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Foreign Corrupt Practices Act Fundamentals

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FOREIGN CORRUPT PRACTICES ACT FUNDAMENTALS

By Jessica Tillipman

Foreign Corrupt Practices Act enforcement activity is currently at its highest level since enactment of the statute in 1977.[1] There were more enforcement actions brought in 2007 than in the years between 2004 and 2006 combined. Moreover, both the Securities and Exchange Commission and the Department of Justice have made clear that FCPA enforcement is a top priority and they will be devoting all resources necessary to enforcing this statute.[2] As noted by Attorney General Michael B. Mukasey, the DOJ alone brought 16 FCPA enforcement actions against individuals and corporations in 2007, including charges against seven individuals.[3] "These 16 enforcement actions represent[ed] a 100 percent increase over the 8 enforcement actions brought in 2006, which was itself the largest total in the FCPA's 30-year history."[4] The message is clear—the U.S. Government is committed to FCPA compliance and there is no evidence enforcement activity will slow any time soon.

IN BRIEF

Though it is difficult to identify one particular reason for this flurry of enforcement activity, it is likely this trend has been caused, at least in part, by the Government's broad interpretation of the FCPA's prohibitions and jurisdictional provisions. While many of the recent enforcement activities involve U.S. companies and their foreign subsidiaries, there has also been a substantial increase in the number of investigations and enforcement actions involving purely foreign concerns as well.

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These actions demonstrate the Government's intent to push FCPA jurisdiction to its limits—even pursuing actions against foreign companies that have already been prosecuted by other foreign governments. In addition to the increasing risk for foreign-based companies, agency and representative relationships remain at high risk for FCPA compliance problems. A sizeable number of recent enforcement actions have involved agents, representatives, or distributors running afoul of the FCPA's antibribery prohibitions while they performed services in foreign countries. As a result, it is imperative that companies continue to keep a close eye on their intermediaries and ensure they have adequate internal controls in place.

While the rise in enforcement actions is a cause of great concern for most companies, these actions provide insight into the Government's FCPA compliance expectations and its interpretation of some of the Act's more challenging provisions.[5] Furthermore, the DOJ continues to offer guidance regarding FCPA compliance through its FCPA Opinion Procedure under which agency provides responses to specific inquiries submitted by companies concerning the legality of their conduct under the FCPA.[6] While the DOJ acknowledges this procedure has traditionally been an underutilized resource, the agency has made clear that it expects companies to take advantage of the FCPA guidance provided in DOJ FCPA Opinions. As explained by Former Assistant Attorney General Alice Fisher, "it serves both [Government and business] interests to avoid FCPA violations before they occur, and the opinion procedure is one way to make that happen."[7]

Another likely cause of the recent upward trend in enforcement activity is the self-reporting of potential FCPA violations. A variety of factors, including the reporting requirements of Sarbanes-Oxley Act of 2002,[8] the threat of fines and incarceration, and fear of irreversible reputational damage, have prompted many companies to voluntarily disclose potential FCPA violations. Although the Government continues to encourage disclosures and promises leniency in return, a review of enforcement actions over the past few years indicates this not necessarily the case. Recent voluntarily disclosed FCPA violations have been settled with enormous fines, lengthy prison terms, the imposition of corporate monitors, and, when settling with the SEC, the disgorgement of any ill-gotten gains. In fact, 2007 saw Baker Hughes Inc. resolving its FCPA enforcement actions with the Government by agreeing to the largest monetary sanction ever imposed in an FCPA case totaling $44 million (a criminal fine totaling $11 million and a civil penalty and disgorgement totaling $33 million).[9] The size of this penalty makes it difficult to see how Baker Hughes received credit for its voluntary disclosure. Moreover, the Government continues to require the retention of independent compliance monitors as a condition to settling enforcement actions.[10] While the Government contends that monitors are not a presumptive condition of settlement agreements,[11] recent enforcement activity indicates otherwise. Corporate monitors are not only expensive, but, given the substantial latitude and vast powers afforded to monitors by the Government, they are also intrusive. Whether the significant costs associated with voluntary disclosures will curb the trend of self-reporting in the future remains to be seen.

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This Briefing Paper provides a general overview of the FCPA and guidance with respect to the more challenging provisions of the Act. It also highlights recent trends in FCPA enforcement and compliance. Specifically, the Paper (a) provides a detailed discussion of the Act's provisions, definitions of its key terms, and a guidance regarding the exception and affirmative defenses to the antibribery prohibitions, (b) presents the bases for corporate liability under the FCPA, including liability for the actions of intermediaries, employees, and subsidiaries or affiliates, (c) discusses the jurisdictional provisions of the Act in detail and highlights recent enforcement trends involving foreign entities, including parallel prosecutions, and (d) addresses the ongoing trend of self-reporting FCPA violations, the consequences of FCPA violations, and recent trends in the resolution of FCPA enforcement actions, including the frequent appointment of compliance monitors, and collateral or related litigation.

FCPA Basics

The FCPA has two components: (1) the antibribery prohibitions and (2) the recordkeeping and internal control provisions. The Act's antibribery component prohibits payments to foreign officials for the purpose of obtaining or retaining business.[12] The Act's books-and-records provisions require the maintenance of reasonably accurate accounting records and adequate internal controls.[13] The plain language of the FCPA is less than clear, but its definitional sections, legislative history, relevant case law, enforcement actions, and the DOJ's FCPA Opinions have helped to clarify the Act's meaning.

■ Antibribery Prohibitions

The FCPA antibribery provisions, as amended in 1998,[14] prohibit a company from corruptly offering or paying money or offering or giving anything of value, directly or indirectly through agents or intermediaries, to a foreign official to obtain or retain business.[15] Specifically, the antibribery provisions prohibit:[16]

(1) Any act corruptly taken either through use the mails or of any instrumentality of interstate commerce or while in the territory of the United States,

(2) In furtherance of an offer, payment, promise to pay, or authorization of the payment of any money or offer, gift, promise to give, or authorization of the giving of anything of value to:

  (a) A foreign official;

  (b) A foreign political party or official thereof;

  (c) A candidate for foreign political office; or

  (d) Any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any of the above,

(3) For the purposes of:

  (a) Influencing any act or decision of such foreign official in his official capacity;

  (b) Inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official;

  (c) Securing any improper advantage; or

  (d) Inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

(4) In order to assist in obtaining or retaining business for or with, or directing business to, any person.

■ FCPA Jurisdiction

The FCPA applies to companies and persons based on either (a) the country in which the improper activity occurred (territorial-based jurisdiction) or (b) the origin of the party committing the act (nationality-based jurisdiction). Territorial jurisdiction covers persons or companies that commit an act within the territory of the United States "in furtherance of" a corrupt payment or offer of payment, using the U.S. mails or other means or instrumentalities of interstate commerce. "Territory of the United States" has been interpreted broadly, encompassing "all areas over which the United States asserts territorial jurisdiction."[17] In 1998, Congress amended the FCPA by expanding the "in furtherance of" requirement, making clear that the requirement is not limited to actions that make use of the mails or any means or instrumentality of interstate commerce.[18] Rather, with respect to foreign companies and persons, the FCPA applies to *any* act taken within the United States that furthers the improper payment.[19] Congress views "any act committed by a foreign national within the United States," in furtherance of a bribe, to fall within its power to regulate "Commerce with foreign Nations."[20] All that is required for liability under the Act is that some conduct occur that facilitates or carries forward the prohibited activity.

Territorial jurisdiction applies to "issuers," "domestic concerns," and foreign companies and persons.[21] An "issuer" is a 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] A "domestic concern" is defined by the Act as any citizen, national or resident of the United States or any corporation or other business entity with its principal place of business in the United States or that is organized under the laws of a state of the United States.[23] As part of its 1998 amendments, Congress extended the FCPA's territorial jurisdiction to include non-"issuer" foreign companies and individuals that commit an act in furtherance of the bribe while in the territory of the United States.[24] Nationality-based jurisdiction, applicable to domestic concerns and U.S. issuers, pertains to acts taken entirely outside the United States, as long as the act is in furtherance of the improper payment or offer, regardless of whether the U.S. mails or other means or instrumentalities of interstate commerce are used.[25]

■ FCPA Definitions & Standards

The term "foreign official," as defined by the FCPA, applies to 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.[26] A review of U.S. Government enforcement actions demonstrates that the Government interprets "foreign official" broadly, including advisors to foreign officials, foreign political parties and their officials, candidates for public office, and private corporations entrusted with quasi-governmental functions. Congress added the term "public international organization" to the definition of "foreign official" in 1998 to include officers or employees of such entities as the United Nations, the International Monetary Fund, the World Bank, and the Red Cross.[27]

The antibribery component of the FCPA includes a prohibition against giving "anything of value" for an improper purpose.[28] The phrase "thing of value" has been construed broadly and is not limited to money. There is no minimum value that must be met before the "thing of value" constitutes an improper gift. Examples include, but are not limited to stocks, travel expenses, entertainment, hospitality provided to a foreign official's spouse or children, discounts on products or services, forgiveness of outstanding debt, donations to a charitable organization on behalf of the foreign official, or employing a foreign official or the official's relative. Generally, whether an item constitutes a "thing of value" depends on the subjective value attached by the particular recipient.[29] In addition, because the Act also prohibits the "offer," "promise," or "authorization" of payments of money or of gifts to an official, mere offers or promises to pay money or to give a thing of value in the future fall within the Act's purview.[30]

Liability under the antibribery provisions attaches only if the improper payment or gift is made "corruptly,"[31] meaning with an "evil motive or purpose, an intent to wrongfully influence the recipient."[32] This standard is met if the payment, gift, or offer is made for one of the four reasons expressly provided in the FCPA: (1) influencing any act or decision of the foreign official in his official capacity under circumstances where the official has discretion and the payment is given to influence the discretionary decision, (2) inducing the foreign official to do or omit to do any act in violation of the official's lawful duty, (3) inducing the foreign official to use his influence with a foreign government or instrumentality to affect or influence any act or decision of the government or instrumentality, or (4) securing any improper advantage.[33] The term "securing any improper advantage" applies to anything to which "the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."[34] Since the FCPA prohibits offering, paying or giving, promising to pay or give, or authorizing to pay or give money or anything of value for any of these four reasons, FCPA liability may attach even if the corrupt act does not succeed in its purpose.[35]

The improper payment, gift, or offer must also be made to obtain or retain business.[36] Like other terms in the Act, the phrase "obtaining or retaining" business has been construed broadly, applying to any improper payment or gift that is "intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person."[37] As long as it can be demonstrated that the payment could provide an unfair advantage over competitors and assist the payor in obtaining or retaining business, this element of the antibribery prohibition will be satisfied.[38] In other words, this standard is not limited to payments or gifts made in exchange for the award or renewal of contracts or other business opportunities with a foreign government. Rather, this standard may be satisfied under a variety of circumstances including the reduction of tax liability,[39] preferential treatment during the customs process,[40] and payments made to secure debt owed to a company.[41]

In regard to liability under the Act for payments or gifts to "any person," i.e., a third party, "while knowing" that the payment or gift will be made, offered, or promised, directly or indirectly, to a foreign official for improper purposes,[42] the FCPA does not require proof that the person making the payment or gift has actual knowledge of the improper activity. Rather, the "knowing" standard is satisfied if "(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur."[43] Moreover, "knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[44] While Congress has made clear that negligence does not form the basis for liability, the Act does encompass circumstances under which a person acts in *conscious disregard, willful blindness*, or *deliberate ignorance* of circumstances that should alert one to the likelihood of an FCPA violation.[45]

■ The Exception & Affirmative Defenses To Antibribery Liability

The FCPA contains a limited exception to the anti-bribery prohibitions for "facilitating" (sometimes referred to as "grease") payments. Specifically, the Act does 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."[46] The purpose of the exception is to allow companies to make payments to foreign officials to speed up the performance of "non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries."[47]

The Act limits the term "routine governmental action" to actions that are ordinarily and commonly performed by a foreign official in "(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature."[48] "Routine governmental actions" do not encompass decisions made by foreign officials to award new business to or to continue business with a particular party.[49]

This exception for "facilitating" payments has been construed narrowly, and it is often difficult for companies to determine whether certain payments qualify under it. As a result, companies should use great caution and carefully scrutinize proposed transactions when seeking to justify payments under this exception.

In addition to the exception for "facilitating" payments, the FCPA provides two affirmative defenses to liability under the antibribery prohibitions for payments or gifts to foreign officials that were (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 the execution or performance of a contract with a foreign government or agency.[50]

With respect to the first affirmative defense, a payment may only qualify under this provision if it is expressly authorized under the written laws or regulations of the foreign country. Indirect references in the law, such as a tax deduction for improper payments, do not qualify under this defense. Moreover, this defense is rarely available because such payments are seldom permitted under the local laws of most countries.

The second affirmative defense to the antibribery provisions of the FCPA permits payments or gifts incurred in connection with the promotion or demonstration of company products or services or with the execution of a contract with a foreign government. This "promotional expenses" 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 the performance of a government contract. The application of this affirmative defense has caused problems for companies in the past. Companies often have trouble determining the extent to which a foreign official's expenses may be covered. Several recent FCPA enforcement actions have provided companies with additional guidance regarding the use of this affirmative defense.

In December 2007, Lucent Technologies Inc. settled FCPA charges with the SEC and the DOJ for improper payments related to "promotional expenses" for Chinese government officials.[51] This enforcement action demonstrates the type of conduct that is outside the scope of the "promotional expenses" affirmative defense. Lucent spent more than $10 million sponsoring trips for Chinese government officials. The trips consisted of primarily sightseeing to locations such as Disneyland, Universal Studios, and the Grand Canyon, and in cities such as Los Angeles, San Francisco, Las Vegas, Washington, D.C., and New York City. The trips typically lasted 14 days each and cost between $25,000 and $55,000 per trip. Lucent also provided between $500 and $1,000 per day to the traveling foreign officials as a "per diem." The trips were approved by senior Lucent Officials and improperly recorded in the company's books and records. Specifically, the trips were primarily characterized in the company's books and records as "factory inspections" or "training" in relation to contracts with its Chinese government customers even though the trips involved little business content. While the facts clearly indicate a violation of the FCPA's antibribery prohibitions, the Government charged Lucent only with violating the Act's books-and-records and internal control provisions (discussed below) for improperly recording expenses and failing to maintain an adequate system of internal controls.

Similarly, in October 2007, Ingersoll-Rand Co. Ltd.'s Italian affiliate settled fraud and FCPA charges after, among other improper activities, it sponsored eight officials from the Iraqi Oil Ministry to spend two days touring a manufacturing facility in Italy and an additional two days "on holiday" touring Florence at the company's expense.[52] The officials were also given $8,000 in "pocket money." Not only were these activities excluded from the purview of the affirmative defense, the company also violated the books-and-records and internal control provisions of the FCPA by failing to properly record the payments in its books and records (referring to the payments under a general ledger account as "cost of sales deferred"). Delta & Pine Land Co. and its subsidiary, Turk Deltapine, Inc., also ran afoul of the FCPA's antibribery and books-and-records provisions.[53] On July 25 and 26, 2007, the SEC filed two settled enforcement proceedings against the company, alleging that from 2001 to 2006, Turk Deltapine made payments valued at approximately $43,000 (including cash, payment of travel and hotel expenses, air conditioners, computers, office furniture, and refrigerators) to multiple officials of the Turkish Ministry of Agricultural and Rural Affairs to obtain governmental reports and certifications that were necessary for Turk Deltapine to operate its business in Turkey. In settling with the SEC, Delta & Pine and Turk Deltapine jointly agreed to pay a $300,000 civil penalty.

The enforcement action against Paradigm B.V. provides another example of conduct that falls outside the scope of the "promotional expenses" affirmative defense.[54] On September 24, 2007, Paradigm settled an FCPA enforcement action with the DOJ related to improper payments made to government officials in China, Indonesia, Kazakhstan, Mexico, and Nigeria. Among other allegations, the DOJ contended that Paradigm paid travel and entertainment expenses for officials of government-owned oil companies in China, including "training" trips in connection with business opportunities with the Chinese government. The "training" trip expenses included airfare, hotel, meals, gifts, cash per diems, and entertainment—including sightseeing and cash payments for shopping. The total amount of the payments could not be determined from the company's documentation. Paradigm admitted to similar conduct in Mexico, including sponsoring the trip of a Mexican government official employed by the Mexican national oil company (Pemex) to Napa Valley, California for "relationship building and client development." The trip, which involved visits to wineries and dinners and coincided with the Pemex official's birthday, cost approximately $12,000 total for all attendees. Paradigm Mexico also spent approximately $10,000 entertaining the same Pemex government official by paying for his dinners, drinks, and other activities. Paradigm's deferred prosecution agreement with the DOJ required the company to pay a $1 million penalty, implement rigorous internal controls, retain outside compliance counsel, and cooperate fully with the Department.

Other lessons may be derived from recent DOJ FCPA Opinions that explain the proper way in which to handle the expenses associated with visits from foreign officials so that the activity is covered by the affirmative defense.[55] The DOJ Opinions' discussion of the factual scenarios provided by requesters provides insight into the type of contemplated conduct covered by this affirmative defense. For example:

(1) Companies should avoid financing the trip of an official's spouse, family, or any guests of the official.[56]

(2) Any unnecessary upgrades to transportation or lodging should be avoided.[57]

(3) Payments should be made directly to a service provider and not directly to or through the foreign official.[58]

(4) Expenditures should be closely tailored to the purpose of the trip, with reasonable estimates of the costs established before the official's trip.[59]

(5) Companies should avoid providing officials with large sums of spending or "pocket money" or providing extravagant entertainment for the officials during promotional trips.[60]

(6) While a modest meals and entertainment (e.g., a brief sightseeing tour) may be permissible, most other forms of entertainment should be covered by the officials themselves.[61]

(7) Any souvenirs that the requestor may provide to the officials may only be of nominal value.[62]

(8) Reimbursement of modest expenses incurred by a foreign official may be made only upon presentation of a written receipt.[63]

(9) Companies should be careful not to select the particular government officials they will be hosting for the demonstration. This decision should be made solely by the foreign government.[64]

(10) Before the trip, a company should obtain written assurance from an established law firm with offices in both the United States and the foreign country that the sponsorship of the visit and its payment of the

expenses is not contrary to the law of the foreign country.[65]

(11) All costs and expenses incurred by the company in connection with the visit must be accurately recorded in the company's books and records.[66]

This guidance demonstrates that the affirmative defense for promotional expenses is narrow in scope and any such expenditures must be directly related to a legitimate business purpose.

■ Recordkeeping & Internal Control Provisions

In addition to the antibribery provisions, the FCPA contains a section requiring issuers of publicly traded securities to maintain internal accounting and recordkeeping controls sufficient to provide reasonable assurance that its financial statements are accurate.[67] This section works in tandem with the antibribery provisions and prohibits companies from using improperly recorded transactions or "off-the-book" accounts as a means of furthering and concealing improper payments to foreign officials.

The jurisdictional provisions of this section are far less extensive than those pertaining to bribery, covering only "issuers" (domestic and foreign companies) that have a class of securities registered pursuant to 15 U.S.C.A. § 78l and entities that must file reports with the SEC pursuant to 15 U.S.C.A. § 78o(d).[68] The recordkeeping provisions do not extend to individuals or companies that do not meet these requirements, regardless of their nationality. Generally, the Act's books-and-records requirements mandate the maintenance of records and accounts that "accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[69] In addition to these recordkeeping requirements, this section of the Act requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" transactions are (a) executed with the authorization of company management, (b) recorded in a manner that permits the maintenance of accountability of assets and the preparation of financial statements in accordance with generally accepted accounting principles, (c) restricted so that assets may be accessed only with direct authorization of company management, and (d) reconciled properly so that asset documentation is checked against actual assets in reasonable intervals to permit the resolution of any discrepancies.[70]

The FCPA's recordkeeping requirements are based on a concept of reasonableness, rather than materiality, and include all original documents (including invoices, receipts, accounting records, and expense reports), regardless of the dollar amount involved in the specific transaction. Notably, the provisions are not limited to illegal or improper payments. Rather, they apply to all payments documented by a company—regardless of the size of the transaction. This means the Government may prosecute a company for violating the books-and-records provisions, even in the absence of a separate violation of the antibribery provisions. Moreover, an intentional violation of the books-and-records provisions may result in criminal liability.[71] Because the antibribery and recordkeeping provisions of the FCPA apply separately, an intentional violation of the accounting provisions may constitute a criminal offense "whether or not such falsification is related to a foreign corrupt practice proscribed by the FCPA."[72] The SEC has taken action against companies under the recordkeeping provisions of the Act, even when there was insufficient evidence to establish a separate antibribery violation.

For example, in an enforcement action against Schering-Plough Corp., the SEC charged the company with violating the recordkeeping and internal control provisions of the FCPA in connection with payments made by its Polish subsidiary to a charity associated with a Polish government official.[73] The SEC found that the company made the payments for the purpose of influencing the official to persuade the Polish government to purchase Schering-Plough's products. Although the DOJ never charged the company with violating the antibribery provisions of the FCPA, the SEC charged the company with violating the books-and-records provisions, finding that the company failed to properly record the payments. In addition, the SEC also found the company violated the internal control provisions of the FCPA because its system of internal controls failed to detect or prevent the improper payments.

In 2007, Lucent Technologies Inc. also settled an enforcement action related to its books-and-records and internal controls. Specifically, Lucent entered into a deferred prosecution agreement with the DOJ and settled a civil action with the SEC regarding its failure to (1) properly account in its books and records for the travel and entertainment expenditures made on behalf of Chinese officials and (2) implement sufficient internal controls to prevent the improper activity.[74] Though the allegations discussed improper expenditures involving government officials, this was a books-and-records case.

These enforcement actions demonstrate the importance of a company's compliance with the FCPA's recordkeeping and internal control requirements. If a company cannot openly record a transaction in its books and records because of its questionable nature, it should not go forward with the transaction.

Bases For Liability

■ Liability For The Actions Of Intermediaries

The antibribery provisions of the FCPA prohibit more than direct payments or gifts to foreign officials. Rather, as noted earlier in this Paper, the Act encompasses payments or gifts made to a third party while knowing that the money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official.[75] This means that FCPA liability attaches regardless of whether the payment is made directly to the foreign official or through an intermediary such as a third-party agent, consultant, joint venture partner, representative, or distributor. The high risks associated with the intermediary relationship require that companies conduct thorough, well-documented due diligence when hiring international agents to conduct business in a foreign country. Companies should have a thorough due diligence plan in place to vet all agents hired to perform work in foreign countries to make certain that the company is entering into business relationships with reputable and qualified partners only.

To ensure consistency when conducting due diligence, a company should have express procedures for the hiring and vetting of foreign intermediaries, including written standards for the selection of intermediaries. The due diligence should, at a minimum, verify (a) whether the potential intermediary is qualified for the position, (b) the number of years the intermediary has been in operation, (c) the size and adequacy of the intermediary's support staff and geographical coverage, (d) the intermediary's personal or professional ties to the foreign government or government officials, (e) a profile of the intermediary's current clientele, (f) its reputation with the U.S. embassy or consulate or other businesses that it deals with on a regular basis, and (g) its familiarity with and willingness to adhere to the FCPA.[76] To tailor an effective compliance program to the particular circumstances, the reputation of the country in which the intermediary will be acting should also be considered when conducting due diligence. For example, if the agreement with the intermediary is to be performed in a country known for bribery activity, a company should employ heightened scrutiny when conducting diligence. Once a company selects an intermediary, the selection should be reviewed in writing, along with all related agreements and payments.[77]

In addition, the language of the agreement executed between a company and a foreign agent is crucial. While the FCPA does not expressly address the contents of agency agreements, the Government will review an agreement's provisions to see if the company took necessary precautions before entering into this type of high-risk agreement. The DOJ has provided some guidance with respect to contents of a proper agency agreement:[78]

(1) A representation by the intermediary that it will not pay or agree to pay, directly or indirectly, any funds or anything of value, on behalf of the company, to any public official in the foreign country for the purpose of influencing the official's official acts or to induce the official to use his influence to the intermediary's benefit.[79]

(2) A provision allowing for internal and independent audits of the books and records of the intermediary to ensure compliance with the FCPA.[80]

(3) A statement that if the intermediary violates the FCPA or any other provision of the agreement, the agreement will automatically be rendered void *ab initio*, the intermediary will automatically surrender any claim for payment under the agreement even for sales previously concluded or sales previously rendered, and the company will have the right, when required, to disclose the agreement, alleged improper activity, and amount of commission applicable to the particular agreement to the U.S. Government and the foreign government in which any improper activity took place.[81]

(4) A statement that the intermediary will be solely responsible for all of its costs and expenses incurred in connection with its representation of the company, unless responsibility is assumed in writing in advance with a detailed itemization of expenses. All purchase orders and authorizations must be in writing.[82]

(5) A representation that neither the agent nor any of its company representatives is a government official, an official of a political party, a candidate for political office, a consultant to a government official, or affiliated with a government official and that none of them will become an official of the foreign government during the term of the agreement.[83]

(6) Confirmation that the agreement is lawful in the foreign country in which it is to be performed.[84]

(7) A prohibition on assignment or novation of the agreement without prior written consent.[85]

While these express provisions are necessary to protect the interests of a company that has formed a relationship with a foreign official, execution and monitoring of the agreement are equally important.[86] Companies should have tight internal controls and monitoring procedures in place to supervise the activities of the foreign intermediary and any payments made to the intermediary for work it has conducted on the company's behalf.[87] Moreover, companies should clearly articulate their corporate procedures in writing and assess the quality of their internal controls on a regular basis to ensure that they have effective FCPA compliance procedures in place.[88]

Companies with overseas agents should also develop and implement both an ethics policy and a separate FCPA policy. The latter should provide a brief overview of the FCPA bribery provisions, present examples of prohibited activities, and contain a statement making clear the company's commitment to FCPA compliance. All company employees should receive a copy of the policies and execute a certification stating that the employee both has read the policies and will strictly comply with their provisions. Moreover, all company employees involved in the selection and monitoring of foreign agents should receive extensive FCPA training and be kept abreast of developments in this area of the law. A culture of FCPA compliance may both prevent FCPA violations and prepare a company in case FCPA issues arise.

The combination of effective due diligence, internal controls, training, and monitoring of all agreements with intermediaries is necessary to help a company identify the "red flags" associated with FCPA violations, including suspicious or unnecessary representatives and intermediaries, conducting business in bribery-prone countries, requests for cash payments, excessive consulting fees or commissions or unusual payment patterns or financial arrangements, a refusal by prospective intermediary to certify compliance with the FCPA, reimbursement requests for inadequately documented expenses, sales to government-sponsored companies, lack of transparency in expenses and accounting records, and evidence of close personal or professional ties to a foreign official.[89]

■ Liability For The Actions Of Employees

A company can be held vicariously liable for an employee's violation of the FCPA. Under such circumstances, a "corporation may be held criminally responsible for . . . [improper activity]…committed by its employees [or agents] if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if…such acts were against corporate policy or express instructions."[90] To impose liability on a corporation, the employee or agent's improper activities need only be motivated *in part* by intent to benefit the corporation.[91]

Even if the conduct is not expressly authorized, there is a high risk of liability for a company if an employee violates the FCPA while acting, at least in part, on behalf of the company. Under these circumstances, the Government is likely to take action against both the company and the responsible employees. In fact, the SEC and the DOJ will often take action against employees who are viewed as most responsible for a company's FCPA violation.

For example, in May 2008, Willbros Group, Inc. announced that it would pay $32.3 million in penalties and disgorgement to resolve FCPA violations relating to its operations in Bolivia, Ecuador, and Nigeria.[92] In addition to the company's settlement with the SEC and deferred prosecution agreement with the DOJ, the Government brought charges against company employees and officers responsible for the improper conduct. Specifically, on July 23, 2007, the DOJ announced the indictment of a former executive of a Willbros subsidiary, Jason Edward Steph.[93] The Government charged Steph with conspiring to make over $6 million in improper payments to Nigerian officials and with money laundering based on the international transfer of some of the bribe money. The Government also filed similar charges against Jim Bob Brown, a former Willbros executive who participated in three separate schemes to bribe foreign officials.[94] Brown pleaded guilty to the charges brought by the DOJ and entered into an agreement with the SEC to be enjoined from future violations for the FCPA. Other examples of the Government's heightened pursuit of responsible employees and executives include Si Chan Wooh of Schnitzer Steel Industries Inc.,[95] Steven Lynwood Head of Titan Corp.,[96] and David Kay, Douglas Murphy, and Lawrence H. Theriot of American Rice, Inc.[97] These enforcement actions against both the companies and their employees demonstrate the Government's willingness to pursue dual actions against corporations and responsible individuals for their violations of the FCPA.

■ Liability For The Actions Of Subsidiaries Or Affiliates

In addition to liability based on the actions of its employees, companies may be held liable for the acts of their subsidiaries or affiliates. Under the books-and-records provisions of the FCPA, each issuer is responsible for the books and records of domestic and foreign subsidiaries and affiliates over which it holds greater than 50% of the voting power.[98] Under these circumstances, companies must ensure their subsidiaries and affiliates comply with the FCPA's recordkeeping provisions.[99] If an issuer holds 50% or less of the voting power of a domestic or foreign subsidiary or affiliate, it is only required to demonstrate a good faith effort to use its influence to cause the subsidiary or affiliate to comply with the FCPA's books-and-records provisions.[100] The Act requires only that the company "use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with" the FCPA.[101] The determination whether the company's conduct is "reasonable under the issuer's circumstances," depends on several factors, "includ[ing] the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located."[102]

While the FCPA expressly addresses liability for company subsidiaries and affiliates under the books-and-records provisions, there is no similar provision in the antibribery prohibitions. Regardless, a company may still be held liable for a subsidiary or affiliate's violation of the antibribery provisions if the company "authorized, directed, or controlled the activity in question."[103] Unlike the recordkeeping provisions, a company's holdings in the subsidiary or affiliate are not a primary consideration under the antibribery provisions. Instead, the Government looks to the degree of control the company has over the subsidiary or affiliate, and its level of knowledge and participation in the bribery scheme.

Increased Prosecution Of Foreign Companies & Nationals

Recent FCPA enforcement actions demonstrate that the U.S. Government is not hesitant to exercise its jurisdiction under the Act over foreign entities based on their contacts with the United States or their status as "issuers."[104] There are a multitude of reasons for the rise in foreign enforcement activity, including the globalization of the marketplace, increased international merger and acquisition activity, and a rise in voluntary disclosures of potential FCPA violations to U.S. authorities. Irrespective of the cause for this increase in activity, the U.S. Government has made clear its intention to take action against foreign companies that violate the FCPA. As noted by Alice S. Fisher, former Assistant Attorney General, the DOJ "will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies."[105]

While enforcement activity involving the foreign subsidiaries of U.S. parent companies has been prevalent for quite some time, since 2004 there has been a steady increase in the number of FCPA investigations involving purely foreign companies. For example, in December 2007, Akzo Nobel N.V., a Netherlands-based pharmaceutical company that trades ADRs, settled an enforcement action with the SEC in relation to its violations of the FCPA's recordkeeping and internal control provisions.[106] According to the SEC's complaint, two of Akzo Nobel's subsidiaries made $279,491 in improper payments in connection with sales in Iraq under the U.N. Oil-for-Food Program. The subsidiaries characterized the payments as "after-sales service fees," though no legitimate services were performed. In settling with the SEC, Akzo Nobel agreed to pay a $750,000 penalty (plus $584,150 in prejudgment interest) and disgorge $1,647,363 in profits. Akzo Nobel also entered into a nonprosecution agreement with the DOJ.

Similarly, in 2006, Statoil ASA, a Norwegian oil and gas company that trades ADRs on the New York Stock Exchange, settled enforcement actions with the SEC and the DOJ in connection with payments totaling $5.2 million to the head of the Iranian Fuel Consumption Optimizing Organization, a subsidiary of the National Iranian Oil Company, through an offshore intermediary company consultant.[107] The consultant made the payments in an attempt to persuade the official to use his influence to secure an oil and gas field contract for Statoil. In settling with the DOJ, Statoil entered into a three-year deferred prosecution agreement and agreed to pay $10.5 million in disgorgement. In its SEC settlement, Statoil consented to the entry of an administrative order requiring the company to cease and desist from committing any future violations of the FCPA, agreed to pay $10.5 million in disgorgement, and agreed to retain a compliance monitor for three years. The company also paid a fine to the Norway National Authority for Investigation and Prosecution of Economic Crime for the same activity—an amount deducted from the U.S. fines.

Likewise, on March 20, 2008, AB Volvo, a Swedish company, settled its enforcement actions with the SEC and the DOJ in connection with improper activity involving the Oil For Food Program.[108] Two of its subsidiaries, Renault Trucks SAS (France) and Volvo Construction Equipment AB (Switzerland), also settled charges of engaging in conspiracies to commit wire fraud and to violate the books-and-records provisions of the FCPA. The settlements included fines, disgorgement, and interest totaling about $19.6 million. Similarly, as noted above, Paradigm, B.V., a company headquartered in the Netherlands, also settled an FCPA enforcement action in 2007 in connection with improper payments made to officials in China, Mexico, Nigeria, Indonesia, and Kazakhstan.[109] The company entered into a deferred prosecution agreement with the DOJ, agreeing to pay a $1 million fine, retain an independent compliance monitor, and adopt more stringent compliance controls. Notably, Paradigm relocated its principal place of business from Israel to the United States in 2005, changing its status to a "domestic concern," though the DOJ took pre-relocation improper activity into account in this matter.

The Government has also shown an increased interest in prosecuting foreign nationals under the FCPA. In March 2007, the DOJ indicted Christian Sapsizian, a French citizen, and former executive of French telecommunications Alcatel CIT.[110]

Sapsizian pleaded guilty to violating the FCPA by making more than $2.5 million in improper payments to Costa Rican government officials to obtain a telecommunications contract. The Government also indicted Edgar Valverde Acosta, a Costa Rican national and Senior Country Officer of Alcatel's Costa Rican subsidiary, based in the same conduct.[111] Another example involves a civil injunction filed by the SEC against four former employees of subsidiaries of ABB Ltd., a Swiss company that trades its ADRs on the New York Stock Exchange.[112] The SEC complaint alleged that the four employees, John Samson, John G. A. Munro, Ian N. Campbell, and John H. Whelan, participated in a scheme to bribe Nigerian government officials in furtherance of ABB's bid to obtain a government contract to provide equipment for an oil drilling project. Samson, Munro, and Campbell are British citizens, while Whelan is a U.S. citizen. All four were alleged to have violated both the antibribery and books-and-records and internal control provisions of the FCPA. Likewise, in September 2007, the SEC settled a civil enforcement action against Chandramowli Srinivasan, a resident of Delhi, India and the former president of A.T. Kearney India, a subsidiary of Electronic Data Systems Corp. at the time.[113] The complaint alleged that Srinivasan directed at least $720,000 in illicit payments to senior employees of Indian state-owned enterprises to retain its business with those enterprises. On a neither admit-nor-deny basis, the SEC ordered Srinivasan to pay a $70,000 penalty.

While there have only been a handful of purely foreign companies and nationals that have settled FCPA enforcement actions, dozens of foreign companies have recently disclosed potential violations of the FCPA and are currently under investigation for the improper activity, including "ABB (Switzerland, energy); Alcatel Lucent (France, communications); AstraZeneca (UK-Sweden, pharmaceuticals); BAE Systems (UK, defence); Daimler (Germany, automotive); Innospec (UK, chemicals); Magyar Telekom (Hungary, telecoms); Norsk Hydro (Norway, energy); Novo Nordisk (Denmark, health, pharmaceuticals); Panalpina (Switzerland, transport); Siemens (Germany, engineering, electronics); Smith & Nephew (UK, medical devices); Total (France, energy)."[114]

Another trend that has arisen with respect to the prosecution of foreign companies and nationals is parallel prosecutions and investigations. FCPA enforcement is just one weapon in an arsenal of international agreements enacted to combat bribery throughout the world, including the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions, Inter-American Convention Against Corruption, United Nations Convention Against Corruption, and the African Union Convention on Preventing and Combating Corruption. Recent enforcement activity and investigations indicate that disclosure to foreign officials and a full investigation of a firm by foreign prosecutors does not preclude U.S. authorities from pursuing a matter. Rather, coordination between the United States and foreign authorities has resulted in an increase in the number of joint investigations and FCPA enforcement actions.

Of course, even if a foreign prosecutor declines to pursue allegations of bribery, the U.S. is still likely to act if it has jurisdiction over the matter. For example, as discussed earlier, in 2006, Statoil ASA, a Norwegian company, settled an FCPA enforcement action with the DOJ by agreeing to pay $21 million—half as a fine payable to the DOJ and half as disgorgement and prejudgment interest to the SEC. The DOJ pursued the case even though Statoil had already been investigated and fined $3 million by Norwegian authorities for the same improper activity.[115] Similarly, in its announcement of a deferred prosecution agreement with Akzo Nobel for its violation of the FCPA, the DOJ noted that the Dutch National Public Prosecutor's Office for Financial, Economic, and Environmental Offences was also investigating an Akzo subsidiary regarding its conduct under the Oil for Food Program, and it was expected the company would pay a criminal fine of approximately €381,000 in the Netherlands.[116] Under the agreement with the DOJ, failure to resolve the charges with Dutch officials would require Akzo to pay $800,000 to the U.S. Treasury.

The United States is also currently investigating allegations into Siemens AG's potential violations of the FCPA.[117] Some estimates indicate the company has uncovered over $1.9 billion in questionable payments. It is expected the investigation will potentially result in the largest fines in history,[118] despite the fact that Siemens has already paid fines ordered by German courts totaling over $290 million (based on related charges).[119] The company has also reportedly spent over $500 million on its internal investigation into the improper activity.[120] Similar investigations into Siemens' improper activity are taking place in over 10 different countries and German courts are currently prosecuting individuals responsible for the corrupt activity. In July 2008, German authorities announced a criminal verdict of breach of trust against Reinhard Siekaczek for his role in funneling €49 million ($77 million) into slush funds for bribes to help win contracts for the company.[121]

A parallel prosecution that has received enormous publicity involves BAE Systems, PLC. The United States is investigating allegations of improper activity related to BAE's £40 billion Al Yamamah arms contract with Saudi Arabia.[122] The British Serious Fraud Office closed its inquiry into the matter in 2006, but the DOJ continued with its inquiry based on, among other reasons, reports that the company spent £1.1 million in Los Angeles, Las Vegas, and New York to cover the cost of hotels, security, transportation, and other expenses for visiting senior Saudi officials.[123] In its investigation into the allegations against BAE, the United States has coordinated its investigative efforts with Swiss authorities who have agreed to provide relevant financial records to assist the DOJ's investigation.[124] On July 30, 2008, the House of Lords, the United Kingdom's highest court, overruled a lower court finding that the Serious Fraud Office had improperly closed the investigation into the bribery allegations.[125] Despite finding that the Serious Fraud Office acted lawfully in closing its investigation, the court's ruling is unlikely to deter the U.S. investigation into this matter.

Given the U.S. authorities' intent to aggressively pursue foreign companies that violate the FCPA, it is imperative that any foreign company subject to U.S. jurisdiction take all necessary steps to ensure compliance with the law.

Voluntary Disclosures & The Costs Of Violating The FCPA

■ Trend Of Voluntarily Disclosing FCPA Violations

Most FCPA investigations and enforcement actions today are prompted by voluntary disclosures of potential violations. While companies are not required by law to voluntarily disclose potential FCPA violations, they usually do so based on legal, financial, and reputational considerations. The primary reason for the dramatic increase in the number of FCPA investigations and enforcement actions is the Sarbanes-Oxley Act of 2002.[126] Under Sarbanes-Oxley, companies must do more than tighten their internal controls and verify the accuracy of accounts and financial statements; they must also identify any "material weaknesses" that affect the internal controls, including potential improper activity, and address these matters within a reasonable time. Sarbanes-Oxley also imposes increased obligations on companies to disclose potential liabilities to shareholders—a requirement that encourages companies to be forthcoming about potential FCPA violations as well. In addition to the influence of Sarbanes-Oxley, there has been a general trend in FCPA enforcement for companies to voluntarily disclose potential violations and to cooperate with U.S. officials in an attempt to achieve favorable treatment and mitigate potential penalties.

Although the Government claims it will reward companies that self-report improper activity, a review of recent enforcement actions demonstrates that the SEC and the DOJ are still likely to impose harsh penalties on companies that voluntarily disclose FCPA violations. For example, in an enforcement action noted above, Willbros Group, Inc. announced in May 2008 that it would pay $32.3 million in penalties and disgorgement (a $22 million criminal penalty to the DOJ and $10.3 in disgorgement and prejudgment interest to the SEC) to resolve FCPA violations after the company self-reported the potential violations to the Government.[127] Although the Government claimed that it considered Willbros' voluntary disclosure in determining its penalty, it is difficult to discern exactly how the voluntary disclosure mitigated the penalty in this matter. Furthermore, after Schnitzer Steel voluntarily disclosed a $1.9 million improper payment, the Government fined the company $7.5 million in criminal penalties and $7.7 million in disgorgement.[128] In contrast, after the Government learned of Statoil ASA's $5.2 million in improper payments from Norwegian newspapers, the U.S. Government fined the company $10.5 million in criminal penalties and $10.5 million in disgorgement of profit.[129] A comparison of these two actions does not adequately demonstrate the benefit Schnitzer received from its voluntary disclosure.

The Government encourages the voluntary disclosure by parties that discover potential FCPA violations and, while declining to guarantee a specific outcome, contends a company will receive some benefit in return.[130] To date, the Government has neither clarified nor demonstrated what constitutes the "benefit" received in return for a complete disclosure and cooperation with Government investigations, but has stated that a voluntary disclosure will be considered by the government when determining a penalty.[131] Former Assistant Attorney General Alice Fisher explained the reason for the lack of clarity as follows:[132]

> [I]t would not make sense for law enforcement to make one-size-fits-all promises about the benefits of voluntary disclosure before getting all of the facts.
>
> It also would not be in the best interests of law enforcement to make promises about lenient treatment in cases where the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty. But what I can say is that there is *always* a benefit to corporate cooperation, including voluntary disclosure....
>
> The fact is, if you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you *will* get a benefit. It may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.
>
> There have been cases where companies have come in and voluntarily disclosed real FCPA violations that we have not prosecuted at all. On the other hand, in other cases a voluntary disclosure might result in a guilty plea, depending on the circumstances.
>
> So although nothing is off the table when you voluntarily disclose, I can tell you in unequivocal terms that you will get a *real* benefit— just like Schnitzer Steel did. As I said earlier, Schnitzer Steel was an excellent example of corporate cooperation.

Despite the Government's assurances that self-reporting and cooperation will result in a tangible benefit, recent enforcement trends do not reflect this promise. As a result, it remains to be seen whether companies will continue to choose voluntary disclosure as the preferred method of resolving FCPA violations.

■ FCPA Enforcement Tools: Fines, Penalties & Incarceration

The FCPA provides both criminal and civil penalties for the violation of its provisions. Penalties for violations of the antibribery provisions include a fine of up to $2 million and a $10,000 civil penalty for corporations and other business entities and a $10,000 civil penalty and a fine of up to $100,000 and five years' imprisonment for willful violations for officers, directors, stockholders, employees, and agents (including non-U.S. nationals).[133] Violations of the recordkeeping and internal control provisions are typically punished with civil penalties that range in size depending on the circumstances. Specifically, maximum civil penalties range from $5,000 to $100,000 for an individual and $50,000 to $500,000 for an entity, or the gross amount of pecuniary gain.[134] Criminal violations of the books-and-records provisions carry a maximum penalty of a $25 million fine for entities, a $5 million fine and 20 years' incarceration for persons, or twice the amount of pecuniary gain to the defendant or loss caused to anyone else.[135] Further, under the "Sentence of Fine" statute, the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment.[136] The Government also usually seeks disgorgement of any ill-gotten gains associated with the improper activity.

Beyond monetary and pecuniary penalties, the Government has a laundry list of administrative penalties that it can use against violators of the FCPA. For example, companies that do business with the Government may be debarred or suspended from future Government contracting opportunities.[137] Companies or persons may also be deemed ineligible to receive export licenses, barred from trading securities, or prohibited from participating in other agency programs.[138]

There appears to be no consistent pattern to the determination of penalties associated with FCPA violations. While certain factors (e.g., the size of the bribe, the benefit a company receives from its improper activity, and prior FCPA violations) are likely to influence the penalty determination, the process lacks transparency. Still, the Government has been aggressive in its punishment of FCPA violators and recent enforcement actions have resulted in the largest fines in FCPA history. In addition to Baker Hughes' $44 million settlement,[139] other companies have been required to pay in the tens of millions to settle their FCPA cases. In May 2008, as described above, Willbros Group, Inc. announced that it would pay $32.3 million in penalties and disgorgement to resolve FCPA violations relating to its operations in Bolivia, Ecuador, and Nigeria.[140] The Government alleged that Willbros employees made corrupt payments totaling more than $6.3 million to Nigerian government officials to assist in obtaining and retaining a $387 million contract. On November 14, 2007, Chevron Corp. agreed to pay a $30 million to settle FCPA charges that it made over $20 million in improper payments.[141] Of the $30 million penalty Chevron paid to settle this matter, $25 million constituted disgorgement. Also, in March 2005, Titan paid $28.5 million (the pre-Baker Hughes fine recordholder) for bribes totaling $3.5 million.[142] The Government claims it considers factors such as voluntary disclosure, cooperation, and FCPA compliance programs when determining how to penalize a company for violating the FCPA. It is not clear, however, how much these additional factors influence the penalty determination.

■ Settlements, Nonprosecution/Deferred Prosecution Agreements & Corporate Monitors

Currently, most enforcement actions brought by the Government are resolved either by the execution of a consent decree (SEC), a nonprosecution or deferred prosecution agreement (DOJ), or both. A typical nonprosecution or deferred prosecution agreement contains a promise by the Government to refrain from criminally prosecuting a company in exchange for cooperation, changes in the corporate structure, continued compliance with the FCPA, and the payment of any fines or penalties imposed as a result of the improper activity. These agreements allow the Government to administer punishment and extract concessions while reserving the right to take action against the company at a later date should the company fail to follow through with its compliance obligations or if further violations are discovered. Because of the reputational damage associated with a conviction, companies often prefer to resolve FCPA violations in this manner, though it is certainly arguable that most of the reputational damage has already occurred by the time an FCPA violation becomes public knowledge. Even without a conviction, companies will still be subjected to negative press, reputational harm, and a potential loss of business as the result of public release of FCPA allegations. Still, this appears to be the preferred course of action for companies at this time.

The prevalence of these agreements has also resulted in another trend: the appointment of an independent compliance monitor as a condition to settlement. Monitors are retained at the company's expense and are tasked with scrutinizing the company's compliance with the FCPA for a specific period of time (typically two or three years). A review of recent enforcement actions suggests a trend of requiring monitors in most FCPA resolutions, regardless of the circumstances of a particular matter.[143] The DOJ, however, contends that various factors are considered when determining whether to require the appointment of a monitor, including "the strength of the company's existing management and compliance team, the pervasiveness of the problem, and the strength of the company's existing FCPA policies and procedures."[144]

Independent monitors are very expensive and companies are generally responsible for adopting the FCPA compliance recommendations suggested by the monitor. Not only must a company pay for cost of the monitor's services (typically at high hourly rates), but they must absorb the costs of implementing the compliance recommendations—an undertaking that can be quite costly depending on the extent of the monitor's recommendations. In addition to monetary considerations, independent monitors put a company at significant risk for the discovery and disclosure of additional FCPA violations. Because the monitor is charged by the Government with filing regular reports on a company's compliance with its recommendations and the FCPA in general, any improper activity or noncompliance that is discovered may have to be reported under the terms of a particular agreement. This has resulted in additional concerns over the implications for confidentiality and attorney-client privilege that may be weakened by the presence of such third-parties within the companies.[145]

In response to recent criticism associated with the use of corporate monitors in the resolution of enforcement actions, on March 7, 2008, the DOJ issued a memorandum setting forth nine principles to guide the use of monitors in deferred and nonprosecution arrangements.[146] The memorandum, titled "The Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements With Corporations," provides guidelines to be followed when selecting a monitor and defining the terms of a monitor arrangement. It also makes clear that the guidance is considered by the DOJ to be "practical and flexible," and will often vary giving the facts and circumstances of each particular enforcement action (e.g., whether the company does not have an effective internal compliance program or has ceased operations in the area where the criminal misconduct occurred). The nine principles address, in general (1) the qualifications to consider in selecting a monitor, (2) the independence of a monitor, (3) the monitor's responsibilities, (4) the scope of the monitorship, (5) communication with the Government, (6) adoption or dispute of the monitor's recommendations, (7) reporting of previously undisclosed or new misconduct, (8) the duration of the monitorship, and (9) termination. While the principles attempt to provide more uniformity with respect to the appointment of monitors and the scope of their arrangements, they still leave prosecutors with great discretion to carry out these obligations. It remains to be seen whether the new policies will inject transparency into the process and result in a more uniform application of this process.

■ Collateral Or Related Litigation

In addition to the high fines and potential jail time that FCPA violators may face, companies may find themselves defending additional lawsuits brought by private parties. There has been an explosion recently in collateral civil litigation brought by angry shareholders of corporations charged with violating the FCPA. Typical cases generally include Securities Exchange Act of 1934 § 10(b)[147] securities fraud actions and shareholder derivative suits. For example, after settling an enforcement action totaling more than $2.95 million with both the SEC and the DOJ,[148] FARO Technologies, Inc. settled a securities fraud class action lawsuit for $6.875 million. The complaint alleged that the company deliberately misrepresented information regarding the adequacy of the company's systems of internal controls and misreported critical financial information regarding FARO's performance to artificially inflate the company's stock price.[149] Similarly, a Michigan public pension fund filed suit against BAE Systems alleging that BAE's directors negligently and recklessly breached their fiduciary duties by allowing managers to violate the FCPA.[150] Titan Corp. also faced multiple suits from its shareholders after its FCPA enforcement actions became public.[151] These cases demonstrate that any "benefit" a company may realize in avoiding conviction and settling FCPA charges with the Government may still result in costly consequences. Once an FCPA enforcement action is made public, shareholders may seek redress for the penalties and reputational harm attributed to a company's failure to prevent violations of the FCPA.

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. Draft and implement an FCPA policy that explains the Act's requirements and defines its provisions. Require all employees involved with international transactions and accounting matters to certify that they have received and read a copy of the policy. The policy should be easy to understand and avoid the use of excessive legalese.

2. Establish a culture of compliance, making clear acceptable practices with respect to overseas activity, recordkeeping, and internal controls. A zero-tolerance policy towards noncompliance should be instituted and management should be clear about its commitment to FCPA compliance.

3. Make the FCPA policy applicable to all company subsidiaries and their employees. All policy directives should control, even if a foreign subsidiary's local law provides different requirements. Any discrepancy should be reported to company legal counsel.

4. Institute an ethics "hotline" or other internal reporting mechanism and encourage employees to report any suspicious activities to the company compliance officer (or company legal counsel). Assure employees that there will be no reprisal if a violation or potential violation is reported. If possible, employees should be able to file reports anonymously.

5. Expressly prohibit making any facilitating or "grease" payments without prior, written approval from company legal counsel. If a payment is approved by legal counsel, the company must ensure that it is properly recorded in the company books and records as a "facilitating payment."

6. Do not pay any "promotional expenses," including the travel, lodging, or entertainment expenses of foreign officials without the prior, written approval of company legal counsel. Any trip involving a foreign official must have a legitimate business purpose and must be narrowly tailored to serve this purpose.

7. Carefully scrutinize all prospective business relationships with foreign agents or representatives. Due diligence must be thorough and well documented and reviewed by high-level company officers or management. Any agreement executed between the company and intermediary must expressly require compliance with the FCPA.

8. Review all agreements with foreign intermediaries frequently and carefully monitor all transactions executed under the agreement.

9. Be on the lookout for FCPA "red flags" at all times.

★ REFERENCES ★

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2/ Prepared Remarks of Alice S. Fisher, Ass't Att'y Gen., U.S. Dept. of Justice, at the ABA Nat'l Inst. on the FCPA, Omni Shoreham Hotel, Washington, D.C. (Oct. 16, 2006) [hereinafter Fisher Remarks].

3/ Statement of the Hon. Michael B. Mukasey, Att'y Gen., U.S. Dept. of Justice, Before the S. Comm. on the Judiciary Concerning Oversight of the U.S. Dep't of Justice (Jan. 30, 2008).

4/ Id.

5/ See Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8, at 1 (July 2005).

6/ 15 U.S.C.A. §§ 78dd-1(e), 78dd-2(f); 28 C.F.R. pt. 80.

7/ Fisher Remarks, supra note 2, at 8.

8/ 15 U.S.C.A. §§ 7201–7266. See generally Barsalona & Treccagnoli, "Accounting for Long-Term Contracts in a Sarbanes-Oxley Environment," Briefing Papers No. 04-9 (Aug. 2004).

9/ SEC Press Release No. 2007-77, "SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order" (Apr. 26, 2007).

10/ See id. See generally Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007).

11/ Fisher Remarks, supra note 2, at 6–7.

12/ 15 U.S.C.A. §§78dd-1, 78dd-2, 78dd-3.

13/ 15 U.S.C.A. § 78m.

14/ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998); see S. Rep. No. 105-277 (1998).

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

16/ 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

17/ S. Rep. No. 105-277, at 6 (1998).

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21/ See 15 U.S.C.A. §§ 78dd-1, 78dd-2, 78dd-3.

22/ 15 U.S.C.A. § 78dd-1(a).

23/ 15 U.S.C.A. § 78dd-2(h)(1).

24/ 15 U.S.C.A. § 78dd-3(a).

25/ 15 U.S.C.A. §§ 78dd-1(g), 78dd-2(i).

26/ 15 U.S.C.A. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

27/ 15 U.S.C.A. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

28/ 15 U.S.C.A. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).

29/ See 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 an item of value given to him by reason of his position").

30/ 15 U.S.C.A. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).

31/ 15 U.S.C.A. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).

32/ S. Rep. No. 95-114, at 10 (1977).

33/ 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

34/ United States v. Kay, 359 F.3d 738, 754 (5th Cir. 2004).

35/ 15 U.S.C.A. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a); see U.S. Attorneys' Criminal Resource Manual tit. 9, § 1018, "Prohibited Foreign Corrupt Practices."

36/ 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

37/ Kay, 359 F.3d at 755.

38/ Kay, 359 F.3d at 749.

39/ Kay, 359 F.3d at 749; see also SEC Press Release No. 2007-201, "SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payments to Nigerian Government Officials and Other Violations" (Sept. 26, 2007).

40/ DOJ Press Release No. 07-075, "Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree To Pay $26 Million in Criminal Fines" (Feb. 6, 2007).

41/ United States v. Vitusa Corp., Cr. No. 93-253 (D.N.J. 1994).

42/ 15 U.S.C.A. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

43/ 15 U.S.C.A. §§ 78dd-1(f)(2)(A), 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

44/ 15 U.S.C.A. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), 78dd-3(f)(3)(B).

45/ H.R. Conf. Rep. No. 100-576, at 920 (1988).

46/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

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

48/ 15 U.S.C.A. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).

49/ 15 U.S.C.A. §§78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).

50/ 15 U.S.C.A. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c).

51/ SEC v. Lucent Techs. Inc., Civ. A. No. 1:07-cv-02301 (D.D.C. filed Dec. 21, 2007); SEC Litigation Release No. 20414 (Dec. 21, 2007); DOJ Press Release No. 07-1028, "Lucent Technologies Inc. Agrees To Pay $1 Million Fine To Resolve FCPA Allegation" (Dec. 21, 2007).

52/ SEC v. Ingersoll-Rand Co. Ltd., Civ. A. No. 107-CV-01955 (D.D.C. Oct. 31, 2007); SEC Litigation Release No. 20353 (Oct. 31, 2007); DOJ Press Release No. 07-872, "Ingersoll-Rand Agrees To Pay $2.5 Million Fine in Connection With Payment of Kickbacks Under the U.N. Oil for Food Program" (Oct. 31, 2007).

53/ SEC v. Delta & Pine Land Co. & Turk Deltapine, Inc., Case No. 1:07-CV-01352 (RWR) (D.D.C. filed July 25, 2007); SEC Litigation Release No. 20214 (July 26, 2007).

54/ DOJ Press Release No. 07-751, "Paradigm B.V. Agrees To Pay $1 Million Penalty To Resolve Foreign Bribery Issues in Multiple Countries" (Sept. 24, 2007); Agreement Between U.S. Dep't of Justice, Crim. Div., Fraud Section and Paradigm B.V. (Sept. 21, 2007).

55/ See FCPA Opinion Procedure Release No. 2007-01 (July 24, 2007); FCPA Opinion Procedure Release No. 2007-02 (Sept. 11, 2007).

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57/ See Complaint for Permanent Injunction and Ancillary Relief in United States v. Metcalf & Eddy, Inc., No. 99CV12566-NG (D. Mass. 1999) (upgrading airline tickets to first class for both the official and his family).

58/ FCPA Opinion Procedure Release No. 2004-01 (Jan. 6, 2004); FCPA Opinion Procedure Release No. 2007-01 (July 24, 2007).

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60/ FCPA Opinion Procedure Release No. 2008-03 (July 11, 2008); FCPA Opinion Procedure Release No. 2007-02 (Sept. 11, 2007).

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65/ FCPA Opinion Procedure Release No. 2007-01 (July 24, 2007).

66/ FCPA Opinion Procedure Release No. 2007-01 (July 24, 2007).

67/ 15 U.S.C.A. § 78m.

68/ See 15 U.S.C.A. § 78m(b)(2).

69/ 15 U.S.C.A. § 78m(b)(2).

70/ 15 U.S.C.A. § 78m(b)(2).

71/ 15 U.S.C.A. § 78m(b)(4), (5).

72/ U.S. Attorneys' Criminal Resource Manual tit. 9, § 1017, "FCPA Corporate Recordkeeping."

73/ SEC v. Schering-Plough Corp., Civ. A. No. 1:04CV00945 (D.D.C. filed June 8, 2004); SEC Litigation Release No. 18740 (June 9, 2004); see also Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8 (July 2005).

74/ SEC v. Lucent Techs., Inc., Civ. A. No. 1:07-cv-02301 (D.D.C. filed Dec. 21, 2007); SEC Litigation Release No. 20414 (Dec. 21, 2007); DOJ Press Release No. 07-1028, "Lucent Technologies Inc. Agrees To Pay $1 Million Fine To Resolve FCPA Allegation" (Dec. 21, 2007).

75/ 15 U.S.C.A. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

76/ See DOJ FCPA Opinion Procedure Release No. 97-01 (Feb. 27, 1997); see DOJ, Lay-Person's Guide to FCPA, available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.

77/ DOJ FCPA Opinion Procedure Release No. 04-02 (July 12, 2004).

78/ DOJ FCPA Opinion Procedure Release No. 08-03 (July 11, 2008); DOJ FCPA Opinion Procedure Release No. 97-01 (Feb. 27, 1997); DOJ FCPA Review Procedure Release No. 84-01 (Aug. 16, 1984); see also Dyer, "Foreign Corrupt Practices Act," Briefing Papers No. 00-5 (Apr. 2000).

79/ DOJ FCPA Review Procedure Release No. 84-01 (Aug. 16, 1984).

80/ DOJ FCPA Opinion Procedure Release No. 04-02 (July 12, 2004).

81/ DOJ FCPA Review Procedure Release No. 84-01 (Aug. 16, 1984).

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87/ DOJ FCPA Opinion Procedure Release No. 04-02 (July 12, 2004).

88/ DOJ FCPA Opinion Procedure Release No. 04-02 (July 12, 2004).

89/ See DOJ, Lay-Person's Guide to FCPA, available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html. See generally Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8 (July 2005).

90/ United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) (citing United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083 (1981)).

91/ See United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985); see also United States v. Bainbridge Mgmt., L.P., 2002 WL 31006135, at *4 (N.D. Ill. 2002) (citing United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984)) ("Criminal liability is generally imposed when the acts of a corporate officer or executive were 'actuated, at least in part, by a purpose to serve the master.'").

92/ SEC v. Willbros Group, Inc., Civ. A. No. 4:08-CV-01494 (S.D. Tex. filed May 14, 2008); SEC Litigation Release No. 20571 (May 14, 2008); DOJ Press Release No. 08-417, "Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees To Pay $22 Million Penalty for FCPA Violations" (May 14, 2008).

93/ See United States v. Jason Edward Steph, Cr. No. H 07-307 (S.D. Tex. filed July 19, 2007); DOJ Press Release No. 07-530, "Former Executive of Willbros Group Inc. Indicted on Foreign Corrupt Practices Act Charges" (July 23, 2007).

94/ United States v. Jim Bob Brown, No. 4:06-cr-00316 (S.D. Tex. 2006); SEC Litigation Release No. 19832 (Sept. 14, 2006); DOJ Press Release No. 06-621, "Former Executive of Willbros Subsidiary Pleads Guilty to Conspiring To Bribe Foreign Officials in Nigeria and Ecuador" (Sept. 14, 2006).

95/ United States v. Si Chan Wooh, No. 07-cr-244-KI (D. Or. June 2007); SEC v. Si Chan Wooh, No. 07-cv-957-ST (D. Or. June 2007); In re Schnitzer Steel Indus., Inc., SEC Administrative Proceeding File No. 3-12456 (Oct. 16. 2006); DOJ Press Release No. 06-707, "Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees To Pay a $7.5 Million Criminal Fine" (Oct. 16, 2006).

96/ United States v. Steven Lynwood Head, No. 06-cr-01380 (S.D. Cal. June 2006); SEC v. Titan Corp., Civ. A. No. 05-0411 (D.D.C. filed Mar. 1, 2005); SEC Accounting and Auditing Enforcement Release No. 2204 (Mar.1, 2005).

97/ United States v. David Kay & Douglas Murphy, Cr. No. 4-01-914 (S.D. Tex., Apr. 2002); SEC v. Douglas A. Murphy, David G. Kay & Lawrence H. Theriot, Civ. A. No. H-02-2908 (S.D. Tex. 2002).

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99/ 15 U.S.C.A. § 78m(b)(6).

100/ 15 U.S.C.A. § 78m(b)(6).

101/ 15 U.S.C.A. § 78m(b)(6).

102/ 15 U.S.C.A. § 78m(b)(6).

103/ DOJ, Layperson's Guide to FCPA, available at http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html.

104/ 15 U.S.C.A. §§ 78dd-1, 78dd-3.

105/ Fisher Remarks, supra note 2, at 4.

106/ SEC v. Akzo Nobel, N.V., Civ. A. No. 07-CV-02293 (D.D.C.); SEC Litigation Release No. 20410 (Dec. 20, 2007).

107/ In re Statoil ASA., SEC Administrative Proceeding File No. 3-12453 (Oct. 13, 2006); DOJ Press Release No. 06-700, "U.S. Resolves Probe Against Oil Company That Bribed Iranian Official" (Oct. 13, 2006).

108/ SEC v. AB Volvo, Civ. A. No. 08-CV-00473 (D.D.C. 2008); SEC Litigation Release No. 20504 (Mar. 20, 2008); DOJ Press Release No. 08-0220, "AB Volvo To Pay $7 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program" (Mar. 20, 2008).

109/ DOJ Press Release No. 07-751, "Paradigm B.V. Agrees To Pay $1 Million Penalty To Resolve Foreign Bribery Issues in Multiple Countries" (Sept. 24, 2007); Agreement Between U.S. Dep't of Justice, Crim. Div., Fraud Section and Paradigm B.V. (Sept. 21, 2007).

110/ United States v. Christian Sapsizian & Edgar Valverde Acosta, No. 1:06-cr-20797 (S.D. Fla. 2006); DOJ Press Release No. 07-411, "Former Alcatel Executive Pleads Guilty to Participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials To Obtain a Mobile Telephone Contract" (June 7, 2007).

111/ United States v. Christian Sapsizian & Edgar Valverde Acosta, No. 1:06-cr-20797 (S.D. Fla. 2006).

112/ SEC v. John Samson, John G. A. Munro, Ian N. Campbell & John H. Whelan, No. 1:06-CV-01217 (D.D.C. July 5, 2006); SEC Litigation Release No. 19754 (July 5, 2006).

113/ SEC v. Chandramowli Srinivasan, Civ. A. No. 1:07-CV-01699 (D.D.C.); SEC Litigation Release No. 20296 (Sept. 25, 2007); SEC Accounting and Auditing Enforcement Release No. 2726 (Sept. 25, 2007).

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116/ DOJ Press Release No. 07-1024, "Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement With Department of Justice" (Dec. 20, 2007).

117/ Esterl & Crawford, "At Siemens, a Conviction Could Trigger More Cases," Wall St. J., July 28, 2008, at B1.

118/ Baker Hughes is the current recordholder at $44 million. See SEC Press Release No. 2007-77, "SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order" (Apr. 26, 2007). See generally Irwin, Katirai & Lorello, "Due Diligence & Compliance Risk Management Abroad for Government Contractors," Briefing Papers No. 07-6 (May 2007).

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132/ Fisher Remarks, supra note 2, at 6.

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139/ Baker Hughes paid bribes totaling more than $5.2 million that generated more than $219 million in gross revenues. SEC Press Release No. 2007-77, "SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order" (Apr. 26, 2007).

140/ SEC v. Willbros Group, Inc., Civ. A. No. 4:08-CV-01494 (S.D. Tex. filed May 14, 2008); SEC Litigation Release No. 20571 (May 14, 2008); DOJ Press Release No. 08-417, "Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees To Pay $22 Million Penalty for FCPA Violations" (May 14, 2008).

141/ SEC Press Release No. 2007-230, "Chevron To Pay $30 Million To Settle Charges for Improper Payments to Iraq Under U.N. Oil For Food Program" (Nov. 14, 2007).

142/ SEC v. Titan Corp., Civ. A. No. 05-0411 (D.D.C. filed Mar. 1, 2005); Accounting and Auditing Enforcement Release No. 2204 (Mar. 1, 2005).

143/ Examples include but are not limited to Baker Hughes, Willbros Group, Faro Technologies, Schnitzer Steel, Statoil, DPC (Tianjin) Ltd., Micrus, Monsanto, Vetco International, and Titan.

144/ Fisher Remarks, supra note 2, at 7.

145/ See generally Shaheen & Geren, "Foreign Corrupt Practices Act Enforcement Trends," Briefing Papers No. 05-8 (July 2005).

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150/ Transparency International, Progress Report 2008: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials 45 (June 24, 2008), available at http://www.transparency-usa.org/documents/OECD2008ProgressReport.pdf.

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