

Basics of the Foreign Corrupt Practices Act

By: Robert W. Tarun

**What Every General
Counsel, Transactional
Lawyer and White Collar
Criminal Lawyer Should
Know**

April 2006 Edition

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Background

Enacted in 1977 in the wake of a series of overseas and domestic bribery scandals involving 400 major corporations, the Foreign Corrupt Practices Act (the “FCPA” or the “Act”) originally prohibited U.S. corporations and U.S. nationals from making improper payments to foreign officials, parties or candidates, in order to assist a company in obtaining, retaining or directing business to any person.¹ It also imposed record-keeping and internal controls requirements on all companies subject to Securities and Exchange Commission (“SEC”) jurisdiction.²

Since 1998, the FCPA is no longer largely the concern of United States companies and citizens. The 1998 amendments to the Act greatly expanded the jurisdiction of the U.S. government to prosecute foreign companies and nationals who cause, directly or through agents, an act in furtherance of a corrupt payment to take place within the territory of the United States. U.S. parent corporations may also be liable for the acts of foreign subsidiaries where they have authorized, directed or controlled the activity of U.S. citizens or residents who were employed by or acting on behalf of such foreign incorporated subsidiaries.

The Department of Justice (“DOJ”) has primary responsibility for enforcing the anti-bribery provisions of the Act while the SEC generally enforces the accounting (books and records and internal controls) provisions. Both have authority to seek permanent injunctions against present and future violations.³ Criminal and civil penalties for violating the FCPA can be severe for corporations as well as individual officers, employees and agents. The DOJ has broadly interpreted the FCPA jurisdictional provisions, and criminal defense and regulatory enforcement attorneys can expect to be defending not only major U.S. corporations and citizens, but also foreign corporations and citizens in FCPA investigations.

The reported DOJ-SEC investigation of DaimlerChrysler’s Mercedes-Benz unit for bribery activity in at least a dozen countries⁴ and the \$28.5 million settlement by defense contractor Titan Corporation⁵ with the DOJ and SEC make clear that multinational corporations with sensitive payment problems are subject to costly U.S. government investigations and massive fines. FCPA issues can also spawn shareholder litigation, government debarment and suspension proceedings and investigations in foreign jurisdictions.

To represent a client effectively, counsel conducting an FCPA internal investigation or defending an SEC or DOJ investigation must understand the conduct that the FCPA regulates, promptly conduct a focused investigation, develop appropriate legal and factual defenses and execute a well-planned strategy. A public company should in the wake of discovering improper conduct also consider the merits of timely voluntary disclosure to the DOJ and SEC.

Foreign Corrupt Practices Act Overview

The FCPA contains two types of provisions: anti-bribery provisions, which prohibit corrupt payments to foreign officials, parties or candidates to assist in obtaining or retaining business or securing any improper advantage; and record-keeping and internal controls provisions, which impose certain obligations on all companies whose securities are registered in the United States or which are required to file reports with the SEC, regardless of whether or not the companies have foreign operations.

A. Anti-Bribery

1. Application

The FCPA's anti-bribery provisions apply to three categories of persons: (1) "issuers"⁶; (2) "domestic concerns"⁷; and (3) other persons⁸ who take any act in furtherance of the corrupt payment while within the territory of the United States. "Issuers" means any company whose securities are registered in the United States or which is required to file periodic reports with the SEC.⁹ "Domestic concerns" means any individual who is a citizen, natural or resident of the United States and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state of the United States, or a territory, possession, or commonwealth of the United States.¹⁰ The Act now covers persons who commit bribery on U.S. territory regardless of whether the person is a resident or does business in the U.S.¹¹

Issuers and domestic concerns may be held liable for violating the anti-bribery provisions of the FCPA whether or not they took any action in the United States in furtherance of the corrupt foreign payment. Prior to the 1998 amendments to the FCPA, only issuers and domestic concerns could be held liable and only if they used the U.S. mails or instrumentalities of interstate commerce in furtherance of the illicit foreign payment. The 1998 amendments expanded the FCPA's jurisdiction to cover corrupt foreign payments outside the United States by U.S. persons without any link to interstate commerce. The FCPA amendments make it illegal for any United States person to violate the FCPA "irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of [the illegal foreign activity]."¹² Thus, a U.S. company or issuer can be liable for the conduct of its overseas employees or agents, even if no money was transferred from the United States and no U.S. person participated in any way in the foreign bribery.

Finally, until 1998, foreign persons were not subject to the anti-bribery provisions unless they were issuers or domestic concerns. The amendments, however, expanded the FCPA to allow for the prosecution of any person who takes any act in furtherance of a corrupt payment while in the territory of the United States.¹³ The legislative history of the 1998 amendments provides that "the territorial basis for jurisdiction should be broadly interpreted so that an extensive physical connection to the bribery act is not required."¹⁴

2. Elements

A violation of the anti-bribery prohibition consists of five elements:

- (1) a payment of - or an offer, authorization, or promise to pay - money or anything of value, directly, or through a third party;
- (2) to (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while “knowing” that the payment or promise to pay will be passed on to one of the above;
- (3) the use of an instrumentality of interstate commerce (such as telephone, telex, e-mail, or the mail) by any person (whether U.S. or foreign) or an act outside the U.S. by a domestic concern or U.S. person, or an act in the United States by a foreign person in furtherance of the offer, payment or promise to pay;
- (4) for the corrupt purpose of influencing an official act or decision of that person, inducing that person to do or omit to do any act in violation of his or her lawful duty, securing any improper advantage, or inducing that person to use his influence with a foreign government to affect or influence any government act or decision;
- (5) in order to assist the company in obtaining or retaining business or in directing business to any person or to secure an improper advantage.¹⁵

3. Key Concepts

a. Offers, Payments, Promises to Pay or Authorizations of Payments

A company can be liable under the FCPA not only for making improper payments, but also for an offer, promise or authorization of a corrupt payment, even if its employees or agents do not actually make a payment. In other words, a corrupt act need not succeed in its purpose.

b. Recipients

The FCPA prohibition extends only to corrupt payments (or offers, promises to pay or authorizations of payment) to a foreign official, foreign political party or party official, or any candidate for foreign political office.

1. Foreign Officials

The term “foreign official” is defined under the Act as “any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on the behalf of any such public international organization.”¹⁶ This broad definition is normally considered to encompass executive branch

employees, elected legislators or parliamentarians, managers of state-owned enterprises and officials of quasi-governmental entities.

The 1998 amendments added “public international organization officials” to the definition of “foreign official.” A public international organization is defined as “(1) an organization that is designated by Executive Order pursuant to section 288 of title 22; or (2) any other international organization that is designated by the President by Executive Order for the purposes of this section...”¹⁷ Foreign officials cannot be prosecuted under the FCPA.¹⁸

2. Foreign Political Party, Political Party Official or Candidate

The FCPA prohibits an illicit offer and payment not only to a foreign official but also to a foreign political party, an official of a foreign political party, or a candidate for foreign office. A potential problem can arise where a U.S. person’s foreign agent or partner makes political campaign contributions to persons in the country where they are doing business. Any United States company should consider instituting a policy that prohibits its foreign agents, partners or consultants from making any political contributions whatsoever for or on behalf of their venture or relating in any way to the venture. Absent a blanket prohibition, all proposed foreign political contributions by an agent, consultant or employee should be reviewed by general counsel on a case-by-case basis.

c. Money or Anything of Value

The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money, gifts or anything of value. Although no FCPA decision has dealt with the concept of a “thing of value,” it clearly includes cash, cash equivalents and other forms of valuable inducements. Federal courts addressing similar criminal statutes have construed the term broadly to include tangible and intangible property such as “information,”¹⁹ the testimony of a witness,²⁰ loans and promises of future employment,²¹ a college scholarship²² and sports equipment.²³

d. Corrupt Intent

To violate the FCPA’s anti-bribery provisions, a payment or offer to pay must be made corruptly. Although the Act does not define “corruptly,” its legislative history indicates that the payment must be intended to influence the recipient to “misuse his official position” in order to wrongfully direct, obtain or retain business. In United States v. Liebo,²⁴ the Eighth Circuit affirmed the following jury instruction definition of the term “corruptly”:

[T]he offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so.... [A]n act is “corruptly” done if done voluntarily [a]nd intentionally, 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.

No other Circuit has interpreted the term “corruptly” under the FCPA.

e. Business Purpose Test

The FCPA prohibits payments made in order to assist a company in obtaining or retaining business for or with, or directing business to, any person. Business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality. As a result of the 1998 amendments, the FCPA now prohibits payments to foreign officials for the purpose of securing “any improper advantage” in obtaining or retaining business. It is not clear at this time what, if any, conduct falls within the scope of this amendment that the FCPA did not previously cover.

The leading FCPA business purpose decision is United States v. Kay²⁵ where the Fifth Circuit reversed a district court dismissal of an indictment that charged a defendant with bribing a Haitian official to understate customs duties and sales taxes on rice shipped to Haiti to assist American Rice, Inc. in obtaining or retaining business. The district court ruled that as a matter of law, illicit payments to foreign officials to avoid portions of customs duties and sales taxes were not the type of bribes that the FCPA criminalizes. On appeal the Fifth Circuit found that such bribes *could* (but do not necessarily) come within the ambit of the FCPA statute. In remanding the case, it indicated that the government would have to prove the defendant intended for the foreign official’s anticipated conduct in consideration of a bribe (the “quid pro quo”) to produce an anticipated result, i.e., the diminution of duties and taxes – that would assist in obtaining or retaining business.²⁶

f. Knowledge

The FCPA does not require proof of actual knowledge that a payment or promise to pay an intermediary will be passed on to a foreign official. A person may be equally liable on the basis of constructive knowledge. The FCPA provides as follows:

- (2)(A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if -
- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
 - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

When knowledge of the existence 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 actually believes that such circumstance does not exist.²⁷

The FCPA’s legislative history speaks of “willful blindness,” “deliberate ignorance” and taking a “head-in-the-sand” attitude as constituting knowledge under the statute. Individuals or corporations who consciously disregard or deliberately ignore known circumstances that should have put them on notice of an improper payment may be prosecuted for knowing that a payment would be passed on to a foreign official.

g. Use of Third Parties

A company may be liable for payments by an agent or third party if the company authorizes the payment or if it “knew” the improper payment would be made. A company is deemed to have knowledge of such offer, promise or payment if it is aware of, but consciously disregards a “high probability” that such an offer, promise or payment will be made.²⁸ The risk of liability because of the actions of third parties means that persons subject to the FCPA must undertake significant steps to minimize the risks of becoming liable due to the actions of third parties.

h. Permissible Payments and Affirmative Defenses

1. Facilitating Payments for Routine Governmental Actions

The FCPA provides an exception for so-called “facilitating” or “grease payments” to low-level foreign officials who perform “routine governmental actions.”²⁹ The purpose of this exception is to avoid liability where small sums are paid to facilitate certain routine, non-discretionary government functions such as the processing of permits, licenses, visas and work orders or other official documents; providing police protection, power and water supply, cargo handling or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across country.³⁰ “Routine governmental action” does not include any decision by a foreign official to award new business or to continue business with a particular party.³¹

2. Affirmative Defenses

The FCPA provides two affirmative defenses to the anti-bribery provisions, which were added when the FCPA was amended in 1988. First, the FCPA provides an affirmative defense where the payment at issue was permitted by the written laws of the foreign official’s or political candidate’s country.³² Second, an affirmative defense exists for payments made for “reasonable and bona fide” expenditures related to the execution or performance of a contract with a foreign government or agency thereof, or the promotion, demonstration or explanation of products or services.³³ For each of these defenses, the company or its officers or employees bears the burden of establishing in the first instance facts underlying the affirmative defense.

i. Written Laws of Foreign Country

A person charged with anti-bribery violations may assert as an affirmative defense that the payment was lawful under the written laws and regulations of the foreign country. The issue of what constitutes a payment permissible under the laws of a country is a matter of significant debate. Although no country has “written laws” permitting bribery, whether a payment to a government official who can under local law undertake commercial activities constitutes a permissible payment under the FCPA is far less clear.

ii. Reasonable and Bona Fide Expenditures

It is also an affirmative defense to an anti-bribery violation that the payment, offer or promise of anything of value was a reasonable and bona fide expenditure, such as travel and lodging

expenses incurred by or on behalf of a foreign official, party official, or candidate, and was related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof.

Thus, a company may pay the reasonable, necessary and bona fide expenses of government officials who are brought to a corporate location to inspect equipment or facilities in connection with a potential sale of the equipment or facilities. Similarly, U.S. persons may cover the reasonable expenditures of foreign officials related to bringing such officials to review and/or approve contractual work (e.g., fabrication of equipment at other locations).

The reasonable expenses defense does not give companies *carte blanche* to pay travel expenses for government officials. In a 1999 civil enforcement action, the Department of Justice took the position that a U.S. company, Metcalf & Eddy, Inc., violated the FCPA by providing an Egyptian official and his family with first class air travel to the United States, food, lodging, and other expenses because the purpose of the visit allegedly was to influence the official to use his authority to help direct a United States Agency for International Development contract award to Metcalf & Eddy. The Department of Justice alleged, among other things, that the official received 150 percent of the estimated per diem expenses in a lump sum payment and then was not required to pay for any of his expenses while in the United States. Metcalf & Eddy³⁴ settled the case with a consent decree, without admitting or denying culpability, and agreed to pay a \$400,000 civil fine as well as \$50,000 to reimburse the U.S. government for the cost of the investigation. Counsel for companies considering paying travel expenses for foreign government officials should scrutinize the proposed travel carefully to ensure it falls within the confines of this affirmative defense and is not a disguised attempt to provide compensation for help in securing business.

4. Commercial Bribery

The FCPA anti-bribery provisions do not govern or prohibit bribes paid to officers or employees of private, non-governmental entities. The FCPA anti-bribery provisions only apply to improper payments made, directly or indirectly, to a foreign official, a foreign political party or official thereof or a foreign political candidate.³⁵ However, commercial bribery payments that are mischaracterized on the books and records of a public company may constitute an FCPA books and records violation or a violation of the Act's internal control provisions.

B. Record Keeping and Internal Controls

In addition to the anti-bribery provisions, the FCPA imposes certain record-keeping and internal control requirements only on issuers. Essentially, these requirements mandate that publicly traded companies keep accurate books and records. Neither the record keeping nor internal control provisions limit themselves to transactions above a certain amount or impose a materiality requirement. The FCPA's accounting provisions are primarily enforced by the SEC,³⁶ but the Department of Justice can bring criminal charges of knowing circumvention of internal controls and knowing falsification of books, records and accounts.³⁷

The rationale behind the books and records and internal control provisions being complimentary to the anti-bribery provision was explained by Stanley Sporkin, the former federal judge and

SEC Enforcement Director who played a major role in the passage of the FCPA. He stated that the SEC proposed the record-keeping and financial control provisions because investigations had revealed that companies that paid bribes overseas never accurately recorded the illicit transactions on their books. Instead, companies had concealed the bribes by falsely describing the payments as other transactions. Judge Sporkin “theorized that requiring the disclosure of all bribes paid would, in effect, foreclose that activity.”³⁸

1. Application

The record keeping and internal controls provisions of the FCPA apply to issuers, those companies whose securities are registered with the SEC, or who are required to file reports with the SEC, pursuant to the Securities Exchange Act of 1934, regardless of whether they have any foreign operations.³⁹

2. Record-Keeping Provisions

The FCPA requires every issuer to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.”⁴⁰ “Reasonable detail” means such level of detail as would satisfy prudent officials in the conduct of their own affairs.⁴¹ Inadvertent mistakes will not give rise to enforcement actions or prosecutions.⁴² The Act defines “records” to include “accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type.”⁴³

Again, these provisions apply to issuers, regardless of whether or not they have foreign operations and whether or not bribery is involved. The act creates an obligation for issuers with respect to their affiliates as well. Where an issuer holds fifty percent or less of the voting power with respect to a foreign or domestic firm, the FCPA requires only that the issuer proceed in good faith to cause the affiliate to devise and maintain a system of internal accounting controls to the extent reasonable under the circumstances.⁴⁴ An individual or entity may be criminally liable if he knowingly falsifies a book, record or account.⁴⁵

Record keeping violations normally involve three types of offenses:

1. records that simply fail to record improper transactions at all, e.g., off-the-books transactions such as bribes and kickbacks;
2. records that are falsified to disguise aspects of improper transactions otherwise recorded correctly; and
3. records that correctly set forth the quantitative aspects of transactions but fail to record the qualitative aspects of the transactions that would have revealed their illegality or impropriety, such as the true purpose of particular payments to agents, distributors or customers.⁴⁶

It is not necessary to an FCPA violation that the inaccurately recorded transactions in question be material under federal securities laws.

An issuer can violate the books and records provisions if a foreign subsidiary creates false records to conceal an illicit payment, and the issuer parent then incorporates the subsidiary's information into its books and records. For example, in 2000 the SEC brought a books and records action against IBM Corp. related to "presumed illicit payments" to foreign officials by one of IBM's wholly-owned subsidiaries. The SEC alleged that IBM-Argentina paid money to a subcontractor which payment in turn was given to certain foreign officials. The SEC charged that IBM-Argentina's then-senior management overrode IBM procurement and contracting procedures and fabricated documentation to conceal the details of the subcontract. IBM-Argentina allegedly recorded the payments to the subcontractor as third-party subcontractor expenses, and IBM incorporated this information into the form 10-K it filed with the SEC in 1994. Without admitting or denying the SEC's allegations, IBM consented to the entry of a cease and desist order and agreed to pay a \$300,000 civil penalty.⁴⁷

3. Examples of Transactions Which Accounting Records May Fail to Adequately or Accurately Disclose

- political contributions;
- smuggling activities;
- commercial bribes or kickbacks;
- income tax violations;
- customs or currency violations;
- payments to foreign government officials; and
- extraordinary gifts

4. Internal Controls

The FCPA's internal controls provisions codify existing auditing standards⁴⁸ and require issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

- (1) transactions are executed in accordance with management's general or specific authorization;
- (2) transactions are recorded as necessary:
 - (a) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements; and
 - (b) to maintain accountability for assets;
- (3) access to assets is permitted only in accordance with management's general or specific authorization; and

- (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.⁴⁹

“Reasonable assurances” means such degree of assurance as would satisfy prudent officials in the conduct of their own affairs.⁵⁰

The FCPA does not mandate “any particular kind of internal controls systems.”⁵¹ Rather the test for compliance is “whether a system, taken as a whole, reasonably meets the statute’s specified objectives.”⁵² A person or entity may be criminally liable if he knowingly circumvents or knowingly fails to implement an internal accounting controls system.⁵³ No criminal liability is imposed for insignificant or technical accounting errors.⁵⁴

An SEC books and records consent decree resolution will in virtually all circumstances be preferable to a DOJ indictment or SEC bribery complaint.

C. Opinion Letters

In 1980 the Department of Justice instituted an FCPA review or opinion procedure,⁵⁵ and in 1992, it published a final rule⁵⁶ which enables public companies and all domestic concerns to obtain an opinion of the Attorney General as to whether prospective conduct would conform with the DOJ’s enforcement policy regarding the anti-bribery provisions of the FCPA. Under this procedure, a request must relate to an actual transaction and not a hypothetical one. It also must be prospective, i.e., made prior to the requestor’s commitment to proceed with a transaction.⁵⁷ The request must be specific and furnish “all relevant and material information bearing on the conduct ... and on the circumstances of the prospective conduct.”⁵⁸

A favorable opinion from the Justice Department creates a rebuttable presumption, applicable in any subsequent enforcement action, that the conduct described in the request conformed with the FCPA. In considering the presumption, a court will weigh all relevant factors, including whether the submission to the Attorney General was accurate and complete and whether the actual conduct diverged from that described in the request. An FCPA opinion provides a safe harbor only to the requestor and affords no protection to any party that did not join in the request.⁵⁹

Since 1980, the Department of Justice has released 42 opinions pursuant to this review procedure, and many of those matters involved minor gifts or payments.⁶⁰ The reluctance of corporations to use the opinion procedure has been attributed to the risk of the loss of confidentiality, the possibility of negative results, and the risk of instigating further government investigation.⁶¹ Although one might anticipate that the 1998 amendments would have spawned greater use of the opinion procedure as businesses sought clarification of the new provisions, there were, in fact, no opinions released in 1999 and only twelve opinions issued from 2000 through 2005.⁶²

D. Penalties, Fines and Other Sanctions

The FCPA is a criminal statute for which sentences of individuals and corporations are considered in the context of the United States Sentencing Guidelines (U.S.S.G.).⁶³

Individuals who commit willful violations of the FCPA anti-bribery provisions may be punished by up to \$250,000 in fines and/or five years imprisonment.⁶⁴ Individuals who violate the FCPA accounting provisions may be fined up to \$5,000,000 and imprisoned up to 20 years.⁶⁵ Corporations may be fined up to \$2,500,000 per violation of the FCPA accounting provisions⁶⁶ and \$2,000,000 for violation of the FCPA anti-bribery provisions.⁶⁷ Moreover, under the Alternative Fines Act, these fines can be much higher: the actual fine may be up to twice the loss to the victim or benefit the defendant did or sought to obtain by making the corrupt payment.⁶⁸ Fines imposed on individuals may not be paid by their employer or principal.⁶⁹ An unlawful payment under the FCPA is not deductible under the tax laws as a business expense.⁷⁰

The FCPA also allows a civil penalty of up to \$10,000 against any firm that violates the anti-bribery provisions of the FCPA, and against any officer, director, employee, or agent of a firm who willfully violates the anti-bribery provisions of the Act.⁷¹ The 1998 amendments eliminated a disparity in penalties between U.S. nationals who are employees or agents of issuers or domestic concerns and foreign nationals who are employees or agents of issuers or domestic concerns. Previously, foreign nationals were subject only to civil penalties under the FCPA. Now, all persons may be subject to civil or criminal penalties.⁷²

A person or company found in violation of the FCPA may be suspended or barred from the programs of federal agencies such as the Commodity Futures Trading Commission and the Overseas Private Investment Corporation.⁷³ The suspension by one government agency generally has government-wide effect.⁷⁴ Indictment alone can lead to the suspension of the right to do business with the U.S. government. Other potential collateral consequences for FCPA violations include ineligibility for export licenses, and SEC suspension and debarment from the securities business.⁷⁵

While the Department of Justice has exclusive jurisdiction to prosecute criminal violations of the FCPA, both the Justice Department and the SEC may obtain injunctive relief to prevent bribery and recordkeeping violations of the FCPA.⁷⁶

E. Private Causes of Action

The FCPA does not expressly provide for a private cause of action, and most federal courts have held that the FCPA does not imply a private cause of action.⁷⁷ However, foreign bribery can result in state court litigation. For example, Lockheed Martin, as successor to Loral Corp., was sued for Loral's alleged payment of bribes in connection with sale of military equipment to the Korean government in 1995-96.⁷⁸ The plaintiff, a representative of Loral's competitor in the sale, alleged that Loral and its agent conspired to induce the Republic of Korea to award the contract to Loral - rather than the plaintiff's client - by employing wrongful means, including bribes and sexual favors. Plaintiff contended that Loral's illicit conduct deprived it of a \$30 million commission it would have received had its client been awarded the contract and constituted intentional interference with prospective advantage and unfair competition under California law. A California trial court dismissed the claims, but the court of appeals reinstated them, finding *inter alia* that a claim under the unfair competition law could be predicated on a violation of the FCPA. Because the parties did not further challenge this finding, the California Supreme Court accepted, without deciding, that a claim under the California Unfair Competition Law may be predicated on a violation of the FCPA.⁷⁹

The Expanded Jurisdiction Over Absent Foreign Persons

A. Origin of the Expanded Jurisdiction

In enacting the FCPA in 1977, Congress originally limited its jurisdictional scope to U.S. companies and individuals. The 1998 amendments expanded the Act's jurisdiction to include foreign individuals and corporations. In particular, Congress amended the FCPA to implement the provisions of the Convention on Combating Bribery of Foreign Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development ("OECD") on December 17, 1997 ("the OECD Convention"). The OECD Convention, which the U.S. Senate ratified on July 31, 1998, required signatories to conform their laws to its terms. The United States did so with the International Anti-bribery and Fair Competition Act of 1998, which President William J. Clinton signed on November 10, 1998.⁸⁰

Among its provisions, the OECD Convention called on signatories to make it a criminal offense for "any person" to bribe a foreign public official⁸¹ and required them "to take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory."⁸² As a result, the FCPA had to be modified to conform to the OECD Convention by extending its anti-bribery provisions to cover any bribery committed by any person (not just issuers or domestic concerns) who commits an offense, in whole or in part, in U.S. territory.

B. Application of the Expanded Jurisdiction

In 1998 Congress implemented the above OECD Convention sections by adding a new section to the FCPA, which provides:

It shall be unlawful for *any person* other than an issuer that is subject to Section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, *while in the territory of the United States*, corruptly to make use of the mails or any means or instrumentality of interstate commerce, or to do any other act 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...⁸³

(Emphasis supplied)

The FCPA thus applies to any person including foreign corporations and foreign nationals who commits any act in furtherance of a prohibited payment while in the territory of the United States.

The Department of Justice has broadly interpreted the new "territory" language. For example, the Department's *Criminal Resource Manual*, the manual for federal prosecutors, addresses the scope of the new section as follows: "Although this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or

national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent."⁸⁴ Thus, under the Department's interpretation, the United States can bring a felony FCPA prosecution against a foreign national who has never set foot in the United States, provided that the foreign defendant caused some act in furtherance of the offense to take place in the United States. Moreover, the amended FCPA extends jurisdiction over absent foreign nationals beyond the person who actually committed the act in furtherance of the violation. Indeed, the legislative history of the 1998 amendments indicates congressional intent to make "foreign businesses" liable "for acts taken on their behalf."⁸⁵ Foreign subsidiaries and foreign national employees of foreign subsidiaries have clear exposure as a result of the 1998 amendment.

The Department of Justice and the SEC have demonstrated a willingness to take action against foreign nationals for exclusively overseas conduct. In United States and Securities and Exchange Commission v. KPMG Siddharta Siddharta & Harsono,⁸⁶ the Department of Justice and SEC filed an unprecedented joint civil action against an Indonesian accounting firm and one of its senior partners, alleging they had authorized the illicit payment of an Indonesian tax official for the purpose of reducing the tax assessment on a United States client.⁸⁷ The complaint alleged that the accounting firm and its partners both aided and abetted their U.S. client's violations and committed their own primary violation of the new provision governing non-U.S. persons. The complaint alleged the Indonesian defendants caused a false invoice to be submitted to the U.S. company, but did not allege any conduct by the defendants in the United States. The defendants entered into a consent decree without admitting or denying guilt. The prosecution stands as clear evidence that the U.S. government is willing to pursue foreign persons for alleged FCPA violations notwithstanding a very limited territorial nexus to the United States.

C. Interstate Commerce and Territorial Jurisdiction Bases

The traditional federal jurisdictional bases over U.S. companies and individuals is that they "make use of the mails or any means of instrumentality of interstate commerce in furtherance of 'an improper payment.'"⁸⁸ The interstate commerce element which has long been broadly interpreted under the mail and wire fraud statutes⁸⁹ is easily satisfied through the use of the mails, computer transmissions and telephone calls. The 1998 amendments created an alternative jurisdiction basis, to wit, nationality. Under the nationality principle, improper payments made by U.S. citizens and U.S. companies that take place wholly outside the U.S. may be prosecuted under the FCPA without any interstate commerce requirement.⁹⁰ Nationality jurisdiction has not been challenged under the FCPA, and a challenge is unlikely given the availability of the broadly interpreted interstate commerce jurisdiction.

The 1998 amendments and the Department of Justice's recent prosecutions portend that criminal defense attorneys will increasingly find themselves defending non-U.S. persons in FCPA investigations and cases. One issue that counsel for non U.S. persons should keep in mind is due process limitations on personal jurisdiction of United States courts. Even where a defendant falls within the broad subject matter jurisdiction of the amended FCPA, the due process clause may be a bar to U.S. courts exercising personal jurisdiction over a defendant in either criminal or civil FCPA actions.

1. Civil Cases: Minimum Contacts

The due process clause of the Constitution has been interpreted to provide that a United States court only may exercise personal jurisdiction over persons who have sufficient “minimum contacts” with the jurisdiction.⁹¹ The exercise of such jurisdiction must not “offend ‘traditional notions of fair play and substantial justice.’”⁹² A defendant must have had sufficient activities in the forum jurisdiction to reasonably anticipate being brought into the forum court.⁹³ In an action brought under a federal statute, the due process inquiry generally turns on a defendant’s contacts with the United States as a whole - not simply the state where the federal district court is located.⁹⁴

Defense counsel should consider a due process argument in contesting personal jurisdiction over a foreign person in an FCPA case where the defendant has little or no contact with the United States. Extraterritorial conduct that causes a substantial effect in the United States create personal jurisdiction over a defendant who personally had no contact with the United States. A person committing such conduct should reasonably anticipate being brought into court in this country.⁹⁵

De minimis consequences do not, however, suffice to create personal jurisdiction. For example, in the securities context, the Second Circuit has held that “not every causal connection between action abroad and ultimate injury to American investors will suffice, ... ‘even assuming ... some causal relation ... the test for in personam jurisdiction is somewhat more demanding.’”⁹⁶ Thus, although a foreign person who defrauds U.S. investors through illicit insider trading is plainly subject to U.S. jurisdiction,⁹⁷ the issue is much less clear in the case of a foreign person who paid a bribe to a foreign official, by money transfer from the United States, in circumstances that do not impact any U.S. investor or company. Where a defendant has little or no contacts with the United States, the strength of his personal jurisdiction argument will turn largely on the materiality (or lack thereof) of the U.S. consequences resulting from his foreign conduct.

2. Criminal Cases: Sufficient Nexus

In criminal prosecutions, the due process analysis for personal jurisdiction is usually stated in terms of whether the defendant’s extraterritorial conduct has sufficient nexus with the United States. As the Ninth Circuit observed, “The nexus requirement serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who ‘should reasonably anticipate being hauled into court’ in this country.”⁹⁸ Thus, foreign persons who plot terrorist acts to be committed in the United States are subject to jurisdiction of U.S. courts,⁹⁹ as are persons who conspire to smuggle drugs into the United States.¹⁰⁰

The same result is not necessarily true for a defendant with little or no contacts to the United States, who causes an act in furtherance of a foreign bribe to take place in the United States - or who aids and abets foreign bribery by a U.S. person - particularly where the conduct at issue causes no material consequences in the United States. Where the U.S. government is relying primarily on an effects test to establish a substantial nexus, the strength of a substantial nexus defense will depend on the significance of the U.S. effects of the conduct at issue.

These due process issues are likely to be played out in the courts in the coming years as the U.S. Government brings additional cases using the amended FCPA's broad provisions targeted at persons other than issuers and domestic concerns.

Anti-Bribery Conventions

Companies doing business internationally must be aware of increasing international focus on rooting out the practice of foreign bribery of government officials. This focus is evident from a number of major international treaties directed against these practices and legislation in the signatory nations implementing these pacts. Increasingly, transaction counsel will need to evaluate transactions through the multiple filters of the various applicable conventions and national legislation applicable to the transaction.

A. The Organization for Economic and Cooperative Development ("OECD") Convention

1. Background

The Organization for Economic and Cooperative Development ("OECD") Convention was signed on December 17, 1997.¹⁰¹ This treaty requires all signatories to take steps to criminalize the payment of bribes to foreign public officials and to establish appropriate sanctions on firms and individuals guilty of violating these provisions. The Convention does not eliminate the tax deductibility of bribes permitted by some countries and does not generally apply to bribes made to political parties. The U.S. State Department has called the OECD Convention "a major milestone in U.S. efforts over more than two decades to have other major trading nations join us in criminalizing the bribery of foreign public officials in international business transactions."¹⁰²

2. The Main Provisions of the OECD Convention

In general, the OECD Convention requires signatory nations to adopt "effective, proportionate, and dissuasive criminal sanctions" to those persons who bribe foreign public officials.¹⁰³ It calls for each nation to exercise its full jurisdictional powers to punish foreign bribery where the offense is committed in whole, or in part, on its soil, or is committed by its nationals abroad.¹⁰⁴ Like the FCPA, it contains both anti-bribery and recordkeeping provisions. Other significant points of the OECD Convention include:

(1) **Active Bribery Only.** The Convention only criminalizes "active bribery" which involves offering or giving a bribe. "Passive bribery," or the act of soliciting a bribe, is not addressed on the basis that this is presumably already a criminal offense in most countries.

(2) **Definition of Bribery.** Active bribery is defined as a bribe offered or given "in order to obtain or retain business or other improper advantage in the conduct of international business." As with the FCPA, small facilitation payments made with the intention of expediting or securing the performance of a routine governmental action, are excluded from the definition of improper payments under the Convention. By referring to "other improper advantage," the Convention intends to address situations where a

payment is made to obtain something to which the company is clearly not entitled (*e.g.*, an operating permit for a factory which failed to meet local health and safety standards.) The Convention also requires signatories to prohibit the use of off-the-book accounts and other practices used to conceal bribes made to public officials.

(3) **Public Officials.** The Convention defines “public officials” as follows: “any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function or involved in a public agency or public enterprise; and any official or agent of a public international organization.” According to an OECD report of the negotiating conference, the term “public official” does not encompass political parties, persons on the verge of being elected or appointed to public office, or private sector corruption¹⁰⁵

(4) **Civil liability if Not Criminal.** The Convention recognizes that in countries like Japan and Germany, legal entities (*e.g.*, corporations) generally cannot be criminally responsible under domestic law. However, Article 2 of the Convention requires all signatories to hold legal entities liable for the bribery of foreign public officials without specifying whether such liability is to be criminal or civil. Article 3.2 further requires that in countries which do not impose criminal liability on legal persons, “effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions” should be imposed.

(5) **Reliance on Domestic Laws.** The Convention seeks to impose general standards rather than detailed prohibitions. Though it provides a definition of the offense criminalized, the Convention also relies on the fact that its signatories’ domestic laws regarding the issue of internal bribery or their rules pertaining to criminal law will be extended so as to address the bribery of foreign public officials.

3. The OECD Convention and Domestic Legislation

By 2004, all 35 signatories had ratified the OECD Convention and had approved legislation to implement the Convention.¹⁰⁶ In the United States, the International Anti-Bribery and Fair Competition Act of 1998 amended the FCPA to implement the OECD Convention. Other countries have similarly adopted legislation, which vary widely on many significant points. As a result, corporations conducting international business must scrutinize carefully the law in each OECD country where they do business.

The OECD Convention has not yet achieved the goal of leveling the playing field between U.S. persons subject to the FCPA and their foreign competitors. The most recent State Department report found many deficiencies in the implementing legislation of the signatories, including, among others, France, Japan, and the United Kingdom.¹⁰⁷ The report notes, however, that many of the deficient countries are in the process of considering, or implementing, amendments to their legislation that may put more teeth in their enforcement programs.¹⁰⁸ Persons engaged in international commerce, and their counsel, should stay abreast of these developments.

B. The Organization of American States (“OAS”) Convention

Similar to the FCPA, the Organization of American States (“OAS”) Inter-American Convention Against Corruption requires parties to criminalize the bribery of foreign officials.¹⁰⁹ To serve its purpose of preventing, detecting, punishing and eradicating corruption, the OAS Convention calls for cooperation among countries in the fight against domestic and transnational corruption.¹¹⁰ The convention requires that member states afford one another the “widest measure of mutual assistance” in the criminal investigation and prosecution of such acts.¹¹¹ As a result, parties must extradite individuals that violate another country’s anti-corruption laws.¹¹² Moreover, member states cannot invoke bank secrecy as a basis for refusing to assist another state.¹¹³

Parties are also required to update their domestic legislation to criminalize corrupt acts such as transnational bribery to prevent any national from bribing an official of another state and illicit enrichment to prohibit inexplicable increases in assets of government officials.¹¹⁴ The U.S., however, ratified the OAS Convention in September 2000 with the understanding that the U.S. would not establish a new criminal offense of illicit enrichment because it is constitutionally problematic.¹¹⁵

The OAS Convention entered into force on March 6, 1997. Twenty-three countries have signed the convention,¹¹⁶ and twenty-nine countries have ratified the convention.¹¹⁷

C. The Council of Europe (“CoE”) Convention

The Criminal Law Convention on Corruption criminalizes a wide range of corrupt practices in both the public and private sector such as bribery of domestic and foreign public officials, active and passive bribery in the private sector, and money laundering of proceeds from corruption offenses.¹¹⁸ Similar to the OAS Convention Against Corruption, the Council of Europe (CoE) calls for states to afford one another the “widest measure of mutual assistance” in investigating or prosecuting such acts.¹¹⁹ Likewise, the CoE convention deems corrupt acts outlined in the convention as extraditable offenses.¹²⁰

The Criminal Law Convention on Corruption is open to accession of non-member states.¹²¹ The “Group of States Against Corruption” (GRECO) shall monitor the implementation of the convention.¹²² There are currently twenty-nine ratifications.¹²³ The U.S. signed the convention in October 2000, but has not yet ratified it.¹²⁴

Board of Directors and Management Responsibilities

A. Board of Director Responsibilities

A board of directors has a duty of care to the company that requires it to be informed of developments in the company’s business and of possible liabilities. Certain categories of SEC investigations (including those raising issues of circumvention of internal controls, improper payments, false books and records) may require the directors to inform themselves of the underlying facts. This is especially true where senior management is accused of improper conduct.¹²⁵

B. *In re Caremark International Inc. Derivative Litigation* (Del. Ch. 1996)

A landmark case that establishes a baseline for the responsibilities of a board of directors is *In re Caremark International Inc. Derivative Litigation*.¹²⁶ In this case the Delaware Chancery Court held that the failure of a board of directors to ensure that its company has an adequate corporate compliance information and reporting system in place could “render a director liable for losses caused by non-compliance with applicable legal standards.” Commenting on the 1991 enactment of the Organization Sentencing Guidelines, Chancellor William T. Allen emphasized: “Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers.”¹²⁷

Further, the chancellor wrote: “The Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.” A company’s compliance program should be “reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation’s compliance with the law and its business performance.”¹²⁸

Chancellor Allen concluded that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by noncompliance with applicable legal standards.”¹²⁹ Directors therefore have an affirmative duty to find and correct illegal behavior by corporate employees. The most effective way to fulfill this duty is through an effective and regularly updated compliance program, including a methodology for identifying and addressing any violations of applicable laws or company policies.

C. *Sarbanes-Oxley Certifications by Public Company Officers*

Under the Sarbanes-Oxley Act of 2002, the chief executive officers and chief financial officers of public companies must certify the accuracy of periodic filings with the SEC.¹³⁰ A CEO or CFO must certify that he has reviewed the report, and to his knowledge the report does not contain any material misstatements or omissions, and the financial statements and other information contained in the report fairly represent in all material respects the company’s financial condition and results of operations of the issuer for the periods presented in the reports.¹³¹

The CEO and CFO must also certify in each quarterly or annual report that they are responsible for establishing and maintaining internal controls¹³² and have designed such internal controls to ensure that material information relating to the company and its consolidated subsidiaries is made known to such officers by others within those entities¹³³; that they have evaluated the effectiveness of the company’s internal controls within the past 90 days¹³⁴; that they have presented in the report their conclusions about the effectiveness of their controls¹³⁵; that they have disclosed to the company’s auditors and the audit committee all significant deficiencies in the design or operation of internal controls which could adversely affect the company’s ability to

record, process, summarize and report financial data and have identified for the auditors any material weaknesses in internal controls, and any fraud, whether material or not, that involves management or other employees who have a significant role in the issuer's internal controls.¹³⁶

Whoever certifies one of the above statements knowing that the periodic report does not comport with all the requirements can be fined \$1,000,000 and imprisoned up to 10 years.¹³⁷ Whoever willfully certifies such a statement knowing it does not comport with the statute's requirements can be fined up to \$5,000,000 and imprisoned up to 20 years.¹³⁸ FCPA investigations can trigger reporting responsibilities and certification issues for publicly held companies and their CEOs and CFOs.

D. Compliance Programs

The hallmarks of a quality corporate compliance program are a clear statement of the company's code of conduct or ethics policy (the "tone at the top"), strong managers and compliance officers, clear written compliance materials, periodic training and consulting, program monitoring, enforcement, and periodic audits of specific work programs.

1. The Seven Minimum Steps of an Effective Compliance Program

Corporations should keep in mind the relevant commentary to the Organization section of the United States Sentencing Guidelines. The commentary for this section states that the "hallmark of an effective program ... is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents."¹³⁹ It then sets forth seven criteria for determining whether a program satisfies minimum standards of due diligence:

- (1) The standards and procedures must be "reasonably capable of reducing the prospect of criminal conduct." In essence, there must be a sincere commitment on the part of the organization to prevent and detect criminal conduct.
- (2) A specific high-ranking individual or several high-ranking individuals within the organization must oversee compliance.
- (3) The organization must exercise due care not to delegate substantial discretionary authority to individuals who may, based on background or other factors, have "a propensity to engage in illegal activities."
- (4) The organization must effectively disseminate the standards and procedures to all employees.
- (5) The organization must take reasonable steps to achieve compliance with its standards.
- (6) Employees who violate the standard must be disciplined through an established mechanism.
- (7) Appropriate modifications to the program must be made after offenses are detected so that future offenses might be prevented.

In addition, SEC enforcement actions and DOJ plea agreements offer guidance on compliance programs. For example, in United States v. Metcalf & Eddy, Inc., the defendant and the Department of Justice settled a civil enforcement case arising from the defendant's alleged corrupt payments of travel and entertainment expenses to an Egyptian government official.¹⁴⁰ As part of the settlement, the DOJ required the defendant to adopt a compliance and ethics program for the purpose of preventing future FCPA violations.¹⁴¹ The terms of the program set forth in the consent decree have been interpreted as signaling what the Department views as the components steps of an effective compliance program. These components include the following:

- a clearly articulated corporate policy prohibiting violations of the FCPA and the establishment of compliance standards and procedures to be followed by the company's employees, consultants and agents that are reasonably capable of reducing the prospect of violations;
- the assignment to one or more senior corporate officials of the responsibility of overseeing the compliance program and the authority and responsibility to investigate criminal conduct of the company's employees and other agents, including the authority to retain outside counsel and auditors to conduct audits and investigations;
- establishment of a committee to review and conduct due diligence on agents retained for business development in foreign jurisdictions as well as foreign joint venture partners;
- corporate procedures to ensure that the company does not delegate substantial discretionary authority to individuals who the company knows, or should know, have a propensity to engage in illegal activities;
- corporate procedures to ensure that the company forms business relationships with reputable agents, consultants, and representatives for purposes of business development in foreign jurisdictions;
- regular training of officers, employees, agents, and consultants concerning the requirements of the FCPA and of other applicable foreign bribery laws;
- implementation of an appropriate disciplinary mechanism for violations or failure to detect violations of the law or the company's compliance policies;
- establishment of a system by which officers, employees, agents, and consultants can report suspected criminal conduct without fear of retribution or the need to go through an immediate supervisor;
- in all contracts with agents, consultants, and other representatives for purposes of business development in foreign jurisdictions, inclusion of warranties that no payments of money or anything of value will be offered, promised or paid, directly or indirectly, to any foreign official public or political officer to induce such officials to use their influence with a foreign government or instrumentality to obtain an improper business advantage for the company;

- in all contracts with agents, consultants, and other representatives for purposes of business development in a foreign jurisdiction, inclusion of a warranty that the agent, consultant, or representative shall not retain any subagent or representative without the prior written consent of the company; and
- in all joint venture agreements where the work will be performed in a foreign jurisdiction, inclusion of similar contractual warranties regarding no payments of foreign officials and no hiring of subagents or representatives without prior written permission.¹⁴²

Each company conducting foreign business will present a different set of issues and challenges, and the necessary components will vary from company to company.

2. FCPA Compliance Program Failures

Failures of FCPA compliance efforts can significantly damage a corporate program's overall effectiveness and deprive the company of salutary benefits under the Organizational Sentencing Guidelines. Such failures include:

- Companies fail to adopt, and fully distribute a clear, written code of conduct or ethics policy, and more particularly, written policies prohibiting FCPA-proscribed conduct and policies establishing a methodology for the identification, selection, approval, and retention of foreign agents, consultants, or other third-party contractors in connection with foreign government procurement or other projects.
- Companies fail to adequately undertake and document their due diligence efforts in evaluating potential agents, consultants, third parties and joint venture partners.
- Companies fail to appoint compliance officers.
- Companies delegate compliance to officers or employees who have no real understanding or training in FCPA requirements and issues. Similarly, companies mistakenly delegate compliance activities to persons who have an inherent conflict of interest, e.g., having a marketing or project proponent undertake due diligence of proposed agents.
- Companies do not require senior management or newly hired senior managers to undertake periodic ethics and FCPA training.
- Companies fail to rotate senior management personnel out of high risk countries.
- Companies fail to work closely with their outside auditors to evaluate annually FCPA efforts and to modify audit work programs, policies and training.
- Companies lack experienced internal auditors that regularly focus on FCPA issues.

- Companies fail to make compliance a priority and, due to the press of other legitimate business matters, compliance efforts and training become a secondary priority.
- Companies fail to implement internal financial controls that reduce risks of improper payments (e.g., check issuance, wire transfers).
- Companies take a laissez-faire attitude about FCPA-proscribed conduct, and senior managers or sales personnel rationalize that other American or foreign competitors engage in FCPA-proscribed conduct.
- Companies do not adequately monitor the activities of foreign subsidiaries.
- Companies and their managers ignore their own compliance rules and policies due to business deadlines and time constraints, and senior managers or sales personnel engage in questionable practices, without advance compliance clearance or legal advice.
- Companies fail to translate into appropriate foreign languages their compliance codes, policies, forms and questionnaires.
- Companies and their managers take a “head-in-the-sand” approach with agents, consultants and partners and senior managers. For example, sales personnel erroneously assume that if they do not conduct due diligence on agents, consultants and partners or if they disregard facts that should prompt them to make further inquiries, they will not face any liability.
- Companies hire or appoint foreign nationals to run overseas operations without thoroughly training them on the specific requirements and prohibitions of the FCPA.
- Companies fail to employ standard-form baseline contracts for foreign agents, joint ventures, sales representatives, consultants, and other contractors or to enforce model uniform covenant, warranty and representation clauses. Random departures from the company’s standard-form foreign agent consultant or representative agreements will raise questions about a company’s commitment to compliance and internal controls.
- Companies fail to continually monitor and update their ethics and FCPA compliance efforts. In particular, in-house legal departments fail to regularly review, reevaluate and modify compliance programs along with agent consultant, third party and joint venture agreements for FCPA-related issues, developments and best practices.
- Due diligence efforts fail to address local law issues that may be relevant to agency or consultant agreements, joint venture agreements or employment relationships.

- Companies fail to take appropriate disciplinary actions in the wake of FCPA misconduct.

Transaction Issues and Considerations

A. Overview

Persons transacting business internationally must always consider possible issues arising under the FCPA. While these issues are particularly relevant in the context of the sale of goods or services to foreign governments and their instrumentalities, FCPA issues can arise even in the context of purely private-sector transactions. Thus, an improper payment to a foreign government official to obtain a license to commence or continue a business activity, e.g., a telecommunications project, may equally be an FCPA violation. General counsel and transaction counsel must be sensitive to FCPA issues in any international transaction, regardless of the direct or indirect role of any governmental entity.¹⁴³

A second significant issue is that some transaction counsel erroneously consider the FCPA to be an issue only when a traditional “intermediary” (agent, commission sales representative, or consultant) is involved, and who could be a possible conduit or payor of an improper payment. Thus, many multinational companies undertake appropriate review and due diligence only in the context of retaining agents, consultants or sales representatives but not in situations involving mergers, acquisitions, or joint ventures. However, as the March 2005 DOJ and SEC criminal and enforcement actions against Titan Corporation demonstrated in an ill-fated merger with Lockheed-Martin,¹⁴⁴ FCPA issues can also arise in any transaction ranging from foreign investments or acquisitions, joint ventures, licensing arrangements, infrastructure projects, offset, countertrade agreements, and mergers. A corporation can violate the FCPA as much for the actions of a joint venture partner or a subcontractor as it would for the actions of a traditional agent, sales representative, or consultant.

Companies operating internationally should implement procedures and steps to assure that FCPA and related compliance considerations are taken into account in every overseas transaction. General counsel and transactional counsel must ensure that the following elements are included in the procedures and methodologies of reviewing and implementing all overseas transactions.

1. **Selection Criteria.** Agents, sales representatives, consultants, partners or other third-party contractors (collectively “third-party contractors”) must be identified and selected on the basis of objective and written evaluation criteria, e.g., a partner is selected on the basis of identifiable commercial and technical competence and not because he is the relative of an important government official.
2. **Target of Joint Venturer’s Business with Foreign Governments.** In considering a target or joint venture partner, one must consider the volume and percentage of the acquiree’s business derived from foreign government contracts as well as its countries of operation.

3. Due Diligence and Reputation Check. Third-Party contractors are objectively evaluated and due diligence is undertaken into their business reputation and integrity. Depending upon the scope of the relationship and other factors, such due diligence may include: (i) checking public sources of information; (ii) checking with business references provided by the potential third-party contractor; (iii) interviewing the third-party contractor; (iv) obtaining information from U.S. government sources; and (v) obtaining information from institutions (banks, accounting firms, lawyers) in the third-party contractor's country of operations.
4. Contract Provisions. Written agreements with third-party contractors must be within the norm for and consistent with standard arrangements in the industry or geographic sector. The agreements should specify duties or services to be provided by the agents, consultants or contractors. The agreements must contain certain standard representations, warranties, covenants and the like, *infra*. The agreements must provide for periodic FCPA certifications and termination for breach of any representations, warranties or covenants or other FCPA-related requirements.
5. Related and Unrelated Transactions. Transactional counsel must look at the big picture to assure that a third-party contractor is not possibly structuring the transaction and related or unrelated agreements so as to generate funds, with or without the company's explicit knowledge, and utilize the funds to make improper payments. There have been examples recently of business arrangements and structures that may not make economic sense and trigger concerns about funds being delivered to third-party contractors to facilitate improper payments. For example, SEC enforcement activity has evaluated unrelated offshore or third-country investment projects, offset and counter trade arrangements, inflated subcontracts, and contracts for "advisory" or other vaguely defined services.
6. Red Flags. There are certain "signaling devices" or "red flags" that should put transactional counsel on notice to review a transaction carefully, because such signs are possible indications that improper payments may be intended by third-party contractors.

B. Examples of Red Flags

Certain signs may suggest that improper payment activity has occurred or may be occurring. Standing alone these signaling devices or red flags certainly do not prove the existence of illicit or improper activity. However, they may suggest the need for further inquiry and economic justification for the arrangements as well as greater vigilance and audit activity during the implementation stages.

Fifteen warning signs that can portend FCPA problems are listed below. Although these red flags focus on agents and consultants, they apply equally to joint venturers, contractors and other business partners:

1. the agent or consultant resides outside the country in which the services are to be rendered;
2. the commission payments to the agent or consultant are required to be made outside the country and/or to a country linked to money laundering activity;
3. company wire transfers do not disclose the identity of the sender or recipient;
4. the agent or consultant demands an unusually high commission without a corresponding level of services or risk (e.g., an agent who bears financial risks on delivery of goods or performs substantial pre- or post-sales services may be entitled to greater compensation than a pure commission agent/broker);
5. the agent or consultant refuses to disclose its complete ownership;
6. the agent or consultant does not have the organizational resources or staff to undertake the scope of work required under the agreement (e.g., pre-award technical activities or logistical assistance, and post-award activities such as assistance with customs, permits, financing, licenses, etc.);
7. the agent or consultant has a close family connection with or other personal or professional affiliation with the foreign government or official;
8. an agent or consultant's family members or relatives are senior officials in the foreign government or ruling political party;
9. the agent or consultant has been recommended to the company by a foreign official of the potential government customer;
10. the agent or consultant has undisclosed sub-agents or sub-contractors who assist in his work;
11. the agent or consultant's commissions are greater than the range which is customary or typical within the industry and region;
12. the agent or consultant refuses to sign representations, warranties and covenants that he/she has not violated and will not violate the requirements of the FCPA;
13. the agent or consultant requests or requires payment in cash;
14. the agent or consultant requests that payments be made to a bank located in a foreign country unrelated to the transaction, or be made to undisclosed third parties;
15. the agent or consultant requests that false invoices or other documents be prepared in connection with a transaction;

16. the transaction involves or takes place in a country with a general reputation for bribery and corruption;
17. there is a lack of transparency in expenses and accounting records; and/or
18. a party to a contract requests a campaign contribution to a foreign party candidate be made in cash or not be disclosed.

C. *Transparency International (TI) 2005 Corruption Perception Index*

In October 2005, Berlin-based Transparency International issued its seventh “Corruption Perception Index,” ranking 159 countries according to the extent they are internationally perceived to have corrupt business environments.¹⁴⁵ More than two-thirds of the nations surveyed scored less than 5 out of a clean score of 10, indicating serious levels of corruption in a majority of the countries surveyed. In the most recent TI index, the 30 “worst countries,” i.e., those that are perceived to be the most corrupt, were in order:

| <u>Ranking</u> | <u>Country</u> |
|----------------|--|
| 1 | Bangladesh, Chad |
| 5 | Haiti, Myanmar, Turkmenistan |
| 8 | Cote d’Ivoire; Equatorial Guinea; Nigeria |
| 9 | Angola |
| 16 | Democratic Republic of Congo, Kenya, Pakistan, Paraguay, Somalia, Sudan, Tajikstan |
| 23 | Azerbaijan, Cameroon, Ethiopia, Indonesia, Iraq, Liberia, Uzbekistan |
| 30 | Burundi, Cambodia, Republic of Congo, Georgia, Kyrgystan, Papua New Guinea |

Naturally, there are clear differences of opinion about any such characterization of these (or any) countries as “most corrupt,” insofar as the bribery reputation of the foreign country is a red flag; however, this list (and similar lists from other organizations) may be useful to counsel in evaluating the potential risks of a proposed foreign transaction, handling an internal investigation, or defending a government investigation, or to auditors deciding which foreign operations to prioritize in FCPA audit reviews.

D. *Agents and Consultants*

The “knowing” standard in the FCPA means that a company is equally liable whether an improper payment is made by the company’s employees or a third party, such as an agent or consultant. In view of the strong ethics or code of conduct policies at many multinational companies, it is more likely that an agent, consultant or other third party will make an improper payment than an officer or employee. A company can be held responsible for the actions of an agent or other third party if it: (1) authorizes an agent or third party to make improper payments to foreign officials or (2) makes payments to an agent or third party, knowing that all or a portion of money will be paid directly or indirectly to foreign officials. The FCPA makes clear that

proof of actual knowledge is not required. Knowledge is satisfied when a person is aware of a high probability of the existence of a particular circumstance.¹⁴⁶ In short, individuals may not consciously disregard or deliberately ignore suspicious facts.

Multinational companies routinely enter into arrangements with local agents, sales representatives or consultants who assist in procuring government business. While each company has its own particular approach to such relationships, it is imprudent for a multinational company to not provide clear direction to the local party concerning FCPA-proscribed behavior and to not obtain the local party's written affirmation of these standards. Typically, of course, such direction and affirmation is contained in written agreements. Such agreements for example, in the case of an agent or consultant, should consider the following terms:

1. Representations and Warranties

- A representation about the identity of all shareholders, directors, officers and other "stakeholders" of the agent or consultant.
- A representation that no shareholder, director, officer, or employee is a foreign official (as defined in the FCPA).
- A representation that in respect of any business for which it provides or may have provided consulting services to the company, it has not paid, offered or agreed to pay any political contributions. Alternatively, a representation that it will disclose and has no objection to the disclosure of all political contributions to the U.S. and/or foreign governments.
- A representation that the agent or consultant has no undisclosed sub-agents or third parties who have any role in the agency company.
- A representation that the agent or consultant has not been convicted of or pleaded guilty to an offense involving fraud, corruption, or moral turpitude and that it is not now listed by any government agency as debarred, suspended, proposed for suspension or disbarment or otherwise ineligible for government procurement programs.
- A representation that the agent or consultant will not make and has not made directly or indirectly any payments or given anything of value to any foreign official in connection with the company's activities or in obtaining any other business from any governmental agency or instrumentality.
- Failure to inform the company of a material change in a representation or warranty or any event that renders or materially alters a representation shall give the company the right to terminate the agreement.

2. Covenants

- Covenants that all of the representations listed above will remain true, accurate and complete at all relevant times and that the agent will promptly inform the company if any of them change (e.g., a shareholder becomes a foreign official).

3. Annual Certifications and Audits

- Agent or consultant will provide annual certifications relating to its understanding of and compliance with the FCPA.
- Agent or consultant will permit company, or an independent accountant, to audit its books and records to assure compliance with the FCPA. (This provision is often difficult to negotiate.)

4. Payments

- Company will make payments only to an established bank account in the country where the business activities are taking place (payments in another offshore location should be limited to special cases that can be justified). Under no circumstances will payments be made in cash or to third parties.

5. Compliance With Applicable Laws

- Agent or consultant will certify that it is in compliance with all applicable laws relating to: (a) its status as a legal entity; (b) its role as an agent for the Company; (c) its scope of work for the Company, including its appearance before governmental agencies and instrumentalities; and (d) its receipt of funds as set forth in the agreement.

E. Joint Ventures and Other Arrangements

1. Transaction Issues

FCPA issues can also arise in transactions involving joint ventures. For example, U.S. companies seeking to sell goods or services in other countries will frequently enter into joint ventures for various commercial, legal or financial reasons. In many jurisdictions, it is a requirement of law that foreign parties must have a local partner to undertake certain projects. In other cases, it will be essential, as a matter of operational necessity, that a foreign company have a local partner in order to access local labor, equipment, financing, and other resources. In large infrastructure projects, the requirements of different forms of input (construction, equipment, labor), level of financing, and risk allocation may require the formation of a joint venture company to undertake such projects. A joint venture can simply be a contractual agreement relating to a particular project, with each party agreeing to undertake certain activities and receive certain benefits and compensation in return. More typically, a joint venture will consist of the formation of a new legal entity under the laws of the country in question, with its equity ownership, board of directors and day-to-day management shared between the partners.

Whatever the form, the joint venture needs to incorporate the same procedures and methodology described above to minimize its risk of FCPA violations.

2. *FCPA Opinion Procedure Release 2001-01 (May 24, 2001)*

U.S. companies forming joint ventures with other foreign companies under which each party will contribute pre-existing contracts to the venture should be aware of potential FCPA issues relating to the contracts procured by the foreign company prior to formation of the venture. In May 2001, the Department of Justice addressed this subject through its opinion release procedure when a U.S. company sought guidance concerning its plans to enter into a joint venture with a French company.¹⁴⁷ Both companies planned to contribute pre-existing contracts to the venture, including contracts procured by the French company before the effective date of the new French Law No. 2000-595 Against Corrupt Practices (“FLAC”). In indicating that it would not take any enforcement action under the facts and circumstances there presented, the DOJ raised several important issues.

The U.S. company requesting the opinion letter informed the DOJ that the French company had represented that none of the contracts and transactions to be contributed by the French company were procured in violation of applicable anti-bribery or other laws. In response, the Department of Justice noted that it specifically interpreted this representation to mean that all the contracts the French company was bringing to the joint venture were obtained in compliance with all applicable anti-bribery law - not just French law. The Department then stated that if the French company’s representation was “limited to violation of then-applicable French law, the Requestor, as an American company, may face liability under the FCPA if it or the joint venture knowingly takes any act in furtherance of a payment to a foreign official with respect to previously existing contracts irrespective of whether the agreement to make such payments was lawful under French law when the contract was entered into.”¹⁴⁸ Thus, a U.S. company can be held liable if it takes any act in furtherance of a payment (e.g., payment of a commission due an agent who had previously assisted in obtaining a contract for the foreign partner) to a foreign official in violation of the anti- bribery provisions of any country.

Opinion 2001-01 also allowed the DOJ to state its view concerning the appropriate termination provision for the joint venture. The joint venture agreement provided that the U.S. company could opt out of the venture or terminate its obligations if “(i) the French company is convicted of violating the FLAC; (ii) the French company enters into a settlement with an admission of liability under the FLAC; or (iii) the Requestor learns of evidence that the French company violated anti-bribery laws and that violation, even without a conviction or settlement, has a material adverse effect upon the joint venture.” The Department objected to the “material adverse effect” standard, which it called “unduly restrictive.” The Department noted, “Should the Requestor’s inability to extricate itself result in the Requestor taking, in the future, acts in furtherance of original acts of bribery by the French company, the Requestor may face liability under the FCPA.” As a result, the Department specifically declined to endorse the “materially adverse effect” standard. This opinion highlights for transaction counsel the importance of structuring joint ventures and acquisitions such that “FCPA-tainted” assets or contracts not result in liability for the U.S. party.

Conducting an Internal Investigation

A. Reasons to Conduct an Internal Investigation

There are compelling legal, practical and tactical reasons to conduct an internal investigation in the wake of FCPA allegations. They include:

1. To fulfill the legal duties of directors and management;
2. To marshal the facts and prepare for the defense of a potential investigation by federal prosecutors or the SEC, or litigation with shareholders and others;
3. To review, reconsider and revise accounting procedures and internal controls to make sure that adequate systems are in place;
4. To assist the Board of Directors and company in determining whether the company has made accurate disclosures;
5. To modify the compliance program and take appropriate disciplinary actions so as to minimize the recurrence of improper acts or the risk of future prosecution;¹⁴⁹
6. To later obtain the benefit of prosecutorial discretion (i.e., declination) by demonstrating that upon discovering misconduct, the company was proactive, investigated the matter, took appropriate disciplinary and remedial measures or voluntarily disclosed to the government;
7. To reduce potential corporate sentencing exposure under the Organizational Guidelines (Chapter 8, United States Sentencing Guidelines); and
8. To make recommendations and provide legal advice to management, Audit Committees or Board of Directors, consistent with the above objectives.

B. Selection of Outside Counsel

For a variety of reasons, companies often turn to outside counsel to conduct internal investigations or to defend grand jury investigations.

1. Outside counsel have internal investigation and grand jury experience, litigation skills and resources that inside counsel may not.
2. Outside counsel generally enjoy at least a partial presumption of independence from management.
3. An investigation by outside counsel may receive greater protection against discovery by the Department of Justice, SEC and others, including attorney work product and attorney-client communication privileges.¹⁵⁰

To conduct a major internal investigation or defend a grand jury investigation, some companies find it prudent to retain or consult a law firm other than their regular outside counsel to secure particular expertise, to demonstrate greater independence, or to avoid potential conflicts where the role or advice of regular outside counsel may be an issue.

C. Basic Investigation Issues and Practices ¹⁵¹

1. The first question to decide is who will be told the final results of the investigation. This will in part be determined by the company's structure and whether the investigation reveals wrongdoing by any individuals in the company's upper levels. Who is likely to or will see the report may affect whether a privilege is waived.¹⁵²
2. Unless the attorney-client and attorney work product privileges are carefully protected, the report may become discoverable.¹⁵³
3. Retainer letters and agreements should be clear that counsel is representing the company alone. Otherwise, there could be joint representation, and the other client(s) could waive the privileged status of the report.
4. There are other issues of representation, especially in dealing with officers and employees.
 - a. In representing the company or an audit committee, investigative counsel will come into contact with many middle- and lower-level employees. These individuals may assume that outside counsel represents them personally and therefore may offer self-incriminating information. ABA Model Rule 1.13(d) requires an attorney who represents only a company or committee to ensure that employees understand that only the company or committee is the client and that the employees may wish to seek separate counsel.
 - b. Counsel should also advise the employees that the interview is privileged and that the privilege belongs to the company or committee which retains the right to waive it.¹⁵⁴
 - c. Employees can be warned that the company may take action against them later based on the information learned in the interview.
 - d. Counsel must control who attends interviews with employees. The presence of a non-attorney at an interview can waive the attorney-client privilege to the communications.¹⁵⁵
 - e. Counsel should avoid tape recordings or verbatim transcripts of interviews. They are less likely to enjoy the status of opinion work product because they do not reflect counsel's mental processes.

D. Reports to Management, Special Committees and/or Board of Directors

A written report simplifies presentation to a board, audit committee or management and memorializes counsel's work, conclusions and recommendations. However, it also increases the danger of waiver and exposes the company to litigation over discovery of the report.

1. The company also may run a risk of appearing noncooperative if it refuses to share a written report with the government.¹⁵⁶
2. Because the results of an internal investigation report may be disclosed at some point careful, draftsmanship is critical. Counsel should draft a report on the worst-case scenario - that is, that the eyes of customers, vendors, employees, regulators, prosecutors, private litigants, competitors, shareholders or the media will read it. Inartful phrasing can result in unintended serious allegations that give rise to libel claims.¹⁵⁷

Increasingly, power point presentations to boards or committees represent a compromise between oral presentations and detailed written reports.

E. Five Basic Steps of an Internal Investigation

The five basic steps of a standard corporate internal investigation¹⁵⁸ apply to an FCPA internal investigation. These steps are to:

1. determine the nature of the allegation(s);
2. develop the facts through document review and interviews in the U.S. and abroad;
3. prepare and update a Working Chronology;
4. develop the legal issue(s); and
5. synthesize the facts and law to serve the client's objective (e.g., to defend a grand jury investigation; to provide legal advice to a Board of Directors or Audit Committee as part of an internal investigation, including recommendations as to compliance programs, discipline and corporate policies; to voluntarily disclose to the DOJ and SEC in order to obtain leniency, etc.).

Often, the general counsel will have the best overall understanding of the nature of the allegations and will be able to identify those persons likely to have relevant knowledge. Document review and witness interviews will often be conducted both in the U.S. and overseas when complex transactions are at issue.

Promptly securing and preserving electronic data is essential to a thorough internal investigation. Counsel should take steps to secure electronic storage facilities such as hard drives, network backup tapes and floppy disks. The SEC and DOJ, when evaluating a company's cooperation, will look to see how promptly and diligently management moved to secure evidence. Of course,

the responsibility of preserving electronic evidence is even greater when responding to a formal subpoena.

It is most useful to keep a chronology to track and analyze key meetings, documents, due diligence steps, closings, amendments, potential red flag issues, remedial measures and other relevant events. Without a constantly updated chronology, it can be difficult to recall and understand the relationship and timing of key events and documents in a lengthy investigation. Chronologies are also helpful in tracking the activities of employees or agents in several countries, ventures or operations. Finally, they are helpful in highlighting key documents, preparing for important interviews and drafting internal reports, position papers, Wells submissions and power point presentations for the government.

Legal issue development will obviously focus on the statutory provisions, the legislative history, the FCPA case law, SEC enforcement actions, possibly foreign law, and any relevant FCPA opinions issued by the Department of Justice. It will likely include analysis of analogous statutes such as domestic bribery statutes, applicable conventions (as implemented) and related case law.

F. Unique Aspects of FCPA Investigations and Multinational Operations

1. *Employees and Others Assert That the Payments, Offers or Other Practices in Question are Common and Necessary to do Business in the Country in Question*

Employees, agents and consultants may concede improper payments or related practices occurred but contend that they are and were necessary to do business in the country in question. The U.S. government does not recognize this defense and routinely responds that Congress was well aware of the customs and practices in foreign countries when it enacted the FCPA in 1977.

2. *There is Ordinarily No Substitute for In-Country Visits and Interviews*

In-country interviews and investigation are usually essential to a full understanding of a company or an agent's, consultant's or contractor's efforts or services in a foreign country. They can strengthen the facts and arguments that a company's officers or employees did not have reason or a high probability to know that improper payments to foreign officials would be or were made. To the extent a company elects to voluntarily disclose or otherwise cooperate, visits and interviews at the locations of the alleged improper activity will enhance the credibility of the reporting.

As a rule, investigation counsel will seek to maintain as low a profile as possible when reviewing documents and interviewing company personnel and other witnesses overseas.¹⁵⁹ In some cases, the interviewing of company personnel in a foreign jurisdiction, and the procurement of foreign documents, can implicate local employment, privacy and commercial laws.

3. *The Company is Usually Unable to Obtain Access to Certain Foreign Bank Records*

Absent an express contractual provision that a foreign agent, consultant, or partner must provide bank records to a company or to an independent accountant, it is unlikely that a company or its

investigation counsel will be afforded access to third party foreign bank records. This limits the ability of a company to determine whether an agent, consultant or business partner has paid improperly monies to a foreign official. In very limited cases, local law may provide judicial remedies to obtain access to bank accounts and trace the disposition of funds from those accounts.

4. *Counsel May Wish to Retain an Independent Accounting Firm to Assist it in Reviewing Accounting Systems and Weaknesses as Well as Internal Control Issues*

Accounting firms often assist investigation counsel in major internal investigations. They can identify books and records and internal control issues and recommend remedial measures. These firms should be independent and not the regular outside accounting or auditing firm to the company. Since there is no federal accountant-client privilege, investigation counsel - not the client - should retain the accounting firm under a clearly defined scope of work set forth in an engagement letter. Investigation counsel should carefully monitor the scope of the accountant engagement and work product.

5. *Multinational Companies Will Often Legitimately Maintain Separate Sets of U.S. and In-Country Books and Records*

Multinational companies will often keep and maintain separate sets of financial books for U.S. and in-country operations. For example, overseas companies may have joint ventures with major competitors, for which it would be inappropriate for a parent corporation or subsidiary to share certain financial information. In such circumstances it may be appropriate or necessary to keep separate books and records.

6. *Sources of Information In-Country*

In conducting an internal investigation of a foreign operation, there are many sources of information that can help determine whether it is more likely than not that a certain event occurred, or was a factor in a questionable transaction. These sources are many of the same sources that transaction counsel would use in conducting the initial due diligence for a foreign transaction. Some helpful foreign sources include:

- a. In Country Records
 1. Consulting Contracts, Joint Venture Agreements and Agency Agreements
 2. Electronic Data Bases
 3. General Ledgers
 4. Local Bank Account Statements
 5. Subcontracts
 6. Vendor Lists and Aging Accounts
 7. Expense Reports
 8. Correspondence Files
 9. Petty Cash Accounts
 10. Purchase Records

- 11. Professional Service Fees
- 12. Off the Books Records
- b. In Country Employees
 - 1. General Managers
 - 2. Financial Officers
 - 3. Sales and Marketing Personnel
 - 4. Accounting and Bookkeeping Personnel
 - 5. Operations Personnel
 - 6. Information Technology Personnel
 - 7. Purchasing Department Personnel
 - 8. Project Superintendents and Engineers
 - 9. Project Estimators
 - 10. Security Personnel
- c. Former Employees
- d. Subcontractors
- e. Agents
- f. Periodicals and Publications
 - 1. Local Business and Trade Journals
 - 2. World Trader Data Reports
 - 3. Dun & Bradstreet Reports
 - 4. *Transparency International* Reports
- g. Local Law Firms
- h. Local Accounting Firms
- i. Chambers of Commerce¹⁶⁰
- j. Banking References
- k. Local Industry Associations
- l. U.S. Embassies (Commercial Attaché)
- m. State Department and Commerce Department Desk Officers
- n. Private Investigators

7. *Third Parties Including Foreign Competitors, Subcontractors and Agents and Foreign Government Officials or Candidates Often Have Political and Economic Motivations to Disparage a Multinational Company or Its Subsidiaries*

From time to time, multinational companies receive serious FCPA allegations only to discover that the allegations are a product of disgruntled employees, foreign competitors, subcontractors and agents, or foreign government officials or candidates who may have strong political and economic motivation to disrupt and disparage the operations. While no allegation can be dismissed lightly without some level of review, it is important to, whenever possible, locate and determine the actual source of the allegation to determine its legitimacy before commencing a full-scale investigation.

8. *There is Often Extraordinary Business Pressure to Enter into An Overseas Joint Venture or Other Commercial Agreement*

Foreign governments vary a great deal in the manner and timing of offering investment opportunities and contract awards to international companies. Moreover, many overseas project opportunities are the subject of local and foreign political pressures, including in the case of developing countries, pressures from favored allies or ex-colonial powers, bilateral financing entities and lending agencies. There are often unique procedural requirements and delays in project announcements and competitive bidding. Occasionally, foreign investment opportunities are substantially altered, restructured or accelerated by the host governments for political and financial reasons. Accordingly, multinational companies, which usually have layered levels of approval, must often rush to meet a newly announced deadline, leading to a lack of a complete paper trail and inadequate due diligence compared to what might occur in a purely domestic project.

Large investments and ventures with foreign partners or contractors can also be documented by somewhat informal documentation that is contrary to the custom and practice of such companies and their counsel. Moreover, until such time as a company is assured of a project award, it may not wish to enter into full-blown properly documented arrangements. In some cases, a company may never enter into such detailed documentation, due to inertia or the priority of ongoing projects. Seemingly negligent failures to document significant projects need to be understood in context. Examples occur on small as well as large projects, including large resource exploitation, infrastructure, and privatization projects.

G. **Recommendations to Management, Special Committees, Audit Committees or Boards of Directors**

At the conclusion of an investigation which raises issues or uncovers problems, counsel will likely make recommendations to the client to correct problems, including changing policies and procedures, modifying audit work programs, instituting or increasing training, disciplining wrongdoers and conducting periodic FCPA follow-up legal audits in foreign jurisdictions where the company does business or in the region where the company has encountered problems.

Recommendations must be constructive and reasoned: if they are too minor, too rigid, too many or overly burdensome, there is a clear risk that they will not be implemented. When making recommendations, it is generally useful to set reasonable deadlines for implementation of the recommendations and to assign specific responsibility to managers, lawyers or compliance officers. If not, other business priorities can intervene, and the recommendations will not be timely or ever implemented. Boards of Directors, shareholders, prosecutors and regulators may then draw the harmful but possibly correct conclusion that compliance is not very important to the company.

Defending an FCPA Investigation

A. U.S. Government Investigations

The Department of Justice and the SEC may jointly or separately initiate an FCPA investigation. They often conduct parallel civil and criminal investigations of the same allegations. The Fraud Section of the Criminal Division of the Department of Justice has FCPA expertise and frequently coordinates with the SEC on FCPA matters. It has become common for the DOJ and SEC to announce resolutions of FCPA investigations simultaneously or within a day or so of each other.

1. Department of Justice

The Department of Justice is responsible for the criminal enforcement of the FCPA. Allegations of FCPA criminal violations are generally investigated by the Federal Bureau of Investigation. The FBI is required by internal regulation to bring alleged FCPA violations to the Fraud Section of the Criminal Division of the Department of Justice. No prosecution of alleged FCPA violations may be instituted without the express permission of the DOJ Criminal Division.¹⁶¹

Clients often question the authority of federal grand juries to conduct broad investigations. Grand juries have broad latitude and “can investigate merely on suspicion that the law is being violated.”¹⁶² Clients need to understand, particularly in weighing whether to testify before a grand jury, that decisions to criminally charge a company or its executives with an FCPA violation will be made by the Fraud Section of the Criminal Division in Washington, D.C., not by a grand jury. Justice William O. Douglas most succinctly captured the reality of the grand jury when he observed: “Any experienced prosecutor will admit he can indict anybody at any time for almost anything before any grand jury.”¹⁶³

Grand jury investigations normally proceed first with the issuance of subpoenas *duces tecum* for records followed by subpoenas *ad testificandum* for the testimony of witnesses. However, if the government secures early cooperation from a company or individuals, it may ask cooperating individuals to record others covertly. In criminal investigations it is the custom and practice of most U.S. Attorney’s offices to advise counsel whether a client is a subject or target. If an individual client is considered a subject or target, the conventional wisdom is he or she should assert a Fifth Amendment privilege in a grand jury proceeding.¹⁶⁴ This privilege protects individuals and sole proprietorships but not corporations, partnerships and other business entities.

2. Securities and Exchange Commission¹⁶⁵

The Securities and Exchange Commission is the primary regulator of the nation’s securities markets. Allegations of civil violations of the anti-bribery and recordkeeping provisions are investigated by the SEC’s Division of Enforcement. The SEC has the authority to bring an action in federal court or before an administrative law judge when it concludes an FCPA violation has occurred and that enforcement is appropriate. The Division and its staff employ attorneys, accountants and analysts and may proceed on their own initiative to informally investigate without subpoena power, or with subpoena power through a “formal order of investigation” issued privately by the Commission.

In informal investigations, SEC enforcement staff ask companies and individuals to provide information on a voluntary basis. Interviews can be in person or by telephone and on or off the record. Informal investigations can include extensive document production and sworn testimony. The Division staff may request compilation of data or counsel may elect to submit to the SEC a chronology or similar data. Counsel should understand that while the SEC staff have no authority to compel the production of such data, any such submissions are voluntary and will likely be deemed admissible.¹⁶⁶

Requests for orders for formal investigations are routinely granted by the Commission and are used whenever the staff needs subpoena authority to obtain the testimony of persons or documents that will not appear or cannot be obtained voluntarily, such as telephone and bank records or to bring in recalcitrant witnesses for sworn testimony. The formal order will describe the investigation in general terms and the suspected statutory violations.

The various federal securities laws grant broad authority to the Commission to conduct investigations.¹⁶⁷ A challenge to the SEC's right to investigate has almost no chance of success.¹⁶⁸ A challenge to the breadth of documents the SEC initially requests or subpoenas has a greater likelihood of success. The scope of such requests is often negotiable with SEC staff. SEC civil enforcement matters may lead to a criminal referral to the Criminal Division.¹⁶⁹ Full access to SEC files is routinely granted to federal prosecutors by the SEC Director of the Division of Enforcement. A U.S. Attorney may independently request access to SEC files.¹⁷⁰

The SEC staff does not use the "subject" or "target" terminology common to federal prosecutors. Defense counsel will normally ask SEC attorneys whether prosecutors have been granted access to SEC files - unless there is a slim likelihood and a concern that merely raising the question could prompt the staff to refer a matter to DOJ it might otherwise not. Unlike in grand jury proceedings, witnesses who testify in SEC investigative proceedings are entitled to copies of their transcripts upon payment of a fee.¹⁷¹ Witnesses in SEC proceedings also have a right to assert attorney-client, attorney work product and Fifth Amendment privileges. However, the Commission may draw an adverse inference from an individual's assertion of the Fifth Amendment privilege, and such an assertion makes an enforcement action highly probable. Still, in most if not all cases, a civil enforcement action is preferable to a criminal charge.

B. Sources of Allegations

Potential sources of FCPA and, in particular, bribery allegations are many and include:

1. Former or current employees
2. Competitors
3. Agents
4. Subcontractors
5. Foreign government officials or party representatives
6. Joint venture partners
7. Public filings
8. Federal agency audits (e.g., Department of Defense, Inspector General, etc.)
9. Journalists or news accounts
10. Internet surveillance

11. Embassy staff
12. Other U.S. government investigations (e.g., Antitrust Division)

Occasionally, FCPA investigations develop in the course of criminal investigations focusing on other matters, e.g., antitrust or money laundering violations.

C. Notice of Government Investigation

Companies can learn of U.S. government investigations in a variety of ways. Occasionally, company officials will learn informally that an employee or officer has been contacted by FBI agents or an SEC staff attorney. Other times, the company will be served with a federal grand jury subpoena *duces tecum* by law enforcement. The SEC is more likely to serve an informal request on the company, but in some instances the SEC staff will at the outset seek and obtain a formal order from the Commission to begin an investigation. Under any of these scenarios, prudent corporate counsel will respond promptly, gather facts in a privileged fashion so as to fully understand the risks, and design a careful and appropriate strategy.

D. Basic Steps

The five basic steps that govern a corporate internal investigation of an FCPA allegation, *supra*, apply equally to the defense of a grand jury or regulatory investigation. There may, in a defensive context, be a need to meet, coordinate and consider sharing information with counsel for other individuals or entities that may be subjects, targets or witnesses in the investigation.¹⁷² The sharing of information and possible strategies is protected under joint defense or common interest privilege caselaw.¹⁷³

The timetable for conducting and completing a defensive investigation for a company is normally accelerated since the consequences of a public FCPA criminal charge or enforcement action can be substantial. Historically, counsel for multinational companies have been able to more quickly and successfully interview employees and foreign third parties and obtain relevant documents than U.S. government agencies. However, this advantage has been eroding with the proliferation of treaties and increased cooperation between U.S. and foreign law enforcement authorities.

E. Persuading the Government Not to Indict

1. Federal Prosecutions of Individuals

The ultimate challenge of defense counsel is to persuade the government not to indict. To do so one must know the factors prosecutors weigh in determining whether to charge individuals and corporations. Generally, federal prosecutors, in deciding whether to charge individuals, consider: the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction, and the adequacy of non-criminal approaches.¹⁷⁴ These factors were first identified in a formal policy statement in 1980 when the Department of Justice published a *Federal Principles of Prosecution* policy which outlined individual charging criteria for federal prosecutors.

2. Federal Prosecutions of Corporations

In February 2000 the Department of Justice issued a *Federal Prosecution of Corporations* policy that outlined eight factors that it will consider in deciding the proper treatment of a corporate target. These factors include:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condemnation of, the wrongdoing by corporate management;
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.¹⁷⁵

In January 2003, the Department of Justice revised and toughened the above corporate prosecution policy with respect to: (1) charging employees responsible for misconduct; (2) alternatives to criminal prosecution; (3) cooperation of the corporation; and (4) compliance programs. Under a revised policy entitled *Federal Prosecution of Business Organizations*, the DOJ heightened the requirements a corporation must meet to avoid indictment and made clear that culpable employees should be prosecuted for their misconduct along with corporations.¹⁷⁶

The commentary to the 2003 DOJ policy stated that “[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas.”¹⁷⁷ It also incorporates a factor -- “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance,”¹⁷⁸ which seems to imply that if the perpetrators of the wrongdoing can be sufficiently prosecuted for their crime, the scale may be tipped against indicting the corporation.

The most recent DOJ charging policy also clarified the Department's position with respect to the nature and severity of the offense factor by stating that "[t]he nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors."¹⁷⁹ This language simply emphasizes the 2000 policy's assertion that, based upon the particular circumstances of a case, some factors may or may not be applicable to a case and, in some instances, one factor may "override all others."¹⁸⁰

With respect to corporate cooperation and voluntary disclosure, the 2003 DOJ policy deviates from the previous policy by declaring that "pretrial diversion"¹⁸¹ may be considered by prosecutors in the course of their investigations. The earlier policy merely stated that immunity or amnesty could be considered. This new language benefits corporations because it affirmatively states that yet another alternative to indictment may be considered. The revised 2003 DOJ policy adds guidance about the necessary corporate cooperation with the government:

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not arising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.¹⁸²

This additional factor increases the burden on the corporation and its defense counsel when cooperating with the government. A corporation must not only provide the requested information, but must also be concerned with whether its attempts to provide such information and its defense counsel's actions are viewed as genuine efforts to assist the government.

Finally, the 2003 DOJ policy supplements the earlier corporate charging policy in addressing compliance programs. Specifically, the new policy states:

In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over the proposed corporate actions rather than unquestioningly ratifying officers' recommendations, are the directors provided with information sufficient to enable the exercise of independent judgment, are internal audit functions conducted at a level sufficient to ensure their independence and accuracy, and have directors established an information and reporting system in the organization reasonabl[y] designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law.¹⁸³

This policy provides guidance to prosecutors seeking to determine if a corporation's compliance program is a mere "paper program"¹⁸⁴ or a program that was thoughtfully and thoroughly designed and carried out. Obviously, portions of the above policy (i.e., waiver of attorney-client and work product privileges) are controversial and create serious parallel proceeding issues and consequences. Defense counsel need to marshal facts and arguments about how these policies should or should not apply in a particular case.

The technical legal standard for indictment is, of course, whether the prosecutor has established probable cause to believe a crime has been committed.¹⁸⁵ Notwithstanding all the criteria prosecutors are urged to consider, the principal standard for indictment, applied by line prosecutors and supervisors throughout the country, is whether the prosecutor believes that the defendant(s) can be convicted on admissible evidence. Responsible prosecutors do not indict cases that they do not believe they can win.

An overriding reason why many federal prosecutors decline to charge a company or its officers is that defense counsel persuade them that they are not likely to win their case for factual or legal reasons. Losing a case is a clear and reasonable fear for the government. Federal prosecutors, who have broad discretion in selecting who and what to charge, are expected to win most of their cases. That expectation is even greater in high profile business crime prosecutions. Because of the attendant publicity and often heightened expectations of conviction in major cases, defeats can be devastating to the government and affect the reputation of the prosecutors or the offices that bring the charges.

Defense counsel must, above all, convey to the Department of Justice that the likelihood of prosecutorial success in the particular case is questionable. If counsel determines that an indictment may be avoided, the defense should outline for the government all factual, legal and policy reasons why charges should not be brought. Policy reasons alone will normally not deter a prosecutor from instituting a case, but they can, in combination with significant factual or legal arguments, persuade a prosecutor not to indict and to resolve the matter in a civil enforcement action.

In deciding whether to try to persuade the Department of Justice not to indict, counsel must fully assess whether the "collective government audience" has an open mind. If it is clear that the DOJ or fraud section attorneys or supervisors have already reached a final decision to return charges, there may be no point in advancing legal or factual defense theories in a pre-indictment context. An exception may be where one concludes a plea is inevitable, and there is an opportunity to obtain a more favorable sentencing agreement by highlighting evidentiary or legal weaknesses and recent remedial measures. In general, however, if the government attorneys have a closed mind and the client intends to go to trial, it is better to save persuasive legal and factual arguments for a judge or jury.

If one decides to try to persuade the Department of Justice not to indict, the decision of whether to do so orally or in writing follows. An oral presentation often has the advantage of allowing an exchange of issues and ideas, and allows the opportunity to follow-up with a written position. The permanent nature of a written submission makes it more likely that the arguments will be fully and carefully considered by supervisors or the ultimate decision-makers.

F. Wells Submissions, Position Papers and Power Point Presentations

At the conclusion of an SEC or federal grand jury investigation, it may be advisable to submit a position paper outlining why no enforcement action is necessary or appropriate, or why criminal charges should be declined as to the client. This procedure before the SEC is known as a Wells submission.¹⁸⁶ Within the Department of Justice and U.S. Attorney's offices, pre-indictment submissions are commonly known as white papers or position papers. In complex criminal matters, these submissions can exceed fifty pages. In such cases, three to five page executive summaries may be advisable.

1. Wells Submissions

The SEC rules provide that the staff may "advise [defendants] of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding."¹⁸⁷ The deadlines can be short. Unlike position papers with Department of Justice attorneys, Wells submissions are made in a context different from offers of settlement and negotiations and may be used as evidence in a subsequent proceeding. The original Wells release in 1972 envisioned that the submissions would focus on questions of policy and on occasion questions of law,¹⁸⁸ because the Commission carefully considers the legal implications and messages to the securities marketplace that each enforcement action communicates. Still, the practice has become that many Wells submissions to the SEC address factual issues, credibility of witnesses and evidentiary matters, as well as policy and legal implications. Counsel will also want to address in a Wells submission the nature of relief that the SEC is likely seeking.

2. Position Papers

Thoughtful position papers can persuade federal prosecutors to decline criminal cases or bring less serious charges. DOJ attorneys typically agree that a written presentation will not waive applicable privileges and will not be used directly against a defendant as an admission. There are no specific guidelines on position papers. What most defense counsel review and address in drafting these papers are the criteria found in the *Federal Principles of Prosecution* (U.S. Department of Justice, 1980), *Federal Prosecution of Corporations* (U.S. Department of Justice, 2000) and *Principles of Federal Prosecution of Business Organizations* (U.S. Department of Justice, 2003) policies. Most responsible prosecutors are willing to share their theories and views of the strengths of the prosecution's case at the conclusion of their investigation and to give defense counsel an opportunity to make an oral presentation or to submit a position paper outlining why charges should not be brought.

3. Power Point Presentations

Increasingly, where a group of DOJ or SEC supervisors will review the merits of a major case, counsel for a company or an executive under investigation can offer a power point presentation to the government. A twenty to thirty slide presentation with charts or graphs can highlight key defense themes, government case weaknesses and remedial measures. A visual presentation

often will better sustain the attention of a large audience. As with all power point presentations, careful and accurate wording, strong organization and powerful graphics will improve the impact of the medium. Defense counsel should anticipate that government attorneys will ask for copies of the power point presentation. A position paper can follow and address issues raised by the government during the visual presentation.

4. General Advice

Before submitting a Wells submission to the SEC or a position paper to the Department of Justice, or considering a power point presentation, counsel for the company or executives must: 1) determine what issues remain at the forefront for the prosecutors or regulators so as to address them and only them; and 2) again ascertain whether the government representatives have an “open mind” about the issues and the merits of an enforcement action or prosecution. If they do not, there may be no advantage in detailing or foretelling the company’s strategy or defense theory. If the underlying investigation has been thorough and focused, counsel for the company or individuals will normally have as great a mastery of key witnesses, documents and in-country issues as the government attorneys. It is wise during a government investigation to outline or draft a Wells submission or position paper in advance since the government may give the defense a short opportunity to submit views and arguments - and counsel should expect only one real opportunity.

An effective presentation will usually marshal factual, legal and policy arguments why a prosecution or an SEC enforcement action is inappropriate in a particular case.¹⁸⁹ In addressing the alleged FCPA transactions and activities at issue, the factual component will frequently focus on the knowledge element of the participants, i.e., whether the company’s employees knew with a high probability that a payment or offer would be made. The presentation may also discuss the transaction documentation, the due diligence efforts, the absence of red flags, and the presence of an effective compliance program - all of which may defeat the “high probability of knowledge” threshold set forth in the FCPA.

The timing of a presentation to the Department of Justice is important. If it is too early, the government will say it is premature, and counsel may address matters not at issue or worse yet, raise problems unknown to the government. If it is too late, it may fall on deaf ears. One has to carefully track the progress of the grand jury investigation and maintain communication with prosecutors in order to determine the optimal time to address the real remaining issues. Defense counsel should maintain a dialogue with DOJ attorneys in order to understand what they consider the central factual and/or legal issues. Those key issues should then be addressed in the defense presentation along with other legal and factual defenses the government may not have fully considered.

An argument that the client conducted business in a foreign country where corrupt practices are routine and long established and there was no other practical way to do business and compete by itself is unlikely to succeed, with either the Department of Justice or the Securities and Exchange Commission. The common government refrain is that Congress was fully aware of such obstacles when it enacted the FCPA almost three decades ago. Foreign policy or national security considerations may in isolated instances be pertinent and determinative.

A quality compliance program lessens the chances that improper conduct will occur. However, if improper conduct is discovered, a proactive company that has effective policies in place will be in a better position when a government investigation arises, to dissuade prosecutors from bringing serious criminal charges or the SEC staff from bringing an enforcement action and seeking serious sanctions.

G. October 2001 SEC Statement on the Relationship of Cooperation to Agency Enforcement Decisions

In October 2001, the SEC issued a “Statement on the Relationship of Cooperation to Agency Enforcement Decisions,” which set forth the agency’s policy for evaluating the impact of a company’s cooperation in determining whether or not to bring an enforcement action.¹⁹⁰ The policy applies to all matters within SEC jurisdiction, including the FCPA. Companies considering self-reporting any matter to SEC should consider carefully the implications of the new SEC policy. In summarizing its new policy, the SEC identified four broad measures of a Company’s cooperation:

- self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulators, and to self-regulators;
- remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- cooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations and the company’s remedial efforts.¹⁹¹

The above criteria, which are addressed in much greater detail in the SEC policy, are non-exhaustive, as the SEC explicitly stated it would not limit itself to the stated criteria.¹⁹² Moreover, the fact that a company has satisfied all of the criteria does not guarantee the SEC will refrain from taking action. Instead, the SEC stated that “there may be circumstances where conduct is so egregious and harm so great that no amount of cooperation or other mitigating conduct can justify a decision not to bring any enforcement action at all.¹⁹³ The criteria will be used to determine how much credit to give a company for its cooperation “from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents [used] to announce or resolve actions.”¹⁹⁴

One of the most sensitive issues related to the SEC’s cooperation policy involves the potential waiver of the attorney-client and/or work product privileges with respect to a company’s internal investigation materials. Once a company crosses that threshold, it may be very difficult to limit

the scope of the waiver. Moreover, privileged materials turned over to the SEC will routinely be turned over to other law enforcement agencies, like the Department of Justice, and may be available to civil plaintiffs through discovery. The SEC has recognized this issue, and has gone so far as to advocate that disclosure of privileged information to the SEC does not constitute a waiver of privilege as to third parties.¹⁹⁵ Still, there are serious questions as to whether courts will accept this limited waiver argument.

The SEC's cooperation policy raises a number of important issues for companies who have discovered potential corporate misconduct. In each case, the decision to cooperate and voluntarily disclose sensitive information to the government requires careful and thorough analysis of the legal issues (including the potential criminal, enforcement and private litigation liability) and as complete an understanding of all relevant facts as possible. Because the benefits of cooperation can decrease quickly in time, management and counsel must move promptly upon the discovery of potential misconduct to put themselves in a position to make a fully informed cooperation decision.

H. Settlements

In major FCPA investigations, companies, officers and employees frequently face separate but parallel investigations by the Department of Justice and the Securities and Exchange Commission involving the same FCPA allegations. The optimum outcome for the defense is of course to avoid any criminal indictment or enforcement action. Short of that outcome, corporate and officer targets will seek to avoid criminal charges, to enter into a civil consent decree whereby the parties neither admit nor deny any liability, and to minimize fines and disgorgement.

Although they are not a prerequisite, Wells submissions and position papers frequently lead to settlement discussions with DOJ and SEC. The vast majority of both SEC and DOJ matters are resolved short of trial and in advance of the filing of civil or criminal charges.

In enforcement matters, the SEC routinely agrees to settle with the defendant or respondent neither admitting nor denying the Commission's allegations of wrongdoing. Fed. R. Evid. 408 provides that a settlement or compromise "is not admissible to prove liability for or invalidity of the claim or its amount." Additional reasons to settle with the SEC include the time and expense of litigation, the potential effect of Enforcement Division litigation on a company's relations with other SEC divisions, e.g., the Division of Corporate Finance, the impact of continuing negative publicity on a company during litigation, the need of senior management to devote substantial time to the litigation, the uncertainty of ongoing government litigation on a company's stock price,¹⁹⁶ and the need for a company to get back to its business.

DOJ settlements raise different issues. The burden of proof in a criminal case is beyond a reasonable doubt, and the collateral consequences of a plea as opposed to a consent decree are normally far greater. A corporate plea is generally admissible in subsequent civil and criminal matters and may lead to debarment and suspension of government contractors. Corporations are subject to the Organizational Sentencing Guidelines which can result in mammoth fines. Although these guidelines have been declared discretionary as a result of the January 2005 Supreme Court decision in United States v. Booker,¹⁹⁷ it remains unclear how much district

courts will stray from guidelines that have been in place and familiar to them for over two decades. Government difficulties in securing proof to meet the criminal burden may in certain cases persuade the DOJ to not file criminal charges and to permit the company or individuals to accept responsibility through an SEC consent decree. Many of the factors listed above that favor settlement in SEC matters apply equally to resolution of criminal cases. If settlement is the best possible resolution for the company and its officers, counsel will want to obtain a global settlement that simultaneously concludes matters with both the DOJ and SEC.

Recent SEC Enforcement Actions and DOJ Matters

A. FCPA Prosecution and Enforcement Trends

The Fraud Section of the Department of Justice which reviews all FCPA criminal matters has recently made clear that fulfillment of the voluntary disclosure and prompt remedial action criteria can in certain circumstances allow a corporation to sign agreements and avoid criminal charges (see, e.g., BJ Services Company, InVision and Micrus) or to enter into more formal court-filed Deferred Prosecution Agreements (see, e.g., United States v. Monsanto¹⁹⁸). The recent practice in FCPA enforcement – the Deferred Prosecution Agreement – holds out promise that DOJ criminal charges may be held in abeyance and not be admissible in civil matters. Corporations and their counsel must be proactive to secure special consideration and usually need to coordinate with both the DOJ and the SEC when electing to voluntarily disclose misconduct and cooperate. Simultaneous resolutions with both the DOJ and the SEC are often in corporations' interests. Increasingly, in most FCPA matters the DOJ and SEC conduct parallel investigations and file simultaneous criminal charges and complaints.

In March 2005 the DOJ and the SEC filed criminal and enforcement cases against Titan Corporation, a Southern-California based military intelligence and communications contractor doing business in 60 countries, that had inadequate internal controls and inaccurate business records.¹⁹⁹ As a result of *inter alia* payments to an agent who funneled money for the presidential campaign in Benin, Titan agreed to pay a \$13 million fine, to pay an additional \$15.5 million in disgorgement and prejudgment interest, to retain an independent consultant to review the company's FCPA compliance and procedures, and to adopt and implement the consultant's recommendations. Failure to adhere to the FCPA's requirements cost this defense contractor nearly \$30,000,000, not to mention a failed merger with Lockheed-Martin, *infra*. The United States v. Titan Corporation case signals how serious the DOJ and SEC are about FCPA enforcement and how costly violations can be to a company.²⁰⁰

In determining whether to file civil or criminal charges, what types of charges to file (e.g., bribery versus a books and records violation), whether to impose substantial fines and whether to require ongoing monitoring of a company, the DOJ and SEC will consider:

- the number of improper payments;
- the total amount of the improper payments;
- the length of time over which improper payments occurred;

- the seniority of foreign officials who received improper payments;
- the seniority of company officers or employees who provided or authorized improper payments;
- the geographic region(s) in which improper business payments occurred (e.g., Asia-Pacific);
- the nature of the payments (cash, wire transfer, cashier's check, etc.);
- the efforts of the company to conceal the nature of the payment (such as disguised records, elaborate bank transfers, foreign bank accounts, fictitious entities, etc.);
- the role of the parent or senior management in authorizing, approving or sanctioning improper payments or misconduct;
- the pervasiveness of improper conduct at the company or one or more subsidiaries, divisions or business units;
- prior enforcement action and criminal history of the company;
- the company's overall perceived tolerance of improper payments;
- the length of time it took the company to respond to the improper payment or practices allegations;
- voluntary disclosure or self-reporting to the DOJ and/or SEC;
- the extent and promptness of corporate cooperation (providing to the government original documents, securing electronic data bases and computer hardware, making employees available as potential witnesses, providing privileged materials or the substance of same to the government, etc.);
- remedial efforts by the company, including prompt disciplinary actions of wrongdoers;
- the presence or absence of adequate internal controls;
- the quality of the corporate compliance program; and
- the response of the Board of Directors and senior management to the discovery of potential FCPA problems.

In DOJ plea agreements and SEC settlements, stated or implied terms have included:

- charging books and records and internal controls violations in lieu of bribery charges;
- Deferred Prosecution Agreements;

- the charging of a subsidiary(ies) rather than the parent corporation;
- charging a business entity rather than employees or other individuals;
- reduced fines;
- periodic FCPA audits;
- improvements to compliance programs, including training;
- the appointment of independent monitors, compliance experts, or consultants;
- the term of any monitoring requirement;
- no debarment or suspension from U.S. government business;
- voluntary production of contemporaneous documents, records or other tangible evidence;
- access to outside accounting and legal consultant work product;
- not asserting a claim of attorney-client or work product privilege as to any memoranda of witness interviews (including exhibits thereto) and documents created contemporaneously with and related to the foreign transactions or events underlying the subject matter;
- ongoing cooperation in the investigation and prosecution of employees and others; and
- flexibility in issuing public statements.

The SEC and DOJ websites publish insightful press releases and copies of complaints, consent decrees, indictments, informations, deferred prosecution agreements, plea agreements and detailed statements of facts relating to FCPA matters (www.sec.gov and www.usdoj.gov/criminal/fraud/fcpa). Emerging FCPA enforcement policies and trends are often discernable from what is stated and not stated in these public documents.

B. Select SEC Enforcement Actions

1. In re: IBM Corp.²⁰¹

In December 2000, the SEC settled with International Business Machines Corporation for violations of the books and records provision, Section 13(b)(2)(A) of the Securities Exchange Act of 1934, relating to bribes paid by former senior officers of its Argentine subsidiary. During 1994 and 1995, senior management of IBM-Argentina, S.A., a wholly-owned subsidiary, entered into a subcontract with Capacitacion Y Computacion Rural, S.A. (“CCR”). Money that IBM-Argentina paid to CCR was subsequently given to Argentine government officials. IBM’s senior management did not follow procurement and contracting procedures when it provided false

documentation and reasons why CCR had been hired. Payments to CCR were recorded by IBM-Argentina as “third-party subcontractor expenses” which were then incorporated into the parent corporation’s 1994 Form 10-K. IBM agreed to an injunctive order prohibiting future violations of Section 13(b)(2)(A) of the Exchange Act along with a \$300,000 penalty.

2. In re: Baker Hughes Inc.²⁰²

In September 2001, the SEC settled with Baker Hughes Inc., an oilfield services company, with respect to a \$75,000 improper payment to an Indonesian tax official. In March 1999, Baker Hughes’ CFO and its Controller authorized an illegal payment through its accounting firm agent, KPMG Indonesia, to the tax official despite warnings of both Baker Hughes’ FCPA advisor and its General Counsel that a payment would violate the FCPA. Baker Hughes was aware that KPMG intended to give all or part of the \$143,000 to the official as a bribe to influence the official’s decision to reduce Baker Hughes’ tax liability. Senior managers at Baker Hughes had also authorized payments to agents in Brazil in 1995 and India in 1998, without making the proper inquiries to assure that the payments were not bribes. All three transactions were inaccurately recorded as routine business expenditures and therefore violated Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act.

Upon learning that the Indonesian bribe had been authorized, Baker Hughes’ General Counsel and FCPA advisor attempted to stop the company’s payment to the KPMG agent in Djakarta, and in turn that agent’s payment to the tax official; took steps to issue a true and accurate invoice; and implemented new FCPA policies and procedures. No criminal charges were filed against Baker Hughes. The company was ordered to cease and desist from committing or causing future violations of Section 13(b)(2)(A) by keeping books, records or accounts with sufficient detail that truly represented the transactions and disposition of the assets. Baker Hughes agreed to an injunctive order prohibiting future violations of Section 13(b)(2)(B) by devising and maintaining a system of internal accounting controls that would provide reasonable assurances that transactions are executed with the approval of management and that the transactions are recorded to properly prepare financial statements in conformity of accepted accounting practices as well as to maintain accountability for assets.

3. In re: Chiquita Brands International, Inc.²⁰³

In October 2001, the SEC settled charges of books and records and internal control violations (Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act) with Chiquita Brands International, Inc. Employees of Banadex, Chiquita's Colombian subsidiary, authorized payments equaling \$30,000 to local customs officials in exchange for a renewal license at Banadex's Turbo, Colombia port facility. The internal audit staff at Chiquita found the two incorrectly identified installment payments and after an internal investigation took corrective measures, including terminating the responsible parties at Banadex. Chiquita agreed to an injunctive order prohibiting further violations of Sections 13(b)(2)(A) and 13(b)(2)(B) and to a \$100,000 civil penalty. No criminal charges were filed against the company.

4. In re: Bell South Corporation²⁰⁴

In January 2002, BellSouth Corporation settled with the SEC over the conduct of BellSouth International, an indirectly wholly-owned subsidiary which in 1997 began to acquire majority ownership of Telcel, C.A., a Venezuelan corporation, and Telefonía Celular de Nicaragua, S.A., a Nicaraguan corporation. Former Telcel senior management authorized payments to six offshore companies totaling \$10.8 million between September 1997 and August 2000. The payments were recorded as disbursements based on fictitious invoices for professional, computer and contracting services that were never provided. BellSouth was unable to determine why the payments were made or to identify the ultimate recipients.

In 1997, BellSouth owned a 49 percent share in Telefonía with an option to acquire an additional 40 percent. Nicaraguan law prohibited foreign companies from acquiring a majority interest in local telecommunications companies. BellSouth needed the Nicaraguan legislature to repeal the law in order to exercise their option. In October 1998, Telefonía hired the wife of the chairman of the Nicaraguan legislative committee with telecommunications oversight to lobby their cause. The wife had prior telecommunications experience, but did not have any legislative experience. Telefonía and the lobbyist agreed to a three-month trial period at a monthly salary of \$6,500. The legislator/husband drafted the proposed repeal while his wife lobbied for Telefonía. The legislator/husband initiated hearings for the repeal in April 1999. The lobbyist was terminated in May 1999, and the following month she received a payment of \$60,000 for consulting services and severance. In December 1999, the Nicaraguan National Assembly voted to repeal the restriction, and BellSouth exercised its 40 percent option six months later. BSI acquired operational control of Telefonía and therefore was responsible for causing Telefonía's failure to comply with the FCPA by recording payments to the wife as consulting services.

BellSouth agreed to injunctive relief prohibiting future violations of Sections 13(b)(2)(A) and 13(b)(2)(B). BSI disciplined and terminated employees involved in the case and also initiated an FCPA compliance program and internal auditing regime. No criminal charges were filed against BellSouth.

5. In re: BJ Services Company²⁰⁵

In March 2004, BJ Services Company, a provider of oil field services, products and equipment, settled with the SEC after B.J. Services, S.A., its wholly owned Argentinean subsidiary, made

questionable payments of approximately 72,000 pesos to Argentinean customs officials in 2001. The Controller of BJSa had learned that the equipment they were waiting for to begin work with a customer had been improperly imported under Argentinean customs laws. The Argentine customs official had offered to release the equipment and overlook the import violation for 75,000 pesos. If he was not paid the money, he would deport the equipment and BJSa would lose the 71,575 pesos which it had already paid in import taxes, pay a penalty of 1 to 5 times the cost of the equipment, and pay importation taxes again when the equipment was properly imported. The Controller contacted the Country Manager of BJ Services who contacted the Regional Manager. The Country Manager told BJ's Argentine Controller that the payment had been approved and directed him to negotiate for a lower payment with the customs official. A third party agent, previously used by BJSa to assist with customs matters, negotiated a 65,000 peso payment with the customs agent. The amount was improperly characterized as Amortization-Fixed Costs.

Also, in September 2001, BJSa's former Treasury and Purchasing Manager authorized payments of 7,000 pesos to an Argentinean customs official to overlook customs violations. The customs official drafted falsified documents to cover up the violation in exchange for the money. BJSa improperly recorded the payment as import duties paid to a third party customs agent. The same BJSa employee approved a 10,994 peso payment in October 2000 to an official in Argentina's Secretary of Industry and Commerce. The payment was made to expedite the approval process and was recorded as an importation cost.

In June 2002, BJ Service's senior management learned of the improper payments and began a full internal investigation. BJ Services learned that 151,406 pesos in additional payments had been made from January 1998 through April 2002. BJ Services notified the SEC and fully cooperated with the agency's investigation. It also replaced management in Latin America, arranged for proper classification of the equipment, changed the account procedures for payments, and expanded the corporate internal audit department, placing a manager in Latin America who reported directly to the BJ Services Director of Internal Audit. Finally, BJ Services retained an independent forensic auditor for the books and records of Argentina as well as expanded its FCPA education and prevention program. The SEC ordered BJ Services to cease and desist from committing or causing any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B). As a result of its full investigation and prompt remedial actions, BJ Services was not charged criminally.

6. In re: Schering-Plough Corporation²⁰⁶

In June 2004, Schering-Plough settled a complaint with the SEC relating to improper payments made by a foreign subsidiary, Schering-Plough Poland, to a charitable organization called the Chudow Castle Foundation. The Foundation was headed by an individual who was Director of the Silesian Health Fund, a Polish governmental body that, among other things, provided money for the purchase of pharmaceutical products and influenced the purchase of those products by other entities such as hospitals. The complaint alleged that S-P Poland paid \$76,000 to the Foundation over a three year period to induce its director to influence the health fund's purchase of S-P Poland pharmaceutical products.

The books and records and internal controls settlement included a \$500,000 civil penalty by the parent corporation, the retention of an independent consultant required to provide a written report to both the SEC and the company, and an injunctive order prohibiting future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act. No criminal charges were filed against the company, and the SEC complaint did not allege that the parent company was in any way involved in the approval or authorization of the payments by the Polish subsidiary to the Chudow Castle Foundation.

C. Select DOJ Matters**1. United States v. Metcalf & Eddy**²⁰⁷

In December 1999, Metcalf & Eddy, Inc., as successor to Metcalf & Eddy, International, Inc., agreed to a civil judgment as a result of the payment of excessive travel and entertainment expenses for an Egyptian government official and his family. Metcalf & Eddy promised to pay travel, lodging, and entertainment expenses to the Chairman of Alexandria General Organization for Sanitary Drainage (AGOSD). In exchange the Chairman, an official of the Egyptian government, would use his influence to have AGOSD support contracts between the United States Agency for International Development (USAID) and Metcalf & Eddy. AGOSD was the beneficiary of these contracts. The AGOSD Chairman did not directly participate in the selection of bidders, but the contract to operate and maintain waste-water treatment facilities managed by AGOSD was ultimately awarded to Metcalf & Eddy. The Chairman along with his wife and two children traveled to the United States twice as guests of Metcalf & Eddy. The first trip included visits to Boston, Washington, D.C., Chicago, and Disney World. The second trip took the AGOSD Chairman and his family to Paris, Boston, and San Diego. The Chairman was paid 150 percent of his estimated per diem expenses and his airline tickets were upgraded to first class by Metcalf & Eddy.

The civil judgment permanently enjoined Metcalf & Eddy from further violations of the FCPA, and the company agreed to pay a \$400,000 fine. No criminal charges were filed.

2. United States v. Syncor Taiwan, Inc.²⁰⁸

In November 2002, Syncor Taiwan, Inc., a Taiwanese subsidiary of Syncor International Corporation, pled guilty to a one count information alleging that over a four year period the foreign subsidiary paid \$344,110 in commissions to doctors who controlled the purchasing

decisions for nuclear medicine departments, including hospitals owned by the legal authorities in Taiwan, for the purpose of obtaining or retaining business. The cash payments were authorized by the Chairman of the Board of Syncor Taiwan while he was traveling in the United States. The payments were recorded as promotional and advertising expenses.

While conducting due diligence for a merger, Cardinal Health, Inc. uncovered improper payments by Syncor Taiwan. Cardinal Health brought the problem to the attention of Syncor. After being notified by Cardinal Health, Syncor promptly disclosed the improper payments to the Department of Justice and engaged outside counsel to conduct a very thorough investigation.

As part of its plea agreement, the Taiwanese subsidiary agreed to pay a fine of \$2 million. Syncor also settled with the SEC by consenting to a cease and desist order preventing future violations of the FCPA as well as a civil penalty of \$500,000. Syncor's board of directors was also required to appoint an independent consultant to review and reorganize Syncor's internal controls for record keeping and financial reporting purposes.

3. United States v. Giffen²⁰⁹

In April 2003, James H. Giffen, the Chairman and principal shareholder of Mercator, Inc., a small merchant bank with offices in New York and the Republic of Kazakhstan, was charged with conspiracy to violate the FCPA in a scheme that awarded oil and gas rights contracts in Kazakhstan, and with money laundering. Mercator and the Kazakh Ministry of Oil and Gas Industries entered into an agreement to help develop a strategy for foreign investment in the oil and gas sector in 1994. The strategy included coordinating and negotiating several oil and gas transactions with foreign parties. Mercator would only receive success fees if the transactions closed. In 1995 the president of Kazakhstan named Giffen his Counselor, a position which enabled him to influence matters of gas and oil transactions involving Mobil Oil, Texaco and Phillips Petroleum. Mercator received \$67 million in success fees from 1995 to 2000. Giffen allegedly diverted \$70 million of various oil companies money to secret Swiss bank accounts which he controlled. From these two sources, the indictment charged Giffen paid more than \$78 million to two Kazakh government senior officials who had the power to determine if Giffen and Mercator would retain their positions. The indictment further alleged that Giffen himself kept millions of dollars from the oil transactions to buy jewelry and a speedboat and to pay for a daughter's tuition.

As a result of the alleged money laundering charge, Giffen will, if convicted, forfeit to the United States all property, real and personal, involved in the money laundering offenses and all property traceable to such property. Giffen awaits trial in the Southern District of New York in 2006.

4. United States v. Bodmer²¹⁰

In August 2003, Hans Bodmer, a Swiss citizen and lawyer with the law firm von Meiss Blum & Partners, was charged with conspiracy to violate the FCPA in connection with a plan to bribe Azerbaijan officials to be able to invest in the privatization of oil enterprises. Bodmer acted as an agent for Oily Rock Group, Ltd., a British Virgin Islands corporation with its primary place of business in Baku, Azerbaijan; Minaret Group, Ltd., another BVI corporation based in Baku; and

Omega Advisors, Inc., a Delaware corporation with its principal place of business in New York; and various other members of the investment consortium. As an agent for the consortium, Bodmer paid bribes and authorized payments of bribes to Azeri officials in an attempt to convince the officials to allow the investment consortium to participate in the privatization auctions of the State Oil Company of the Azerbaijan Republic (SOCAR) and to acquire a controlling interest in SOCAR. In October 2004 Bodmer pled guilty to a money laundering conspiracy charge.²¹¹

5. United States v. ABB²¹²

In July 2004, ABB Vetco Gray Inc., a U.S. subsidiary, and ABB Vetco Gray U.K. Ltd., a U.K. subsidiary, of the Swiss company ABB Ltd. each pled guilty to a two count information in connection with commissions and referral payments made to officials in Nigeria, Angola, and Kazakhstan. ABB Vetco Gray US and ABB Vetco Gray UK, from 1998 through 2001, paid bribes and authorized the payment of bribes to Nigerian officials in the government program known as National Petroleum Investment Management Services (NAPIMS). NAPIMS was responsible for reviewing and awarding bids to potential contractors for oil exploration projects in Nigeria. ABB Vetco Gray UK hired a Nigerian agent to perform consulting work such as marketing and goodwill. ABB Vetco Gray UK used this agent to pay some of the bribes to NAPIMS officials. The bribes were in exchange for information regarding competitors' bids and to help secure contract awards. Six contract bids won by ABB had bribes attached to them, including automobiles, shopping excursions, country club memberships, housing expenses, as well as cash payments. Pursuant to the plea agreement, each subsidiary agreed to pay a criminal fine of \$5,250,000.

In a separate action, the SEC, which had conducted a parallel investigation, filed a complaint against the Swiss parent company ABB Ltd., the stock of which is traded in the U.S. through American Depository Receipts. Pursuant to a settlement, the SEC enjoined ABB Ltd. from future violations of the FCPA, and ABB Ltd. agreed to pay \$5.9 million in disgorgement of profits and prejudgment interest and a \$10.5 million civil penalty. The latter penalty was deemed satisfied by the payment of the ABB subsidiaries' criminal fines totaling the same amount. ABB Ltd. also agreed to retain an independent consultant to review its FCPA compliance policies and procedures.

6. United States Department of Justice -- InVision Agreement

In December 2004, the Department of Justice entered into a civil agreement with InVision Technologies, Inc. (“InVision”), a Newark, California public company, in connection with its sales or attempted sales of airport security explosive detection products to airports owned by the governments of Thailand, China, and the Philippines. InVision through its employees and agents authorized bribes to government officials in order to facilitate or retain business. In China and the Philippines, InVision employees paid agents who in turn gave the bribes to foreign officials. In Thailand, a manager and executive of InVision set up a company masked as an InVision distributor. The distributor used the price differential of the equipment to pay Thai government officials and political party members.

InVision voluntarily disclosed the conduct and related conduct to the Department of Justice and also prevented the improper payment in Thailand. InVision’s cooperation and prompt disciplinary action and absence of prior FCPA-related charges led to the DOJ decision not to file criminal charges against the company, finding that InVision had accepted responsibility for the actions of its employees and their failure to maintain internal controls with respect to foreign transactions. InVision also agreed to pay a penalty of \$800,000. At the time of the investigation InVision was merging with General Electric, which agreed to take the responsibility for assuring future compliance with FCPA policies and procedures. The agreement also requires on-going cooperation by GE and allows the United States to investigate and prosecute individuals and other entities.

7. United States v. Monsanto²¹³

In January 2005, Monsanto Company, under a Deferred Prosecution Agreement, settled charges with the Department of Justice in connection with improper payments to a senior Indonesian government official. A senior Monsanto manager, based in the United States, authorized payments to a senior Indonesian Ministry of Environment official in an attempt to influence the official to repeal a law that had an adverse affect on Monsanto. The bribe was made, but the law was not repealed. The senior Monsanto manager attempted to cover up the payment by creating false invoices that were submitted to Monsanto and approved for payment. From 1997 to 2002, Monsanto also made approximately \$700,000 in improper payments to 140 current and former Indonesian government officials and their families under a bogus product registration scheme. The payments were inaccurately recorded or not recorded at all in its books and records.

Under the Deferred Prosecution Agreement with the Department of Justice, Monsanto accepted and acknowledged that it was responsible for the acts of employees set forth in a detailed Statement of Facts. In return, the DOJ Fraud Section agreed that prosecution of Monsanto under the filed false books and records Information would be deferred for three years and that it would dismiss with prejudice the Information if Monsanto complied with the terms of the agreement for three years. Monsanto agreed to pay a \$1,000,000 penalty, to retain an independent consultant to review its FCPA compliance policies and procedures and to the entry of an injunction barring it from any future violations of the FCPA. There was no indication that Monsanto, under the Deferred Prosecution Agreement, would be suspended or barred from U.S. government contracts. In a related proceeding, the SEC charged Monsanto with anti-bribery, books and

records and internal control violations for the same FCPA misconduct. Under the SEC settlement, Monsanto agreed to pay a \$500,000 civil penalty.

8. United States v. Titan Corporation²¹⁴

In March 2005 Titan Corporation of San Diego, California pled guilty to three FCPA criminal violations: one count of violating the anti-bribery provision, one count of falsifying the books and records provision, and one felony tax count; it also agreed to pay a record FCPA criminal fine of \$13 million. The military intelligence and communications company did not contest that from 1999 to 2001 it paid \$3.5 million to its agent in Benin, Africa, who was then known by Titan to be the President of Benin's business advisor. Much of the money funneled to Titan's African agent went to the election campaign of Benin's then incumbent president. A former senior Titan officer directed that payments be falsely invoiced as consulting services and that actual payment of the money be spread over time and into smaller increments.

Simultaneously, the SEC brought an enforcement action against Titan that alleged violations of the anti-bribery, internal controls and books and records provisions of the FCPA.²¹⁵ Under a consent decree, Titan agreed to pay the \$13 million penalty to the Department of Justice; to pay approximately \$15.5 million in disgorgement and pre-judgment interest; and to retain an independent consultant to review the company's FCPA compliance procedures and to adopt and implement the consultant's recommendations. The SEC stated that despite utilizing over 120 agents and consultants in over 60 countries, Titan never had a formal company-wide FCPA policy, disregarded or circumvented the limited FCPA policies and procedures in effect, failed to maintain sufficient due diligence files on its foreign agents, and failed to have meaningful oversight over the foreign agents.

The background that led to the criminal and SEC enforcement case against Titan is as follows: in September 2003 Titan became a party to a merger agreement in which Lockheed-Martin agreed to acquire Titan pending certain contingencies. Titan affirmatively represented in that merger agreement that "to the knowledge of Titan, neither the Company nor any of its Subsidiaries, nor any director, officer, agent or employee of the Company or any of its Subsidiaries has . . . taken any action which would cause the Company or any of its Subsidiaries to be in violation of the FCPA." This representation was publicly disclosed and disseminated by Titan. As a result of due diligence by Lockheed-Martin, the acquisition fell apart.

Titan's inclusion of the merger agreement containing its affirmative FCPA representation in public disclosures, including a proxy statement filed with the SEC, also led the SEC to issue a Section 21(a) report to provide guidance concerning potential liability under the anti-fraud and proxy provisions of the federal securities laws for publication of materially false or misleading disclosures in merger and other contractual agreements.²¹⁶

9. United States Department of Justice – Micrus Corporation Agreement

In March 2005 Micrus Corporation, a privately held company based in Sunnyvale, California that develops and sells, in domestic and foreign markets, medical devices known as embolic coils which allow minimally invasive treatment of neurovascular diseases, agreed to resolve its criminal liability associated with potential FCPA violations by paying \$450,000 in penalties to the United States and cooperating fully with the DOJ investigation.

The investigation revealed that Micrus, through the conduct of certain officers, employees, agents and salespeople, paid more than \$105,000 – disguised in Micrus’s books and records as stock options, honorariums and commissions – to doctors employed at publicly owned and operated hospitals in France, Turkey, Spain, and Germany in return for the hospitals’ purchase of embolic coils from Micrus. An additional \$250,000 was comprised of payments for which Micrus did not obtain the necessary prior administrative or legal approval as required under the laws of the relevant foreign jurisdictions. The DOJ investigation followed the voluntary disclosure to the DOJ by Micrus of facts obtained in its internal investigation into the potential FCPA violations.

The term of the Micrus non-prosecution agreement with the government is two years. As a result of Micrus’ cooperation commitment, its remedial actions and voluntary disclosure of the wrongdoing, the Department of Justice agreed not to file criminal charges stemming from the investigation for the two-year period. If Micrus fails to fully comply with the terms of the agreement during that two-year period, the DOJ will charge Micrus with violations of the FCPA.

In exchange for the DOJ’s agreement not to prosecute Micrus for the conduct disclosed by Micrus to the Department, Micrus agreed, among other things, to: accept responsibility for its conduct; fully and affirmatively disclose to the Department activities that Micrus believes may violate the FCPA, and continue to cooperate with the Department in its investigation; agree that a statement of facts summarizing the subject transactions was materially accurate and further agree not to contradict those facts; pay a monetary penalty to the United States of \$450,000; adopt an FCPA compliance program, where previously it had none, as well as a set of internal controls designed to prevent violations in the future; and retain an independent compliance expert for a period of three years to ensure the company’s compliance program and internal controls are effective.²¹⁷

10. United States v. DPC (Tianjin) Co. Ltd.

In May 2005 the United States charged DPC (Tianjin) Co. Ltd., the Chinese subsidiary of Los Angeles-based Diagnostic Products Corporation (DPC), with violating the FCPA in connection with the payment of approximately \$1.6 million in bribes in the form of illegal “commissions” to physicians and laboratory personnel employed by government-owned hospitals in the People’s Republic of China.

The company, a producer and seller of diagnostic medical equipment, agreed to plead guilty to a single charge, adopt internal compliance measures, and cooperate with ongoing criminal and SEC civil investigations. An independent compliance expert was appointed to audit the

company's compliance program and monitor its implementation of new internal policies and procedures. DPC Tianjin also agreed to pay a criminal penalty of \$2 million.

The bribes were allegedly paid from late 1991 through December 2002 for the purpose and with the effect of obtaining and retaining business with the China hospitals. According to the criminal information and a statement of facts filed in court, DPC Tianjin made cash payments to laboratory personnel and physicians employed in certain hospitals in the People's Republic of China in exchange for agreements that the hospitals would obtain DPC Tianjin's products and services. This practice, authorized by DPC Tianjin's general manager, involved personnel who were employed by hospitals owned by the legal authorities in the People's Republic of China and, thus, "foreign officials" as defined by the FCPA.

In most cases, the bribes were paid in cash and hand-delivered by DPC Tianjin salespeople to the person who controlled purchasing decisions for the particular hospital department. DPC Tianjin recorded the payments on its books and records as "selling expenses." DPC Tianjin's general manager regularly prepared and submitted to Diagnostic Products Corporation its financial statements, which contained sales expenses. The general manager also caused approval of the budgets for sales expenses of DPC Tianjin, including the amounts DPC Tianjin intended to pay to the officials of the hospitals in the following quarter or year. The "commissions," typically between 3 percent and 10 percent of sales, totaled approximately \$1,623,326 from late 1991 through December 2002, and allowed DPC to earn approximately \$2 million in profits from the sales.

Simultaneously with the criminal charge, the SEC filed an FCPA enforcement proceeding against DPC Tianjin's parent company, Diagnostic Products Corporation. The SEC ordered the company to cease and desist from violating the anti-bribery, internal controls and books and records provisions of the FCPA and to disgorge approximately \$2.8 million in ill-gotten gains, representing its net profit in the People's Republic of China for the period of its misconduct plus prejudgment interest.²¹⁸

11. United States v. Kozeny, et al.²¹⁹

In October 2005 the United States charged Viktor Kozeny, Frederic Bourke and David Pinkerton with participating in a conspiracy to bribe senior government officials in Azerbaijan to ensure that those officials would privatize the State Oil Company of the Azerbaijan Republic (SOCAR) and allow the three and others to share in the anticipated profits arising from that privatization and resale of its shares in the market. The Southern District of New York indictment charged that Kozeny on behalf of the co-defendants and others made a series of corrupt payments to four Azeri officials. Payments allegedly included more than \$11 million to the Azeri officials or their family members and \$300 million worth of a controlled company's shares. Three others, Thomas Farrell, Clayton Lewis and Hans Bodmer (*supra*), have in related cases pled guilty in connection with their participation in the bribery scheme.

Conclusion

In an era of increasing globalized trade, anti-bribery conventions, international law enforcement cooperation and corporate governance reform, Department of Justice prosecutions and SEC enforcement actions against U.S. companies and their employees for FCPA violations are on the rise and the stakes are much greater. Foreign companies must likewise understand that they and their employees can also run afoul of the FCPA if their employees or agents cause actions in furtherance of illicit payments to take place in territories of the United States.

When potential FCPA or related violations arise, prudent management and counsel will promptly investigate and, where appropriate, take swift remedial and disciplinary actions. In some instances, companies will choose to voluntarily report violations and to cooperate with the Department of Justice and the Securities and Exchange Commission in return for more lenient treatment by these government agencies. Unless defense counsel conduct a thorough investigation before or parallel to any government investigation, the opportunity to persuade DOJ attorneys or SEC staff to not return criminal charges or bring a civil enforcement action will almost surely be compromised. Prompt disciplinary actions and remedial measures in the wake of FCPA violations can help a company or its employees avoid criminal charges in certain circumstances as well as minimize the risk of costly litigation, government suspension and debarment, substantial fines, foreign jurisdiction investigations and the adverse publicity of a corporate scandal.

Biography of Robert Tarun

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Education

M.B.A., Finance, University of Chicago, 1982

J.D., DePaul University Law School, 1974

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Areas of Expertise

A member of the California and Illinois bars, Bob Tarun is an experienced trial lawyer with more than 50 federal jury trials and 25 years of experience in business litigation, corporate internal investigations and white collar criminal cases across the nation. He has defended domestic, foreign and multinational corporations as well as individuals. His experience includes:

- **Business Litigation:** Representation of corporations, law firms, directors and officers in contract, fiduciary duty, negligence, malpractice, common law fraud, RICO and civil antitrust claims.
- **Internal Investigations:** Representation of corporations, boards of directors, audit committees and special committees in sensitive investigations in the United States and 35 foreign countries involving fiduciary duty, accounting irregularity, improper payment, antitrust, Foreign Corrupt Practices Act (FCPA), U.S. and foreign tax, securities fraud and corporate governance issues.
- **SEC Enforcement:** Representation of corporations, accountants and business executives in SEC enforcement actions involving revenue recognition, insider trading, FCPA, Investment Company Act regulations and other accounting irregularities.
- **White Collar Criminal Defense:** Representation of corporations, officers, attorneys and accountants nationally in grand jury investigations and indicted cases alleging conspiracy, price fixing, tax evasion, campaign finance charges, bank fraud, insider trading, health care, mail and wire fraud and FCPA violations. Mr. Tarun co-chairs the Firm's Global White Collar Criminal Practice Group.

From 1976 to 1985 Mr. Tarun was a federal prosecutor in Chicago, where he served as an Assistant U.S. Attorney, Deputy Chief of the Criminal Receiving and Appellate Division and finally as the Executive Assistant U.S. Attorney (1982-1985). He received numerous awards from the United States Department of Justice including the Director's Award for Superior Performance.

Awards and Honors

Mr. Tarun is listed in:

- *The Best Lawyers in America 2006: Commercial Litigation and White Collar Criminal Defense*
- *Chambers' USA: America's Leading Business Lawyers 2004, 2005*



*Partner,
Litigation Department,
Chicago*

- *The International Who's Who of Business Crime Lawyers 2005*
- *The International Who's Who of Business Lawyers 2006*
- *Guide to the World's Leading Litigation Lawyers*
- *Guide to the World's Leading White Collar Crime Lawyers*
- *Illinois Leading Lawyers: Commercial Litigation*
- *Illinois Leading Lawyers: White Collar Criminal Defense*
- *Top Lawyers Crain's Chicago Business*

Mr. Tarun has been a Fellow of the American College of Trial Lawyers since 1992, a designation reserved for the most outstanding trial lawyers in the United States. He was the Chair of its Federal Criminal Procedure Committee (2003-2005) and the Principal Drafter of its *Proposed Codification of Disclosure of Favorable Information under Federal Rules of Criminal Procedure 11 and 16*, 41 Am. Crim. L. Rev. 93 (2004). He currently serves as the College's Regent for Illinois, Indiana and Wisconsin.

Publications

Mr. Tarun is a co-author of the highly regarded *Corporate Internal Investigations* (Law Journal Press 1993 - 2005). He has served as a member of the Board of Editors of *The Business Crimes Bulletin* (Law Journal Newsletters) since 1999. Other publications include:

- *The TAP Pharmaceutical Acquittals: Recap of a White-Collar Criminal Trial*, Vol. 12 Business Crimes Bulletin No. 2 (March 2005).
- *Basics of the Foreign Corrupt Practices Act: What Every General Counsel, Transactional Lawyer and White Collar Criminal Lawyer Should Know* (ABA White Collar Crime Institute 2005).
- *Ten Tips for Handling Sensitive Investigations: Practical Advice You Need in the Sarbanes Oxley Era*, Vol. 10 Business Crimes Bulletin No. 10 (November 2003).
- *Basics of the Sherman Criminal Antitrust Act: What Every General Counsel, Transactional Lawyer and White Collar Criminal Lawyer Should Know* (ABA White Collar Crime Institute 2003).
- *An American Trial Lawyer's View of an Old Bailey Trial*, Vol. 143 New Law Journal 6609 (London 1993).

Teaching

As a Lecturer in Law at the University of Chicago Law School since 2000, Mr. Tarun has regularly taught Business Litigation and White Collar Criminal Practice. He previously served as an Adjunct Professor of Law at Northwestern University School of Law.

Speaking Engagements

Mr. Tarun is a member of the Planning Committee of the American Bar Association White Collar Crime Institute and has regularly chaired its annual panels on Criminal Antitrust Enforcement and the Foreign Corrupt Practices Act. He has also spoken at the Georgetown University Law Center's Corporate Counsel Institute.

Footnotes

¹ Foreign Corrupt Practices Act of 1977, Pub.L.No. 95-23-, 91 Stat. 1494 (codified as amended at 15 U.S.C. 78m, 78dd-1 to 78dd-2,78ff (1994) [hereinafter FCPA] as amended by International Anti-bribery and Fair Competition Act of 1998, 15 U.S.C.A. 78dd-1 to 78dd-3,78ff (1999) [IAFCA].

² 15 U.S.C. §§ 78m(b)(2)(A) and (B).

³ See 15 U.S.C. § 78dd-2(d) (injunctions sought by the Attorney General); 15 U.S.C. § 78u(d)(1) (injunctions sought by the SEC).

⁴ Wilke and Power, *U.S. Probes Allegations of Bribery at DaimlerChrysler – Launch of Criminal Inquiry Stems from Lawsuit Claims of Illegal Foreign Payouts*, WALL ST. J., Aug. 5, 2005 at A1.

⁵ *United States v. Titan Corp.*, No. 05 CR 0314 BEN (S.D. Cal. March 1, 2005)

⁶ 15 U.S.C. §§ 78dd-1(a)(3) (for issuers).

⁷ 15 U.S.C. §§ 78dd-2(a)(3) (for domestic concerns).

⁸ 15 U.S.C. § 78dd-3(a)(3) (for “any person”).

⁹ 15 U.S.C. § 78dd-1(a)

¹⁰ 15 U.S.C. § 78dd-2(h)

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

¹² 15 U.S.C. § 78dd-2(i)(l). See also 15 U.S.C. § 78dd-1(g) (setting forth the same rule for “Issuers.”)

¹³ 15 U.S.C. § 78dd-3(a).

¹⁴ S. Rep. No. 105-277 at 6 (1998) (quoting Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary re: Article 4 1)).

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

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

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

¹⁸ See *United States v. Blondek*, 741 F.Supp. 116, 119-20 (N.D. Tex. 1990).

¹⁹ *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980).

²⁰ *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974).

²¹ *United States v. Crozier*, 987 F.2d 893, 901 (2d Cir. 1993); *United States v. Hare*, 618 F.2d 1085 (4th Cir. 1980).

²² *United States v. McDade*, 827 F. Supp. 1153 (E.D. Pa. 1993).

²³ *Id.*

²⁴ 923 F.2d 1308, 1312 (8th Cir. 1991)

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- 25 359 F.3d 738 (5th Cir. 2004)
- 26 *Id.* at 740.
- 27 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3).
- 28 15 U.S.C. § 78dd-1(f)(2)(B) and 78dd-2(h)(3)(B).
- 29 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b).
- 30 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).
- 31 *Id.*
- 32 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1).
- 33 *Id.* §§ 78dd-1 (c)(2), 78dd-2(c)(2), 78dd-3(c)(2).
- 34 *United States v. Metcalf & Eddy, Inc.*, 99 Civ. 12566 NG (D. Mass. 1999).
- 35 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).
- 36 15 U.S.C. § 78(m)(a) (1994).
- 37 *See e.g., United States v. Rothrock*, 4 FCPA Rep. 699.818801 (W.D. Tex 2001) (plea to knowingly and willfully falsifying and causing to be falsified certain books, records and accounts in violations of FCPA); *United States v. UNC/Leah Services*, 2 FCPA Rep. 600.050 (W.D. KY) (recording \$140,000 payments to a subcontractor falsely as engineering fees).
- 38 Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 Nw. J. Int'l. L. Bus. 269, 274 (1998).
- 39 15 U.S.C. § 78m(a).
- 40 Reasonableness, rather than materiality, is the threshold standard. Criminal liability under the accounting provisions requires that a person “knowingly” falsify its books and records and “knowingly” circumvent a system of internal accounting records.
- 41 15 U.S.C. § 78m(b)(7).
- 42 *See* Speech of Securities and Exchange Commission Chairman Harold Williams before the SEC Developments Conference of AICPA (January 13, 1981), Securities Exchange Rel. No. 17500 (January 29, 1981).
- 43 15 U.S.C. § 78c(a)(37).
- 44 15 U.S.C. § (m)(b)(6).
- 45 15 U.S.C. § 78(m)(b)(4)-(5).
- 46 *Cruwer, Complying with the Foreign Corrupt Practices Act*, (American Bar Association 2d. Ed. 1999).
- 47 *See* SEC Lit. Rel. No. 16839, SEC v. International Business Machines Corp., (Dec. 21, 2000).
- 48 American Institute of Certified Public Accountants, Statement on Auditing Standard No. 1,320.28 (1973), cited in “Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices,” May 12, 1976 at 12, reprinted in Sec. Reg. & L. Rep. (BNA), No. 353, Special Supplement (May 19, 1976).
- 49 15 U.S.C. § 78m(b)(2).

50 15 U.S.C. § 78m(b)(7).
51 Williams Speech at 11,545.
52 *Id.*
53 15 U.S.C. § 78(m)(b)(4)-(5).
54 15 U.S.C. §78m(b)(4) (1994)
55 USAM. 9-47.110.
56 28 C.F.R. 50.18. (Attorney General Order No. 878-80).
57 The current D.O.J. opinion procedure is codified in 28 C.F.R. § 80.1, § 80.6 (1993). D.O.J. opinions may
be found in issues of Foreign Corrupt Proc. Act. Rep. (Bus. Laws Inc.) or on-line at www.usdoj.gov/criminal/fraud.
58 28 C.F.R. § 80.6.
59 USAM. Criminal Resource Manual 1016.
60 U.S. Department of Justice, Criminal Division, Fraud Section Web site,
www.usdoj.gov/criminal/fraud/fcpa (November 28, 2001).
61 Naftalis, “The Foreign Corrupt Practices Act” 11 White Collar Crime Reporter No. 8 at 6 (September
1997).
62 FCPA Opinion Procedure Releases available at www.usdoj.gov/criminal/fraud/text/opiindx.htm (last
updated 10/14/2004)
63 Sentencing for individuals who violate FCPA accounting provisions are considered under § 2B1.1.
Sentencing for individuals who violate FCPA bribery provisions are determined under § 2B4.1. See U.S.S.G. Manual
(2004). In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the guidelines were
supervisory and not mandatory.
64 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).
65 15 U.S.C. § 78ff(a).
66 15 U.S.C. § 78dd-2(g), 78dd-3(e).
67 15 U.S.C. § 78ff(a) (accounting) and 15 U.S.C. § 78dd-2(g)(1)(A) (bribery).
68 18 U.S.C. §3571(d).
69 *See* 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff (c) (3).
70 26 U.S.C. § 162(c).
71 *Id.* §§ 78dd-2(g)(1)(B) and 78ff(c)(2)(C), 78dd-3(e)(1)(B)
72 *See* 15 U.S.C. §§ 78ff(c), 78dd-2(a), 78dd-3(a), 77d-1 (a).
73 48 C.F.R. § 9.406-2(a)(3).
74 *See* Exec. Order No. 12,549,51 Reg. 6,370 (Feb. 18, 1986).
75 USAM. Criminal Resource Manual 1019
76 *Id.* §§ 78dd-2(d)(1) and 78u(d)(1).
77 *See, e.g., Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir. 1990); *J.S. Serv. Ctr. Corp. v. GE*
Tech. Servs., 937 E Supp. 216, 226-27 (S.D.N.Y. 1996). *But see United States v. Young & Rubicain, Inc.*, 741
F.Supp. 334, 399 (D. Conn. 1990)

- 78 *Korea Supply Co. v. Lockheed Martin Corp.*, 90 Cal. Rptr. 902, 909 (Cal. App. 2 Dist. 2001), de-published and review granted, 2001 Cal. Lexis * 7135 (2001).
- 79 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134; 131 Cal. Reprtr, 2d 29, 2003 Cal. LEXIS 1301 (March 3, 2003) n.5.
- 80 Pub. L. No. 105-366.
- 81 OECD Convention, Article 1.
- 82 OECD Convention, Article 4.
- 83 15 U.S.C. § 78dd-3(a)(emphasis supplied).
- 84 USAM Criminal Resource Manual, 1018.
- 85 Both the Senate and House committee reports contained this language. See S. Rep. No. 105-277 at 5-6; H.R. Rep. No. 105-802 at 19.
- 86 Civil Action No. H-01-3105 (S.D. Tex) (filed September 11, 2001).
- 87 Civil Action No. H-01-3105 (S.D. Tex 2001); see SEC Lit. Rel. No. 17127 (September 12, 2001).
- 88 15 U.S.C. §§ 78 dd-1(a), 78 dd-2(a).
- 89 See e.g. *Schmuck v. United States*, 489 U.S. 705 (1989).
- 90 International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, § 4, 112 Stat. 3302, 3306 (1998). 15 U.S.C. §§ 78 dd-1(g) and 78 dd-2(i).
- 91 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
- 92 *Id.* (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).
- 93 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).
- 94 See, e.g., *Central States v. Reimer*, 230 F.3d 934, 946 (7th Cir. 2000); *U.S. v. Int'l Bhd. of Teamsters*, 945 F. Supp. 609, 620 (S.D.N.Y. 1996)
- 95 *SEC v. Unifund Sal*, 910 F.2d 1028, 1033 (2d Cir. 1990). Commentators and other countries have criticized the exercise of jurisdiction over foreign nationals, based solely on the U.S. effects of overseas conduct. See e.g., *H. Lowell Brown, Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach now Exceed its Grasp*, 26 N.C. J. Int'l Law & Com. Reg. 239 335 (Spring 2001) (discussing criticism).
- 96 *SEC v. Unifund Sal*, 910 F.2d at 1033 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 1000 (2d Cir. 1975).
- 97 *Id.*
- 98 *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (quoting *World-Wide Volkswagen*, 444 U.S. at 297)).
- 99 *United States v. Bin Laden*, 92 F. Supp. 2d 189, 219 (S.D.N.Y. 2000).
- 100 See, e.g., *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990).
- 101 The signatories of the OECD Convention are: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chili, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak

Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *Battling International Bribery* 2004 at 9.

102 *Id.* at v.

103 OECD Convention, Article 3.

104 OECD Convention, Article 4.

105 However, under the laws of some countries, bribes promised or given to a person anticipating to become a foreign public official may qualify under the Convention. See *Battling International Bribery* 2004, Commentaries on Convention on Combating Bribery at B-6. Furthermore, there are some countries where certain individuals (such as political party officials in single party states) who are not formally recognized as public officials, but for their de facto performance of a public function. Under the legal principles of those states, such individuals may be considered public officials. See *Id.* at B-7.

106 *Battling International Bribery* at iii. See n. 95.

107 *Id.* at 12.

108 *Id.* at 14.

109 See U.S. Dept. of State Fact Sheet, “QAS Inter-American Convention Against Corruption,” 5/27/1997.

110 See *Inter-American Convention Against Corruption* Art. II.

111 See *Id.* at Art. XIV.

112 See *Id.* at Art. XIII.

113 See *Id.* at Art. XVI.

114 See *Id.* at Arts. VII-IX.

115 See U.S. Dept of State, “First Annual Report to Congress on the Inter-American Convention Against Corruption,” April 2001.

116 www.oas.org/juridico/English.sigs

117 See *Id.*

118 See *Criminal Law Convention on Corruption* Ch. II.

119 See *Id.* at Ch. IV, Art. 26.

120 See *Id.* at Art. 27.

121 See *Id.* at Ch. V, Art. 33.

122 See *Id.* at Art. 32.

123 See Council of Europe, Chart of Signatures and Ratifications, available at www.conventions.coe.int.

124 See *Id.*

125 See *Report of Investigation in the Matter of Cooper Companies, Inc. as It Relates to the Conduct of Cooper’s Board of Directors*, Release No. 34-35082, 1994 SEC Lexis 3975, at *18-20 (Dec. 12, 1994).

126 698 A.2d 959 (Del. Ch. 1996)

127 *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 972 (Del Ch. 1996).

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- 128 *Id.*
- 129 *Id.*
- 130 15 U.S.C. § 7241.
- 131 15 U.S.C. § 7241(a)(1)-(3).
- 132 15 U.S.C. § 7241(a)(4)(A).
- 133 15 U.S.C. § 7241(a)(4)(B).
- 134 15 U.S.C. § 7241(a)(4)(C).
- 135 15 U.S.C. § 7241(a)(4)(D).
- 136 15 U.S.C. § 7241(a)(5).
- 137 18 U.S.C. § 1350(c)(1).
- 138 18 U.S.C. § 1350(c)(2).
- 139 U. S. Sentencing Guidelines (USSG), ch. 8, Commentary 8C2.5. See 56 Fed. Reg. 22,785 (May 16, 1991).
- 140 *United States v. Metcalf & Eddy, Inc.*, 99 Civ. 12566-NG (D. Mass. filed Dec 14, 1999).
- 141 *Consent and Undertaking of Metcalf & Eddy, Inc.*, 99 Civ. 12566-NG (D. Mass. Filed Dec. 14, 1999).
- 142 *Id.* ¶¶ 4, 7.
- 143 Counsel must often master in these investigations international transaction agreements and practices, including Joint Venture Agreements, Shareholder Agreements, Merger and Acquisition agreements, Operating and Management Agreements, Transfer of Technology and License agreements, Production Sharing Agreements (PSAs), Joint Operation Agreements (JOAs), and Commercial Agency Agreements, Distribution Agreements, Commission sales representation agreements, consulting contracts and so forth.
- 144 *U.S. v. Titan Corp.*, No. 05 CR 0314 BEN (S.D. Cal. March 1, 2005) and *SEC v. Titan Corp.*, Civ. A. No. 05-0411 (D.D.C.) (JR) (filed March 1, 2005).
- 145 Transparency International, Press Release, October 18, 2005, London/Berlin. Transparency International's 2005 Corruption Perceptions Index ranks 159 countries in terms of the degree to which corruption is perceived to exist by business people and country analysts, both resident and non-resident. It is a composite index, drawing on 16 different polls and surveys from 10 independent institutions. For a country to be included, it must feature in at least 3 polls. Transparency International Web Site, Background to the CPI, (accessible at www.transparency.org).
- 146 15 U.S.C. §§ 78dd-1 (f)(2), 78dd-2(h)(3), 78dd-3(f)(3).
- 147 See FCPA Opinion Procedure Release 2001-01 (May 24, 2001).
- 148 *Id.*
- 149 See Webb, Tarun and Molo, *Corporate Internal Investigations* (Law Journal Press 2005) (originally published 1993): Chapter 16 "Persuading the Government Not to Indict."
- 150 *But see In re Steinhardt Partners, L.P.*, 9 F.2d 230, 235-39 (2d Cir. 1993) (voluntary submission of report to SEC is disclosure to an adversary, waiving work product protection.)

- 151 Romatowski and Stewart, “Basics of SEC Investigations: What Every Criminal Lawyer Should Know,” National Institute on White Collar Crime 1992 (ABA March 2-3, 1992 San Francisco).
- 152 *See, e.g., SEC v. Gulf & Western Indus. Inc.*, 518 F. Supp. 675, 680-82 (D.D.C. 1981).
- 153 *See In re Salomon Bros. Treasury Litig.*, Fed. Sec. L. Rep. (CCH) 97,254 at 95, 146 (S.D.N.Y. 1992).
- 154 *See Upjohn Co. v. United States*, 449 U.S. 391, 394-95 (1981) (holding that communications between corporate counsel and tower-level employees for the purpose of seeking legal advice were protected as privileged attorney-client communications).
- 155 *In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992).
- 156 *See, e.g., Pedowitz*, “Conducting and Protecting Internal Corporate Investigations,” Business Crimes Bulletin: Compliance & Litigation (March 1994) at 9.
- 157 *Id.*
- 158 Webb, Tarun and Molo, *Corporate Internal Investigations* (Law Journal Press 2005) (originally published 1993) (Chapters 3 “Duties of Management,” 4 “Developing and Implementing a Strategy,” 12 “The Grand Jury” and 16 “Persuading the Government Not to Indict.”).
- 159 *See* Tarun, “Thirty Countries Later: Lessons of an International Business Crimes Lawyer,” Business Crimes Bulletin (December 2001 and January 2002) at 1.
- 160 Counsel must understand the customs and practices of the country in question. For example, a due diligence check with the in-country Chamber of Commerce might strike many Americans as of little value. Yet under the laws of Colombia, the Chamber of Commerce is recognized by statute as the official business registry of the country.
- 161 USAM 9-47.110.
- 162 *United States v. R. Enterprises*, 498 U.S. 292 (1991).
- 163 *United States v. Mara*, 410 U.S. 19, 23(1973).
- 164 Webb, Tarun and Molo, *Corporate Internal Investigations*, (Law Journal Press 2005) (originally published 1993).
- 165 For an excellent detailed review of the SEC enforcement process, *see* Colleen P. Mahoney, *The SEC Enforcement Process: Practice and Procedure in Handling an SEC Investigation After Sarbanes-Oxley*, 77 2nd C.P.S. (BNA)
- 166 *See, SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989) (chronology submitted to SEC was admissible).
- 167 *See, e.g., Securities Act of 1933* § 20(a), 15 U.S.C. § 77t(a), *Securities Exchange Act of 1934* § 21(a)(1), 15 U.S.C. § 78u(a); *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735 (1984).
- 168 *See, e.g., SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1022-28 & n.45 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979), quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).
- 169 15 U.S.C. § 78u(d)(1).
- 170 17 C.F.R. § 202.5(b).
- 171 Commission Rule 6. But the Commission may for good cause shown deny a request.

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- 172 144 See Webb, Tarun and Molo, *Corporate Internal Investigations*, (Law Journal Press 2004) (originally printed 1993) (Ch. 7 Multiple Representation and Joint Defense Agreements).
- 173 See *Continental Oil v. United States*, 330 F.2d 347 (9th Cir. 1964); *United States v. McPartlin*, 595 F.2d 1321(7th Cir. 1978); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965).
- 174 See U.S.A.M. § 9-27.220.
- 175 See U.S.A.M. Criminal Resource Manual 162 at 11(A).
- 176 Memorandum from Deputy General Larry D. Thompson to All Component Heads and United States Attorneys re: *Federal Prosecution of Business Organizations*.
- 177 *Id.* at 1.
- 178 Vinegrad, “Government Likely to Go After Corporations,” *The National Law Journal*, p. 31 (March 10, 2003)
- 179 Memorandum from Deputy Attorney General Larry D. Thompson to All Component Heads and United States Attorneys re: *Federal Prosecution of Business Organizations*, at 3.
- 180 *Id.* at 5.
- 181 *Id.*
- 182 *Id.* at 6.
- 183 Memorandum from Deputy Attorney General Larry D. Thompson to All Component Heads and United States Attorneys re: *Federal Prosecution of Business Organizations*, at 7.
- 184 *Id.* at 8.
- 185 See *Id.* at 11(B).
- 186 Securities Act Release No. 5310, Fed. Sec. L. Rep. (CCH) 79,010 (September 27, 1972).
- 187 17 C.FR. §202.5(c).
- 188 Securities Act Release No. 5310, Fed. Sec. L. Rep. (CCH) 79,010 (September 27, 1972).
- 189 See Webb, Tarun and Molo, *Corporate Internal Investigations* (Law Journal Press 2005) (originally published 1993) §16.07.
- 190 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470, October 23, 2001) (“Cooperation Statement”). The SEC issued the Cooperation Statement in the context of announcing that it was commencing and settling a cease and desist proceeding against the former controller of a public company’s subsidiary for misstating financial information. The SEC stated that it was not taking any action against the parent company because of its extensive cooperation with the investigation, and, in the process, the SEC took the opportunity to state its general criteria for evaluating a company’s cooperation.
- 191 SEC Press Release, October 23, 2001, available at www.sec.gov/news/press/2001-117.txt.
- 192 Cooperation Statement at 2.
- 193 *Id.*
- 194 *Id.*

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- 195 *Id.* at n. 3 (citing Brief of SEC as Amicus Curiae, McKesson HBOC, Inc. No. 99-C-7980-3 (Ga. Ct. App. Filed May 13, 2001)).
- 196 Colleen Mahoney, et al., *The SEC Enforcement Process and Procedure in Handling an SEC Investigation After Sarbanes-Oxley*, 77-2nd C.P.S. (BNA)
- 197 125 S.Ct. 738 (2005).
- 198 *United States v. Monsanto Company*, No. 05 CR 00008 (d.) January 6, 2005)
- 199 *U.S. v. Titan Corp.*, No. 05 CR 0314 BEN (S.D. Cal. March 1, 2005) and *SEC v. Titan Corp.*, Civ. A. No. 05-0411 (D.D.C.) (JR) (filed March 1, 2005)
- 200 *Id.*
- 201 *SEC v. International Business Machines Corporation*, Litigation Release No. 16839, 73 S.E.C. Docket 3049 (Dec. 21, 2000)
- 202 *In the Matter of Baker Hughes Incorporated*, Exchange Act Release No. 44784, 75 S.E.C. Docket 1808 (Sep. 12, 2001)
- 203 *In the Matter of Chiquita Brands International, Inc.*, Exchange Act Release No. 44902, 75 S.E.C. Docket 2308 (Oct. 3, 2001)
- 204 *In the Matter of Bellsouth Corporation*, Exchange Act Release No. 45279 (Jan. 15, 2002)
- 205 *In the Matter of BJ Services Company*, Exchange Act Release No. 49390 (Mar. 10, 2004)
- 206 *In the Matter of Schering-Plough Corporation*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644 (Jun. 09, 2004)
- 207 *United States v. Metcalf & Eddy, Inc.*, No. 99 Civ. 12566 (D.Mass. Dec. 14, 1999)
- 208 *United States v. Syncor Taiwan, Inc.*, No. 02 CR 01244 (C.D.Cal. Dec. 5, 2002)
- 209 *United States v. James H. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004)
- 210 *United States v. Hans Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004)
- 211 U.S. Attorney for Southern District of New York Press Release, “U.S. Announces Charges in Massive Bribe Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan”, (October 6, 2005).
- 212 *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.*, No. 04 CR 27901 (S.D. Texas 2004)
- 213 *United States v. Monsanto Company*, No. 05 CR 00008 (D.D.C. Jan. 6, 2005)
- 214 *United States v. Titan Corp.*, No. 05 CR 0314 BEN (S.D. Cal. March 1, 2005)
- 215 *SEC v. The Titan Corp.*, Civ. A. No. 05-0411 (D.D.C.) (JR) (filed March 1, 2005)
- 216 Section 21(a) of the Exchange Act allows the Commission, in its discretion, to “make such investigations as it deems necessary to determine whether any person has violated, is violating or is about to violate any provision of this title” and “to publish information concerning any such violation.” Such reports enable the Commission to broadly discuss its position regarding the conduct in question.

²¹⁷ U.S. Dept. of Justice Press Release, “Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability” (March 2, 2005), www.usdoj.gov/opa/pr/2005/March/05

²¹⁸ U.S. Dept. of Justice Press Release, “DPC (Tianjin) Ltd. Charged with Violating The Foreign Corrupt Practices Act” (May 20, 2005), www.usdoj.gov/opa/pr/2005/May/05

²¹⁹ U.S. Attorney for Southern District of New York Press Release, “U.S. Announces Charges in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan”, (October 6, 2005).