorandum or note taken by an employee relating to any business matter.

Furthermore, transactions must be accurately recorded "in reasonable detail." The FCPA defines "reasonable detail" to mean "such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs."[164] This means that records should include any

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160. 15 U.S.C. § 78M(b)(2)(A).

161. Maris & Singer, *supra* note 137, at 580; Deming, *supra* note 48, at 483-90; DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 14-17 (2d ed. 1999).

162. 15 U.S.C. § 78(c)(a)(37).

163. SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 748-49 (N.D. Ga. 1983).

164. 15 U.S.C. §§ 78m(b)(2)(A) & (b)(7); SEC v. Battenberg, No. 06-14891, 2011 U.S. Dist. LEXIS 88255, at *10 (E.D. Mich. Aug. 9, 2011).

information tending to alert the SEC to any impropriety. For example, external and internal auditors should look for cash payments, payments to anonymous or numbered bank accounts, checks written to "bearer" or "cash" and misleading or fake documentation serving as a cover for fictitious sales, purchases, loans or other transactions.

All public companies that file Form 10-K reports must observe the accounting provisions regardless of whether they engage in foreign operations.[165] Officers, directors, employees and stockholders or agents of a publicly traded firm are also subject to the accounting provisions. Individuals and non-publicly traded entities can be subject to the accounting provisions to the extent they are accomplices to statutory violations. The accounting provisions apply to various types of corporate activities, even wholly domestic activities and the manner in which those activities or transactions are reflected in corporate accounting records.[166]

A U.S. publicly traded firm (an "issuer") must ensure that any majority-owned foreign subsidiary adheres to the accounting provisions. For example, in 2006, the SEC brought an action against Schnitzer Steel Industries, Inc.[167] Allegedly, Schnitzer's wholly owned subsidiaries, SSI International Far East Ltd. and SSI International, Inc., made improper cash payments to managers of scrap metal customers owned, in whole or in part, by the Chinese government, to induce purchases of Schnitzer's scrap metal.[168] "In order to conceal the improper payments, Schnitzer falsely described those payments to foreign officials as 'sales commissions,' 'commissions to the customer,' 'refunds,' or 'rebates' in Schnitzer's books and records."[169] Schnitzer paid a $7.7 million civil penalty for violation of both the anti-bribery and accounting/internal control provisions of the FCPA.[170]

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165. Said FCPA provisions are part of the federal securities laws which apply to all U.S. publicly traded firms (with or without foreign business activity). The accounting and internal control provisions have a broader reach than improper payments to foreign officials and apply to all aspects of practices relating to the preparation of financial statements of an entity. Maris & Singer, *supra* note 137, at 579; Deming, *supra* note 48, at 482; THOMAS LEE HAZEN, 2 LAW OF SECURITIES REGULATION 348 (5th ed. 2005). *See* 15 U.S.C. §§ 78m(b)(2)(A), (b)(6).

166. *See* United States v. CropGrowers Corp., 954 F. Supp. 335, 356-57 (D.D.C. 1997).

167. *In re* Schnitzer Steel Indus., Inc., Exchange Act Release No. 34-54606, at 1 (Oct. 16, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54606.pdf.

168. *Id.* at 2.

169. *Id.* at 3.

170. *Id.* at 4-8.

A parent issuer may also be held responsible in some cases of less than 50% ownership.[171] When an issuer does not have an ownership interest greater than 50%, it must "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause [the affiliate] to devise and maintain a system of internal accounting controls" consistent with the accounting provisions.[172] Good faith efforts should "include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located."[173] Other relevant factors in assessing good faith include the extent to which the issuer has the opportunity to obtain access to books and records, and the extent to which the issuer can influence a subsidiary's or other partner's actions by other means.[174] The SEC applies practical tests in its determination of whether an issuer controls a foreign subsidiary. An issuer's duty to influence a foreign subsidiary's behavior increases directly with the degree to which it can exercise control over the subsidiary.

2. Internal Controls

The FCPA itself does not define "internal accounting controls." In general, internal controls are the various policies, procedures, and processes by which a business is managed effectively and efficiently. One federal appellate court defined "internal accounting controls" as the "mechanism by which companies monitor their accounting system (their individualized method of processing transactions) for errors and irregularities in order to safeguard company assets and ensure that records are sufficiently reliable."[175]

The FCPA requires publicly traded firms to design and maintain a system of internal controls sufficient to provide reasonable assurances that:

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171. *See* Deming, *supra* note 48, at 474. The SEC took enforcement action against an issuer that had less than 50% control in SEC v. BellSouth Corp., No. 1:02CV-0113 (N.D. Ga. Jan. 15, 2002), *available at* http://www.sec.gov/litigation/litreleases/lr173 10.htm.

172. 15 U.S.C. § 78m(b)(6) (2006).

173. *Id.*

174. *See* Witten et al., *supra* note 93, at 701.

175. *In re* Ikon Office Solutions, Inc., 277 F.3d 658, 672 n.14 (3d Cir. 2002).

> **(i)** transactions are executed in accordance with management's general or specific authorization; **(ii)** transactions are recorded as necessary **(I)** to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and **(II)** to maintain accountability for assets; **(iii)** access to assets is permitted only in accordance with management's general or specific authorization; and **(iv)** the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . .[176]

The SEC does not mandate any specific internal controls. The SEC articulates broad goals that controls should achieve and leaves the implementation of specific policies and procedures to issuers. Several factors are considered in the determination of whether a system of internal controls is reasonable under the circumstances: (1) the role of the board of directors; (2) communication of corporate procedures; (3) assignment of authority and responsibility; (4) competence and integrity of personnel; (5) accountability for performance and compliance with policies and procedures; and (6) objectivity and effectiveness of the internal audit function.[177] The failure to establish an audit committee may violate the FCPA. A public firm may also violate the law if it has no controls for a particular activity such as fund transfers outside the country or the making of political contributions.

3. *Enforcement of Accounting and Internal Control Provisions*

Both the SEC and DOJ have enforced the FCPA's accounting and recordkeeping provisions, with the SEC often taking the lead. In addition, the accounting provisions have been used to support charges under the anti-bribery provisions. Prosecution under the anti-bribery provisions is more difficult because evidence is obtained in a foreign setting.[178]

In an anti-bribery case, one of the most difficult elements is tracing funds through offshore corporations and bank accounts, the beneficial ownership of which can be extremely costly to determine.[179] The

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176. 15 U.S.C. § 78m(b)(2)(B)(i)-(iv).

177. Maris & Singer, *supra* note 137, at 581.

178. Deming, *supra* note 48, at 492.

179. Suppose that to prove a case against a bribe-giver the U.S. must prove that payments to a certain Caribbean corporation secretly benefited the procurement minister in the foreign nation concerned. Proving the link between the minister and the company can be difficult and expensive. Philip Segal, *Coming Clean on Dirty Dealing:*

cooperation of authorities in foreign nations is vital. If law enforcement in a given country fails to cooperate then the U.S. government must prove the case here without subpoena and search powers where the bribe may have occurred.[180]

For a FCPA case involving the accounting provisions, no need exists to prove "corrupt intent," whether a "foreign official" was involved or to demonstrate whether a promise, offer or payment was made to "obtain or retain business" or "secure an improper advantage."[181] The elements of an accounting violation are limited to whether the business record is covered by the accounting provisions, whether the conduct was willful, and whether the record was accurate in reasonable detail.[182]

For example, in July 2010, the SEC filed books and records, and internal controls charges against General Electric and two GE subsidiaries—Ionics, Inc. and Amersham PLC.[183] The SEC alleged that the two subsidiaries made $3.6 million in illegal kickback payments to the Iraqi Health Ministry, that GE and the two subsidiaries failed to maintain adequate systems of internal controls to detect and prevent the payments and that the accounting for the transactions failed to properly record the nature of the payments.[184] GE agreed to pay $23.4 million to settle the charges.[185]

In another case, the SEC entered into a deferred prosecution agreement ("DPA") with Tenaris S.A. concerning allegations that the steel pipe product manufacturer bribed Uzbekistan officials to supply oil and natural gas pipelines.[186] In response to SEC findings, Tenaris reviewed its compliance practices.[187] Generally, businesses can improve

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Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act, 18 FLA. J. INT'L. L. 169, 187 (2006).

180. *Id.*

181. Deming, *supra* note 48, at 482, 492.

182. United States v. Wilson, No. 01 CR. 53 (DLC), 2001 U.S. Dist. LEXIS 9572, at *19 (S.D.N.Y. July 13, 2001).

183. SEC v. Gen. Elec. Co., Exchange Act Release, No. 3159, CA No. 1:10-CV-01258 (D.D.C. July 27, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21602.htm.

184. *Id.*

185. *Id.*

186. *Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement*, SEC NEWS DIGEST, 1 (May 17, 2011), http://www.sec.gov/news/digest/2011/dig051711.htm.

187. *Id.*

their internal controls through due diligence requirements related to the retention and payment of agents and FCPA training.

4. Vicarious Liability Under the Accounting and Internal Control Provisions

a. Criminal Liability

An individual or entity can be held vicariously liable for the conduct of a third party when the latter is acting for or on behalf of the individual. Even if a third party is not subject to the accounting and internal control provisions, an individual or entity may become subject to vicarious liability if that individual or entity directs, authorizes or ratifies prohibited conduct.[188] The key determinant is whether the agent is acting within the scope of express, implied or apparent authority.[189] Improper entries in an entity's books and records often result when improper payments are made or funneled to a foreign official through a foreign agent.[190] A parent firm probably confronts an accounting/internal controls violation despite that an improper accounting entry is made on the books of a remote subsidiary or affiliate.[191] Also, an accounting/internal controls charge may be pressed against a parent based on the notion that had appropriate internal controls been enforced any improper payment would not have happened.[192]

For criminal liability to attach for the conduct of third parties, a publicly traded firm must possess knowledge that the third party has circumvented or intends to violate the accounting provisions. Deliberate

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188. Deming, *supra* note 48, at 476.

189. United States v. Basic Constr. Co., 711 F.2d 570, 572 (4th Cir. 1983); *see also* United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981).

190. Koehler, *supra* note 95, at 402.

191. *Id.*

192. *Id.* For example, Halliburton was held liable under the accounting and internal control provisions based on the conduct of agents used by a joint venture in which Halliburton participated indirectly through subsidiaries. Specifically, Halliburton was held liable based on the allegation that it exercised control over subsidiaries that were involved in the joint venture. The SEC complaint contended that: (1) Kellogg, Brown, and Root's ("KBR") board of directors consisted solely of senior Halliburton officials; (2) senior Halliburton officials hired and replaced KBR's senior officials, set compensation and established performance goals; (3) Halliburton consolidated KBR's financial statements; and (4) KBR's Halliburton officials were aware of the joint venture's use of a U.K. agent. Complaint at 30, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009).

ignorance or conscious disregard can satisfy the knowledge requirement.[193] Conscious acquiescence to an authorized act or acts may amount to authorization of those acts.[194] Knowledge may reside with one person not necessarily a senior officer,[195] or may be the collective knowledge of various employees acting within the scope of employment. [196]

Vicarious criminal liability can also emanate from an entity or individual being an accomplice under the aiding and abetting statute.[197] Criminal liability based on aiding and abetting requires intent that an offense be committed plus conduct that aids or abets a violation.[198] Also, a conspiracy (i.e., an agreement) of two or more entities and/or individuals to violate the accounting and/or internal control provisions may serve as the basis for a federal conspiracy offense.[199] The statute requires the commission of an overt act in furtherance of the conspiracy.[200] The overt act need not be unlawful, so long as it contributes to an unlawful end. A relatively minor act, such as a phone call, or a series of e-mails, can serve as an overt act. The overt act is attributable to all co-conspirators who are members at the time the act is committed or those who join later.[201]

Moreover, under the *Pinkerton* rule, a defendant may be vicariously liable for a substantive offense committed by another member of the

193. United States v. Picciandra, 788 F.2d 39, 46 (1st Cir. 1986); *see also* United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984).

194. Brown, *supra* note 78, at 32-33.

195. United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1982).

196. United States v. Bank of New England, 821 F.2d 844, 855-56 (1st Cir. 1987).

197. 18 U.S.C. § 2 (2006) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.").

198. United States v. Medina, 887 F.2d 528, 532 (5th Cir. 1989); *see also* United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990).

199. 18 U.S.C. § 371. This statute makes it a crime for "two or more persons to conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose . . . ." *Id.*

200. United States v. Quinn, 403 F. Supp. 2d 57, 67 (D.D.C. 2005). An overt act is an "outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960).

201. *See* Salinas v. United States, 522 U.S. 52, 63-64 (1997).

conspiracy.[202] A co-conspirator may be convicted of an offense (other than conspiracy) without knowledge of or participation in the offense.[203] *Pinkerton* liability is not rare in white collar crime cases such as FCPA violations.

b. Civil Liability

A civil action under the accounting and internal control provisions does not require knowledge.[204] An entity can be held strictly liable for the actions taken by an officer, director, employee, shareholder or agent acting on behalf of the issuer.[205] When an issuer has an interest greater than 50%, strict liability applies.[206] When an entity has less than a 50% interest, strict vicarious liability attaches when it is shown that the entity has not proceeded "in good faith to use its influence, to the extent reasonable under the . . . circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal controls consistent" with those provisions.[207]

Another theory of vicarious liability used by the SEC is "control person" liability under §20(a) of the Securities Exchange Act of 1934.[208] This legal approach requires that the plaintiff establish a primary FCPA violation by the controlled person entity, as well as control of the primary violator.[209] Control of a primary violator may be shown by ownership of voting securities, contract, ability to influence management policies or otherwise.[210] Once a prima facie violation of

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202. Pinkerton v. United States, 328 U.S. 640, 645-48, 651 (1946). In that case, Daniel Pinkerton, the defendant, was convicted of tax fraud actually committed by his brother. Daniel was in jail at the time and did not participate in or even know of the offenses. Daniel's liability was upheld on the theory that co-conspirators are responsible for each other's acts.

203. *See id.*

204. *See, e.g.*, *In re* Int'l. Bus. Machs. Corp., Securities Act Release No. 34-43761 (Dec. 21, 2000), *available at* http://www.sec.gov/litigation/admin/34-43761.htm; Witten et al., *supra* note 93, at 702; Deming, *supra* note 48, at 480.

205. *See id.*

206. Deming, *supra* note 48, at 480; Witten et al., *supra* note 93, at 701; Giudice, *supra* note 142, at 353.

207. 15 U.S.C. § 78m(b)(6) (2006).

208. *Id.* § 78t(a); *see, e.g.*, SEC v. First Jersey Secs., Inc., 101 F.3d 1450 (2d Cir. 1996).

209. *First Jersey Secs., Inc.*, 101 F.3d at 1472.

210. 17 C.F.R. § 240.12b-2 (2009).

§20(a) is established the burden of proof shifts to the control person or entity to demonstrate actions taken in good faith.[211]

c. FCPA Penalties

Criminal and civil penalties can result from violation of the FCPA. A company that violates the anti-bribery provisions may be fined up to $2 million per offense and be subject to civil penalties of $100,000 per violation.[212] An individual may be fined up to $100,000 per violation and imprisoned for five years for a willful violation and may be subject to civil penalties of $10,000 per violation.[213] Alternatively, fines can be levied up to $250,000 for an individual and $500,000 for a corporation, or twice the gross gain from unlawful activity, whichever is greater.[214]

A company that knowingly commits a violation of the accounting provisions may be fined up to $25 million and face civil penalties of up to $500,000.[215] An individual may be fined $5 million, imprisoned for 20 years, and face up to $100,000 in civil penalties.[216] Other penalties for accounting provision violations include SEC injunctive actions, civil penalty actions, equitable remedies, such as "disgorgement" of profits and administrative proceedings.

XII. FCPA COMPLIANCE PROVISIONS

The main reasons for a FCPA compliance program are to prevent violations prior to their occurrence, quickly detect any violations and mitigate the penalties in the event a violation occurs. The DOJ and SEC have indicated that the existence of a compliance program is a significant factor taken into account in deciding whether to bring charges, what charges to bring and what penalties to impose.[217] The failure to establish a FCPA compliance program may be seen as

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211. Marbury Mgmt. Inc. v. Kohn, 629 F.2d 705 (2d Cir. 1980).

212. 15 U.S.C. §§ 78dd-2(g)(1), 78dd-3(e)(1), 78ff(c)(1)-(2) (2006).

213. *Id.* §§ 78dd-2(g)(2), 78dd-3(e)(2).

214. 18 U.S.C. § 3571.

215. *Id.* §§ 78u(d)(3)(B)(iii), 78ff(a).

216. *Id.* §§ 78ff(a).

217. Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Dec. 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

evidence of a lack of internal controls that might in and of itself be a violation of the accounting provisions.[218]

U.S. Federal Sentencing Guidelines and several FCPA settlement agreements outline criteria by which a compliance program is evaluated by the SEC and DOJ.[219] Although these criteria are not legally binding, they provide solid guidance on the contents of an effective FCPA compliance program. These criteria include:

- Clearly stated corporate policy against violations of the FCPA and establishment of compliance standards and procedures that are reasonably capable of diminishing the prospect of violations;

- Assignment of the responsibility for compliance oversight to appropriate senior corporate officials who report directly to the audit or compliance committee of the Board of Directors;

- Identification of high-risk countries or businesses and performance of periodic anti-bribery audits of operations in such countries;

- Regular FCPA training for officers and employees involved in foreign projects and for agents, consultants, and subcontractors;

- Adoption and implementation of accounting and internal controls to ensure compliance with the accounting and recordkeeping provisions of the FCPA;

- Establishment of a reporting system for officers, employees, agents, consultants, joint venture partners, and distributors to report suspected criminal conduct without fear of reprisal; and

- Adoption and implementation of procedures to ensure that the company's agents, consultants, joint venture partners,

218. *See* Witten et al., *supra* note 93.

219. U.S. SENTENCING COMMISSION, SUPPLEMENT TO 2010 GUIDELINES MANUAL § 8B2.1 (2010); Plea Agreement, United States v. Titan Corp., No. 05CR0314, at 4-5 (S.D. Cal. Mar. 1, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/03-01-05titan-plea.pdf; Plea Agreement, United States v. DPC Tianjin Ltd., No. CR 05-482, at 4-5 (C.D. Cal. May 20, 2005), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/dpc-tianjin/5-19-05dpc-tianjin-plea-agree.pdf.

> and distributors are not likely to engage in improper activities.[220]

Conducting a due diligence investigation of agents, partners or consultants of a firm that could potentially violate the FCPA is one way to reduce the risk of FCPA violations. Company procedures should require that a due diligence process be undertaken before the firm enters into a relationship with a foreign agent, representative or business partner. FCPA due diligence concerning consultants, partners or agents should include requirements that the company:

- determine the competence, expertise, and reputation of the party, as well as the party's contacts with important government decision-makers. The party's experience, education, former governmental or military service, family and business relationships, and reputation for honesty are all important areas of inquiry;

- evaluate whether the proposed compensation to be paid in exchange for the services rendered or products delivered is reasonable. "Success fees" deserve special scrutiny;

- contact local counsel to ensure that they proposed arrangement will not violate local law . . . and, depending on the circumstances, FCPA counsel;

- insert standard representations and warranties concerning compliance with the FCPA;

- assure the maintenance of accurate books and records by the consultant, [agent] or partner;

- apply a common sense "smell" test to the proposed arrangement; and

- after [due] diligence is completed, prepare a file memorandum to record the [due] diligence steps taken.[221]

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220. Witten et al., *supra* note 93, at 724-26.

Different sources to help ascertain a consultant's or agent's reputation, expertise and relationships include auditing firms, law firms, the relevant U.S. Embassy, the Commerce Department, the State Department, financial institutions and possibly private investigations.[222]

Companies using foreign consultants, agents, or representatives should place protective covenants in consultancy, partnership or agency agreements, such as:

- The parties' confirmation of an awareness of the terms of the FCPA;
- An agreement not to violate the FCPA;
- An agreement not to pay money or anything of value to foreign officials;
- A representation that the party is not an employer, officer, or agent of a foreign government or candidate for public office, and an agreement that the U.S. party will be advised if the partner or consultant assumes the position of a government official during the relationship;
- An agreement that the party will keep accurate books and records;
- A covenant that will allow the U.S. firm to review or audit all the books and records of the consultant or agent relating to its activities for the benefit of the U.S. firm; and
- An agreement that payments under any contract will be made only by check or wire transfer to an account in the name of the contracting party located in the host country.[223]

All compliance efforts should be documented carefully to permit the U.S. firm to prove later that it implemented a rigorous program in practice.

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221. O'MELVENY & MYERS LLP, FOREIGN CORRUPT PRACTICES ACT HANDBOOK (4th ed. 2003).
222. *Id.*
223. *Id.* at 12-13.

It is critical to have the appropriate "tone from the top" for FCPA compliance. The entity's FCPA policies and procedures must be endorsed and sponsored by both senior and mid-level management. The latter are important because they actually conduct the firm's daily business operations. Each entity should also conduct periodic reviews of its FCPA compliance program with a view toward remedial action so that any missteps are not repeated. Continuous monitoring for FCPA compliance should be linked to other anti-fraud efforts because a relationship exists between the way bribery is conducted and the types of schemes used for fraud.[224]

CONCLUSION

The FCPA now plays a pivotal role in addressing U.S. firms' involvement in bribery of foreign public officials and requiring that publicly traded firms meet certain standards regarding internal controls and accounting practices, books and records. The SEC and DOJ have increased enforcement of the FCPA during the last few years to such an extent that many publicly traded firms have FCPA audits performed by internal and/or external auditors.

The anti-bribery provisions criminalize the payment or offer of payment either directly or indirectly, of money or anything of value to an official of a foreign government, public international organization, foreign political party or candidate for public office, made with corrupt intent to obtain or retain business or secure an improper advantage. The anti-bribery provisions are much broader than the accounting provisions.

All public companies that file Form 10-K reports must observe the accounting provisions regardless of whether they engage in foreign operations. Officers, directors, employees, and stockholders or agents of a public company, acting on the latter's behalf, are subject to the accounting provisions. The latter are aimed at prohibiting the establishment of off-the-books accounts, making of off-the-books transactions, recording of non-existent expenditures and the use of false documentation for concealing bribery activities.

The FCPA also requires publicly traded firms to design and maintain a system of internal controls. Although the SEC does not mandate any specific controls, it does articulate broad goals that controls should achieve while leaving the implementation of specific policies and

224. Taylor, *supra* note 10, at 23.

procedures to issuers. FCPA provisions related to internal controls provide many ways for the SEC to initiate legal proceedings.

Serious criminal and civil sanctions can result from FCPA violations. During the last decade, numerous firms have paid fines and penalties totaling billions of dollars and individuals have been sentenced to prison. A firm's cooperation is considered by the government in deciding whether to bring criminal charges and what penalties to seek.

FCPA compliance programs are a key means to demonstrate cooperation in the event of a violation. A firm's board of directors and senior management should establish a compliance culture through preventative training and ongoing monitoring. Specific audits focused on the FCPA have become more common in many firms. Also, in an acquisition setting, it is possible for an acquirer to be held liable if a seller's FCPA violations are not uncovered.

In sum, the FCPA and its enhanced enforcement represent an important step towards combating bribery in international business transactions and promoting more transparent financial reporting. Increased enforcement of the FCPA should result in a reduction of the level of corruption and fraud. Only then will the global marketplace become a level playing field that embraces the principles of fairness and transparency and promotes confidence in the arena in which international and securities transactions occur.

Table 1 – Page 1 of 2
SUMMARY DATA ON FCPA VIOLATIONS—2000-2009

Year	2009	2008	2007	2006	2005
Total number of cases filed	67	47	47	18	14
Number of cases against corporations	17	30	29	7	8
Of which are foreign corporations	1	17	6	3	1
Number of cases against Individuals	50	17	18	11	6
Cases disposed	32	43	46	18	14
Cases pending at end of year	35	4	1	0	0
Cases Filed by SEC					
Number of cases	15	15	21	11	5
Total value of SEC sanctions (in million $)[a]	209.489(13)	406.667(12)	86.351(18)	68.485(7)	35.095(5)
Average sanction (in million $)	16.114	33.889	4.797	9.783	7.019
Total value of business obtained (in million $)[a]	6037.370(7)	10759.706(8)	2608.965(13)	945.719(8)	151.010(3)
Average value of business obtained (in million $)	862.481	1344.963	200.69	118.215	50.337
Total bribe paid (in million $)[a]	182.311(6)	1616.148(13	86.095(18)	14.381(11)	5.622(5)
Average bribe amount (in million $)	30.385	124.319	4.783	1.307	1.124
Average ratio of bribe to value of business obtained	0.1478	0.2721	0.1935	0.0133	0.0213
Cases Filed by DOJ					
Number of cases	52	32	26	7	9
Total value of DOJ sanctions (in million $)[a]	438.908(11)	508.889(16)	91.132(18)	8.284(6)	17.458(7)
Average sanction (in million $)	39.901	31.805	5.063	3.047	2.4941
Total value of business obtained (in million $)[a]	6542.504(29)	9582.188(21)	5816.416(17)	751.590(5)	112.055(3)
Average value of business obtained (in million $)	225.604	456.295	342.142	150.318	37.352
Total bribe paid (in million $)[a]	217.280(26)	1168.823(25)	383.168(20)	20.200(7)	914.462(9)
Average bribe amount (in million $)	8.357	46.753	19.158	2.886	101.607
Average ratio of bribe to value of business obtained	0.1359	0.2222	0.1077	0.0462	0.0296

Note: [a] Figures in parentheses indicate the number of cases for which data was available. NA – data not available

Table 1 – Page 2 of 2
SUMMARY DATA ON FCPA VIOLATIONS—2000-2009

Year	2004	2003	2002	2001	2000
Total number of cases filed	8	6	9	15	1
Number of cases against corporations	6	0	3	4	1
Of which are foreign corporations	3	0	1	0	0
Number of cases against Individuals	2	6	6	11	0
Cases disposed	8	5	7	15	1
Cases pending at end of year	0	1	2	0	0
Cases Filed by SEC					
Number of cases	3	1	5	7	1
Total value of SEC sanctions (in million $)[a]	16.426(2)	NA	.661(3)	0.175(2)	NA
Average sanction (in million $)	8.213	NA	0.22	0.087	NA
Total value of business obtained (in million $)[a]	NA	NA	NA	6.457(3)	NA
Average value of business obtained (in million $)	NA	NA	NA	2.152	NA
Total bribe paid (in million $)[a]	0.186(2)	NA	11.960(3)	0.669(7)	NA
Average bribe amount (in million $)	NA	NA	3.987	0.0956	NA
Average ratio of bribe to value of business obtained	NA	NA	NA	0.1504	NA
Cases Filed by DOJ					
Number of cases	5	5	4	8	0
Total value of DOJ sanctions (in million $)[a]	6.0518(2)	NA	2.406(3)	0.063(3)	NA
Average sanction (in million $)	3.025	NA	0.802	0.021	NA
Total value of business obtained (in million $)[a]	450.300(4)	1101.000(2)	2.270(3)	9.0975(4)	NA
Average value of business obtained (in million $)	112.575	NA	0.756	2.275	NA
Total bribe paid (in million $)[a]	2.604(4)	1011.000(5)	0.757(4)	1.595(4)	NA
Average bribe amount (in million $)	0.651	202.2	0.189	0.399	NA
Average ratio of bribe to value of business obtained	0.0101	NA	0.131	0.2896	NA

Note: [a] Figures in parentheses indicate the number of cases for which data was available. NA – data not available