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The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences

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THE FOREIGN CORRUPT PRACTICES ACT & GOVERNMENT CONTRACTORS: COMPLIANCE TRENDS & COLLATERAL CONSEQUENCES

By Jessica Tillipman

The U.S. Government spent nearly $538 billion dollars in Fiscal Year 2010 for goods and services provided by private contractors.[1] This astronomical number is the result of the U.S. Government's ever-increasing reliance on private companies to keep the Government running. Private companies that contract with the U.S. Government are subject to an extensive set of rules and requirements designed to ensure they behave responsibly and to provide taxpayers and the U.S. Government with the best value for their money.[2] Experienced Government contractors maintain sophisticated compliance programs to ensure they do not run afoul of the stringent U.S. procurement requirements.

In the past decade, however, as U.S. Government contractors continue to expand their global presence, even the most experienced contractors have exposed themselves to new risks and compliance requirements. In particular, as contractors expand their business with government entities outside the United States, the long arm of the U.S. Government continues to govern their transactions. Specifically, the Foreign Corrupt Practices Act prohibits, among other things, the bribery

IN BRIEF

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of foreign officials to obtain or retain business with a foreign entity.[3]

The United States is currently the world leader in foreign antibribery enforcement.[4] This is due to a sharp rise in FCPA enforcement activity in the past decade.[5] The number of FCPA enforcement actions continues to increase each year, breaking records not only in the number of corporate prosecutions, but also in total penalties imposed. In 2010 alone, total penalties resulting from FCPA enforcement actions topped $1.7 billion.[6] In addition, with over 150 criminal and 80 civil FCPA investigations in the pipeline in 2010, enforcement does not show signs of slowing anytime soon.[7] Indeed, the Department of Justice has made clear that FCPA enforcement is a priority, noting that it "remains committed to prosecuting violations of the FCPA to ensure that the payment of bribes can no longer be viewed simply as the cost of doing business in a foreign nation."[8]

While FCPA compliance is imperative for all companies subject to its jurisdiction, it is particularly important for companies that contract with the Government. Given the nature of a Government contractor's business, they are naturally at greater risk of violating the FCPA than those companies that do not interact with Government officials on a regular basis. In fact, in the years preceding the enactment of the FCPA, the U.S. Congress singled out Government contractors and their overseas behavior as particularly troubling. In the 1970s, a bribery scandal involving Lockheed Corporation (now Lockheed Martin Corporation), Northrop Corporation, and oil companies (Gulf Oil Corporation, Phillips Petroleum Company, and Ashland Oil, Inc.) was the likely impetus for legislation prohibiting overseas corruption.[9] The Government discovered, among other instances of bribery, that Lockheed had paid millions of dollars in bribes to foreign governments to secure contracts, embarrassing both the United States and the relevant foreign governments.[10] Moreover, although the company admitted to paying $22 million "under the table to foreign government officials and political organizations," the company refused to identify the recipients of the bribes, explaining that "identifying its beneficiaries could hurt its $1.6 billion backlog of unfilled foreign orders."[11] The company also refused to promise to stop bribing foreign officials, stating that the payments were a necessary cost of doing business and "consistent with practices engaged in by numerous other companies abroad."[12] Government investigations and congressional hearings during this time uncovered a landscape in which bribery was pervasive and an accepted practice of the Government's largest contractors.[13] Thus, in enacting the FCPA, the Government sought to deter and prevent Government contractors and other companies from engaging in corrupt practices overseas.

Three decades later, the legislation designed to prevent and punish the bribery of foreign government officials has become a thorn in the side of companies that seek to do business with the U.S. Government. Six of the 10 most prolific contractors with the U.S. Government, including Lockheed Martin Corporation, The Boeing Company, General Dynamics Corporation, Raytheon Company, L-3 Communications, and BAE Systems, either violated the FCPA or engaged in activities that allegedly implicate the FCPA's antibribery provisions. Moreover, U.S. Government contractors that have been investigated by

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the Government for violating the FCPA generally have not settled cheaply. In fact, the top 10 most expensive settlements in FCPA history include eight large U.S. Government contractors: Siemens AG, Halliburton/KBR, BAE Systems, JGC Corporation, Daimler AG, Alcatel-Lucent, Panalpina, and Johnson & Johnson.[14]

For contractors that do business with the Federal Government, these record-shattering FCPA fines are levied in the shadow of the U.S. Government's purchasing power. For example, the companies that settled the three most expensive FCPA enforcement actions to date, and together paid approximately $1.8 billion in fines (Siemens AG, $800 million; Halliburton/KBR, $579 million; BAE Systems, $400 million),[15] also obtained over $10 billion dollars in U.S. Government contracts in FY 2010.[16] These figures demonstrate that the FCPA creates a substantial risk for U.S. Government contractors that want to maintain or grow their business with certain foreign governments. If a U.S. Government contractor runs afoul of the FCPA, it could be subject to a multitude of penalties beyond those faced by companies that do not contract with the U.S. Government, as discussed below. Indeed, U.S. Government contractors that violate the FCPA face not only sky-high fines and other monetary penalties, but also risk being blacklisted and prevented from bidding on future contracting opportunities offered by its Government customers.[17]

FCPA Basics & Recent Developments In The Law

The FCPA contains two distinct components: (1) the antibribery prohibitions[18] and (2) the recordkeeping and internal control provisions.[19] The DOJ is responsible for all criminal enforcement of the antibribery provisions and all civil enforcement of the antibribery provisions involving domestic concerns and foreign companies and nationals.[20] The DOJ is also responsible for the criminal enforcement of "willful" violations of the books-and-records provisions.[21] The U.S. Securities and Exchange Commission is responsible for civil enforcement of the books-and-records provisions, as well as for civil enforcement of the antibribery provisions as applied to "issuers"—any U.S. or foreign company, or an officer, employee, agent, or stockholder thereof, that either issues securities (or American Depositary Receipts) or must file reports with the SEC.[22] The Federal Bureau of Investigation now plays a prominent role in FCPA matters, including through its specialized "International Corruption Unit" dedicated to the investigation of overseas corruption.[23] Indeed, all three agencies have specialized units dedicated to the enforcement of the FCPA.[24]

■ Antibribery Prohibitions

The antibribery provisions prohibit the offer or payment of money or anything of value to a foreign official for the purpose of obtaining or retaining business.[25] The phrase "anything of value" has always been construed broadly by the Government and is not limited to money.[26] Generally, whether an item constitutes "anything of value" depends on the subjective value attached by the particular recipient.[27] Moreover, there is no minimum value that must be met before the item constitutes an improper gift. Recent enforcement actions indicate that even *de minimis* payments are prohibited under the antibribery provisions. For example, the Criminal Information charging Panalpina Inc. with conspiring to violate and violating the antibribery provisions of the FCPA noted that "[t]he value of the bribe payments ranged from *de minimis* amounts to $25,000 per transaction,"[28] and in the settlement of Paradigm B.V.'s FCPA enforcement action, the Government noted that the bribes included payments or "acceptance" fees of $100–200 dollars.[29]

The antibribery provisions prohibit the bribery of foreign government officials—they do not prohibit bribery of purely commercial entities. The FCPA expressly defines the term "foreign official" as officers or employees of a foreign government, including its departments, agencies and instrumentalities, public international organizations, or persons acting in an official capacity for or on behalf of these entities.[30] Similar to other aspects of the FCPA, the Government has interpreted the term "foreign official" very broadly, including low-level employees of state-owned entities. Although the FCPA's definition of foreign official does not expressly mention state-owned enterprises, the Government has argued that state-owned enterprises are merely an "instrumentality" of a foreign government, as expressly provided for in the FCPA.[31] In several recent cases, federal judges have affirmed the Government's interpretation of "foreign official," including a case in May 2011, where a judge ruled that a state-owned entity may qualify as an "instrumentality" of a foreign government.[32] The defendants in that matter, former executives from Control Components Inc., argued that a state-owned entity could never be considered an instrumentality of a foreign government.[33] The judge rejected this argument, explaining that the determination regarding whether a company is an instrumentality is a question of fact that depends upon various factors, including (a) the foreign state's characterization of the entity and its employees, (b) the foreign state's degree of control over the entity, (c) the purpose of the entity's activities, (d) the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions, (e) the circumstances surrounding the entity's creation, and (f) the foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).[34] The court stated that the factors are "not exclusive, and no single factor is dispositive," explaining that they are merely "relevant when determining whether a state-owned company constitutes an 'instrumentality' under the FCPA."[35] Other recent cases have also supported the Government's interpretation,[36] indicating that the Government's broad definition of the term "foreign official" should be a benchmark for companies designing FCPA compliance policies.

The FCPA provides one limited exception to the antibribery prohibitions, as well as two affirmative defenses. All three are difficult to navigate and rarely provide an adequate safeguard for a company once improper payments have been detected. The facilitating payment exception states that the antibribery prohibitions do not apply "to any facilitating payment or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action."[37] This *extremely* limited exception is designed to permit payments used to expedite "non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries."[38] The exception is so limited, it has even been called "illusory."[39] For example, in the DOJ's settlement with Noble Corporation for payments it made to Nigerian customs officials in "special handling charge[s]," the Government stated that the payments "were not qualifying facilitating payments under the FCPA or otherwise legitimate expenses."[40] Consequently, because the company improperly recorded the fees as "facilitation payments" in its books and records, the Government also alleged that Noble Corporation created false books and records in violation of the FCPA. The U.S. Government's limited interpretation of the facilitating payment exception brings it in line with the majority of other governments, including the United Kingdom, that do not permit facilitating payments under their antibribery regimes.[41] As the Noble matter demonstrates, the facilitation payment exception has caused confusion among companies that do business with foreign governments, especially given the "continued high level of demand for facilitation payments by foreign officials, especially customs officers and for the implementation of operating and maintenance contracts."[42] Despite this increasing demand, facilitation payments continue to create a dilemma for companies, given that (1) facilitation payments are likely prohibited in the country in which they are being sought, (2) there is little available guidance regarding when the exception is applicable, and (3) even if a payment were to qualify as a facilitation payment, a company would still need to record it properly in its books and records. Indeed, failure to accurately record potentially qualifying facilitation payments has caused numerous companies to run afoul of the FCPA's books-and-records provisions.[43]

The two affirmative defenses to the antibribery prohibitions are similarly limited in scope. Both provisions provide a defense to liability under the antibribery prohibitions for payments or gifts to foreign officials if they are (1) lawful under the written laws and regulations of the foreign official's country, or (2) "reasonable and bona fide" expenditures incurred by or on behalf of a foreign official "directly related" to the promotion, demonstration, or explanation of products or services or to the execution or performance of a contract with a foreign government or agency.[44]

The first affirmative defense permits payments only if they are expressly authorized under the written laws or regulations of the foreign country. This defense has long been considered relatively obsolete, but was further narrowed in a recent court ruling that clarified that this affirmative defense applies only to laws that render the bribe itself legal, regardless of whether the law provides a form of legal amnesty to the defendant under certain circumstances.[45]

The second affirmative defense permits U.S. companies to pay "reasonable and bona fide" expenses associated with a foreign official's visit to the United States, as long as they are directly related to the promotion or demonstration of a product or to the performance of a Government contract.[46] The DOJ's FCPA Opinion Procedure, under which the agency responds to specific inquiries submitted by companies concerning the legality of their conduct under the FCPA,[47] continues to provide instructive guidance regarding this affirmative defense.[48] Among many other Opinion Procedures released in past years, the first for 2011 outlines "hospitality" best practices, which include, but are not limited to the following: (1) companies should pay only for the expenditures of the government officials, not spouses or other family members, (2) the company should not play a role in selecting the government official who will visit, (3) costs should be paid directly to service providers, (4) companies should not provide officials with cash or spending money, (5) any souvenirs provided should have nominal value, and (6) side trips and other nonbusiness-related activities should not be funded by the company.[49]

■ Recordkeeping & Accounting Provisions

The recordkeeping and accounting provisions of the FCPA require issuers of publicly traded securities to maintain records and accounts that accurately reflect the company's transactions.[50] The provisions also require an issuer to maintain internal accounting controls sufficient to provide reasonable assurance that its financial statements are accurate.[51] The purpose of the latter requirement is to ensure a company detects and (preferably) prevents violations of the FCPA. Moreover, because the accounting requirements are based on a concept of reasonableness and not materiality, the provisions apply to all documents and records, regardless of the dollar amount involved in the specific transaction.[52] For example, Team Inc., a Texas industrial services company, disclosed that it was internally investigating potential corrupt payments totaling at *most*, $50,000.[53] Moreover, in its disclosure, the company explained that the total annual revenues from the branch of the company involved in the improper activity represented "approximately one-half of one percent of our annual consolidated revenues."[54] Because there is no *de minimis* exception applicable to the books-and-records provisions of the FCPA, the company found itself spending approximately $3.2 million to investigate payments that were immaterial to the company's overall financial situation.[55] This example makes clear that companies must ensure their books and records are accurate and must make internal controls a priority.

The accounting and antibribery sections work in tandem to prevent companies from hiding bribes and other improper transactions off-the-record to conceal misconduct.[56] There is, however, no requirement that the accounting provisions must be linked to the bribery of a foreign official. Consequently, the Government may prosecute a company for violating the accounting provisions, even in the absence of a separate violation of the antibribery provisions.[57] In recent years, the SEC has taken action against companies pursuant to the accounting provisions of the Act, even when the Government is unable to establish a violation of the antibribery provisions. For example, in 2011, the SEC settled a civil action charging NATCO Group, Inc. with violations of the books-and-records and internal control provisions of the FCPA.[58] In the NATCO action, the Government alleged that the company's wholly owned subsidiary, TEST Automation & Controls, Inc., "created and accepted false documents while paying extorted immigration fines and obtaining immigration visas in the Republic of Kazakhstan." Although the company made improper payments, it was not charged with violating the antibribery provisions.[59] Instead, the Government alleged that TEST violated the accounting provisions of the FCPA when it falsely characterized the payments as a "salary advance."[60]

FCPA Jurisdiction

The FCPA's prohibitions and requirements have been construed broadly by the relevant enforcement agencies, especially in regard to its jurisdictional reach. The FCPA's antibribery prohibitions apply to any act "in furtherance of" an improper payment taken within the United States, regardless of the nationality of the party engaging in the improper activity.[61] Thus, the antibribery provisions apply to both U.S. and foreign concerns, if the conduct occurs in any area over which the United States asserts "territorial jurisdiction."[62] Territorial jurisdiction also applies to any issuer that has a class of securities (including American Depository Receipts) registered pursuant to 15 U.S.C.A. § 78l or that is required to file reports with the SEC under 15 U.S.C.A. § 78o(d).[63] The antibribery provisions' nationality-based jurisdiction renders the statute applicable to acts taken wholly outside the United States, as long as a U.S. concern or issuer commits the act.[64] Jurisdiction under the accounting provisions of the FCPA extend only to individuals or companies that meet the definition of "issuer."[65]

In recent enforcement actions, the Government has continued to expand FCPA jurisdiction, especially in regard to foreign companies and individuals. Since 1998, the FCPA antibribery prohibitions have applied to both "issuer" and non-"issuer" foreign companies and individuals that commit an act in furtherance of the bribe while in the territory of the United States.[66] The Government's liberal interpretation of the FCPA's "in furtherance of" requirement has enabled the Government to pursue foreign companies and individuals, as long as they take some act within the United States that facilitates or furthers the improper payment.[67] Indeed, eight of the eleven top FCPA settlements in history involve foreign companies (or persons).[68] Recent enforcement actions have demonstrated that the Government will pursue foreign companies even when the act "in furtherance of" the improper payment includes a mere transfer through a correspondent account in the United States. For example, in 2011, JGC Corporation resolved FCPA allegations, agreeing to a settlement including $218.8 million for the bribery of Nigerian government officials.[69] The Criminal Information included allegations that JGC aided and abetted a co-conspirator in causing "corrupt U.S. dollar payments" to be wire transferred from a bank account in Amsterdam, "via correspondent bank accounts in New York," to bank accounts in Switzerland, to be used, in part, for the bribery of Nigerian government officials.[70] The Government has alleged jurisdiction on the basis of the use of correspondent accounts in several other recent enforcement actions as well, including against Siemens,[71] KBR,[72] and Technip S.A.[73]

While most FCPA enforcement actions in recent years have continued to push the boundaries of the FCPA's territorial jurisdiction, a recent case indicates that there are limits to the reach of the FCPA. When the U.S. Government charged Pankesh Patel, a UK citizen, with violating the FCPA, the Government predicated jurisdiction on allegations that Patel mailed an original copy of a purchase agreement relating to alleged corrupt activity from the United Kingdom to the United States.[74] The court rejected this argument, granting Patel's Rule 29 acquittal motion, and noting that because the mailing of the agreement occurred in the United Kingdom, it was not "in the territory of the United States" and did not establish jurisdiction under 15 U.S.C.A. § 78dd-3(a).[75] While the Government's broad interpretations of jurisdiction are rarely tested, it is possible that as more companies and individuals test these theories in court, some limitations to the reach of the FCPA may be established.

FCPA Sanctions

■ Monetary Fines & Penalties

Recent enforcement actions indicate that a company's failure to adequately monitor its business practices overseas could cost it hundreds of millions of dollars in fines and expenses. The consequences are even more problematic for contractors that do business with the U.S. Government, as an FCPA violation could harm a contractor's business with the U.S. Government and foreign governments. Contractors have substantial incentive to comply with the FCPA given the potential penalties that may result if they fail to do so.

The FCPA's primary sanction for violations of its provisions involves monetary fines, penalties, and incarceration. Penalties for corporations and other business entities that violate the FCPA's antibribery provisions include a civil penalty of up to $10,000 and a criminal fine of up to $2 million, while penalties for individuals include a civil penalty of up to $10,000, a criminal fine of up to $250,000, and five years' imprisonment, for each violation of the FCPA.[76] In addition, the "Sentence of fine" statute permits the Government to fine persons up to twice the gross pecuniary gain or loss resulting from the corrupt payment.[77] These fines and penalties are particularly difficult for individuals, because employers are not permitted to pay for their employees' monetary penalties.[78]

Violations of the recordkeeping and internal control provisions may result in civil penalties of up to $500,000 for an entity and up to $100,000 for an individual, or the gross amount of pecuniary gain.[79] Criminal violations of the recordkeeping provisions carry a maximum fine of $25 million for companies, and a $5 million fine and incarceration for up to 20 years for individuals.[80] The SEC also typically seeks disgorgement of any ill-gotten gains associated with the improper activity.[81]

Recent FCPA enforcement actions indicate that the Government is continuing to use monetary penalties, disgorgement, forfeiture, and incarceration to deter other companies and individuals from running afoul of the FCPA. The Government will continue to prosecute FCPA actions in this manner, because "prosecuting individuals—and levying substantial criminal fines against corporations—are the best ways to capture the attention of the business community."[82] Indeed, FCPA enforcement is responsible for nearly 50% of the $2 billion in settlements and judgments obtained by the Criminal Division of the DOJ in 2010.[83] The SEC has been similarly active. Since 2010, the SEC has filed 32 FCPA cases and settled enforcement actions resulting in more than $600 million in penalties, disgorgement, and interest.[84]

The Government's message has been clear: if you violate the FCPA, you will pay for it. The numbers support this. In 2010, the DOJ and SEC imposed over $1.7 billion in penalties and disgorgement for violations of the FCPA—the highest year for FCPA fines in history.[85] In the past decade, the dollar amounts have increased at a dramatic rate. Indeed, the top 10 FCPA corporate settlements of all time were imposed between 2008–2011, with Siemens AG holding the title of "most expensive FCPA violation" to date.[86]

	Company	Date of Settlement	DOJ	SEC	Total
1	Siemens	12/12/08	$450,000,000	$350,000,000	$800,000,000
2	Halliburton/KBR	2/11/09	402,000,000	177,000,000	579,000,000
3	BAE	3/1/10	400,000,000	0	400,000,000
4	Snamprogetti	7/7/10	240,000,000	125,000,000	365,000,000
5	Technip	6/28/10	240,000,000	98,000,000	338,000,000
6	JGC Corporation	4/6/11	218,800,000	0	218,800,000
7	Daimler	4/1/10	93,600,000	91,400,000	185,000,000
8	Alcatel-Lucent	12/27/10	92,000,000	45,372,000	137,372,000
9	Panalpina	11/4/10	70,560,000	11,300,000	81,890,000
10	J&J	4/8/11	21,400,000	48,600,000	70,000,000

The top 10 corporate settlements total nearly $3.2 billion in fines and penalties. Fines against individuals are similarly large. Between 1998 and October 2010, more than $2 billion in criminal fines were imposed against individuals.[87] This number includes several sizable monetary payouts by individuals, including the eighth most expensive FCPA enforcement action to date against Jeffrey Tesler, totaling $148,964,568.[88]

The Government also continues to exploit the other monetary remedies available to it, such as disgorgement. In fact, from 2004 to date, over $1 billion has been disgorged.[89] Disgorgement is an equitable remedy used to prevent an entity from profiting from illegal activities by stripping it of any ill-gotten gains it may have received as a result of the improper activity.[90] The SEC currently uses disgorgement as an enforcement tool in a majority of the FCPA matters it settles. Because disgorgement is not considered punitive, the SEC may only disgorge "the approximate amount earned from the alleged illicit activities."[91] FCPA-related disgorgements can total hundreds of millions of dollars, as with Siemens ($350 million),[92] KBR ($177 million),[93] and Snamprogetti ($125 million).[94]

The Government may also subject FCPA violators to another financial blow—forfeiture. "Forfeiture" permits the Government to seize a wide variety of assets, including money judgments, property, and substitute assets.[95] The Government will use "substitute assets" when the proceeds of a defendant's illegal act are unrecoverable as the result of the defendant's acts or omissions.[96] Although traditionally considered to be a rarely used sanction, recent FCPA enforcement actions suggest that this is no longer the case. For example, after paying bribes to Nigerian government officials for nearly decade to obtain engineering, procurement, and construction contracts, Jeffrey Tesler, a former consultant to KBR and its joint venture partners, pleaded guilty to conspiracy to violate the FCPA and agreed to forfeit $148,964,568—the largest FCPA-related forfeiture involving an individual in history.[97] Similarly, when Gerald and Patricia Green, former Hollywood film executives, were convicted of nine counts of violating the FCPA and seven counts of money laundering for their payment of approximately $1.8 million in bribes to the former governor of the Tourism Authority of Thailand,[98] in addition to other sanctions and remedies, the court imposed a personal money judgment of criminal forfeiture in the amount of $1,049,465, plus the amount of each defendant's share of their pension plans.[99] The defendants could not satisfy this order, so the Government filed a motion seeking substitute assets in the form of Patricia Green's West Hollywood residence.[100] The sanctions and forfeiture eventually rendered the defendants indigent, claiming the couple's savings, home, car, company, and pension assets.[101]

The Government is also using forfeiture as a means to recover illegal bribes from the foreign government officials who accept them. Attorney General Eric Holder has made clear that through the "enforcement of [the United States'] asset forfeiture laws," recovering the bribes accepted by foreign officials is "a global imperative."[102] For example, in 2010, Robert Antoine, the former director of international affairs for Haiti's state-owned national telecommunications company, Telecommunications D'Haiti, pleaded guilty to conspiracy to commit money laundering.[103] In his plea agreement, Antoine admitted to accepting bribes from three U.S. telecommunications companies and laundering them through intermediary companies.[104] In addition to a four-year prison sentence and the payment of $1,852,209 in restitution, the U.S. Government was able to recover the illegal proceeds of this bribery scheme by ordering Antoine to forfeit $1,580,771.[105]

■ Incarceration

In addition to monetary penalties and remedies, the most dramatic trend in recent FCPA actions involves the incarceration of individuals who violate the FCPA. The Government has made clear that FCPA violations may result in "very serious penalties, which can include substantial prison time for individuals who violate the law."[106] The prison terms have been significant. In April 2011, Charles Paul Edward Jumet, an officer of Ports Engineering Consultants Corporation, received an 87-month prison sentence—the longest prison sentence ever associated with an FCPA matter.[107] Jumet pleaded guilty to conspiring to violate the FCPA by conspiring to pay more than $200,000 in bribes to Panamanian government officials in exchange for contracts to maintain lighthouses and buoys along Panama's waterway.[108] Jumet also made a false statement to federal agents about the true nature of a check used to corruptly pay a Panamanian government official.[109] Similarly, the former chairman and chief executive officer of KBR, Albert "Jack" Stanley, agreed to an 84-month prison term when he pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit mail and wire fraud.[110] Stanley admitted to authorizing a joint venture that paid nearly $200 million in bribes to Nigerian officials to obtain $6 billion in Nigerian construction contracts to build liquefied natural gas facilities on Bonny Island, Nigeria.[111]

In many cases, judges have ordered prison sentences far lighter than what was initially sought by the Government. For example, prosecutors in the case against Patricia and Gerald Green sought a 10-year prison term for both defendants, though they each received only six-month terms.[112] Leo Winston Smith, former director of sales and marketing for Pacific Consolidated Industries, pleaded guilty to bribing a government official in the UK Ministry of Defense.[113] Despite the Government's 37-month recommendation, Mr. Smith received a six-month prison term with an additional six months of home confinement.[114] Prosecutors sought a 168–210 month sentence for Nam Nguyen[115] for bribing government officials in Vietnam to secure high-tech contracts, but he was only sentenced to 16 months,[116] while his co-defendant An Nguyen received nine months for his role in the bribery scheme,[117] despite the 87–108 months recommended by prosecutors.[118] While a variety of factors may be the cause of this frequent downward departure by judges (e.g., health or age of the defendant), judges may be revealing a bias against lengthy prison terms for cases involving foreign bribery. What is clear, however, is that the Government will continue to seek lengthy prison terms as both a deterrent against corruption and bargaining chip in its plea negotiations with individuals.

FCPA Collateral Consequences

While the threat of fines, penalties, disgorgement, and incarceration are sufficient to deter most companies from bribing officials to obtain business with foreign governments, companies that contract with the Government have even more to lose if they are caught making illicit payments. For contractors, their livelihood is at risk, because suspension or debarment from selling goods or services to the United States (and other government entities) is a potential collateral consequence of violating the FCPA.

■ U.S. Suspension & Debarment Regime

The U.S. suspension and debarment regime is designed to protect taxpayer dollars by ensuring that the Government does business only with responsible firms.[119] Both suspension and debarment are extraordinary tools, empowering the Government with the authority to suspend a contractor for up to a year[120] or debar a contractor for up to three years.[121] Neither suspension nor debarment is meant to be punitive—they are designed to ensure that the Government does business only with ethical and honest companies. A company's exclusion from the U.S. procurement regime may be as broad or as limited as the Government deems necessary to protect its interests, ranging from the debarment of the entire company to the debarment of a division, facility, or even a single individual.[122]

While the terms "suspension" and "debarment" are often used interchangeably, they differ in scope and procedure. The decision to suspend or debar hinges on the ability to demonstrate "present responsibility," which requires, among other things, a "satisfactory record of integrity and business ethics."[123] Suspension is a temporary exclusion from contracting, triggered by "adequate evidence" of an offense or misconduct that either indicates a lack of business integrity or is so serious that it affects the "present responsibility" of a contractor.[124] Some agencies consider an indictment of such misconduct, such as the bribery of a foreign official, to be adequate evidence of a lack of present responsibility (though it is not required).[125] In contrast, debarment is a more permanent status, requiring a "preponderance of evidence" of misconduct or the commission of an offense that indicates either a lack of business integrity or is so serious that it affects the "present responsibility" of a contractor.[126] An agency may debar a contractor based on a conviction or civil judgment for various offenses, including the bribery of a foreign official, but neither is required.[127]

Any agency may suspend or debar a contractor, but once an agency has made that determination, all agencies must abide by that agency's decision (absent negotiated exceptions). In other words, if a contractor is suspended by the U.S. Air Force, "it cannot do business with the Navy, [the National Aeronautics and Space Administration], the [General Services Administration], or any of the other approximately 125 Executive Branch agencies or departments."[128] Thus, once a company is either suspended or debarred, it is completely excluded from both obtaining contracts directly with the Government and subcontract work under prime contracts with the Government.[129] Notably, because the system is not designed to punish contractors, suspension or debarment only applies to future contracts, task orders, and options to extend current contracts—neither suspension nor debarment affects existing contract work with the Government.[130]

Once a contractor is either suspended or debarred, its status as a blacklisted company is made public through a variety of mechanisms. First, suspended and debarred contractors are publicly listed on the Excluded Party Listing Service.[131] All contracting officials are required to review the EPLS prior to award, and prime contractors are prohibited from awarding subcontracts to contractors on this list as well. The EPLS is even often relied upon by state and local governments, which often refuse to work with any contractor listed on the EPLS. While there are no free, publicly available databases that monitor state and local debarments, there are privately maintained databases that are available to the public for a fee.[132]

Even if a contractor is neither suspended nor debarred, its alleged violation of the FCPA may be added to the company's profile in several other databases. The Federal Government now maintains a Federal Awardee Performance and Integrity Information System (FAPIIS), developed to maintain "specific information on the integrity and performance of covered Federal agency contractors and grantees," such as contract terminations, past performance, responsibility determinations, administrative agreements, or criminal, civil, or administration actions involving the contractor.[133] Similar to the EPLS database, Contracting Officers are supposed to use FAPIIS to review a company's history, including any past misconduct, before awarding a contract.[134] In addition to the Government-maintained FAPIIS database, the Project on Governmental Oversight (POGO) maintains a Federal Contractor Misconduct Database (FCMD), which contains "histories of misconduct such as contract fraud and environmental, ethics, and labor violations."[135] The FCMD "is a compilation of misconduct and alleged misconduct committed by the top Federal Government contractors between January 1, 1995, and the present," including civil, criminal, or administrative settlements.[136] No contractor wants to find itself listed in a publicly available database alongside companies that have behaved in a disreputable manner. These databases may not only harm a contractor's reputation, they can also potentially harm a contractor's Government business. Contracting Officers tasked to work with only responsible contractors[137] may be deterred from working with contractors that have blemished records. Moreover, because the information in these databases is available to the public, media and congressional pressure may influence agencies to avoid contracting with FCPA violators.

What makes suspension and debarment a particularly complicated collateral consequence of the FCPA, is that it is not a coordinated regime—the authority to take such action does not lie with the FCPA enforcement agencies—it resides with any one of the procuring agencies and binds all other agencies to the determination. Moreover, any agency can suspend or debar a contractor at any time, regardless of the recommendation of the DOJ. If a contractor has committed an offense, such as bribery, an agency is unlikely to find the contractor "presently responsible," unless the contractor can demonstrate that the bribery was limited to a division or subsidiary of the company that does not do business with the U.S. Government. Even then, a contractor must still convince the Government that the violation of the FCPA was an isolated incident and has no bearing on the company's Government business. Consequently, a contractor's behavior following the discovery of the misconduct, its level of cooperation with the Government, and any remedial measures it has taken, become essential to its survival.

The risk of suspension and debarment places contractors in an unfortunate position when an FCPA violation is uncovered. Because the DOJ lacks the authority to prevent the suspension or debarment of a contractor, contractors must proceed cautiously to avoid any of the likely suspension and debarment triggers. If, for example, a legal proceeding (such as an indictment) has been formally initiated by the DOJ, any procuring agency may suspend that contractor until the legal proceeding has finished—including any and all appeals.[138] It is therefore obvious why many U.S. contractors try to eliminate this risk as quickly as possible through settlement negotiations.

Notably, while a company may resolve an FCPA matter with the DOJ by settlement agreement to avoid a criminal charge or conviction, these agreements are not a guaranteed shield against suspension or debarment. The Government has been clear that neither type of settlement agreement will preclude a company's suspension or debarment, as the agreements bind only the DOJ.[139] It is, however, possible for the DOJ to agree to make "representations about a company's criminal conduct and remediation measures to a government contracting agency" to help the company avoid suspension and debarment.[140] Thus, it is common for the Government to use the threat of suspension and debarment to extract extraordinary fines and penalties from companies in exchange for their support during negotiations with debarment officials from other agencies. Indeed, if a company agrees to cooperate, the DOJ may even agree to insert an affirmative statement in the settlement documents attesting to a company's present responsibility. For example, in 2010, Daimler AG resolved bribery allegations in which the Government alleged that the company "engaged in a long-standing practice of paying bribes to foreign officials…in at least 22 countries…to assist in securing contracts with government customers for the purchase of Daimler vehicles valued at hundreds of millions of dollars."[141] In its deferred prosecution agreement with the DOJ, the Government included a provision that stated:[142]

> With respect to Daimler's present reliability and responsibility as a government contractor, the Department agrees to cooperate with Daimler, in a form and manner to be agreed, in bringing facts relating to the nature of the conduct underlying this Agreement and to Daimler's cooperation and remediation to the attention of governmental and other debarment authorities.

The DOJ's ability to work with a company to avoid suspension and debarment is significant leverage given the potentially devastating consequences that either could have on a company. Many companies would rather cooperate with the DOJ than suffer the consequences that might stem from an indictment or guilty verdict. As such, it is no surprise that nearly all companies settle FCPA charges with the Government rather than challenge them in court.

In recent years, criticism has been levied against the Government for its failure to use the suspension and debarment tools when companies settle FCPA or FCPA-related matters.[143] Specifically, commentators and lawmakers have complained that when U.S. Government contractors are involved in an FCPA enforcement matter, "an agreement by DOJ to intervene on the company's behalf in any collateral proceedings, such as suspension and debarment, is a staple of deferred prosecution agreements."[144] While the indignation is currently directed towards the suspension and debarment regime in the context of the FCPA, the regime itself, even in matters unrelated to the FCPA, has long been criticized as an impotent enforcement tool.[145] It is not surprising that this tool is underutilized, as the Government depends on a relatively small number of contractors to supply a majority of its goods and services. Indeed, "with fewer major, critical contractors available to compete for the Government's most sophisticated requirements, it seems disingenuous to bar a key player from future competition."[146] In fact, although BAE Systems PLC admitted to (1) conspiring to defraud the United States by impairing and impeding its lawful functions, (2) making false statements about its FCPA compliance program, and (3) violating the Arms Export Control Act and International Traffic in Arms Regulations when it actually (allegedly) bribed government officials in exchange for billions of dollars worth of defense contracts, the U.S. Government still awarded it over $6.6 billion in contracts in FY 2010.[147] Critics may continue to gripe about the current state of the suspension and debarment regime, but the takeaway is clear: companies that provide unique and important goods and services to the Government are highly unlikely to be suspended or debarred as the result of an FCPA violation. As such, the critics' demands are not only impractical; they demonstrate a fundamental misunderstanding of the U.S. suspension and debarment regime. The decision to suspend or debar is a *business decision* "that requires a weighing of the risks and benefits to the Government of contracting with an ethically questionable firm."[148] The Government, therefore, has determined in recent matters that the benefits to working with contractors that have violated the FCPA outweigh the risks. Moreover, requiring the mandatory debarment of companies that are found to have violated the FCPA could substantially deter companies from disclosing wrongdoing, remedying problems, and improving compliance systems. [149] Indeed, "linking mandatory debarment to a criminal resolution would fundamentally alter the incentives of a contractor-company to reach an FCPA resolution because such a resolution would likely lead to the cessation of revenues for a government contractor— a virtual death knell for the contractor-company." Similarly, mandatory debarment would have a negative impact on prosecutorial discretion—eliminating the flexibility necessary to fashion an appropriate resolution depending on the particular matter.[150]

■ Denial Of Other U.S. Public Advantages

In addition to debarment from the U.S. procurement regime, a company that violates the

FCPA may be ineligible to receive certain other "public advantages" from the Government, such as grants, loans, subsidies, or insurance.[151] Likewise, a contractor may be excluded from various other Government programs, such as those found in agencies like the Commodity Futures Trading Commission and the Overseas Private Investment Corporation.[152] Similarly, the Export-Import Bank may also decline, among other things, applications for export credit as the result of a company's fraudulent or corrupt activity.[153] Another potential collateral consequence of an FCPA violation is the possible loss of Government licenses. This sanction could have an even more devastating impact on a contractor than debarment, as the denial of necessary licenses would likely affect not only a company's Government sales, but its commercial sector business as well.[154] In addition, a company could have its Government security or facility clearances[155] revoked as the result of its violation of the FCPA—a sanction that could render the company ineligible for any current or future contracts containing such requirements.

The denial of arms export licenses under § 38 of the AECA[156] is another possible outcome when an applicant has been indicted for or convicted of violating the FCPA.[157] In addition, § 120.1 of the ITAR expressly states that licenses or other approvals may not be granted to entities indicted for, or convicted of, violating the FCPA.[158] Following BAE's $400 million FCPA-related settlement with the DOJ, the U.S. Department of State announced that it entered into a civil settlement with BAE Systems for 2,591 alleged violations of the AECA and ITAR "in connection with the unauthorized brokering of U.S. defense articles and services, failure to register as a broker, failure to file annual broker reports, causing unauthorized brokering, failure to report the payment of fees or commissions associated with defense transactions, and the failure to maintain records involving ITAR-controlled transactions."[159] The settlement required BAE to pay $79 million in fines and remedial compliance measures—the largest civil penalty in State Department history.[160] Because of BAE's criminal conviction, the State Department imposed a statutory debarment on BAE, but concurrently rescinded the order, after determining that "appropriate steps had been taken to mitigate law enforcement concerns."[161] The Department also released an administrative hold that it had placed on BAE's license authorization requests immediately following the company's conviction. The agency did, however, impose a "policy of denial" on three BAE subsidiaries that were substantially involved in the activities that led to the company's conviction. This means that there is "an initial presumption of denial" for all applications from the impacted entities absent a determination by the State Department that "it is in the foreign policy or national security interests of the United States to provide an approval."[162]

Global Antibribery Enforcement & Collateral Consequences

Government contractors with a global presence must not only worry about compliance with the FCPA, they also must be aware of the antibribery laws in other countries as well. In recent years, numerous other countries have implemented more aggressive antibribery regimes and are actively investigating and prosecuting bribery cases. For example, the UK Bribery Act, in force since July 1, 2011, is currently the cause of greatest concern to companies that do business in the United Kingdom, because its provisions are broad, relatively undefined, and prohibit activities beyond those prohibited by the FCPA. Similar to the FCPA, the UK Bribery Act prohibits the bribery of foreign officials, but it also prohibits commercial bribery and the failure of a commercial organization to prevent bribery.[163] Also unlike the FCPA, the Bribery Act extends jurisdiction over bribe recipients.[164] The UK Bribery Act is causing further difficulty for companies that do business in both the United States and United Kingdom because it does not permit facilitation payments or allow an affirmative defense for hospitality expenditures. As such, companies are strongly advised to review and update their bribery policies and compliance programs to ensure they comply not only with the FCPA, but with the new heightened standards provided by the UK Bribery Act (and the bribery laws in any other country in which the company does business).

In addition to the penalties associated with the violation of a foreign country's antibribery laws, contractors may also be debarred from doing business with a foreign government. If a company violates the FCPA (or another country's antibribery laws), debarment from government procurement contracts in Europe is also a potential consequence. Article 45 of the EU Public Sector Procurement Directive requires contractors convicted of any of the following crimes to be debarred from public procurement: (1) participation in a criminal organization, (2) corruption, (3) fraud, or (4) money laundering.[165] This is a punitive regime under which debarment is mandatory and is designed to deter corruption and bribery in public procurement activities.[166] The mandatory debarment trigger is clear: "conviction by final judgment of which the contracting authority is aware."[167] This stringent penalty provides an even greater incentive for companies that violate antibribery laws to settle with the Government—they do not want to lose their contracts with the EU member states. While there is an exception for "overriding requirements in the general interest," it is unclear whether authorities would permit an exception to the mandatory debarment rules for a company that violates the FCPA or other antibribery laws.[168] In addition, even if a contractor is not "convicted" of violating such a law, it may still be prohibited from contracting with an EU member state. Section 2 of Article 45 also describes a discretionary debarment trigger under which contractors may be excluded for a variety of other reasons, including "grave professional misconduct."[169]

The mandatory debarment provisions have been implemented in the United Kingdom through Regulation 23(1) of the Public Contracts Regulations 2006[170] and Regulation 26(1) of the Utilities Contracts Regulations 2006.[171] Moreover, in June 2011, the UK Ministry of Justice published amended legislation relating to the Bribery Act making clear that mandatory debarment will be a likely collateral consequence of a conviction under §§ 1 and 6 of the Bribery Act—the bribery of another person or a foreign public official, respectively.[172] Conversely, the MOJ has stated publicly that a corporation's conviction under § 7 of the Bribery Act—failure of a commercial organization to prevent bribery—may only result in discretionary debarment.[173]

Recent FCPA-related settlements have demonstrated that government officials in both the United States and Europe may go to great lengths to prevent a valuable contractor from being excluded by the EU mandatory debarment provisions, as "there is a growing recognition that the [European Union] debarment requirement presents particular challenges for companies trying to settle cases."[174] As a result, the Government considers "collateral consequences when structuring settlement agreements."[175] The Government's settlement with BAE exemplifies this issue. Despite widespread allegations of bribery, neither the U.S. nor UK governments charged BAE with violating the countries' relevant antibribery laws. Thus, neither settlement agreement triggered mandatory debarment—a clear goal of the two countries, given that debarment could "ruin BAE, which employs more than 100,000 people and is the biggest supplier to the British Armed Forces."[176] In this instance, the U.S. Government extracted an extraordinary $400 million criminal fine from BAE, the third highest FCPA settlement in history, in exchange for lesser charges that would not implicate the mandatory debarment regime. Indeed, the BAE Sentencing Memorandum expressly explains that the settlement was structured for this reason, noting that:[177]

> Mandatory exclusion under EU debarment regulations is unlikely in light of the nature of the charge to which BAES is pleading. Discretionary debarment will presumably be considered and determined by various suspension and debarment officials.
>
> The Department will communicate with U.S. debarment and regulatory authorities, and relevant foreign authorities, if requested to do so, regarding the nature of the offense of which BAES has been convicted, the conduct engaged in by BAES, its remediation efforts, and the facts relevant to an assessment of whether BAES is presently a responsible Government contractor.

Recent settlements with Siemens AG and Daimler AG were similarly structured to avoid implicating the mandatory debarment regime.[178]

Debarment By Other International Organizations

Other international organizations may also suspend or debar contractors if the company or individual is found to have violated the FCPA. For example, the World Bank may debar any firms or entities that have been found "to have engaged in fraudulent, corrupt, collusive, coercive or obstructive practices."[179] In fact, "debarment with conditional release has become the default or 'baseline'" sanction for such actions.[180] Similar to the United States, the World Bank also maintains a list of debarred contractors that renders the companies and individuals on the list "ineligible to be awarded a World Bank-financed contract" for the period of debarment.[181]

Historically, the World Bank has demonstrated that it is far more likely than its government counterparts to debar a company in response to corrupt behavior. For example, the World Bank exercised its debarment authority against Siemens after Siemens settled its FCPA violations with the United States.[182] Specifically, Siemens AG and its affiliates entered into a settlement agreement with the "World Bank Group,"[183] under which it agreed to, among other things, debarment from all projects, programs, or other investments financed or guaranteed by the World Bank for at least two years and a payment of $100 million over 15 years to support global efforts to fight fraud and corruption.[184] In a separate proceeding, the World Bank debarred Siemens Russia OOO, a subsidiary of Siemens AG, for four years for "having engaged in fraudulent and corrupt practices in relation to a World Bank-financed project"[185] The World Bank Group permitted Siemens to continue working on existing contracts, though it required the company to withdraw all bids that had not been accepted by the start of the debarment period.[186] Similarly, the World Bank debarred Macmillan, a UK-based publisher, after it admitted to bribing officials in Sudan to win a World Bank-related contract to print educational material.[187] The debarment has rendered Macmillan ineligible from Bank-financed contracts for six years.[188]

Debarment from a multilateral bank is now even a greater risk to companies that have violated the FCPA given a recent action taken by the heads of leading multilateral development banks to purge corrupt companies and individuals from their projects. On April 9, 2010, the leading MDBs—the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group—entered into an "Agreement For Mutual Enforcement of Debarment Decisions," under which a company or individual debarred by one bank may be debarred from contracting with all five development banks, as long as the debarment exceeds a period of one year and relates to corruption.[189] This agreement is made even more effective by its disclosure requirements: all five institutions are required to notify each other when they have debarred a contractor.[190]

In addition to MDBs, other institutions may refuse to do business with a company that violates the FCPA. For example, a company may be suspended from doing business with the United Nations Secretariat Procurement Division if it violates the FCPA.[191] A year after Siemens settled its FCPA violations with the U.S. Government, Siemens announced that the Vendor Review Committee of the UNPD was suspending Siemens from the UNPD vendor database for a minimum period of six months.[192]

Other Costs Associated With FCPA Enforcement

While the Government has a mighty arsenal of penalties and sanctions that it can impose on companies that run afoul of the FCPA, they are not the only costs a company could face should it uncover evidence of questionable payments. For example, an internal investigation could cost a company millions of dollars. In 2009, Team Inc. disclosed that an internal investigation uncovered questionable payments totaling no more than $50,000.[193] In a filing with the SEC, the company noted that it had spent approximately $3.2 million in investigation-related expenses, such as legal fees.[194] The SEC notified Team in 2011 that it did not intend to impose fines or penalties on the company.[195] The DOJ similarly indicated that it was unlikely to take formal action against the company, though it has yet to formally close the investigation.[196] The company, therefore, spent $3.2 million—an amount 64 times greater than the $50,000 the company allegedly paid to obtain an improper business advantage, to investigate allegations that the Government did not deem worthy of prosecution. This example makes clear that for many companies, the costs associated with a discovered FCPA violation may far exceed any benefit obtained by the bribe.

Similarly, when Avon Products Inc. received notice of an allegation that "certain travel, entertainment and other expenses may have been improperly incurred in connection with the Company's China operations," it launched an internal investigation that, according to the company's own disclosures, has cost them over $150 million dollars to date.[197] While the initial allegation involved only the company's activities in China, the investigation soon expanded to the company's operations in other countries.[198] Thus, it is possible that by the time Avon finishes its investigation and begins settlement negotiations with the Government, the cost of the internal investigation alone will top $250 million.[199]

Other collateral expenses may result from the disclosure of an FCPA investigation in an SEC filing. In particular, this type of disclosure may result in a substantial decrease in the company's stock price, profits, or sales, generating yet another FCPA-related cost. For example, when Avon disclosed its investigation into bribery allegations in China, its shares dropped 8%.[200] When Faro Technologies Inc. disclosed that it was close to settling an FCPA enforcement action with the DOJ and SEC, the company directly attributed a drop in profits to its announcement regarding the pending FCPA settlement.[201] When weapons maker Smith & Wesson announced an internal investigation into potential violations of the FCPA, the company soon discovered that the announcement negatively affected its sales, disclosing that "[p]istol sales decreased 25.3%, driven by the reduction in consumer demand as well as reduced international shipments related to our investigation of the FCPA matter."[202]

Companies may also face additional expenditures stemming from collateral civil litigation. While there is no private right of action under the FCPA,[203] companies are now finding that after they announce an investigation into allegations of improper conduct, or even after they settle their FCPA-related enforcement actions, they may become the target of lawsuits, including but not limited to, securities fraud actions and shareholder derivative suits. While the success of these suits has varied, some collateral litigation has resulted in enormous payouts to the plaintiffs: Willbros Group settled for $10.5 million, Nature's Sunshine settled for $6 million, and Faro Technologies settled for $6.9 million.[204] Avon is also currently the target of a number of securities fraud and shareholder derivative actions alleging "breaches of various fiduciary duties for not properly monitoring the company's operations and securities violations for not making proper disclosure of the problems."[205] Whether these suits will be successful remains to be seen, but Avon stands as a cautionary tale to other companies that do business overseas. One can only assume that by the time the dust settles, Avon's total bill for all FCPA-related activity will be astronomical.

The Road To Settlement

Any contractor that discovers evidence of a potential violation of the FCPA must be prepared to take immediate action to avoid, or at least minimize, the fines, penalties, and collateral consequences that may result. Should a company become aware of a potential violation of the FCPA, its first course of action should be a swift and thorough investigation into the allegation. Companies should not prolong an investigation, as they must demonstrate that they take their employees' claims seriously. Indeed, companies that ignore allegations may run the risk that an employee will disclose the alleged violation to the Government through, among other available mechanisms, the SEC's new whistleblower program, under which a whistleblower who voluntarily provides original information about a potential FCPA violation to the SEC that leads to the successful enforcement of an administrative action could potentially receive a reward of between 10%–30% of a monetary sanction levied against the company in excess of $1 million.[206] This new regime highlights the importance of adopting company policies designed to effectively manage internal complaints and allegations. Specifically, an effective policy must make clear that employee complaints will be taken seriously, kept confidential, and will not result in retaliation.[207]

Although in-house counsel may initially verify that an allegation has some factual basis, a company's best course of action is to hire experienced and independent *outside* FCPA counsel to thoroughly investigate the allegations. The outside counsel's independence is imperative, as a company never knows where the trail may lead, or who in the company may be implicated by the allegations. Moreover, federal enforcement authorities view investigations completed by in-house counsel skeptically, often considering them to be unreliable—especially if the results are favorable to company management or counsel.[208] A company seeking to make a good first impression with the SEC and the DOJ can avoid these issues by simply retaining independent counsel from the outset—or risk the Government launching its own investigation into the allegations.

Should a company's internal investigation uncover a potential violation of the FCPA, it must decide whether it will disclose the results of the internal investigation to Government authorities. While companies are not required by law to voluntarily disclose potential FCPA violations, they usually do so based on legal, financial, and reputational considerations. Moreover, with the threat of the new SEC whistleblower program, companies may find that disclosure is the only appropriate course of action in certain instances.

Self-reporting potential FCPA violations is a common course of action for companies. In fact, the DOJ estimates that roughly 50% of its current FCPA investigations derive from voluntary disclosures.[209] Companies that do disclose allegations must be aware that cooperation does not cease at disclosure. Rather, companies must be prepared to cooperate fully with the Government throughout the entire enforcement process, including the initial disclosure, a potentially lengthy investigation phase, and settlement negotiations. The Government has long urged companies to self-report, claiming that a company will receive credit for its disclosure and cooperation. While in the past, it was often difficult to determine whether companies had, in fact, benefited from disclosure, recent FCPA settlements support the Government's claim. For example, the recent settlement of Johnson & Johnson's FCPA enforcement action is an example of how the Government may reward cooperation. Although Johnson & Johnson admitted to bribing "publicly-employed health care providers in Greece, Poland and Romania," and paying kickbacks "to the former government of Iraq under the United Nations Oil for Food program," the Government praised the company for its cooperation and for playing an "important role in identifying improper practices in the life sciences industry."[210] The DOJ's press release further describes how it credited the company for its disclosure and cooperation, explaining that because of the company's voluntary disclosure, and extensive cooperation, self investigation, remedial efforts, and compliance improvements, the company received a reduced fine and was not required to retain a corporate monitor.[211]

Most FCPA allegations that have been investigated by the Government have resulted in a form of settlement, including nonprosecution agreements, deferred prosecution agreements, a consent decree, or a combination of one or more of these types of agreements. Nonprosecution agreements "typically are not filed with the court, but instead are maintained by DOJ and the corporation," while deferred prosecution agreements are "typically filed with the court, along with a document that identifies the charges that the prosecution has brought against the corporation.[212] Nonprosecution agreements and deferred prosecution agreements both typically provide a detailed account of companies' alleged wrongdoing and require companies "to comply with a set of terms for a specified duration in exchange for prosecutors deferring the decision to prosecute or deciding not to prosecute."[213] Terms may require a company to improve its compliance program, hire an independent compliance monitor, or make monetary payments ranging from fines and penalties to forfeiture and restitution."[214] The agreements also typically reserve the right to take action against a company at a later date should the company fail to follow through with its compliance obligations or if further violations are discovered.[215]

While the Government will often require a company to retain an independent compliance monitor as a condition of settling an enforcement action, recent settlement agreements suggest that this practice may be on the decline. The Government has received substantial criticism in recent years about the costs of retaining a corporate monitor, as Judge Ellen Segal Huvelle recently noted during a hearing to approve a company's guilty plea: "It's an outrage, that people get $50 million to be a monitor.... It's a boondoggle."[216] Indeed, a recent Government Accountability Office report noted some monitors' rates range from $290 per hour to $895 per hour, with the total cost per month ranging from $8,000 to $2.1 million .[217]

Perhaps responding to criticism about the excessive costs associated with monitors, recent FCPA settlements have required compliance monitors in fewer matters, signaling a move towards simply requiring companies to self-police and report directly to the Government.[218] A review of recent FCPA enforcement actions reveals that only one of the seven FCPA settlements announced by the DOJ between January and mid-July of 2011 involved the appointment of an independent compliance consultant.[219] The Johnson & Johnson FCPA settlement is instructive, as the DOJ press release describes several of the factors that the Government considered when deciding not to impose a compliance monitor: (1) the company had a preexisting compliance and ethics programs, (2) the company engaged in the extensive remediation and improvement of its compliance systems and internal controls, and (3) the company agreed to enhanced compliance undertakings.[220] In lieu of a corporate monitor, the agreement requires the company to report directly to the DOJ regarding the "implementation of its remediation and enhanced compliance efforts every six months for the duration of the agreement."[221] Whether the recent shift away from compliance monitors is an actual trend that will be present in future settlements remains to be seen.

While companies and the Government often prefer negotiated settlements, whether the settlement actually provides tangible benefit to a contractor often depends not only on the company's cooperation, but the compliance programs in place at the time of settlement.[222] The ability to demonstrate an effective compliance program is particularly important for U.S. Government contractors, which will be required to demonstrate "present responsibility" if they wish to avoid suspension and debarment. Moreover, even if a company has a written FCPA compliance policy in place, it must be more than a "paper program" that exists without the proper internal controls to enforce it. As the Siemens matter demonstrated, having a written FCPA policy is worthless if the company fails to dedicate proper resources to its compliance program, routinely ignores FCPA "red flags," and fails to punish wrongdoers.[223]

Although FCPA enforcement has been widely criticized for its lack of judicial review and frequent use of settlement agreements to resolve potential FCPA violations, the Government's use of these negotiated agreements continues to grow each year. In fact, while the SEC has traditionally settled alleged violations of the FCPA with cease-and-desist orders, in 2010, the SEC announced that it would begin using cooperation agreements, such as nonprosecution agreements and deferred prosecution agreements, in its resolution of alleged violations of the FCPA.[224] The SEC entered into its first deferred prosecution agreement with Tenaris S.A. in May 2011.[225] The deferred prosecution agreement alleges that Tenaris bribed government officials in Uzbekistan in exchange for contracts that resulted in a $5 million profit for the company.[226] In resolving the matter with the Government, Tenaris agreed to pay $5.4 million in disgorgement and prejudgment interest under its deferred prosecution agreement with the SEC, and another $3.5 million in criminal penalties under its nonprosecution agreement with the DOJ. The SEC explained that Tenaris was a proper candidate for the SEC's first deferred prosecution agreement because of the company's "immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training."[227]

GUIDELINES

These *Guidelines* are intended to provide guidance regarding FCPA compliance and enforcement issues. They are not, however, a substitute for professional representation in any specific situation.

1. Companies should know that the Government interprets the FCPA's provisions very broadly, including the definition of "foreign official." Companies should be aware that low-level employees of state-owned companies may be considered foreign officials for purposes of the FCPA.

2. Companies should be aware that the FCPA prohibits corrupt payments, regardless of their size. There is no exemption for *de minimis* payments under the FCPA.

3. Companies are advised to prohibit employees from making facilitating payments without obtaining advanced, written approval from legal counsel.

4. Companies should be aware that the Government may charge a company with violating the books-and-records provisions of the FCPA, even in the absence of a substantive antibribery charge. If company legal counsel permits an employee to make a facilitating payment, the company must ensure that it is properly recorded in the company books and records as a "facilitating payment."

5. Companies should not pay for any "hospitality expenses" of a foreign official without the advanced, written approval of legal counsel. Expenses must have a legitimate business purpose and be directly related to the promotion or demonstration of a product or the performance of a Government contract.

6. Government contractors should be aware that a violation of the FCPA may result in the company's suspension or debarment from the U.S. procurement system and, depending on the extent of a contractor's global presence, debarment under the EU regime as well. Contractors are advised to negotiate coordinated settlement agreements amongst all relevant agencies and countries to prevent this collateral consequence.

7. Contractors should be familiar with the antibribery laws of all of the countries in which they do business and must tailor their antibribery compliance programs to comply with these laws.

8. If a company discovers evidence of a potential violation of the FCPA, it must take action immediately to verify the accuracy of the allegation. Companies should not prolong investigations, as employee-whistleblowers may disclose allegations to the Government.

9. Any internal investigation into potential FCPA violations should be conducted by experienced and independent outside counsel. Companies should not leave the internal investigation to in-house counsel, who may lack the impartiality necessary to fully investigate the company.

★ REFERENCES ★

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2/ The Federal Acquisition Regulations System, consisting of the Federal Acquisition Regulation and agency supplemental acquisition regulations, is a robust set of rules and requirements governing the U.S. Government's procurement process. It is located in Title 48 of the U.S. Code of Federal Regulations.

3/ See 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78dd-3. See generally Irwin & Rathbone, "Managing International Regulatory Risk in The Government Contract Supply Chain," Briefing Papers No. 11-6 (May 2011); Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10 (Sept. 2008); Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8 (July 2005).

4/ Heimann & Dell, Transparency International Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention 11 (July 28, 2010), available at http://www.transparency.org/publications/publications/conventions/oecd_report_2010.

5/ Statement of the Hon. Michael B. Mukasey, Att'y Gen., DOJ, at the ABA Nat'l Inst. on the FCPA, Omni Shoreham Hotel, Washington, D.C. (Oct. 16, 2006).

6/ Urofsky & Newcomb, Recent Trends and Patterns in FCPA Enforcement 1 (Shearman & Sterling LLP, Jan. 20, 2011), available at http://www.shearman.com/files/upload/FCPA_Trends.pdf.

7/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 11 (Oct. 15, 2010).

8/ DOJ Press Release No. 11-596, "California Company, Its Two Executives and Intermediary Convicted by Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Electrical Utility in Mexico" (May 10, 2011).

9/ See Spalding, "Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets," 62 Fla. L. Rev. 351, 360 (2010); Posadas, "Combating Corruption Under International Law," 10 Duke J. Comp. & Int'l L. 345, 349 (2000).

10/ Spalding, "Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets," 62 Fla. L. Rev. 351, 360 (2010) (citing "Lockheed's Defiance: A Right To Bribe?" Time, Aug. 18, 1975, available at http://www.time.com/time/magazine/article/0,9171,917751-1,00.html); see also "Lockheed Bribery: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs," 94th Cong. 1, at 40–42 (1975).

11/ "Lockheed's Defiance: A Right To Bribe?" Time, Aug. 18, 1975, available at http://www.time.com/time/magazine/article/0,9171,917751-1,00.html.

12/ "Lockheed's Defiance: A Right To Bribe?" Time, Aug. 18, 1975, available at http://www.time.com/time/magazine/article/0,9171,917751-1,00.html.

13/ See Spalding, "Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets," 62 Fla. L. Rev. 351, 379 (2010).

14/ The FCPA Blog, "J&J Joins the New Top Ten" (Apr. 8, 2011), http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html.

15/ See, e.g., United States v. Siemens Aktiengesellschaft, No. 08-367 (D.D.C. filed Dec. 15, 2008); SEC v. Siemens Aktiengesellschaft, No. 1:08-cv-02167 (D.D.C. filed Dec. 15, 2008); SEC v. Halliburton Co. and KBR, Inc., No. 4:09-CV-399 (S.D. Tex. filed Feb. 11, 2009); DOJ Press Release No. 10-209," BAE Systems PLC Pleads Guilty and Ordered To Pay $400 Million Criminal Fine" (Mar. 1, 2010).

16/ http://www.USAspending.gov.

17/ DOJ, Lay-Persons Guide to the FCPA Antibribery Provisions, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf; see also FAR pt. 9.

18/ 15 U.S.C.A. §§ 78dd-1 et seq.

19/ See 15 U.S.C.A. § 78m.

20/ DOJ, Lay-Persons Guide to the FCPA Antibribery Provisions, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf; see also 15 U.S.C.A. §§ 78dd-1(d)–(e), 78dd-2(e)–(f); 28 C.F.R. §§ 80.1–80.16.

21/ 15 U.S.C.A. § 78ff(a).

22/ 15 U.S.C.A. § 78dd-1(a); see also Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

23/ See OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 13 (Oct. 15, 2010).

24/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 12, 13 (Oct. 15, 2010); see also Robert Khuzami, Dir., SEC Div. of Enforcement, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), available at http://www.sec.gov/news/speech/2009/spch080509rk.htm.

25/ 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78dd-3; see also Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 3 (Sept. 2008).

26/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

27/ See 15 U.S.C.A §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a); see also United States v. Gorman, 807 F.2d 1299, 1304 (6th Cir. 1986) (finding that loans and promises of future employment were "things of value" under the gratuities statute, 18 U.S.C.A. § 201(g), where the purpose of the statute "is to reach all situations in which a government agent's judgment concerning his official duties may be clouded by the receipt of some item of value given to him by reason of his position").

28/ Information, United States v. Panalpina World Transp. (Holding) Ltd., No. 10-cr-769, ¶ 42 (S.D. Tex), available at http://www.justice.gov/opa/documents/panalpina-world-transport-info.pdf.

29/ DOJ Nonprosecution Agreement, Paradigm B.V., ¶ 9 (Sept. 21, 2007), available at http://fcpa.shearman.com/files/21d/21d9e9d88181ea2ed230ccb3595654c5.pdf?i=b416942fe5279e0412375246846c54f2.

30/ 15 U.S.C.A. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B); see also Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

31/ See, e.g., DOJ Press Release No. 11-596, "California Company, Its Two Executives and Intermediary Convicted by a Federal Jury in Los Angeles on All Counts for Their Involvement in Scheme To Bribe Officials at State-Owned Utility in Mexico" (May 10, 2011); United States v. Carson, No. 09-cr-00077 (C.D. Cal.); United States v. Esquenazi, No. 09-21010-cr-Martinez/Simonton (S.D. Fla.).

32/ See Criminal Minutes—Order Denying Motion To Dismiss Counts 1 through 10 of the Indictment, United States v. Carson, No. 09-cr-00077 (C.D. Cal. May 18, 2011) (No. 373); see also United States v. Noriega, No. 2:10-cr-01031 (C.D. Cal.) (also ruling that a state-owned enterprise may be considered an instrumentality of a foreign government under the FCPA).

33/ Criminal Minutes—Order Denying Motion To Dismiss Counts 1 through 10 of the Indictment, United States v. Carson, No. 09-cr-00077 (C.D. Cal. May 18, 2011) (No. 373).

34/ Criminal Minutes—Order Denying Motion To Dismiss Counts 1 through 10 of the Indictment, United States v. Carson, No. 09-cr-00077 (C.D. Cal. May 18, 2011) (No. 373).

35/ Criminal Minutes—Order Denying Motion To Dismiss Counts 1 through 10 of the Indictment, United States v. Carson, No. 09-cr-00077 (C.D. Cal. May 18, 2011) (No. 373).

36/ See, e.g., United States v. Noriega, No. 2:10-cr-01031 (C.D. Cal.) (explaining that the state-owned utility company was an "instrumentality" of the Mexican government under the FCPA, so its officers who accepted bribes were therefore "foreign officials" under the statute).

37/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

38/ United States v. Kay, 359 F.3d 738, 751 (5th Cir. 2004).

39/ Grime & Zdeb, The Illusory Facilitating Payments Exception: Risks Posed by Ongoing FCPA Enforcement Actions and The U.K. Bribery Act, available at http://seclawcenter.pli.edu/wp-content/uploads/2011/05/Grime-Risks-Posed-by-Ongoing-FCPA.pdf.

40/ SEC v. Noble Corp., No. 4:10-cv-04336 (S.D. Tex. 2010) available at http://www.sec.gov/litigation/complaints/2010/comp21728.pdf.

41/ See, e.g., UK Ministry of Justice, The Bribery Act 2010: Guidance" 18 (explaining that facilitation payments could violate the UK Bribery Act), available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

42/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 24 (Oct. 15, 2010).

43/ See OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 50 (Oct. 15, 2010) ("There are also cases that involve the misreporting of facilitation payments concerning customs, immigration and visa processing, inspections, training, gifts, travel and entertainment. See, for example, Lucent, UTStarcom, Natco, Veraz Networks, and Avery Dennison.").

44/ 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 6 (Sept. 2008).

45/ United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008) (ruling that the FCPA affirmative defense does not apply to a law that permitted a defendant to avoid criminal prosecution for the bribery of a foreign official if the bribe was the result of extortion or the defendant made a voluntary report to local authorities about the extortion).

46/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 6 (Sept. 2008).

47/ 15 U.S.C.A. §§ 78dd-1(e), 78dd-2(f); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 2 (Sept. 2008).

48/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 6–8 (Sept. 2008), for an extensive discussion of DOJ guidance on "reasonable and bona fide" expenses.

49/ DOJ, FCPA Opinion Procedure Release No. 11-01, "Foreign Corrupt Practices Act Review" (June 30, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf.

50/ 15 U.S.C.A. § 78m(b)(2)(A).

51/ 15 U.S.C.A. § 78m(b)(2)(B); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

52/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

53/ Team Inc., Form 8-K (Aug. 4, 2009), available at http://apps.shareholder.com/sec/viewerContent.aspx?companyid=TISI&docid=6728585.

54/ Team Inc., Form 8-K (Aug. 4, 2009), available at http://apps.shareholder.com/sec/viewerContent.aspx?companyid=TISI&docid=6728585.

55/ Team Inc., Form 8-K (Jan. 5, 2010), available at http://www.faqs.org/sec-filings/100105/TEAM-INC_8-K/.

56/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

57/ U.S. Attorneys' Criminal Resource Manual, tit. 9, § 1017, "FCPA Corporate Recordkeeping," available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01017.htm; see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

58/ SEC Litigation Release No. 21374, "SEC Files Settled Civil Action Charging NATCO Group Inc. With Violations of the Foreign Corrupt Practices Act" (Jan. 11, 2010).

59/ SEC v. NATCO Group Inc., No. 4:10-cv-98, at 1, ¶ 8 (S.D. Tex.). It is possible that the company was not charged with violating the antibribery provisions because, as the Government acknowledged, the company's employees were threatened with fines, jail, and deportation if they did not pay the fines, and they believed the threats to be genuine.

60/ SEC v. NATCO Group Inc., No. 4:10-cv-98, at 1, ¶¶ 6–7 (S.D. Tex.); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

61/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

62/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

63/ See 15 U.S.C.A. § 78dd-1(a).

64/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

65/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 8 (Sept. 2008).

66/ 15 U.S.C.A. § 78dd-3(a); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

67/ See Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No. 08-10, at 4 (Sept. 2008).

68/ Siemens (Germany), BAE (United Kingdom), Snamprogetti Netherlands B.V./ ENI S.p.A. (Holland/Italy), Technip S.A. (France), Daimler AG (Germany), Alcatel-Lucent (France), Panalpina (Switzerland), Jeffrey Tessler (UK citizen).

69/ DOJ Press Release No. 11-431, "JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees To Pay $218.8 Million Criminal Penalty" (Apr. 6, 2011).

70/ United States v. JGC Corp., No. 11-cr-260, ¶ 22 (Apr. 6, 2011).

71/ SEC v. Siemens AG, No. 08-cv-02167, ¶¶ 17,19, 22 & 27 (D.D.C.), available at http://www.scribd.com/doc/30881452/SEC-v-Siemens.

72/ United States v. Kellogg Brown & Root LLC, No. 09-cr-00071, ¶¶ 22, 24 (Feb 6, 2009).

73/ United States v. Technip S.A., No. 10-cr-00439, ¶ 22(June 28, 2010).

74/ Superseding Indictment, United States v. Goncalves, No. 09-cr-00338, at 33 (Apr. 16, 2010).

75/ Minute Entry, United States v. Goncalves, No. 09-cr-00335 (D.D.C. June 6, 2011).

76/ 15 U.S.C.A. §§ 78dd-2(g), 78dd-3(e), 78ff(c).

77/ 18 U.S.C.A. § 3571(d).

78/ DOJ, Lay-Persons Guide to the FCPA Antibribery Provisions, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

79/ 15 U.S.C.A. § 78u(d)(3)(B)); see Tillipman, "Foreign Corrupt Practices Act Fundamentals," Briefing Papers No.08-10, at 15 (Sept. 2008).

80/ 15 U.S.C.A. § 78ff(a).

81/ 15 U.S.C.A. § 78ff(a).

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

83/ DOJ Press Release No. 11-085, "Department of Justice Secures More Than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division" (Jan 21, 2011).

84/ SEC Press Release No. 2011-146, "SEC Charges Armor Holdings, Inc. With FCPA Violations in Connection With Sales to the United Nations" (July 13, 2011).

85/ Shearman & Sterling LLP, FCPA Digest at i (Urofsky et al. eds., 2011), available at http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf.

86/ DOJ Press Release No. 08-1105, "Siemens and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree To Pay $450 Million in Combined Criminal Fines" (Dec. 15, 2008); SEC Litigation Release No. 20829 and Accounting and Auditing Enforcement Release No. 2911, "SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over $1.6 Billion" (Dec. 15, 2008).

87/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 39 (Oct. 15, 2010).

88/ Plea Agreement, United States v. Tesler, No. 4:09-cr-00098, at 7 (S.D. Tex. Mar. 11, 2011).

89/ Plea Agreement, United States v. Tesler, No. 4:09-cr-00098, at 10 (S.D. Tex. Mar. 11, 2011).

90/ See Kalb & Bohn, "Disgorgement: The Devil You Don't Know," Corporate Compliance Insights (Apr. 12, 2010), available at http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/ (citing SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.D.C. 1989); SEC v. Patel, 61 F.3d 137, 139 (1st Cir. 1995); SEC v. Druffner, 517 F. Supp. 2d 502, 511 (D. Mass. 2007)).

91/ Kalb & Bohn, "Disgorgement: The Devil You Don't Know," Corporate Compliance Insights (Apr. 12, 2010), available at http://www.corporatecomplianceinsights.com/2010/disgorgement-fcpa-how-applied-calculated/ (citing SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.D.C. 1989).

92/ DOJ Press Release No. 08-1105, "Siemens and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree To Pay $450 Million in Combined Criminal Fines" (Dec. 15, 2008).

93/ DOJ Press Release No. 09-112, "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees To Pay $402 Million Criminal Fine" (Feb. 11, 2009).

94/ DOJ Press Release No. 10-780, "Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees To Pay $240 Million Criminal Penalty" (July 7, 2010).

95/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 43 (Oct. 15, 2010) (citing18 U.S.C.A §§ 981, 1956; 21 U.S.C.A. § 853; 28 U.S.C.A. § 2461).

96/ 21 U.S.C.A § 853(p)(1)(B); see also Motion for an Order To Include Substitute Assets, United States v. Green, No. 08-cr-00059 (C.D. Cal. Nov. 19, 2010).

97/ DOJ Press Release No. 11-313, "UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme" (Mar. 11, 2011).

98/ See DOJ Press Release No. 09-952, "Film Executive and Spouse Indicted for Paying Bribes to a Thai Tourism Official To Obtain Lucrative Contracts" (Sept. 14, 2009). Patricia Green was also found guilty of two counts of falsely signing a U.S. income tax return.

99/ Motion for an Order To Include Substitute Assets, United States v. Green, No. 08-cr-00059 (C.D. Cal. Nov. 19, 2010).

100/ Motion for an Order To Include Substitute Assets, United States v. Green, No. 08-cr-00059 (C.D. Cal. Nov. 19, 2010).

101/ Motion for an Order To Include Substitute Assets, United States v. Green, No. 08-cr-00059, at 4 (C.D. Cal. Nov. 19, 2010).

102/ Att'y Gen. Eric Holder, DOJ, Remarks at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, Doha, Qatar (Nov. 7, 2009), available at http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html.

103/ DOJ Press Release No. 10-639, "Former Haitian Government Official Sentenced to Prison for his Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme" (June 2, 2010).

104/ DOJ Press Release No. 10-639, "Former Haitian Government Official Sentenced to Prison for his Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme" (June 2, 2010).

105/ DOJ Press Release No. 10-639, "Former Haitian Government Official Sentenced to Prison for his Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme" (June 2, 2010).

106/ DOJ Press Release No. 10-442, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials" (Apr. 19, 2010).

107/ DOJ Press Release No. 10-442, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials" (Apr. 19, 2010). In addition to the lengthy prison term, Jumet also received two years of supervised release following his prison sentence and was ordered to forfeit $331,000 in criminal proceeds.

108/ DOJ Press Release No. 10-442, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials" (Apr. 19, 2010).

109/ DOJ Press Release No. 10-442, "Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government Officials" (Apr. 19, 2010).

110/ DOJ Press Release No. 08-772, "Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charge" (Sept. 3, 2008).

111/ DOJ Press Release No. 08-772, "Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charge" (Sept. 3, 2008).

112/ Judgment & Probation/Commitment Order for Gerald Green at 1, United States v. Green, No. 08-cr-059-GW (C.D. Cal. Sept. 10, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/greeng/09-10-10green-judgment.pdf; Judgment & Probation/Commitment Order for Patricia Toledo Green at 1, United States v. Green, No. 08-cr-059-GW (C.D. Cal. Sept. 10, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/greeng/09-10-10greenp-judgment.pdf.

113/ DOJ Press Release No. 09-928, "Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to U.K. Ministry of Defense Official" (Sept. 3, 2009).

114/ Judgment & Probation/Commitment Order for Leo Winston Smith, United States v. Smith, No. 07-cr-069-AG, at 1 (C.D. Cal. Jan. 1, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/smithl/01-11-11smith-leo-amended.pdf.

115/ Government's Sentencing Memorandum, United States v. Nam Quoc Nguyen, No. 2:08-cr-00522-TJS, at 2 (E.D. Pa. Sept. 8, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/nguyenn/09-08-10nguyennam-sent.pdf.

116/ Judgment in a Criminal Case for Nam Quoc Nguyen, United States v. Nam Quoc Nguyen, No. 2:08-cr-00522-TJS, at 2 (E.D. Pa. Sept. 16, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/nguyenn/09-16-10nguyennam-judgment.pdf.

117/ Judgment in a Criminal Case for An Quoc Nguyen, United States v. An Quoc Nguyen, No. 2:08-cr-00522-TJS, at 2 (E.D. Pa. Sept. 16, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/nguyenn/09-16-10nguyenan-judgment.pdf.

118/ Government's Sentencing Memorandum, United States v. Nam Quoc Nguyen, No. 2:08-cr-00522-TJS, at 2 (E.D. Pa. Sept. 8, 2010).

119/ This Briefing Paper provides a broad overview of the U.S. federal procurement suspension and debarment regime. For a more detailed discussion of suspension and debarment rules, requirements and procedures, see West, Hatch, Brennan & VanDyke, "Suspension & Debarment," Briefing Papers No. 06-9 (Aug. 2006).

120/ This period may be extended for an additional 6 months (but may not exceed 18 months). FAR 9.407-4(b).

121/ The three-year cap may be extended if the debarring official determines "that any extension is necessary to protect the Government's interest." FAR 9.406-4(b).

122/ FAR 9.406-1(b).

123/ FAR 9.104-1(d).

124/ FAR 9.407-2.

125/ FAR 9.407-2(b).

126/ FAR 9.406-2; The Department of the Air Force General Counsel, GCR FAQ Topic, http://www.safgc.hq.af.mil/questions/topic.asp?id=1643.

127/ FAR 9.406-2(a).

128/ The Department of the Air Force General Counsel, GCR FAQ Topic, http://www.safgc.hq.af.mil/questions/topic.asp?id=1643.

129/ FAR 9.405(a).

130/ FAR 9.405-1.

131/ The EPLS is available at http://www.epls.gov.

132/ See, e.g., http://www.sagerity.com/vendor-debarment/ (fee-based database maintained by Sagerity Investigative Intelligence that permits subscribers to review suspended and debarred vendors in multiple state and local jurisdictions).

133/ Past Performance Information Retrieval System, http://www.ppirs.gov/fapiis.html.

134/ Past Performance Information Retrieval System, http://www.ppirs.gov/fapiis.html.

135/ Federal Contractor Misconduct Database, http://www.contractormisconduct.org/index.cfm/1,72,218.

136/ http://www.contractormisconduct.org/index.cfm/1,72,218.

137/ See FAR 9.103(a) ("Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.").

138/ The Department of the Air Force General Counsel, GCR FAQ Topic, http://www.safgc.hq.af.mil/questions/topic.asp?id=1643.

139/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 41 (Oct. 15, 2010).

140/ OECD, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions 41 (Oct. 15, 2010).

141/ Information, United States v. Daimler AG, No. 10-cr-00063, at 3 (D.D.C. Mar. 22, 2010).

142/ Deferred Prosecution Agreement, United States v. Daimler AG, No. 10-cr-00063, at 14 (D.D.C. Mar. 24, 2010); see also Plea Agreement, United States v. Siemens AG, No. 08-cr-367, at 12 (Dec. 15, 2008) (similarly agreeing to cooperate with Siemens to bring facts relating to the company's present responsibility to the attention of suspension and debarment authorities).

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