Doing Business Under the FCPA

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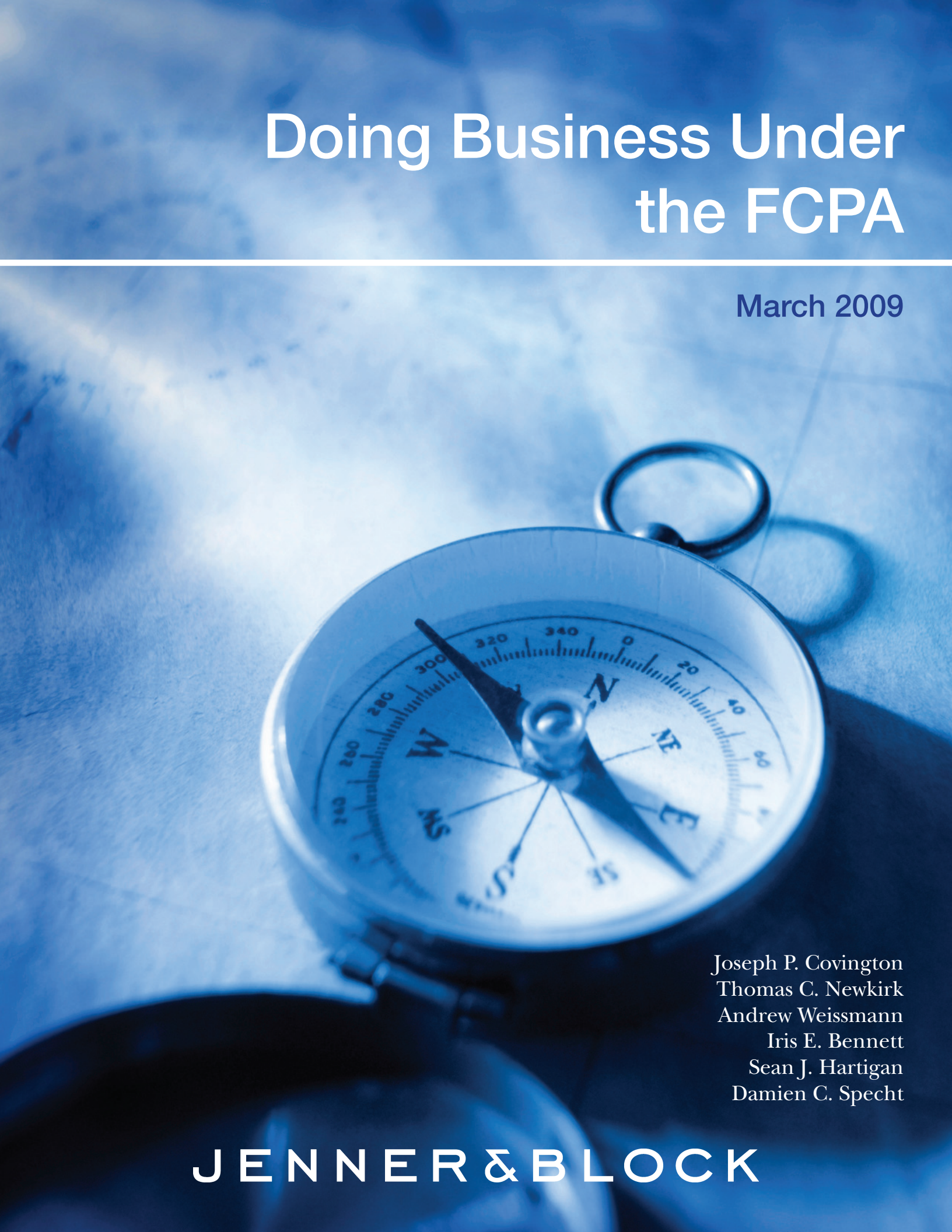

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We are pleased to present the 2009 edition of Doing Business Under the FCPA. We are now in the 31st year post-passage of the Foreign Corrupt Practices Act. Last year, the upward trend in the number of cases brought by the DOJ and SEC continued and shows no signs of slowing in the near future.

This edition includes the latest guidance on how best to confront the reality of corruption in the world's marketplaces and practical tips on how to deal with FCPA issues, both before and after the government is involved. Our attorneys have been focusing on these issues since the beginning of the FCPA, and they provide clients with a wide array of FCPA-related services.

If you have any questions about this guide, or the FCPA in general, please feel free to contact any of the authors below.

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INTRODUCTION TO THE PRACTICE GUIDE

With the FCPA entering its fourth decade, it is an apt time to comment on the historical context of this moment. There continues to be a considerable enforcement focus on the FCPA. At the same time, the country has elected a President who not only campaigned on themes of hope and change, but who also has a very different perspective on how the U.S. should interact with the rest of the world from his predecessor. Of particular note on the theme of anti-corruption is President Obama's 2006 Kenya speech. In that speech, delivered at the University of Nairobi, then-Senator Obama demonstrated that he sees corruption as evil in a very special and personal way, describing how he sees corruption as stifling economic development by "siphon[ing] off scarce resources," and "stack[ing] the deck high against entrepreneurs that cannot get their job-creating ideas off the ground." Then-Senator Obama concluded, "In the end, if the people cannot trust their government to do the job for which it exists – to protect them and to promote their common welfare – all else is lost. And this is why the struggle against corruption is one of the great struggles of our time." Secretary of State Clinton has expressed similar sentiments, stating during her Senate confirmation process that corruption must be combated in order to bring peace and stability to troubled regions of the world, because "[c]alls for expanding civil and political rights in countries plagued by mass hunger and disease will fall on deaf ears unless democracy actually delivers material benefits that improve people's lives while weeding out the corruption that too often stands in the way of progress."

The question for the coming years is whether enforcement will be increased, and what enforcement approach will be taken, to support these aspirational pronouncements. One can safely predict that federal anti-corruption enforcement authorities will be no less enthusiastic during the Obama era. Whether the resources will be there to match the rhetoric, however, is another matter. Moreover, there is the ever-present question of the uneven levels of enforcement as between the U.S. and other nations. We can predict continued efforts by U.S. authorities to urge and cajole foreign law enforcement to pursue corruption – but will other nations respond in anywhere near equal measure as U.S. law enforcement has done? We can predict that U.S. foreign policy and foreign aid strategies under the current administration will strive to achieve stable democratic regimes free of corruption – but can they really change age-old practices embedded in corrupt regimes and political processes? There is little reason to hope that foreign competition or corrupt governments will do their part to stem the demand for bribes.

Thus, we can certainly predict that U.S. law enforcement will continue to place a heavy burden on U.S. industry, consistent with the trends for 2008 noted below. But we also see that the times may present an opportunity for U.S. industry to take advantage of a unique historical moment to petition the government for an enforcement approach that fosters a more equitable distribution of the anti-corruption burden. What would be the elements of such an approach? At a minimum, we think it would include clearer and greater incentives for disclosure; a foreign policy that seeks to stem the demand from abroad through anti-corruption training programs; and funding of international enforcement organizations, especially with respect to countries where the U.S. has in the past tolerated open and notorious corrupt regimes.

One model to which U.S. companies could look in undertaking an affirmative effort to work with the Obama administration to achieve such goals would be the Defense Industry Initiative. The DII grew out of the coordinated response of leading defense contractors to criticism by a 1986 Presidential Blue Ribbon Commission report of waste, fraud and abuse in the

defense industry. The DII developed a common code of ethics and a program of voluntary disclosure to the Department of Defense. That same year, the DOJ voluntary disclosure program began; while outcomes were not guaranteed, it was generally understood and was the practice that disclosure would significantly decrease a defense contractor's chances of suspension or debarment, providing clear incentives for companies. (Effective December 12, 2008, the voluntary disclosure program was replaced by new federal regulations imposing a mandatory disclosure regime in the government contractor context.)

Whether an analogous effort to the DII in the FCPA context would bear fruit remains to be seen. Certainly, there may be additional complexities not present in the relatively homogeneous and entirely domestic – in terms of the customer – U.S. defense industry context. That said, at Jenner & Block we believe that if the moment were ever to be ripe for fresh thinking in this area, with an aim towards establishing a more level playing field for U.S. industry, then that moment is now. Of course, in order to move ahead, it is important to understand the current state of FCPA enforcement and recent trends, and those are described herein.

Trends and Events of 2008

The increased level of FCPA enforcement actions in recent years did not abate in 2008. Last year, there were 20 FCPA actions by the DOJ, and 13 by the SEC. Thus, enforcement levels were on a par with 2007, which saw 20 DOJ matters and 18 SEC matters.

- Of the 20 DOJ actions, 12 involved individuals, highlighting the risk of personal liability – and incarceration – for company executives and others that become involved in FCPA schemes. The highest profile individual case involved Albert ("Jack") Stanley, the former CEO and Chairman of Kellogg, Brown & Root, Inc. (KBR). Stanley was sentenced to seven years imprisonment for violating the FCPA, and for taking kickbacks, and is cooperating with the DOJ in an attempt to secure a reduced sentence.

- Individuals are more likely to litigate criminal prosecutions than are corporations, and 2008 saw at least two FCPA court decisions of note: first, another Fifth Circuit decision in the *Kay* matter, this time concerning the "willfulness" element of an FCPA violation; and second, an SDNY decision in *Kozeny*, concerning both the scope of the affirmative defense that a payment was lawful under the foreign jurisdiction's law, and the question of whether corrupt intent must be lacking where a payment is the product of extortion.

- Enforcement officials have stated publicly that they are taking more affirmative steps than ever to identify and prosecute FCPA cases without relying on voluntary disclosures. Voluntary disclosures continue, however, to play an important role. Four of the DOJ's eight FCPA matters against companies in 2008 were the product of voluntary disclosures. Three of the SEC's matters against companies resulted from disclosures. And a number of cases involving individuals resulted from voluntary disclosures made by the individuals' employers – the Willbros disclosure in 2008 is an example.

- A new "highest fine ever" was meted out in 2008, this time against the German corporation Siemens AG, to the tune of over $800 million in penalties and disgorgement paid to the United States (Siemens was also fined by German authorities). That said, given the extent and lengthy history of Siemens' involvement in corrupt payments, and as reflected in the sentencing documents, Siemens could have been fined far more. According to the sentencing documents, Siemens was able to avoid an even larger fine as a result of its extraordinary cooperation with the government's investigation, and in light of the additional fines being levied by the German government.

- Mandatory compliance monitors and consultants continue to play a frequent role in settlements with the DOJ and SEC. Enforcement officials have stated, however, that these onerous requirements will not be imposed in every case, and it is true that the obligations have not been imposed across the board. In 2008, the DOJ imposed an independent monitor in three out of the eight cases against companies last year; the SEC imposed a compliance consultant in two cases. Also of note, and discussed further herein, *see infra*, in 2008 the DOJ released new guidelines regarding the selection of corporate compliance monitors.

- The SEC and DOJ continue to demonstrate increased interest in prosecuting non-U.S. companies, including through cooperation with relevant foreign enforcement authorities. Siemens AG was the most dramatic example of this sort of coordinated effort, leading to more than $1.6 billion in fines and disgorgement paid by the company to U.S. and German regulators. Other less high-profile examples of this activity include the prosecutions of Fiat S.p.A., Aibel Group Ltd., and AB Volvo.

- The recent increase in FCPA investigations has led to a related trend: follow-on civil litigation by private parties. These suits have included shareholder derivative actions as well as suits arising in the merger/acquisition context, suits against business partners alleging RICO violations and contract breach, and suits by companies competing for contracts alleging RICO and antitrust violations, tortious interference, and unjust competition.

As with past versions, the 2009 edition of *Doing Business Under the FCPA* describes and analyzes the latest developments in FCPA enforcement and provides practice guidance. We also provide an overview of the statute and address typical questions that a company operating in the international marketplace may have about how to avoid running afoul of the statute. Naturally, the information presented herein is not intended to be legal advice in any specific situation. Such advice could only be provided after a full evaluation of all of the facts and circumstances of a particular matter.

THE STATUTORY FRAMEWORK

The FCPA's anti-bribery provisions prohibit payments to foreign officials for the purpose of obtaining or retaining business. *See* 15 U.S.C. §§ 78dd-1, dd-2 and dd-3. The statute's books-and-records provisions require the maintenance of reasonably accurate accounting records and adequate internal controls.

The Anti-Bribery Provisions

Substantive Prohibitions

The FCPA's anti-bribery provisions make it unlawful:

(1) Corruptly to make use of the mails or any means of instrumentality of interstate commerce, or for "persons" only, to commit any other act, 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 any of the following:

  (i) a foreign official;

  (ii) a foreign political party or official thereof;

  (iii) a candidate for foreign political office; or

  (iv) 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.[1]

(3) For the purposes of:

  (i) influencing any act or decision of such foreign official in his official capacity;

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

  (iii) securing any improper advantage; or

  (iv) 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.

[1] For convenience, the foregoing terms will hereinafter be referred to collectively as "foreign official."

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

Some comments regarding certain key elements:

Corruptly. The FCPA requires that the pertinent acts be committed "corruptly." The Act's legislative history reflects that the payments "must be intended to induce the recipient to misuse his official position." H.R. Rep. No. 95-640, at 8 (1977). "An act is 'corruptly' done if done voluntarily and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991); *see also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181-183 (2d Cir. 2003) (a "bad or wrongful purpose and an intent to influence a foreign official to misuse his official position" satisfy this element).

In a 2008 decision, *Kozeny*, a federal district court considered whether a defendant may obtain a jury instruction regarding whether corrupt intent was lacking because the bribe was the result of extortion. The court agreed that "true extortion" can be a viable defense and held that, where a defendant presents sufficient evidence, the court should instruct the jury as to what constitutes true extortion such that a defendant cannot be found to have the requisite corrupt intent. The *Kozeny* court was not called upon to decide the precise parameters of "true extortion" but concluded that it must involve more than a simple demand for payment. Citing the FCPA's legislative history, the court stated: "while the FCPA would apply to a situation in which a 'payment [is] demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract,' it would not apply to one in which payment is made to an official 'to keep an oil rig from being dynamited…'" *United States v. Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

In furtherance of an unlawful payment. This provision requires a nexus between the use of interstate commerce (or, for certain actors, any act within the United States) and the unlawful payment. In most cases it is easily met – for example, by email or telephonic communications relating to the payments, or by the wiring of money or other payment mechanisms. Importantly, the DOJ reads the provision as encompassing a much broader range of circumstances. An example is the 2008 AGA Medical Corporation matter. AGA Medical involved a scheme of improper "commissions" to doctors and patent agents in China in connection with the sales of and patent approvals for certain medical devices. While the charging documents describe email communications relating to the payments, the Justice Department also deemed the "in furtherance of" requirement to be met by the shipping of the products to China.

Something of Value. In analyzing whether something of value has been offered to a foreign official, the courts have looked not only to objective value but also to "the value the [official] subjectively attaches to the items received." *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986). Things of value under the statute include both tangible and intangible objects. *See*, *e.g.*, *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). In addition to cash and cash equivalents (stock, stock options), in the FCPA context, things of value have included: college scholarships, *see United States. v. McDade*, 827 F. Supp. 1153 (E.D. PA. 1993), *aff'd in part*, 28 F.3d 283 (3d Cir. 1994); the service of a prostitute, *see Girard*, 601 F.2d at 71, and

United States v. Marmolejo, 89 F.3d 1185, 1193 (5th Cir. 1996); and offers of future employment, *see Girard*, 601 F.2d at 71.

Authorization of unlawful payments. The FCPA prohibits not only the making but also the "authorization" of any payment or giving of anything of value to an official. 15 U.S.C. § 78dd-1(a). As discussed at more length at FAQ 3, *infra*, authorization does not have to be explicit.

The payment need not be consummated. The statute also prohibits not only improper payments but offers or promises to make such payments; thus, the payment need not actually be made in order for there to be a violation.

Knowing. The statute employs a broad definition of "knowing," which is a key element where, for example, payments to a third party are at issue. Knowledge of a relevant circumstance exists "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." 15 U.S.C. § 78dd-1(f)(2)(B). Willful blindness to circumstances indicating a high probability of unlawful activity will thus satisfy the knowledge requirement.

Improper Purpose. The offer, gift or promise to a foreign official must be given for one of four purposes in order to be punishable: (1) to influence any act or decision of such foreign official in his official capacity; (2) to induce such foreign official to do or omit to do any act in violation of the lawful duty of such official; (3) to secure any improper advantage; or (4) to induce 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.

These purposes encompass nearly every act a foreign official might take that could benefit the party making the promise, payment or offer. The first applies when the foreign official has some sort of discretion within the laws of the pertinent foreign county, and the offer, gift or promise was given in order to influence the exercise of that discretion. The second applies when a foreign official breaks the laws of the pertinent foreign country. The third purpose, "securing any improper advantage," broadly concerns "something to which the company concerned was not clearly entitled, [such as] an operating permit for a factory which fails to meet the statutory requirements." *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) ("*Kay I*"). Any advantage that was not readily available to other competitors and which was secured by a payment could be deemed as falling within the scope of this provision. *Id.* at 750-55. The fourth listed purpose focuses on persuasion of the receiving foreign official to use his or her influence within the foreign government. For example, in the 2006 Statoil matter, the government brought an enforcement action against a foreign oil company that entered into a $15 million consulting agreement with an Iranian official, the purpose of which was to induce the Iranian official to use his influence to assist the company in obtaining a contract. Statoil ASA, Exchange Act Release No. 54599 (Oct. 13, 2006).

To obtain or retain business. The leading case on this issue is *Kay I*, in which the Fifth Circuit held that this statutory requirement was satisfied by payments designed "to secure illegally reduced customs and tax liability," because lower tax payments would "more generally help[] a domestic payor obtain or retain business for some person in a foreign country." *Kay I*, 359 F.3d 738. Thus, the "obtain or retain business" provision will be read broadly.

Exceptions and Affirmative Defenses

The breadth of the FCPA is reinforced by the relatively narrow nature of the exceptions and affirmative defenses to liability. *Kay I*, 359 F.3d at 756 ("Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.").

Facilitating Payments Exception

The exception to liability is the so-called "facilitating" or "grease" payment exception, designed to permit companies to accelerate the normal operations of government without receiving special exercises of discretion by foreign officials. The exception provides that the FCPA 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." 15 U.S.C. § 78dd-1(b).

This exception is designed to cover routine, nondiscretionary "ministerial activities performed by mid- or low-level foreign functionaries," *see Kay I*, 359 F.3d at 750-51, such as:

(a) Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country;

(b) Processing governmental papers;

(c) Providing police protection, mail pickup and delivery or scheduling inspections associated with contract performance or inspections related to transit of goods;

(d) Providing phone service, power and water supply, loading and unloading cargo or protecting perishable products; or

(e) Actions of a similar nature so long as the official's decision does not involve whether, or on what terms, to award new business to or to continue business with a particular party.

15 U.S.C. § 78dd-1(f).

By carving out these narrow categories of payments from the FCPA's coverage, Congress sought to draw a line between those acts "that induce an official to act 'corruptly,' *i.e.*, actions requiring him 'to misuse his official position' and his discretionary authority," and those acts that are "essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action." *Kay I*, 359 F.3d at 747. The key is discretion – a payment that convinces an official to bestow his good graces upon a company is suspect, whereas a payment that merely advances in time a decision that would have been made anyway is less so. And, although there is no statutory limit on the amount of grease payments, the DOJ has only expressly permitted payments of less than $1,000.

Should one seek to justify a payment under the "facilitating payment" exception, one should focus on the amount in question, and whether the official must exercise any discretion or

judgment in deciding whether to issue the permit or take other requested action. Companies that permit such payments should ensure that they are reviewed and approved in advance by in-house or other counsel.

Affirmative Defenses

The FCPA contains two affirmative defenses to anti-bribery liability.

First, it is an affirmative defense that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country." 15 U.S.C. § 78dd-1(c)(1). Note that the payments must be legal under the written laws or regulations of the foreign country, and that the authorization must be express. Indirect references, such as a tax deduction for payments, do not suffice.

Kozeny addressed the scope of this affirmative defense. The defendant was alleged to have made bribes in Azerbaijan related to obtaining business with SOCAR, the state oil company. The defendant argued that the alleged payments were legal under local law because he had reported the payments to Azeri authorities, and under Azeri law the payor of a bribe is relieved from punishment if he makes such a report. 582 F. Supp.2d at 538. The court disagreed, concluding that Azeri legal provision may waive punishment but it does not render the payment itself lawful. "[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality." *Id*. at 539.

Second, it is an affirmative defense that the payment or thing of value "was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services; or . . . the execution or performance of a contract . . . ." 15 U.S.C. § 78dd-1(c)(2). This provision creates a limited exception for typical, focused demonstration and product-testing by companies seeking government contracts, or for ongoing inspections associated with the execution of such a contract.

What is clear from the DOJ Opinions[2] is that any paid expenses must be closely tailored to the company's legitimate goals. If the purpose of a trip is to demonstrate a product, then expenses should be paid for non-extravagant travel, lodging and meals for a period of time closely related to how long it takes to demonstrate the product. *See* Opinion 07-02 (approving expenses paid directly to providers for domestic air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company's U.S. headquarters); Opinion 07-01 (approving domestic expenses for four-day trip by six-person delegation of the government of an Asian country). The DOJ may permit some digression for the officials' entertainment. In Opinion 07-02, for example, the DOJ approved the payment for a modest four-hour city sightseeing tour for the six visiting foreign officials. However, expenses cannot resemble added "perks" for the officials. If a company is to pay air fare, for example, it should be economy class. *See* Opinion 07-02 (approving expenses paid directly to providers for

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[2] Under 15 U.S.C. § 78dd-1(e), the Attorney General is obligated to have in place an opinion procedure by which the Department of Justice provides "responses to specific inquiries by issuers concerning conformance of their conduct with the" FCPA. The opinions are available on the Department's website.

domestic economy air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company's U.S. headquarters). It must also be clear from the overall expense plan that the trip is for the purposes outlined in the statute and that the vast majority of expenses are advancing those ends.[3]

With respect to whether a company may finance the trip of an official's family, although there is one instance in which such payments were approved in the past, *see* Opinion 83-02 (approving payment of less than $5,000 to pay for the wife of a foreign official to travel with the official while in the U.S. visiting company sites), more recently the DOJ has demonstrated that it will prosecute such cases, so payments for officials' family members should be avoided. *See Complaint for Permanent Injunction and Ancillary Relief in United States v. Metcalf & Eddy, Inc.*, (No. 99CV12566-NG), D. Mass. 1999.

Applicability

FCPA jurisdiction is broad and extends to all U.S. companies or persons, as well as foreign companies that are registered with the SEC and foreign companies or persons that commit an act in furtherance of an improper payment or offer while in the United States.

Territorial-based jurisdiction extends to any "issuer," "domestic concern," officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or concern, that makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment. 15 U.S.C. § 78dd-1(a); *id.* § 78dd-2(a).[4] An "issuer" is any company – American or foreign – that either issues securities within the United States or is required to file reports with the SEC. *Id.* § 78c(a)(8). A "domestic concern" is a U.S. citizen, national, or resident, or a corporation or other business entity with its principal place of business in the United States or organized under the laws of the United States. *Id.* § 78dd-2(h).

Another type of territorial-based jurisdiction extends to foreign companies (or more specifically, foreign companies that are not issuers) that, while in the territory of the United States, commit any act in furtherance of an improper payment or offer. 15 U.S.C. § 78dd-3(a).

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[3] *See also* Opinion 82-01 (reasonable travel, meals and entertainment); Opinion 81-02 (product samples to government officials for testing and quality assurance); Opinion 83-02 (included travel and entertainment expenses of official's wife) (note, however, that more recent enforcement actions suggest that companies should not pay any expenses for an official's family); Opinion 85-01 (U.S. company provided travel expenses for French ministry inspection tour in U.S.); Opinion 92-01 (annual expenditures of $250,000 approved for training expenses of Pakistani officials); and Opinion 96-01 (approved $15,000/year training costs for ten officials).

[4] Interstate commerce includes making use of the mail, telephones, email and any form of interstate travel. *E.g.*, *United States v. Brika*, 487 F.3d 450, 455 (6th Cir. 2007) (telephone); *United States v. Hausmann*, 345 F.3d 952, 959 (7th Cir. 2003) (interstate mail and wire communications systems); *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005) (e-mail and internet).

Finally, nationality-based jurisdiction renders the FCPA anti-bribery provisions applicable, based on U.S. nationality alone, to those who act outside the United States in furtherance of an improper payment or offer: (1) any issuer organized under the laws of the United States; (2) United States persons that are officers, directors, employees, agents and stockholders of such issuer and are acting on behalf of such issuer; (3) any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship organized under the laws of the United States; or (4) any other citizen or national of the United States. 15 U.S.C. § 78dd-1(g); *id.* § 78dd-2(i). Thus, U.S. companies and citizens are subject to the FCPA regardless of where the act in furtherance of an improper payment or offer takes place, and without any requirement that a means of interstate commerce be used.

The Books-and-Records Provisions

The books-and-records provisions of the FCPA work in tandem with the anti-bribery provisions by requiring accurate accounting and reporting of expenditures, but they also generally impose obligations to maintain accurate books and records, whether or not there is any issue of improper payments.

Substantive Requirements

The books-and-records provisions require that any issuer:

> (A) Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
>
> (B) Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –
>
> > (i) transactions are executed in accordance with management's general or specific authorization;
> >
> > (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
> >
> > (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
> >
> > (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2).[5] These provisions make clear that issuers must compile records in accordance with generally accepted accounting standards. These requirements are not based on any sense of "materiality" as that term is generally used in securities laws. Rather, the requirement is grounded in the concept of reasonableness and accuracy – what a business manager would reasonably want and expect in his day-to-day operation of a business. Moreover, transactions below a certain amount are not exempted.

Because liability under the books-and-records provisions does not depend on proving an improper payment, these provisions may be used to sanction a company in cases involving suspected improper payments but where the government may not be able to prove or for whatever reason chooses not to pursue an anti-bribery charge. A company may be charged only with violations of the books-and-records and internal-control provisions of the FCPA, even though the underlying conduct involved improper payments to a foreign official. For example, the SEC brought administrative charges against Oil States International for violating the books-and-records and internal-controls provisions of the FCPA, even though the SEC believed that the company provided approximately $348,350 in improper payments to employees of an energy company owned by the government of Venezuela. Companies should avoid all arrangements which cannot be or are not openly recorded in the books.

Applicability

The books-and-records provisions apply only to issuers – that is, entities that have a class of securities registered pursuant to 15 U.S.C. § 78l and entities that are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d). *See* 15 U.S.C. § 78m(b)(2).

[5] Criminal liability attaches for "knowing" violations of these provisions. 15 U.S.C. § 78m(b)(4) & (5).

CONSEQUENCES OF FCPA VIOLATIONS

Violations of the FCPA's provisions can entail monetary penalties, extensive costs associated with waging a defense, harm to reputation, imposition of onerous compliance programs and the risk of imprisonment.

The maximum statutory penalties for a violation of the anti-bribery provisions are a $2,000,000 criminal fine and a $10,000 civil penalty for a corporate entity. For individuals, the maximum criminal fine is $250,000 and the maximum civil penalty is $10,000. In addition, far greater criminal fines (up to twice the amount of the benefit obtained or sought via the bribe) may be levied under the Alternative Fines Statute. And finally, individuals may be sentenced to up to five years incarceration per violation.[6] *See* 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e), 18 U.S.C. § 3571.

Violations of the books-and-records provisions are civil violations unless they are committed willfully, in which case they are punishable as criminal offenses. *See* 15 U.S.C. § 78m(b)(4)-(5). Depending on the circumstances – the statute sets forth a series of aggravating factors – maximum civil penalties per violation range from $5,000-$100,000 for an individual and $50,000-$100,000 for an entity, or the gross amount of pecuniary gain, whichever is greater. 15 U.S.C. § 78u(d)(3). In addition, the SEC often requires as a condition of settlement the disgorgement of ill-gotten gains. Criminal violations of the books-and-records provisions carry maximum penalties of a $25 million fine for entities, and a $5 million fine and 20 years incarceration for persons. 15 U.S.C. § 78ff(a).

It has also become common for the government to require appointment of an independent compliance monitor, at the company's expense, for some period of time (typically two or three years) into the future. The independent monitor is charged with making recommendations to the company for FCPA compliance with which the company generally must comply, and the monitor has reporting duties to the government. Unsurprisingly, the independent monitor requirement is an expensive proposition for any company subjected to it.

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[6] This penalty requires a "willful" violation. However, the Fifth Circuit has held that this element requires only that the defendant "acted intentionally, and not by accident or mistake" and "with the knowledge that he was doing a 'bad' act under the general rules of law." *United States v Kay*, 513 F.3d 432, 447-448 (5th Cir. 2007).

FREQUENTLY ASKED QUESTIONS

1. Who Is Subject To The FCPA?

The anti-bribery provisions apply to "issuers," "domestic concerns" and "persons." An "issuer" is any company that issues securities within the United States or files reports with the SEC. A "domestic concern" is a U.S. citizen, national, or resident, or a business entity with its principal place of business in the United States or organized under U.S. law. Any "person" that acts in furtherance of a corrupt payment within the territory of the United States, including foreign entities or persons, is also covered. Liability under the books-and-records provisions is limited to "issuers."

2. When Is An American Company Liable For The Acts Of A Foreign Subsidiary?

A company subject to the FCPA may be liable for the acts of a foreign subsidiary. Under the books-and-records provisions, even an issuer owning 50% or less of the voting power of a subsidiary must make "good faith" efforts to use to "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. 15 U.S.C. § 78m(b)(6). Relevant factors "include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located." *Id*.; *see also* H. Lowell Brown, *Parent-Subsidiary Liability under the Foreign Corrupt Practices Act*, 50 Baylor L. Rev. 1, 21 (1998). As for issuers owning more than 50% of the voting power of a subsidiary, the legislative history of the books-and-records provisions makes it apparent that such issuers must ensure that their subsidiaries comply with those FCPA provisions. *See* Brown, 50 Baylor L. Rev. at 19-21. *See also* H.R. Rep. No. 100-576, at 916-17 (1988), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/history/1988/tradeact.html.

Although liability for the acts of subsidiaries typically arises in connection with books-and-records violations, a parent corporation or its officials also "may be held liable for the acts of [a] foreign subsidiar[y] where they authorized, directed, or controlled the activity in question." U.S. Department of Justice, *Layperson's Guide to FCPA*, *available at* http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html. The statutory text is amenable to that interpretation. *See* 15 U.S.C. § 78dd-1(a) ("authorization of the payment of any money"). A company may also be liable for acts of a subsidiary acting as an agent of the parent, *id*., or where the corporate veil is pierced because the subsidiary is a mere alter ego of the parent, *see generally United States v. BestFoods*, 524 U.S. 51, 62 (1998).

There is significant risk, under those standards, that a parent can be held liable for the acts of a subsidiary. Unlike the books-and-records provisions, the anti-bribery provisions do not make a distinction between majority and minority ownership. *See, e.g.*, Don Zarin, Doing Business Under the FCPA: The Foreign Payments Provision § 6:3 at 6-10 to 6-11 (2007). As one commentator has noted, "where the U.S. parent is a majority shareholder of a foreign affiliate and is actively involved in the management and operations of the affiliate," it is more likely to know of improper payments. *Id.* If unrepudiated, that conduct may be construed as "implicit authorization." *Id.* However, even as a minority shareholder, a company can become aware of improper conduct and be held liable as a result, "particularly where the parent is represented on the board of directors of the affiliate." *Id.* at 6-12. The background question is

one of the parent's knowledge of and involvement in the subsidiary's affairs, which would be sorted out on a case-by-case basis and therefore should be a source of caution for U.S. companies.

3. What Does It Mean To "Authorize" An Improper Payment?

The FCPA does not define the term "authorization," and as with many aspects of the Act, the case law is undeveloped. The legislative history makes clear, however, that authorization can be implicit or explicit. *See* H.R. Rep. 95-640 (Sept. 28, 1977) ("[I]n the majority of bribery cases . . . some responsible official or employee of the U.S. parent company had knowledge of the bribery and either explicitly or implicitly approved the practice. . . . [S]uch persons could be prosecuted."); *see also* Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414, 98th Cong., 1st Sess. (1983) at 38 (Memorandum from Deputy Attorney General Edward C. Schmults) (describing standard for implicit authorization under the FCPA, noting that one may implicitly authorize a corrupt payment merely by pursuing a course of conduct that conveys an intent that an illicit payment be made).

Practitioners typically agree that the government will look broadly at all of the surrounding circumstances to determine whether there was implicit authorization. *See, e.g.*, Don Zarin, Doing Business Under the FCPA: The Foreign Payments Provision § 4:9 at 4-44 to 4-45 (2007). Such circumstances include when a company became aware of a particular payment and whether the company objected to the payment once it learned of its existence. *Id.* In addition, conscious acquiescence in a series of unauthorized acts could be interpreted as implicit authorization, *id.* at 4-44, and mere acquiescence combined with other overt acts could provide a predicate for conspiracy liability, *id.* at 4-45 (citing *United States v. Gillen*, 599 F.2d 541 (3d Cir. 1979)). Given the broad nature of the term "authorization" and the government's aggressive stance on FCPA matters of late, we urge extreme caution in this area.

4. What Is A Facilitating, Or "Grease," Payment?

The FCPA 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." 15 U.S.C. § 78dd-1(b). This exception for what are colloquially referred to as "grease payments" is designed to cover routine, nondiscretionary "ministerial activities performed by mid- or low-level foreign functionaries," *Kay I*, 359 F.3d at 750-51, such as: obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country; processing governmental papers; or providing general governmental services, such as police protection, mail, power or water. 15 U.S.C. § 78dd-1(f).

This narrow exception exempts from liability only those acts that are "essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action." *Kay I*, 359 F.3d at 747. It is recommended that companies seeking to justify payments under this exception make sure that the proposed payments are scrutinized by counsel familiar with the FCPA and the DOJ's enforcement policy. Issues to consider would be the amount of the payment and whether the official at issue must exercise any discretion or judgment in deciding whether to take the requested action. Although there is no statutory limit on the amount of grease payments, the DOJ has only expressed approval of payments of less than $1,000.

5. Are American Companies Liable For The Prior Illegal Acts Of Companies They Purchase?

An American company may be held liable for or suffer other consequences from the prior illegal acts of a company that it acquires. For example:

During the due diligence phase of GE's acquisition of InVision Technologies, it came to light that InVision had authorized its agents and distributors in Thailand, China and the Philippines to make or offer improper payments to foreign officials, and had failed to ensure accurate accounting and adequate internal controls to prevent or detect such payments. InVision voluntarily disclosed the matter to, and ultimately reached a settlement with, the SEC. The acquisition occurred during the government's investigation, and the new company – GE InVision – was required to pay over $1 million in civil penalties and disgorgement and to hire an independent monitor. The revelation of the improper conduct also spawned a private action, discussed *infra*.

In another enforcement action, the SEC brought charges against Titan Corporation for $3.5 million in payments to Titan's agent in Benin, Africa, who was the business advisor to Benin's President. Lockheed Martin Corporation had sought to acquire Titan, and the improper payments were discovered during due diligence. Ultimately Titan settled the matter for $28 million, but Lockheed's acquisition effort fell through because Titan had failed to settle with the DOJ in a timely manner.[7]

Generally, however, the DOJ does not take enforcement action against a company for pre-acquisition conduct if there was no illicit post-acquisition conduct and if, once discovered, the prior conduct was investigated and disclosed. *See, e.g.*, Opinion 01-01 (an American company purchased a foreign company and its existing contracts obtained through an agent; the DOJ took no action based on the American company's lack of knowledge of prior illegal acts in accepting the benefits of contracts); Opinion 04-02 (investment group acquired from ABB, Ltd. certain companies that had pleaded guilty to FCPA violations; the DOJ took no enforcement action where the acquirer agreed, *inter alia*, to institute an FCPA compliance plan, cooperate with the government during its continuing investigation, discipline those involved in the FCPA violations, and institute appropriate internal audit procedures).

6. Can The U.S. Government Prosecute Foreign Companies Under The Act?

Yes – and as noted one emerging enforcement trend is the U.S. government's willingness to do so. The Siemens AG prosecution, despite the fact that Siemens had already paid substantial fines to the German government, is a timely example of this trend. The prosecutions of Fiat S.p.A., Aibel Group Ltd., and AB Volvo are other examples. As to the jurisdictional hooks that make such prosecutions possible, a foreign company that becomes an "issuer" so that

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[7] *See also* Ivan R. Lehon & Gregory E. Wolksi, *United States: Gauging Risk in Acquisition Due Diligence – The Hidden Deal Killer?*, Mondaq.com (originally in Financier Worldwide), Jan. 25, 2008, *available at* http://www.mondaq.com/article.asp?articleid =56470&login=true ("exposure of fraud and the recently heightened focus on it have altered deal dynamics . . . . For a global company involved in an acquisition, the . . . FCPA is at the forefront of compliance risk[.]").

it can take advantage of U.S. capital markets is subject to the SEC's jurisdiction under FCPA. But in addition, even a foreign company that is not an issuer is subject to the FCPA if it acts in furtherance of an improper payment within the United States or its territories. A foreign company may act within the U.S., moreover, by making use of instrumentalities of U.S. interstate commerce. Thus, for example, a foreign company may be held liable if it sends an email in furtherance of the illegal activity to a U.S. citizen or company.

7. What Provisions Should An Agreement With A Foreign Representative Contain?

Agreements with foreign representatives should include the elements outlined in the DOJ's "Bechtel" Opinion, 81-01, the agency's most comprehensive pronouncement on the subject:

1. A requirement that all company payments be (a) by check or bank transfer, (b) to the foreign representative by name, (c) at its business address in-country (or where services were rendered), and (d) upon the written instructions of the foreign representative;

2. A requirement that the foreign representative independently represent its familiarity with and commitment to adhere to the FCPA. In addition to promising to make no illegal payments, the agreement should also require the representative to notify the company of any request it receives for improper payments from any company employee;

3. A provision requiring a representation that no member of the entity is a government official, an official of a political party, a candidate for political office, a consultant to a government official, or affiliated with the government official (with limited exceptions);

4. A provision confirming that the agreement is lawful in the foreign country;

5. A requirement that any assignment by the representative of any right, obligation and/or services to be performed under the agreement must be approved in writing by the company;

6. A provision permitting the company to void the agreement upon a good-faith belief that the entity has violated any of its provisions;

7. A provision permitting the company to disclose the agreement to anyone, including government organizations;

8. Provisions mandating the existence of adequate controls over reimbursable expenses. *See*, *e.g.*, Opinion 81-01 (describing provisions requiring entertainment and business meetings to occur on the same day; written approval of travel expenses; that gifts be lawful and customary in the country and be under $500 in 1981.

U.S. dollars; and that all reimbursements be on a detailed invoice, subject to company audit); and

9. Provisions demonstrating that representatives are well established entities, with sufficient resources to perform the work. The agreement should also refer to the company's selection criteria for representatives, which should include: years in operation, size and adequacy of support staff, business outlook, reputation, professional and/or technical expertise, and familiarity with and willingness to adhere to the FCPA. *See* Opinion 97-01 (documenting depth of due diligence).

A country's reputation for bribery also should be considered in assessing the sufficiency of steps taken to minimize risk in the selection of agents.

In addition to these recommendations, companies should also consider adopting a separate policy containing these guidelines and other procedures for conducting due diligence with respect to retaining and working with foreign agents. All employees involved with international agreements should be familiar with this policy and with the FCPA. The policy should contain a statement from senior management declaring the company's commitment to FCPA compliance.

Finally, although a company may conclude that it will not undertake the same degree of due diligence for service providers and distributors, those persons or entities must also be selected and managed so as to address FCPA risk. Payments to service providers or distributors can be used as a vehicle for improper payments to foreign officials.

8. May A Company Make Charitable/Educational Contributions At The Request Of A Foreign Official?

The DOJ will closely scrutinize donations made to charitable organizations or for educational purposes to ensure that any officials requesting donations, or otherwise associated with the donees, have no possible role in reviewing matters for, or providing preferential treatment to, the donating business.

For example, in the matter of Schering-Plough Corporation, the SEC charged the company with violating the books-and-records and internal-controls provisions when one of the corporation's Polish subsidiaries made charitable contributions to a legitimate charity affiliated with a Polish governmental official for the purpose of influencing the official to purchase the company's pharmaceutical products. *See* Schering-Plough, Inc., Complaint, Admin. Proc. Rel. No. 34-49838 (June 9, 2004). *See also* Opinion 80-01 (declining to take enforcement action when American firm sought to provide $10,000 annually for education of adopted children of an honorary government official whose "duties . . . are only ceremonial and do not involve substantive decision-making responsibilities"); Opinion 97-02 (declining to take enforcement action where facts demonstrated that donation would be given directly to a government entity – "and not to any foreign government official" – for the purposes of building a school).

9. May A Company Sponsor an Educational Trip For Foreign Officials or Provide Other Hospitality?

Yes, but only under the strictest conditions. Regarding educational trips, the DOJ will not take enforcement action against U.S. companies that co-sponsor seminars or pay for foreign study tours when sponsoring companies have no relevant or pending business with the government entities receiving travel benefits, and where payments either go directly to the service providers or go to the officials on presentation of valid receipts for necessary and reasonable expenses. The DOJ issued two Opinions on this issue in 2007 (Opinions 07-01 and 07-02), declining to take action against companies proposing to cover expenses of a delegation to U.S. companies' operation sites or headquarters.

There were important caveats in each Opinion, however. In Opinion 07-01, the U.S. company planned to pay the costs of domestic economy-class travel for the officials, domestic lodging, local transport and meals directly to vendors, while the foreign government would pay the costs of the international travel. Furthermore, the U.S. company would not pay any expenses for visiting spouses, family members or other guests of the foreign officials. Similarly, in Opinion 07-02, the requesting company proposed that, after the conclusion of a foreign government-sponsored internship program, the foreign officials could attend a five-day educational program at the company's headquarters in order to become familiar with the operations of a United States insurance company. The company proposed to pay for six days of expenses, with air travel limited to domestic economy seating. The DOJ also issued an opinion on this subject in 2008, advising a company that it was acceptable to pay expenses for Chinese journalists to attend a press conference, because the payments were considered "reasonable under the circumstances and directly relate[d] to 'the promotion, demonstration, or explanation of [TRACE's] products or services,'" thus falling within the FCPA's promotional expenses affirmative defense.[8]

The issues surrounding educational trips provide a sound framework to consider gifts and hospitality generally. Hospitality and gifts may be extended if they are reasonable, related to a legitimate business purpose, and not intended to influence a government official to use his authority improperly to direct business or provide an unfair advantage. These common-sense guidelines dictate that reasonable travel and lodging is usually acceptable if related to product demonstrations or contract performance activities, and reasonable entertainment (*e.g.*, meals) if connected to business meetings.[9] Similarly, low-value tangible gifts (*e.g.*, marketing items with company logos, such as pens, caps, cups, and shirts) may be given, provided such gifts are acceptable under the officials' applicable government rules and the U.S. company's ethics policies.

10. May A Company Make Commission Payments?

The payment of commissions to foreign agents is perfectly appropriate. However, they can be vehicles for bribes. That a commission's percentage rate is either low or consistent with

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[8] *See* FCPA Opinion Procedure Release No. 08-02 (June 13, 2008) *available at* www.usdoj.gov/criminal/fraud/fcpa/opinion.

[9] Of course, any such gifts and hospitality should also be legal under foreign laws and regulations applicable to the officials at issue.

the "market" rate in the country does not ensure the commission's legality. Companies should follow the guidance set forth in Opinion 81-01 (discussed at Question 5, *supra*) and ensure that any commission paid is economically defensible, *see* Opinion 96-02 and Opinion 97-01 (generally approving market rates). For other examples, *see* Opinion 82-02 (in which 1% commission to clerk of Embassy for marketing support was approved, probably more because of the clerk's lack of influence, disclosure and legality in country); Opinion 85-03 (agent's hourly compensation arrangement reasonable); and Opinion 87-01 (10% commission on large boat sale approved).

Similarly, while it is of course appropriate to make payments to service providers for services performed, or to distributors for costs in connection with product distribution, adequate due diligence also should be undertaken to ensure that payments to service providers and distributors are not used to fund bribes.

11. Is A Company Liable For Improper Payments By Distributors or Other Third Parties?

The general rule is that upon final sale of an item, subsequent illegal payments made by a reseller cannot be attributed to the original seller, absent a prior specific conspiratorial agreement to make the payment or an ongoing relationship between the seller and the franchisee/distributor in which the seller knowingly benefits from the illicit activity. For example, in Opinion 87-01, the DOJ took no action on an American company's sale of product to a foreign company that planned to resell the product to its government on terms to be negotiated. The American company represented that it was not aware of any illegal payment plans.

It is important to note, however, that payments made to an agent, sales consultant, or other intermediary acting on behalf of the company can create liabilities for a U.S. company even after those payments have left the company's hands. Specifically, the FCPA provides that the making of a payment to "any person" is illegal if the person making or authorizing the payment "knows" that all or a portion of the payment will be redirected to improper ends. The statutory definition for "knowing" makes clear that a well-founded suspicion will suffice.[10] Thus, while it may seem reasonable to take the position that because one cannot be sure what a service partner will do with funds provided to it, it is preferable to know as little as possible about the payment once it leaves a U.S. company's hands, exactly the opposite is true.

Under the FCPA liability framework, U.S. companies should document such payments to ensure that they are not viewed as taking a "head in the sand" approach should the payments ultimately be redirected to government officials. The DOJ press release describing the prosecution of Martin Self highlights this fact. Self had admitted that he was unaware of what services were being provided by a third-party service provider (who was also related to a foreign government official) but nevertheless initiated several of the wire transfers to that individual,

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[10] The FCPA indicates that a person "knows" about conduct if he or she is either "aware" that the conduct is occurring or has a "firm belief that such circumstance exists or that such result is substantially certain to occur." 15 U.S.C. § 78dd-1(f)(2)(A) (2006). The statute further explains: "When knowledge of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person believes the circumstance does not exist." *Id.* § 78dd-1(f)(2)(B) (2006).

while he "deliberately avoided learning the true facts" of the arrangement. The DOJ explained that "using an intermediary to make bribe payments will not insulate individuals from prosecution."[11]

12. If Necessary, How Should A Company Make Overseas Payments?

The DOJ insists on visibility and transparency in payments made to agents and other representatives abroad. Generally, the government demands that payments are sent to the agent's country, the location where the work was performed or at a business' normal address and bank account. Opinion 81-01, for example, cited these factors in support of a decision against taking enforcement action. Wire transfers are preferable to checks because they provide proof that funds were in an agent's primary business account. If checks are used, they should be retained to show the place of deposit. Domestic parents should require their subsidiaries to follow American accounting rules regarding business expenditures.

13. How Should A Company Handle Subcontractor Payments?

Often, foreign governments require that an American contractor hire a local entity to do some portion of the work on a contract. The negotiations of such arrangements should be carefully monitored and documented because subcontractor arrangements differ from those involving distributors. A corrupt subcontractor could easily pad its subcontract price to include improper payments. Once included, subsequent payments made to a foreign official can be said to have been made with funds received from the American company, creating a predicate for liability. Accordingly, margins should be reasonable. The DOJ is concerned with the knowledge of relevant company actors as to the destination of the payments. Litigating that issue against the DOJ will prove costly and time-consuming, and will place any company in an unfavorable public light. The best safeguards against this sort of liability are to demand reasonable profit margins and to monitor subcontractors closely. Moreover, changes in the structure of the arrangement or scope of work should be closely examined for improper motives.

All subcontracts should include provisions requiring subcontractors to certify their compliance with the FCPA and permitting termination if an improper payment is discovered. If termination is not possible, the American company should closely monitor contract costs and require the subcontractor to certify its compliance with the FCPA.

14. Who Qualifies As A Foreign Official?

The DOJ takes a very broad view of the FCPA's definition of a public official. The term includes employees of any government instrumentality, including state-owned enterprises involved in activities normally reserved for the private sector in the United States, such as airlines, power companies and the like. Government ownership or control is enough. Recent amendments added international organizations to the definition of foreign official (*e.g.*, International Monetary Fund, The World Bank and the Red Cross). Members of parliament, even without any ability to affect government decisions beyond their individual votes, are considered public officials. *See*, *e.g.*, Opinion 86-01 (declining to take enforcement action when U.S. companies employed foreign members of parliament under agreements that complied with

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11 *See* http://losangeles.fbi.gov/dojpressrel/pressrel08/la050808usa.htm.

foreign and U.S. laws, where members of parliament agreed "not to vote or conduct any other legislative activity for the benefit of the corporation and "not [to] use his influence as a member of Parliament with his government to affect or influence any of its act[s] or decisions which would be of benefit to the United States corporation").

Members of a royal family, specifically princes and princesses, present particular difficulty. Often, such individuals have no official role in government. Mere membership in the royal class does not make them "foreign officials." However, payments to royals or organizations including royals should be made with great care. In many countries, members of the royal family occupy important ceremonial roles and wield significant governmental influence. Reasonable steps should be taken to ensure that the royal does not exercise an inappropriate or corrupt influence over government decisions.

Consultants and unofficial advisors to government officials, as well as any other persons acting on behalf of a government agency, may be considered "foreign officials" for purposes of the FCPA. *See* 15 U.S.C § 78dd-2(h)(2)(A) (defining "foreign official" to include "any person acting . . . on behalf of" a government agency). To qualify as a "foreign official," there must be a direct link between the private individual (as a formal or informal advisor to a government body or government official) and the government apparatus. For example, in the recent enforcement action against Statoil ASA, the SEC concluded that an associate of the Iranian Oil Minister qualified as a foreign official where a company knew that he had influence over the Oil Minister and consequently made payments to him as "the 'link' to opportunities to obtain business in Iran." Statoil ASA, Exchange Act Release No. 54599 (Oct. 13, 2006). This enforcement action demonstrates the government's broad interpretation of the term "foreign official" and makes clear that a person does not need to have legal authority to represent the government, only the capacity to influence a government decisions.[12]

15. Can A U.S. Company Do Business With A Business Entity In Which A Foreign Official Is A Participant?

The mere passive ownership of stock by a foreign official in an entity with which an American company does business is not a violation of the FCPA. DOJ Opinions focus on whether the official's participation in the affairs of the entity is transparent to his government agency or any other procuring authority of the foreign government; whether the official adequately recused himself from participation in any transaction involving the American company; and whether his participation in the entity is legal according to the laws of his country.

In Opinion 80-04, a business partner of an American company served as an outside director of a foreign state-owned airline. The DOJ took no action based on the director's recusal from participation in any matter affecting the American company's business with the government, his full and public disclosure of the relationship and assurances that the director's participation would not violate the laws of the country.

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[12] Further, whether a person draws a salary or other financial compensation from a foreign government does not determine whether that person is a foreign official; the determinative factor is influence over a government decision, not employment status. *See* Statoil ASA, *supra*.

In Opinion 82-04, the DOJ took no action with respect to commission payments to an agent whose brother was a government employee. To ensure compliance with the FCPA, the DOJ required the agent and his brother to sign affidavits promising compliance with the FCPA, and guaranteeing that payments to be made in the foreign country would be in accordance with the foreign country's currency laws. Similarly, upon assurances of compliance and other prophylactic measures, the DOJ has taken no action when an American firm sought to establish an agency agreement with foreign company that had principals that were related to and managed the affairs of a foreign country's head of state. *See* Opinion 84-01. In another case, the DOJ took no action for the participation of an American company in a joint venture with a foreign official whose director was related to the foreign country's leader and was himself a public official. *See* Opinion 95-03 (approval based on stringent conditions ensuring that the leader did not participate in the government approval of company business).

A foreign employee of an American concern can even become an official in the host country under limited circumstances. In Opinion 80-02, a foreign employee of an American subsidiary wanted to run for an office in his country. The DOJ took no action based on assurances that his pay would be for his work only, his work did not involve advocacy or representation to the government, it was customary in that country to hold outside employment, he would notify his government of his recusal from any matters involving the company's business and local law was not violated.

The DOJ dealt with this question most recently in Opinion Release 08-01, which described a joint-venture opportunity with a company in which a foreign government official was involved. The Justice Department indicated that despite the fact that one of the company's principals was a "foreign official," no enforcement action was warranted because of (1) the U.S. Company's extensive due diligence and disclosures; (2) the U.S. Company's decision to obtain representations and warranties that the private company had not and would not violate anti-corruption laws; and (3) the U.S. Company's retention of a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws.

16. Can Companies Make Payments To Foreign Government Entities?

The FCPA prohibits payments to government officials, but not to government entities themselves.

Nevertheless, there is an inherent risk that any payment directed toward the government may end up in the account of an official. Thus, any payments to government entities should be made to accounts clearly identified as such, in the country where the government operates, and with clear documentation. Such payments should only be made on written direction of the government entity. *See* Opinion 06-01 (documenting DOJ approval of payments to African customs department to develop incentive program for law enforcement to improve anti-counterfeiting measures); Opinion 82-03 (permitting payments to Yugoslav military entity acting as sales agent); Opinion 83-01 (permitting use of a Sudanese government entity as a sales agent); Opinion 93-02 (permitting legally required commission payments to a government-owned entity for defense sales paid to treasury of country); Opinion 96-02 (commission payments permitted to a government entity acting as sales agent for American company); and 97-02 (permitting $100,000 donation to government entity to build a school). *But see* Opinion 98-01 (DOJ stating

its intention to initiate a criminal investigation if proposed payments of "fines" and "modalities" were made to foreign officials rather than to an agency account).

17. Are Payments To Resolve Tax Or Customs Disputes Covered By The FCPA?

Yes. The FCPA forbids payments to foreign officials "in obtaining or retaining business." This prohibition is not limited to traditional commercial transactions between a business and a foreign government, such as the award or renewal of contracts. The Fifth Circuit, after analyzing at great length the statute's legislative history, has held that the FCPA prohibits payments "intended to assist the payor" either directly or indirectly in obtaining or retaining business, and that the scope of the prohibition "encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states." *Kay I*, 359 F.3d at 748. For example, payments to Haitian officials to understate quantities of imported grain so as to obtain reduced import taxes violated the FCPA. *Id.*

18. Are There Benefits To Voluntary Disclosure?

The government encourages companies to come forward with potential violations of the FCPA and promises leniency in exchange. Thus in 2006, in a speech before the American Bar Association's National Institute on the Foreign Corrupt Practices Act, Assistant Attorney General Alice S. Fisher emphasized the benefits of voluntary disclosures. In discussing the Schnitzer Steel case, Fisher noted that the matter was an "excellent example of how voluntary disclosure followed by extraordinary cooperation with the Department result[ed] in a real, tangible benefit to the company." According to Fisher, the company's "exceptional cooperation" was "critical to its ability to obtain a deferred prosecution agreement, and resulted in a Department recommendation that Schnitzer's subsidiary pay a criminal fine well below what it would otherwise have received." Enforcement officials continue to refer to the Fisher speech as reflecting the Department of Justice philosophy regarding disclosure.

Whether or not voluntary disclosure is advisable in any given situation is obviously highly fact-specific. Certainly, however, the rewards are nowhere near as clear-cut as those that inure under certain programs, such as: the DOJ Antitrust Division's amnesty program, which can confer amnesty on a company that is "first in" to report participation in antitrust activity; or the Department of Defense's prior program for government contractors, pursuant to which companies clearly had a significantly decreased risk of suspension or debarment from government contracting if they made a voluntary disclosure.

Voluntary disclosure will not necessarily lead to the avoidance of substantial monetary penalties. In the past year, for example, Willbros made a voluntary disclosure but was still subjected to a $22 million criminal penalty and imposition of an independent compliance monitor. This said, a company that makes a voluntary disclosure is more likely, all other things being equal, to obtain a deferred or non-prosecution agreement than a company that does not disclose. However, there may be many circumstances in which such an agreement will not be afforded even though there has been a disclosure. Nor does obtaining such an agreement mean that a company will avoid monetary sanctions. And, in addition, while obviously preferable to a guilty plea, such agreements do not provide ironclad insulation against criminal prosecution. Indeed, one of the 2008 FCPA prosecutions came about because the company – Aibel Group Ltd. – was found to have violated an FCPA deferred prosecution agreement from 2004.

In addition, often when a company discloses alleged FCPA violations, the illegal activity is made public through the press or filings with the SEC. Thus, while the threat of prosecution is often a company's greatest concern, voluntary disclosures may result in shareholder suits, as further described *infra*. These suits can result in large settlements with shareholders. In fact, Faro Technologies was hit with just such a suit, s*ee In re Faro Technologies, Inc.*, No. 05-cv-01810 (M.D. Florida 2006), which ended up adding another $6.875 million to the company's FCPA liabilities after it settled. Titan was also sued on the basis of its admitted FCPA issues, *see In re Titan Inc. Securities Litigation*, No. 04-0676, and settled that case for an additional $61.5 million.

Any company contemplating a voluntary disclosure must ensure that it has conducted an exhaustive internal investigation prior to doing so, and must recognize once a matter is disclosed the government will almost certainly require yet further investigation and vetting efforts on the part of the company in order to discover any potential violations (and going beyond the violation or violations that have been disclosed).

Finally, a voluntary disclosure to the government will not spare a company from reputational damage because the violations are eventually disclosed to the public. Even a brief reference to a potential FCPA violation in a company's SEC filings can attract attention. Once discovered, the illegal activity will inevitably be discussed in the press. Although the negative publicity is likely to be more short-lived than if the government and the company were engaged in protracted litigation, allegations of bribery still result in unwanted reputational damage.

19. Should Companies Be Concerned About Other Statutes, Such As The Money Laundering Statutes?

Yes. The money laundering statutes make it a felony to conduct a financial transaction knowing that the funds are the proceeds of "specified unlawful activity." 18 U.S.C. § 1956(a)(1). The statute expressly lists "any felony violation of the Foreign Corrupt Practices Act" in its definition of "specified unlawful activity." *Id*. § 1956(c)(7)(D). Accordingly, if financial transactions either involve the proceeds of an FCPA violation (*e.g.*, profits derived from an illicit payment), or if a company's illicit payment to an agent aids or abets that official's money-laundering activities under 18 U.S.C. § 2, then a company might expose itself to criminal liability beyond that imposed by the FCPA itself. In addition, the DOJ has stated that it plans to utilize all available theories of liability under Title 18, the section of the United States Code that addresses federal crimes. The DOJ has pointed to the possibility of state commercial bribery statutes under the Travel Act to prosecute non-FCPA kickbacks to violations viewed similarly to violations of the FCPA anti-bribery provisions by the government.

RECENT DOJ OPINION RELEASES

Opinion 08-01

This Opinion was requested by a Fortune 500 company whose wholly-owned foreign subsidiary ("U.S. Company") sought to make a majority investment in a foreign company ("Target Company"). *See* FCPA Opinion Procedure Release No. 08-01, *available at* www.usdoj.gov/criminal/fraud/fcpa/opinion. A foreign government, however, owned a majority share in the Target Company, with the remaining share owned by a foreign private company whose controlling owner and general manager ("Owner") was a citizen of the foreign country. After the foreign government initiated a public bid process to divest its share in the Target Company, the U.S. Company sought to gain a controlling interest through a joint venture whereby the Owner would buy the foreign government's shares and the U.S. Company would purchase a controlling interest from the Owner at a substantial premium. Believing the Owner to be a "foreign official" under the FCPA, the U.S. Company undertook extensive due diligence and other measures to ensure FCPA compliance.

The Justice Department agreed that the Owner was a "foreign official," but nevertheless concluded that no enforcement action was warranted because of (1) the U.S. Company's extensive due diligence and disclosures; (2) the U.S. Company was to obtain from the Owner representations and warranties that the private company had not and would not violate anti-corruption laws; and (3) the U.S. Company had a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws. This result is interesting because the DOJ previously had found a more narrow right to terminate insufficient in another Opinion, where it was limited to corruption violations with a "material adverse effect" on the joint venture. *See* FCPA Opinion Procedure Release No. 01-01.

Opinion 08-02

This Opinion addresses the question of how a company making an acquisition can avoid liability for a target company's FCPA violations where the acquiring company is prevented by law from conducting adequate pre-acquisition due diligence. *See* FCPA Opinion Procedure Release No. 08-02 (June 13, 2008), *available at* www.usdoj.gov/criminal/fraud/fcpa/opinion. Here, acquirer Halliburton was prevented by U.K. law from conducting due diligence into whether Expro International Group, its target, had made improper payments to foreign officials. Because Expro had government customers in countries known for public corruption, Halliburton requested guidance as to whether it could be held responsible for any Expro past FCPA offenses or for violations occurring after the acquisition but before Halliburton had an opportunity to address compliance issues.

The DOJ opined that if Halliburton acquired Expro, it must immediately disclose to DOJ any information "suggest[ing] any FCPA, corruption or related internal controls or accounting issues," past or present, at Expro, provide DOJ with a comprehensive anti-corruption due diligence work plan, and then follow up with periodic reports. Further, Halliburton must complete the investigation of all issues it finds within one year of closing, and it may not divest Expro if DOJ is investigating Expro or any officer, director, employee, agent, subsidiary, or affiliate. In addition, Expro and all of its subsidiaries and affiliates will retain their liability for past and future FCPA violations. As a final note, DOJ "discourages" requestors not to limit their

ability to put all of the facts in an Opinion Request by signing non-disclosure agreements, although it provided an opinion to Halliburton, which had done so.

Opinion 08-03

This Opinion provides guidance on paying expenses for Chinese journalists to attend a press conference, a potential FCPA concern given that most of the Chinese media outlets are wholly owned by the Chinese government. *See* FCPA Opinion Procedure Release No. 08-02 (June 13, 2008), *available at* www.usdoj.gov/criminal/fraud/fcpa/opinion.

TRACE International, Inc. ("TRACE"), a membership organization, which promotes TRACE membership and initiatives, would pay the journalists cash stipends intended to cover food and transportation expenses, expenses which their employers typically do not cover, and which are not conditioned on the journalists actually covering or on the nature of the coverage given to the conference. The DOJ placed no weight on the argument that it is a common practice for companies in China to provide these types of benefits to journalists. These payments were nonetheless permitted because they were considered "reasonable under the circumstances and directly relate[d] to 'the promotion, demonstration, or explanation of [TRACE's] products or services,'" thus falling within the FCPA's promotional expenses affirmative defense.

RECENT FCPA ENFORCEMENT ACTIVITY

Jeffrey Tesler and Wojciech Chodan (Kellogg, Brown & Root Inc.)

Department of Justice
Indictments
March 5, 2009

The DOJ announced on March 5, 2009 that it had indicted two citizens of the United Kingdom, Jeffrey Tesler and Wojciech Chodan. The Department alleged that the two individuals had participated in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction contracts.

According to the indictment, Tesler was hired in 1995 as an agent of a four-company joint venture that was awarded contracts by Nigerian officials to build liquefied natural gas facilities. Chodan was a former salesperson and consultant of a United Kingdom subsidiary of Kellogg, Brown & Root Inc., one of the four joint venture companies. At group meetings Chodan and other co-conspirators allegedly discussed the use of Tesler and other agents to pay bribes to Nigerian government officials in order to secure their support for the award of contracts to the joint venture. This case arose out of the same operative scheme as did Kellogg Brown & Root LLC's guilty plea in February 2009 and Albert "Jack" Stanley's guilty plea in September 2008. In it, the DOJ is pursuing aggressive jurisdictional and forfeiture theories.

KBR, Inc. and Halliburton Co.

Department of Justice and Securities and Exchange Commission
Guilty Plea and Civil Settlement
February 11, 2009

The SEC announced on February 11, 2009 that it had settled FCPA charges against both KBR, Inc. ("KBR") and Halliburton Co. ("Halliburton"). The charges stemmed from alleged bribes to Nigerian government officials over a 10-year period, along with the books & records and internal controls violations that accompanied those improper payments. The alleged bribes occurred as part of a campaign to obtain construction contracts worth more than $6 billion, and were concealed through sham contracts with agents and a joint venture that KBR and Halliburton entered into with Nigerian government officials. The internal controls of Halliburton, the parent company of the KBR predecessor companies from 1998 to 2006, failed to detect or prevent the bribery, and Halliburton records were falsified as a result of the payments.

Albert "Jack" Stanley, a former KBR executive, pleaded guilty to charges related to his role in the affair in December 2008. KBR and Halliburton consented to the entry of a court order permanently enjoining them from violating the anti-bribery and books & records provisions of the FCPA, as well as aiding and abetting violations of the latter. The companies also agreed to disgorge $177 million in profits derived from the scheme and to accept an independent consultant for Halliburton, to review its FCPA compliance policies and procedures.

The DOJ also announced on the same day that it had filed a related criminal action against Kellogg Brown & Root LLC, charging one count of conspiracy to violate the FCPA and four counts of violating the Act's anti-bribery provisions. Kellogg Brown & Root LLC pleaded

guilty to each of those counts, agreed to pay a criminal fine of $402 million, and agreed to retain a monitor to review and evaluate its FCPA compliance policies and procedures.

ITT Corporation

Securities and Exchange Commission
Civil Settlement
February 11, 2009

The SEC announced on February 11, 2009 that it had filed a settled civil injunctive action against ITT Corporation ("ITT"), alleging violations of the internal controls and books & records provisions of the FCPA. The Commission's complaint alleged that ITT's violations resulted from payments to Chinese government officials by a wholly-owned Chinese subsidiary of the company, designed to ensure purchases of water pumps manufactured by the subsidiary for infrastructure projects. The alleged payments to employees of Chinese state-owned entities occurred from 2001 to 2005, totaling approximately $200,000 and resulting in over $4 million in sales to the subsidiary. These sales generated improper profits of more than $1 million.

The improper payments were disguised as increased commissions in the subsidiary's books and records, which exposed ITT to FCPA liability once the subsidiary's entries were consolidated into the parent's filings for the 2001 through 2005 fiscal years. ITT was ordered to pay disgorgement and prejudgment interest of almost $1.4 million along with a civil penalty of $250,000. The Commission considered the fact that ITT self-reported the violations, along with the company's subsequent remedial actions, when it arrived at these penalties.

Morgan Stanley

Securities and Exchange Commission
Voluntary Disclosure
February 9, 2009

In a Form 8-K filing dated February 9, 2009, Morgan Stanley announced that it had uncovered actions taken by a China-based employee that appeared to violate the FCPA. Morgan Stanley terminated the employee before reporting the issue to the authorities and continuing its internal investigation.

Richard Morlok and Mario Covino

Department of Justice
Guilty Pleas
February 3, 2009

The DOJ announced on February 3, 2009, that Richard Morlok, the former finance director of a California valve company, pleaded guilty in connection with his role in a conspiracy to pay approximately $628,000 in bribes to government officials. He had been charged with conspiring to make corrupt payments for the purpose of securing business for the company, in violation of the FCPA. Morlok admitted that between 2003 and 2006, he caused the company's employees and agents to make the payments and that the company earned approximately $3.5 million in profits as a result. Mr. Morlok also admitted to providing false and misleading information to internal and external auditors during 2004 audits and agreed, as part of his plea

agreement, to cooperate with the DOJ in its ongoing investigation. Mr. Morlok is scheduled to be sentenced in July 2009.

The Department also noted that in a related case, Mario Covino pleaded guilty in January 2009 to conspiring to make corrupt payments totaling approximately $1 million for the purpose of securing business for the same valve company. Mr. Covino, an Italian citizen but resident of Irvine, California, was also scheduled to be sentenced in July 2009.

Fiat S.p.A.

Department of Justice and Securities and Exchange Commission
Deferred Prosecution Agreement and Civil Settlement
December 22, 2008

The Fiat, S.p.A. matter represents the tenth FCPA matter related to the United Nations Oil for Food program, and the fourth such matter in 2008. Fiat is an Italian corporation based in Turin, Italy. The charges arose out of allegations that between 2000 and 2003 Fiat and its subsidiaries made approximately $4.3 million in kickback payments in connection with sales of humanitarian goods to Iraq under the Oil for Food Program. The kickbacks were characterized as "after sales service fees" but no bona fide services were performed in exchange. According to the SEC complaint, Fiat subsidiaries themselves initially entered into contracts with Iraqi ministries through which the kickbacks were made, but later used agents or distributors to purchase equipment directly from the company and then sell the equipment at inflated prices to provide the kickbacks necessary to make the sale.

In the SEC matter, Fiat consented to the entry of a final judgment permanently enjoining the company from future violations of the FCPA's books & records and internal controls provisions. The company also agreed to disgorge over $7.2 million in profits and prejudgment interest and pay a civil penalty of $3.6 million. Fiat also agreed to pay a $7 million criminal penalty as part of its deferred prosecution agreement with the Department of Justice.

James K. Tillery and Paul G. Novak (Willbros International Inc.)

Department of Justice
Indictment
December 19, 2008

The DOJ announced on December 19, 2008, that it had charged James K. Tillery and Paul G. Novak with FCPA violations arising out of an alleged bribery scheme involving Willbros International, Inc. ("WII"), a subsidiary of Willbros Group Inc. According to the DOJ, Tillery and Novak violated the FCPA in connection with a conspiracy to pay more than $6 million in bribes to government officials in Nigeria and Ecuador, in order to secure gas pipeline construction and rehabilitation business from state-owned oil companies in those countries. The indictment charged Tillery and Novak with one count of conspiracy to violate the FCPA, two counts of violating the FCPA in connection with the authorization of specific payments, and one count of conspiring to launder the bribe payments through consulting companies controlled by Novak. If convicted, both defendants face sentences of up to 35 years in prison and fines of $250,000 or twice the pecuniary gain or loss from the offense, whichever is greater, for conspiring to violate the FCPA and for each violation of the FCPA.

Siemens AG

Department of Justice and Securities and Exchange Commission
Guilty Plea and Civil Settlement
December 15, 2008

The DOJ and SEC announced on December 15, 2008, that FCPA charges brought against Siemens AG ("Siemens") had been settled. Siemens, a Munich, Germany-based company, was accused of engaging in a widespread and systematic practice of paying bribes to foreign government officials to obtain business. The SEC noted that the misconduct "involved employees at all levels, including senior management, and revealed a corporate culture long at odds with the FCPA." The alleged bribes occurred between March 2001 and September 2007, involving more than 4,200 payments totaling approximately $1.4 billion. The bribes were paid in numerous countries, including Venezuela, China, Israel, China, Bangladesh, Nigeria, and Russia. Siemens was also alleged to have paid kickbacks to Iraqi ministries in connection with sales of equipment to Iraq under the United Nations Oil for Food Program. Siemens was also alleged to have paid an additional 1,185 payments to third parties that were not properly controlled and which were used, at least in part, for "illicit purposes, including commercial bribery and embezzlement."

Notably, the parent company was not required to plead guilty to violating the anti-bribery provision, but instead plead guilty to knowing violation of the FCPA's internal controls provisions. This represents the first conviction ever under the criminal internal controls provision. Employment of this provision rather than the anti-bribery provision also was significant for Siemens with respect to avoiding debarment from contracting with the U.S. government.

In the DOJ proceeding, the company agreed to pay a $450 million criminal fine in total, split between Siemens itself ($448.5 million) and three of its subsidiaries ($500,000 each). The SEC charged Siemens with violating the FCPA's anti-bribery, books & records, and internal controls provisions. Without admitting or denying those allegations, Siemens consented to entry of judgment permanently enjoining it from future violations of the FCPA and disgorgement of $350 million in profits. In addition, Siemens agreed to a disposition with the German government requiring the company to pay approximately $569 million in fines and disgorgement of profits. In total, Siemens paid over $1.6 billion in fines, penalties, and disgorgement or profits, including $800 million to U.S. authorities: an immense amount, but about half what it could have been fined but for its "extraordinary cooperation" with the DOJ. As part of its settlement, Siemens also agreed to the appointment of an independent monitor for a four-year period. Interestingly, and also unprecedented, Siemens was permitted to have a German national appointed as its monitor.

Misao Hioki

Department of Justice
Guilty Plea
December 10, 2008

The DOJ announced on December 10, 2008, that Misao Hioki ("Hioki") pleaded guilty to charges contained in a two-count indictment filed two days prior, on December 8. The FCPA charges arose out of Hioki's role in "a conspiracy to violate the Foreign Corrupt Practices Act

(FCPA) by making corrupt payments to government officials in Latin America and elsewhere to obtain and retain business." The other count in Hioki's indictment detailed an alleged price-fixing and bid-rigging scheme related to marine hose. Nine other co-conspirators were charged with a mix of counts for the two conspiracies, but Hioki was the first to plead guilty to the FCPA charges. His sentence is pending.

Aibel Group Ltd.

Department of Justice
Guilty Plea
November 21, 2008

The DOJ announced on November 21, 2008, that Aibel Group Ltd. ("Aibel"), a United Kingdom corporation, pleaded guilty violating the antibribery provisions of the FCPA. Aibel had been charged with both conspiring to and violating the FCPA. The alleged conspiracy developed between September 2002 and April 2005, and involved at least 378 corrupt payments – totaling approximately $2.1 million – to Nigerian customs service officials. The payments were designed to induce the officials to give Aibel preferential treatment during the customs process and were coordinated by the Houston office of an international freight forwarding and customs clearance company. In its announcement of the plea agreement, the DOJ noted that this was the third time since July 2004 that entities affiliated with Aibel had pled guilty to FCPA violations, and that this included Vetco Gray UK entities that pleaded guilty in February 2007. Aibel also entered into a 2004 deferred prosecution agreement at the same time, and the November 2008 plea agreement was required due to Aibel's admission that it was not in compliance with that agreement.

As part of the plea agreement, Aibel agreed to pay a $4.2 million criminal penalty and serve a two year term of "organizational probation" that required periodic reports from the company regarding its progress in implementing antibribery compliance measures.

Shu Quan-Sheng

Department of Justice
Guilty Plea
November 17, 2008

The DOJ announced on November 17, 2008, that Shu Quan-Sheng ("Shu") pleaded guilty to a three-count criminal information containing allegations of FCPA violations, along with violations of the Arms Export Control Act. Specifically, the DOJ alleged that Shu "offered, paid, promised and authorized the payment of bribes to Chinese government officials to influence their decisions" with respect to obtaining or retaining business. The criminal information described three occasions on which Shu offered money to Chinese officials, totaling approximately $189,000. Shu faces a possible maximum sentence of 5 years in prison and a $250,000 fine (or twice the gross gain) for the FCPA violations alone (the Arms Export Control Act violations have separate maximum penalties associated with them). His sentence is pending.

Nexus Technologies, Inc. and Employees

Department of Justice
Indictment
September 5, 2008

On September 5, 2008, the DOJ charged in an indictment that four employees of Nexus Technologies, Inc. paid bribes to Vietnamese government officials in exchange for contracts to supply equipment and technology to Vietnamese government agencies. The indictment charged those individuals, along with Nexus, with four substantive counts of violating the FCPA and one count of conspiracy to bribe public officials in violation of the FCPA. The alleged bribery scheme developed between 1999 and 2008, and the defendants were alleged to have paid at least $150,000 in bribes.

Albert "Jack" Stanley (Kellogg, Brown & Root Inc.)

Department of Justice and Securities and Exchange Commission
Guilty Plea and Civil Settlement
September 3, 2008

On September 3, 2008, the SEC and DOJ announced settlement of charges against Albert "Jack" Stanley, a former executive of Kellogg, Brown & Root, Inc ("KBR")., a Houston-based engineering, construction and services company, for violating the anti-bribery provisions of the FCPA and related provisions of federal securities laws. The complaint alleged that Stanley and others participated in a scheme to bribe government officials in order to obtain construction contracts worth more than $6 billion for a KPR joint venture. To conceal the payments to Nigerian officials, Stanley and others approved entering into sham contracts with two "agents" to funnel money to those officials. Over the course of the scheme, those agents were paid more than $180 million, a substantial portion of which was redirected to Nigerian government officials.

Stanley consented to entry of judgment in the SEC matter permanently enjoining him from violating the anti-bribery, books & records, and internal control provisions of the FCPA. In addition, Stanley agreed to cooperate with the SEC's ongoing investigation.

In his related criminal case, Stanley admitted that he had "intended for the agents' fees to be used, in part, for bribes to Nigerian government officials," and to receiving approximately $10.8 million in kickbacks. Under the plea agreement Stanley faced a sentence of seven years in prison and payment of $10.8 million in restitution.

Con-way, Inc.

Securities and Exchange Commission
Civil Settlement
August 27, 2008

The SEC announced settlement of FCPA charges against Con-way, Inc. ("Con-way") on August 27, 2008. The Commission had alleged that a Con-way subsidiary made approximately $417,000 in improper payments between 2000 and 2003. The payments, made to foreign officials at the Philippines Bureau of Customs, the Philippine Economic Zone Area, and foreign officials at fourteen state-owned airlines conducting business in the Philippines, were made to

induce officials to violate customs regulations or give preferential treatment to Con-way shipments passing through the Philippines. The SEC also alleged that none of the improper payments were accurately reflected in Con-way's books and records.

Without admitting or denying the allegations made in the complaint, Con-way agreed to pay a $300,000 civil penalty to settle the matter. In addition, the SEC issued a settled cease-and-desist order against Conway finding that the company violated the books and records and internal controls provisions of the FCPA in connection with the improper payments made by the Con-way subsidiary.

Faro Technologies, Inc.

Securities and Exchange Commission and Department of Justice
Non-Prosecution Agreement and Civil Settlement
June 5, 2008

On June 5, 2008, the SEC announced the filing of a settled enforcement action charging Faro Technologies, Inc., with violating the FCPA through improper payments made by Faro's Chinese subsidiary between 2004 and 2006. Specifically, the SEC alleged violations of the antibribery, books and records, and internal control provisions of the FCPA, arising from more than $440,000 in payments made to secure net profits of over $1.4 million. After a voluntary disclosure by Faro, the Commission found that a high level executive, the Director of Asia-Pacific Sales, authorized employees of the Chinese subsidiary to make improper payments, including payments made "through third-party intermediaries in order to avoid detection."

The SEC settlement required the company to cease and desist from such violations and disgorge more than $1.8 million in profits and prejudgment interest. The Commission also required Faro to retain an independent consultant for a two year term to review and make recommendations concerning the company's FCPA compliance policies and procedures. The Commission noted in its announcement that it "considered the fact that Faro self-reported and promptly undertook remedial actions, as well as the cooperation it afforded the Commission staff in its investigation."

The DOJ also announced a non-prosecution agreement with the company on June 5, 2008, which required Faro to pay a $1.1 million criminal penalty and agree to the same terms concerning the independent consultant.

AGA Medical Corporation

Department of Justice
Deferred Prosecution Agreement and Civil Settlement
June 3, 2008

In another case involving a voluntary disclosure, on June 3, 2008, the DOJ announced that it had entered into a deferred prosecution agreement with AGA Medical Corporation, settling charges that the company had violated the FCPA by making $460,000 in corrupt payments to Chinese government officials for the purpose of obtaining $13.5 million in sales. The DOJ had alleged that between 1997 and 2005, AGA employees agreed to make improper payments to doctors in China who were employed by government-owned hospitals, then caused those payments to be made through the company's local Chinese distributor. In exchange, the

Chinese doctors directed the government-owned hospitals to purchase AGA's products rather than those of the company's competitors. The Department also alleged that between 2000 and 2002 AGA had made payments through a local distributor in order to secure patent protection from the Chinese government.

As conditions to the DOJ's agreement to defer prosecution for three years, AGA agreed to pay a $2 million criminal penalty, implement enhanced compliance policies and procedures, and engage an independent corporate monitor for the three-year term of the agreement.

Willbros Group and Employees

Department of Justice and Securities and Exchange Commission
Non-Prosecution Agreement and Civil Settlement
May 14, 2008

In yet another case that began with a voluntary disclosure, the SEC and DOJ settled numerous charges, including antibribery and books & records allegations, with Willbros Group, Inc. and several former employees on May 14, 2008. The SEC had alleged that Willbros, "through the actions of others acting on its behalf, engaged in multiple schemes to bribe foreign officials." These schemes allegedly were implemented in Nigeria and Ecuador, and involved improper payments or attempted payments of more than $1.1 million, to obtain contracts worth $11.9 million. The Commission charged the company with antibribery, books & records, and internal control violations of the FCPA as well as violations under separate antifraud statutes. The Commission also charged four Willbros employees with one or more of the same FCPA violations, depending on the particular employee's level of involvement in the scheme. In a related criminal proceeding, the DOJ charged Willbros Group and its subsidiary, Willbros International, Inc., with FCPA violations.

Willbros entered into an agreement with the SEC in which it agreed to pay $10.3 million in disgorgement and prejudgment interest and which permanently enjoined the company from future violations of the FCPA provisions at issue. The individuals also settled with the Commission; each was permanently enjoined from future violations of the FCPA and imposed penalties of $30,000 and $35,000 on two of those defendants.

The Department of Justice entered into a non-prosecution agreement with Willbros and its subsidiary but did not charge the individuals involved. Willbros agreed to pay a criminal penalty of $22 million and engage an independent compliance monitor for a period of three years.

Martin Self (Pacific Consolidated Industries LP)

Department of Justice
Guilty Plea
May 8, 2008

On May 8, 2008, the Department of Justice announced a plea agreement with Martin Self, a former executive of Pacific Consolidated Industries LP ("PCI"). PCI manufactured equipment for defense departments throughout the world, for aircraft support and military hospitals. Self had been PCI's president at all times the alleged FCPA crimes occurred, and as such he was a signatory on PCI marketing agreements and bank accounts. PCI allegedly entered

into a marketing agreement with a person that Self "understood to be a relative" of a U.K. Ministry of Defense official. That official was able to influence the awarding of contracts for services and equipment; the DOJ charged that Self had been involved in the illicit payment of more than $70,000 in bribes.

As part of the plea agreement, Self admitted that he "was not aware of any genuine services provided by the official's relative, and believed there was a high probability that the payments were being made to the official's relative" in order to influence that official's decisions on awarding business to PCI. Despite these beliefs, Self initiated several of the improper wire transfers and "deliberately avoided learning the true facts" of the nature of the payments. In its press release the DOJ noted that "using an intermediary to make bribe payments will not insulate individuals from prosecution." Self's plea agreement contemplated a prison term of 8 months, although he had not been sentenced as of early 2009.

Steven Ott, Roger Young, and Yaw Osei Amoako (ITXC Corp.)

Department of Justice and Securities and Exchange Commission
Guilty Pleas and Civil Settlement
May 6, 2008

On May 6, 2008, the SEC settled pending FCPA matters against Ott, Young, and Amoako, former executives of ITXC Corp, and the DOJ announced sentencing of each, for related criminal violations to which they had already pled guilty. The Commission had alleged that the defendants violated both the anti-bribery and books & records provisions of the FCPA, the charges arising out of an alleged scheme to bribe senior officials of government-owned telephone companies in Nigeria, Rwanda, and Senegal. Prior to its acquisition by Teleglobe International Holdings Ltd. in May 2004, ITXC was a publicly-held international telecommunications carrier based in Princeton, New Jersey. Ott, Young, and Amoako were all managers of the ITXC sales divisions responsible for the African countries at issue. As alleged in the complaints, the defendants were responsible for over $265,000 in bribes paid between August 2001 and May 2004, in order to obtain contracts (providing ITXC with the right to transmit telephone calls to individuals and businesses in those countries) resulting in more than $11.5 million in net profits for the company. Amoako was also charged with receiving approximately $150,000 through embezzlement and kickbacks in connection with the scheme.

With respect to the SEC charges, all three defendants consented to entry of judgment permanently enjoining them from violating the FCPA's antibribery and internal control provisions. Ott and Young were also permanently enjoined from violating the FCPA's books and records provisions, and Amoako was ordered to pay nearly $190,000 in disgorgement and prejudgment interest.

With respect to the criminal charges brought by the DOJ, Amoako was sentenced to a prison term of 18 months and paid a $7,500 fine. Sentencing for Young and Ott was continued until July and September 2008, respectively. Young was eventually sentenced to pay a $7,500 fine, while Ott eventually was sentenced to 5 years probation (including six months in a community confinement center and six months home confinement) and ordered to pay a $10,000 fine. Both Ott and Young received reduced sentences based on their cooperation with the government's investigation.

AB Volvo

Department of Justice and Securities and Exchange Commission
Deferred Prosecution and Civil Settlement
March 20, 2008

On March 20, 2008, the SEC settled an FCPA matter with AB Volvo, a Swedish company that provides commercial transport solutions. The Commission alleged that between 1999 and 2003, two of the company's subsidiaries and their agents had made or authorized over $8.5 million in kickback payments related to sales of humanitarian goods to Iraq under the United Nations Oil for Food Program. The kickbacks were characterized as "after-sales service fees" but no actual services were performed in exchange. Some of these payments were made through a foreign agent/distributor, an entity that "did not have the infrastructure that normally would have been required by [the subsidiary] for its distributors, and [the subsidiary] did not enter into any written distributorship agreement."

The SEC alleged that AB Volvo "either knew or was reckless in not knowing that illicit payments were either offered or paid" in connection with the transactions at issue. Without admitting or denying the allegations in the Commission's complaint, AB Volvo consented to entry of judgment permanently enjoining it from future violations of the books & records and internal controls sections of the FCPA, disgorged over $8.5 million in profits and interest, and paid a civil penalty of $4 million. The company also entered into a deferred prosecution agreement with the Department of Justice, and paid a penalty of $7 million in connection with that agreement.

Flowserve Corp.

Department of Justice and Securities and Exchange Commission
Non-Prosecution Agreement and Civil Settlement
February 21, 2008

On February 21, 2008, Flowserve Corporation settled FCPA books & records and internal controls charges with the SEC. The SEC alleged that from 2001 to 2003, two of company's subsidiaries (located in France and the Netherlands) entered into contracts for sales of industrial equipment to the Iraqi government under the United Nations Oil for Food Program, which provided for over $820,000 in kickback payments to an Iraqi slush fund. The kickbacks were characterized as "after-sales service fees," but according to the SEC no services were ever performed in exchange.

The Commission charged that Flowserve "either knew or was reckless in not knowing that illicit payments were either offered or paid in connection with these transactions" and that the company's internal controls were insufficient to prevent or detect the payments. Flowserve ultimately consented to the entry of judgment permanently enjoining it from future violations of the FCPA provisions at issue, agreed to disgorge over $3.5 million in profits and prejudgment interest, and to pay a civil penalty of $3 million. Flowserve also entered into a non-prosecution agreement with the DOJ, in which the company agreed to pay a $4 million fine and a "criminal disposition" with the Dutch Public Prosecutor, which also required payment of a fine.

Westinghouse Air Brake Technologies Corp.

Department of Justice and Securities and Exchange Commission
Non-Prosecution Agreement and Civil Settlement
February 14, 2008

On February 14, 2008, the DOJ and SEC announced the settlement of an enforcement action against Westinghouse Air Brake Technologies Corporation ("Wabtec"). The settlement agreements alleged that a Wabtec subsidiary in India paid approximately $137,000 in improper cash payments to employees of the Indian government to obtain government contracts. Wabtec was charged with violating the anti-bribery, books & records, and internal controls provisions of the FCPA.

Wabtec entered into a consent order with the SEC requiring it to cease and desist from such violations, disgorge nearly $290,000 including interest, pay a civil penalty in the amount of $87,000, and retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures. Wabtec also entered into a non-prosecution agreement with the Department of Justice dictating that the company pay a $300,000 penalty, implement rigorous internal controls, and cooperate fully with the Department. In its press release related to the case, the DOJ indicated that the agreement "acknowledge[d] Wabtec's voluntary disclosure and thorough self-investigation of the underlying conduct, the full cooperation provided by the company to the Department, and the remedial efforts undertaken by the company."

Gerald and Patricia Green

Department of Justice
Indictment
January 17, 2008

On January 17, 2008, Gerald and Patricia Green (the owners/operators of Film Festival Management, Inc.) were charged with FCPA conspiracy for making $1.7 million in payments to the Tourism Authority of Thailand (TAT) in order to obtain a $10 million contract to run an international film festival in Bangkok. The indictment also charged that the Greens concealed the bribery scheme by making payments through different business entities, some of which had false business addresses and telephone numbers, and disguised the payments as "sales commissions." The trial was continued to Dec. 2008 and a superseding indictment was filed in October 2008, which added additional FCPA bribery and tax fraud charges related to payments to other Thai Trade officials.

OTHER 2008 DEVELOPMENTS

The past year also saw several other important developments that will impact companies' potential FCPA-related liabilities going forward. First, there were increased lawsuits between private parties that, while not based on the FCPA directly (given that it confers no private right of action), were nevertheless based on the acts underlying alleged FCPA violations. Second, the DOJ issued new guidelines regarding prosecution of organizations decisions in corporate fraud cases, and regarding the appointment of independent compliance monitors.

Private Actions

Although the FCPA confers no private causes of action, 2008 saw a burst of civil litigation collateral to FCPA cases, most commonly securities fraud actions and follow-on shareholder derivative suits. Plaintiffs, however, have been increasingly creative, and lawsuits alleging RICO violations, common-law fraud, breach of contract, antitrust, and tortious interference have arisen in the past year, brought by foreign governments, private parties, and business competitors alike.

1. Securities Fraud

There were at least seven FCPA-related securities fraud cases in the past year, and they are an increasingly important area of potential liability. One of the most interesting was *Glazer Capital Mgmt., LP v. Magistri*, in which a class of shareholders who purchased InVision stock – after a merger announcement but before potential FCPA violations came to light – alleged that assertions in the merger agreement regarding FCPA compliance were actionable as material misstatements to investors. The Ninth Circuit ultimately affirmed the district court's dismissal of the case on the grounds that plaintiffs failed to meet the heightened pleading requirement of the Private Securities Litigation Reform Act. In order to reach this issue, however, the court first held that inaccurate statements in a merger agreement *could* form the basis for shareholder liability. This decision could therefore have far-reaching implications for the standard warranties and representations in merger agreements that are publicly disclosed in SEC filings.

Conversely, a 2008 security case brought against UTStarcom, Inc., *UTStarcom, Inc*., No. 04-cv-04908, (N.D. Cal. 2008), was actually the result of disclosure of FCPA problems. In *UTStarcom*, the plaintiffs alleged that company officers knew there were insufficient controls in place to ensure that the company was not obtaining contracts through bribery. The claim was supported by the company's disclosure in securities filings that a former employee had made a payment to a Thai official while other payments to Mongolian officials had also likely occurred. A case against FARO Technologies ("FARO"), *In re Faro Technologies, Inc.*, No. 05-cv-01810 (M.D. Florida 2006) also demonstrated the potential for civil liability stemming from voluntary disclosure. FARO voluntarily disclosed that its Chinese subsidiary had made corrupt payments to state owned and controlled Chinese businesses. FARO shareholders claimed this disclosure demonstrated the company had misrepresented its internal control system by stating it was adequate to protect against FCPA violations. In 2008, this suit ended in a settlement of $6.875 million.

2. Actions by Foreign Governments

A related trend is suits brought by foreign governments against United States companies in U.S. courts, notable because foreign governments have previously rarely chosen to subject themselves to the civil discovery process in another country. In *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 08-cv-00299 (W.D. Pa. 2008), for example, Aluminum Bahrain BSC ("Alba"), majority owned by the government of Bahrain, sued Alcoa Inc. for corruption and fraud. Alba alleged that it paid $2 billion in overcharges to Alcoa over a 15-year period. According to Alba, those funds were then used to bribe Alba executives, who were themselves foreign officials. Those allegedly receiving bribes included Alba's former chairman, who served as the country's powerful minister of petroleum. Alba's pre-investigation suit caught the attention of the Department of Justice which, only a few weeks later, asked the court to stay the suit pending a criminal investigation of the allegations.

Other foreign governments have chosen to bring collateral suits after the relevant FCPA allegations have already been resolved by the DOJ or SEC. For example, in June of 2008, the Republic of Iraq sued more than 50 companies (including Chevron, Eastman Kodak, Chrysler AG and Dow), alleging the defendants conspired with Saddam Hussein's regime to corrupt the Oil-for-Food program and divert as much as $10 billion in bribes to Hussein's government. The ongoing case, *Republic of Iraq v. ABB AG, et al,* No. 08-cv-05951 (S.D.N.Y 2008), is based on RICO violations as well as other fraud and money laundering statutes and largely targets firms that have already faced enforcement actions under the FCPA (including AB Volvo, Flowserve, Siemens and Ingersoll-Rand).

3. Other Private Claims

Suits by competitors who lost out on foreign contracts because of improper payments may be an area of litigation risk in the future. In one ongoing case, *Supreme Fuels Trading FZE v. Sargeant,* No. 08-cv-81215 (S.D. Fla. 2008), a United Arab Emirates corporation, Supreme Fuels Trading FZE ("Supreme"), filed a complaint against International Oil Trading Company ("IOTC") and other defendants alleging IOTC tortuously interfered with Supreme's business relations and violated RICO, the Sherman Act, and equivalent Florida laws when it bribed Jordanian government officials to secure a contract. According to Supreme, the bribery prevented other contractors from obtaining business to provide fuel to the military in Iraq.

Another interesting type of suit consists of litigation alleging that the defendant paid bribes on the plaintiff's behalf but without the plaintiff's authorization or knowledge. An example is the ongoing *Agro-Tech. Corp. v. Yamada Corp.,* No. 1:08-cv-00721 (N.D. Ohio 2008), brought by Agro-Tech Corporation ("Agro Tech") against its distributor, Yamada. Agro-Tech, noting that its distribution contract required compliance with its FCPA policies, alleged that Yamada had breached that contract when it paid Japanese officials in order to secure defense contracts. Presumably, prospective plaintiffs under this theory must be careful to ensure that they do not have unclean hands. This case also highlights the importance of including appropriate company protections in distributor / agent contracts, discussed *supra*.

In another RICO claim, this time between private persons, one business partner sued its other partners for over six million dollars based on injuries caused by potential FCPA violations. In that unique case, *Grynberg et. al. v. BP PLC et al.,* No. 1:08-cv-00301 (D.D.C. 2008),

Colorado-based oilman Jack Grynberg sued his former business partners, BP and Statoil. Grynberg contracted with these companies to help them explore and develop Kazakhstan's oil and natural gas potential. Over the course of that relationship, Grynberg alleged that his partners, without his knowledge but using some of his money, bribed Kazakh officials in order to win oil rights. This, according to Grynberg, damaged his reputation, injured his company and exposed it to risks (and costs) associated with the ongoing DOJ criminal investigations against each of the oil and gas company Defendants. Based on a pre-existing settlement agreement between the parties, this case has been dismissed and has moved into arbitration.

Failure to make necessary disclosures to a merger *partner* are of course another potential area of collateral litigation. One continuing case in this area is a 2008 state court suit, *eLandia International v. Granados*, No. 08-37352 CA20 (Miami-Dade), resulting from claims made in the merger agreement between eLandia International, Inc. ("eLandia") and Latin Node, Inc. ("Latin Node"). After the transaction was complete, eLandia discovered potentially corrupt payments made by Latin Node, disclosed these payments to the DOJ and SEC, then sued Latin Node's former CEO and others for their alleged failure to disclose the illegal acts and, as a result, failing to fulfill their merger obligation to be in compliance with applicable laws. An eLandia quarterly filing reveals it offered the DOJ $2 million to settle claims arising from its acquisition of Latin Node.

Other plaintiffs have chosen to bring FCPA related challenges under federal statutes. In the case of *In re Syncor ERISA Litig., 03-cv-02446* (2007), Syncor employees who participated in its employee stock ownership plan sued the company alleging that Syncor had violated its fiduciary duties by investing the plan's funds in company stock while pursuing a scheme to bribe doctors and hospital officials in Taiwan and China. After the trial court's summary judgment for defendants was overturned by the Ninth Circuit Court of Appeals, this case settled.

Changes to Enforcement Philosophy

Last year also saw several important developments that, while not specifically related to the FCPA, will impact prosecutions under the act going forward. Both developments came after criticisms were levied at the Department of Justice for certain aspects of its white collar criminal enforcement. First, the DOJ revised its Principles of Federal Prosecution of Business Organizations, which govern how federal prosecutors investigate, charge, and prosecute corporate crimes.[13] Second, Acting Attorney General Craig S. Morford issued a memorandum governing selection and use of monitors in deferred and non-prosecution agreements on March 7, 2008.[14]

1. Principles of Federal Prosecution of Business Organizations

In August 2008, the DOJ issued new Principles or guidelines regarding the prosecution of organizations. These guidelines address, among other topics, the standards that govern when a corporation may receive benefits by cooperating with the Department's investigation. The guidelines now state that cooperation credit will *not* depend on a corporation's waiver of attorney-client or work product privilege, instead being tied to "the disclosure of relevant

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13 http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html.

14 http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

facts."[15] In fact, whereas the old guidelines allowed federal prosecutors to *request* the disclosure of non-factual attorney-client or work product privileged materials, the new guidelines specifically forbid the practice, subject to several "well established" exceptions.[16] These changes appear to have been in direct response to mounting criticism over the approach taken by the DOJ in its prior communications interpreting the guidelines – the Thompson and McNulty memoranda – which were widely viewed as encouraging waiver and other interferences with attorney-client relationships. This criticism culminated in the Second Circuit's opinion in *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008), which affirmed the dismissal of an indictment against thirteen former partners and employees of KPMG, LLP, on the grounds that governmental pressure to cap the defendants' attorneys fees violated their Sixth Amendment right to counsel.[17]

Although this decoupling of cooperation credit from the disclosure of privileged material is welcome, only time will tell how the dynamic between a cooperator and the government will shift. While the codification of the new guidelines indicates that prosecutors "should not ask" for privilege waivers it nevertheless explains that corporations "remain[] free to convey non-factual or 'core' attorney-client communications or work product."[18] This could create an implicit pressure (or perception thereof) to waive even if explicit requests are forbidden.

Other aspects to note regarding the revised Principles is that they: 1) instruct prosecutors not to consider a corporation's advancement of attorneys' fees to employees (presumably a direct response to *Stein*); and 2) make clear that mere participation in a joint defense agreement will not render a corporation ineligible for such credit. The Principles also provide that, in deciding whether to award cooperation credit, prosecutors may not consider whether a corporation has sanctioned culpable employees; however whether such sanctions have been imposed remains relevant to assessing a company's remediation and, therefore, to the charging decision.[19]

2. Use of Monitors in Deferred and Non-Prosecution Agreements

The DOJ's issuance of the "Morford Memorandum," governing selection and use of monitors in deferred and non-prosecution agreements,[20] was also viewed as a response to outside criticism, specifically H.R. 5086, introduced by Rep. Frank Pallone, Jr. (D-N.J.), which would impose a number of requirements to be followed in this area.[21] Before executing an agreement that includes a corporate monitor, the memorandum requires prosecutors to notify appropriate superiors within the Department and calls for copies of all such agreements to be kept on file. It

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15 *Id*.

16 *Id*.

17 It is also notable that the *Stein* opinion and the DOJ memorandum changing the guidelines were both released on the same day, August 28, 2008.

18 http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf, at p. 10.

19 http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html.

20 http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

21 Pallone's bill was also apparently in response to concerns that monitors were sometimes retained not on the basis of merit but favoritism. *See* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h5086ih.txt.pdf.

also sets out internal guidance principles for drafting provisions pertaining to the use of monitors, in non- and deferred prosecution agreements. Most importantly, a monitor is to be selected on the merits as a result of discussion between the company and the government. It should be noted, however, that the DOJ typically continues to retain a great deal of influence over the selection in FCPA settlements, for example by requiring a candidate to propose three candidates from which the monitor will be chosen, and by retaining veto rights until a candidate acceptable to the Department is proposed.

Other important points include: the monitor is an independent third party, not an agent of the government; the monitor's primary responsibility is to assess compliance with the terms of the agreement; the monitor's responsibilities should not be broader than necessary to reduce the risk of recurrence of the misconduct at issue; the agreement should identify the types of misconduct on which the monitor will report, although the monitor has the discretion to report other types of misconduct; and the duration of the agreement should be tailored to the facts of the case.

JENNER & BLOCK'S FOREIGN CORRUPT PRACTICES ACT PRACTICE

The attorneys leading the Foreign Corrupt Practices Act Practice Group provide a wide array of services to clients facing FCPA compliance issues. Counseling and defending clients of the Firm who confront allegations of improper payments and violations of the books-and-records requirements are the primary focuses of the practice. In addition, we advise clients conducting business across international borders on the development, implementation and auditing of their FCPA compliance programs.

We regularly conduct extensive internal investigations abroad, and provide our clients with seasoned judgment to assess both the gravity and veracity of the allegations. The reliable findings and conclusions gleaned from our internal investigations permit our clients to make informed decisions under difficult circumstances. We also advise clients on the most effective methods to mitigate the impact of any alleged misconduct, including the potential benefits and risks of voluntary disclosure when appropriate.

We develop and assist in implementing comprehensive FCPA compliance programs designed to detect and prevent violations – and to minimize the likelihood of any recurrence. And because our attorneys have a heightened understanding of Sarbanes-Oxley issues, we approach the FCPA with a profound sensitivity to the intersection between these two statutory and regulatory regimes.

The Practice Group offers a wealth of experience, with two former Assistant U.S. Attorneys, including the former Chief of the Justice Department's international fraud enforcement component, and the former Chief of the Criminal Division of the U.S. Attorney's Office for the Eastern District of New York. In addition, the Practice Group boasts three former SEC enforcement attorneys, including the former Associate Director of the Division of Enforcement, and two former Assistant Chief Litigation Counsels. The FCPA Practice Group is part of the larger White Collar Criminal Defense and Investigations Practice, which includes two former United States Attorneys and more than a dozen former Assistant U.S. Attorneys and public defenders.

This "strength on the bench" permits our clients to select the best course of action from a host of options. Once an appropriate direction has been chosen, our experienced and knowledgeable attorneys pursue that remedy vigorously.

We command significant foreign language resources both within our practice group and within the Firm, including attorneys who are fluent in Russian, Spanish, German, French and other languages. We routinely employ these resources to bolster the effectiveness of our FCPA practice, including conducting internal investigations in foreign languages.

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Martina E. Vandenberg is a partner in Jenner & Block's Washington, DC office. Ms. Vandenberg maintains a diverse practice, focusing primarily on white-collar criminal matters, internal corporate investigations, Foreign Corrupt Practices Act enforcement work and Small Business Administration matters including the Section 8(a) program. Ms. Vandenberg, a Rhodes Scholar and a Truman Scholar, graduated *cum laude* from Pomona College in 1990 with a bachelor's degree in international relations. She received a master's degree in Russian and East European Studies from Oxford University in 1992. She graduated from Columbia Law School in 2000, where she was named a Harlan Fiske Stone Scholar, and has served as an adjunct faculty member at American University.

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Monica R. Pinciak-Madden is a partner in Jenner & Block's Chicago office. She has represented both corporations and individuals in connection with federal criminal investigations involving bribery, public corruption, bid rigging, and fraud, and has counseled clients in connection with corporate internal investigations. She has extensive experience dealing with federal law enforcement authorities, including the Federal Bureau of Investigation, and has participated in the negotiation of settlements with the Department of Justice. She has counseled corporations on the development and implementation of corporate compliance programs, with particular emphasis on anti-corruption and anti-bribery measures, and has worked with corporations to design and develop code of conduct provisions dealing with the conduct of ethical business practices. Ms. Pinciak-Madden is also the co-author of a manual titled "A 50-State Guide to the Laws Governing Gifts to State and Local Government Officials and Employees," which was prepared to assist clients with monitoring compliance with applicable gratuity laws. Ms. Pinciak-Madden has also represented both corporate and individual clients in a broad range of complex civil disputes in state and federal court. Ms. Pinciak-Madden joined Jenner & Block after serving as a staff law clerk to the United States Court of Appeals for the Seventh Circuit. Ms. Pinciak-Madden graduated with honors from DePaul University in 1996, receiving a B.S. in Business Administration. She received her J.D. with high honors from Chicago-Kent College of Law in 1999, where she served as Executive Articles Editor of the *Chicago-Kent Law Review*. Ms. Pinciak-Madden is a member of the Order of the Coif. She is also a member of the Illinois bar and is admitted to practice before the United States District Court for the Northern District of Illinois, the United States District Court for the Eastern District of Wisconsin, and the United States Court of Appeals for the Seventh Circuit.

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